NOT FOR PUBLICATION

WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

NATIONAL SURETY CORP., Plaintiff/Counter-Defendant, vs. FIRST SPECIALTY INSURANCE CORP. Defendant/Counter-Plaintiff.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO.: L-3983-16 Civil Action **OPINION**

Decided: November 18, 2016

By: Stephanie A. Mitterhoff, J.S.C.

This matter comes before the court by way of Defendant/Counter-Plaintiff First Specialty Insurance Corporation's ("FSIC") motion for summary judgment seeking a declaratory judgment in favor of FSIC and against National Surety Corporation ("National Surety"). Specifically, FSIC seeks a declaratory judgment from the court finding that (1) FSIC has the discretion under the policy to settle the claims against UPS and thereby exhaust the policy without also obtaining a release from the Plaintiff of the claims against the Mall Defendants; and (2) that FSIC's obligation to defend the Mall Defendants in this action will terminate upon FSIC's exhaustion of

the policy limits. National Surety in opposition seeks a determination that (1) FSIC is not permitted to settle on behalf of one of its insureds without a global settlement as to both of its insureds; and (2) Even if FSIC exhausts its policy in contributing to a settlement of the claims against UPS, then FSIC's defense obligations still continue with respect to the remaining non-settled insureds.

I. Background

By way of background, this case arises out of the murder of Dustin J. Friedland at the Short Hills Mall on December 15, 2013. Jamie Schare Friedland, on behalf of herself and as administrator ad prosequendum of the Estate of Dustin J. Friedland (collectively "Plaintiffs") filed a declaratory judgment action to determine the responsibilities of various insurers, including those for Taubman Centers, Inc. ("TIC"), Short Hills Associates, LLC ("SHA"), Michael McAvine (collectively "Mall Defendants") and Universal Protection Service, LLC ("UPS") for the claims asserted in the underlying tort action entitled Jamie Schare Friedland, administrator ad prosequendum of the Estate of Dustin J. Friedland, and Jamie Schare Friedland, Individually v. Taubman Centers, Inc. et als. Docket No. L-1671-14, venued in the Superior court of New Jersey, Essex County (the Underlying Action).

FSIC provides primary-level additional insured coverage to UPS and the Mall Defendants under a general liability policy that has a $2 million limit of liability for each occurrence. After attempts to fashion a global settlement failed despite repeated attempts to settle this case through mediation or settlement conferences with the court, and because the potential reasonable liability of these insureds exceeds FSIC's $2,000,000.00 policy limit, FSIC engaged in negotiations with Ms. Friedland and UPS's excess insurer, U.S. Fire, which have

created the potential for FSIC to use its $2,000,000.00 policy limit toward a settlement of Ms. Friedland's claims against UPS. That settlement would exhaust FSIC's policy limit. If the proposed settlement goes forward, the Mall Defendants would still have their own insurance available to them, issued by Twin City Fire Insurance Company ("Twin City," the Mall Defendants' primary insurance carrier) and National Surety Corporation ("National Surety," the Mall Defendants' excess insurer).

The FSIC Policy provides Additional Insurance coverage to UPS and the Mall Defendants. The FSIC Policy contains a Commercial General Liability Form CG 00 01 12 07, which states that FSIC shall have the discretion to settle any claim or suit under the FSIC Policy and that FSIC's duty to defend ends when FSIC exhausts its policy limits. Section I of the policy, defining coverage for Bodily Injury and Property Damage Liability, states:

> 1. Insuring Agreement
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> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
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> * * *
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> (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverage A or B or medical expense under Coverage C.

FSIC agreed to defend UPS and the Mall Defendants pursuant to its obligations under the policy. In its correspondence with the Additional Insureds dated April 18, 2014, FSIC noted that it would not be responsible for judgments in excess of the policy limit and that FSIC's duty to defend would end when and if FSIC exhausted its policy limit in the payment of judgments or settlements.

Settlement negotiations have occurred in this action and FSIC has made its $2 million policy limit available for contribution to a global settlement. As the court is personally cognizant, extensive settlement negotiations have failed to yield a global settlement. The negotiations apparently have led to a potential opportunity for FSIC to pay its $2 million as part of a settlement to completely settle all claims against one of its insureds to obtain a complete release from the underlying claims. In the wake of that possibility, National Surety, the Mall Defendants' excess insurer, filed this lawsuit to prohibit FSIC from extinguishing some but not all of the claims at issue.

In June 2016, National Surety filed the instant declaratory judgment action seeking a determination that:

> (1) FSIC is required to make any and all settlement offers and/or tenders of the FSIC Policy limits equally on behalf of both UPS and the Mall Defendants; and
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> (2) FSIC has a continued duty to defend the Mall Defendants for the claims asserted in the Underlying Lawsuit notwithstanding any potential offers and acceptance off FSIC's policy limit on behalf of UPS and the exhaustion of FSIC's $2 million policy limit for the payment of judgments or settlements in the Underlying Lawsuit.

By way of its Counter-Claim and Third-Party Complaint, FSIC is seeking a declaration that:

> 1) FSIC has discretion to exhaust its policy limit in good faith to settle the underlying claims against one of its insureds even if that settlement does not extinguish the claims against its other insureds; and
>
> (2) FSIC's duty to defend all of its insureds ends upon exhaustion of its limits of liability by way of judgment or settlement paid on behalf of any insured.

II. Arguments of the Parties

FSIC argues that it is entitled to use its discretion to exhaust its limits to settle on behalf of any insured defendant because the policy language unambiguously gives it that right. Here, while the policy limit is insufficient to achieve a global settlement on behalf of both of the

Additional Insureds, FSIC believes that it has an opportunity to pay its $2 million policy limit as part of a settlement of Friedland's claims against UPS. FSIC argues that the proposed settlement of UPS's claims would have a benefit for National Surety, because National Surety would have the benefit of a setoff of any amounts paid out on behalf of UPS. FSIC further argues that its position furthers New Jersey's public interest in fostering settlements and preventing a third party like National Surety from thwarting and holding hostage the reasonable piecemeal settlement of a lawsuit. Finally, FSIC argues that their defense obligations end upon exhaustion of FSIC's policy limit through settlement. FSIC argues that the policy explicitly states that FSIC's duties terminate upon exhaustion of the policy and that the policy is enforceable as written.

In opposition, National Surety argues that an insurer must not be allowed to "cherry pick" which insured it will release in exchange for payment of policy limits. National Surety argues that allowing an insurance company to do so would discourage global settlements because a plaintiff could potentially recover in excess of the policy limit by receiving policy limits in exchange for the release of one insured, while maintaining its action against one or more of the other insureds. Thus, National Surety argues that any proposed settlement on behalf of only one of FSIC's insureds would be unreasonable under the circumstances and would constitute bad faith.

Next, National Surety argues that it would not receive a setoff in the amount paid on behalf of UPS. Under New Jersey law, National Surety argues, non-settling defendants are entitled to have the trier of fact "allocate the percentage of fault among the settling and non-settling defendants to enable the court to calculate the percentage attributable to the non-settlers." Thus, National Surety argues that the Mall Defendants would never be entitled to a setoff of any

amounts paid out on behalf of UPS. At most, the Mall Defendants would be entitled to a reduction of the judgment based on the percentage of liability allocated to UPS.

Finally, National Surety argues that FSIC's duty to defend the Mall Defendants is not terminated by an FSIC settlement that does not release the asserted claims against the Mall Defendants. National Surety argues that an insurer may not enter into a settlement, which exhausts the policy limits, to avoid its obligations to defend its insureds under the applicable policy. Further, National Surety argues that the April 18, 2014 correspondence does not make clear that FSIC's duty to defend would terminate if the policy limit was used up upon a payment or settlement on behalf of another insured.

III. Discussion

A. Standard of Review

Motions for summary judgment are governed by Rule 4:46-2, which provides that summary judgment should be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2. In Brill, the Supreme Court explained that in determining whether a genuine issue of material fact exists, the question is whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Brill explained that "[c]redibility determinations will continue to be made by a jury and not the judge," but "when

the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Ibid. (citations and internal quotation marks omitted).

B. Discretion to Settle

The court starts with the uncontroversial proposition that settlements are favored as a matter of public policy. "Public policy favors the settlement of disputes. Settlement spares the parties the risk of an adverse outcome and the time and expense—both monetary and emotional—of protracted litigation." Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 253–54 (2013). "Settlements avert the risks of litigation, spare the parties ruinous litigation expenses, and conserve judicial resources." Pinto v. Spectrum Chems. & Lab. Prods., 200 N.J. 580, 594 (2010). Moreover, settlements permit "litigants to resolve disputes on mutually acceptable terms in place of risking exposure to an adverse judgment." DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 259 (2009). Finally, it must be noted that an insurance company owes its insured a duty of good faith that applies when, as here, the insurer reserves control of settlement negotiations. See Bowers v. Camden Fire Ins. Assoc., 51 N.J. 62, 71 (1968). The parties disagree, however, about the resolution of the tension between a carrier's desire to achieve finality of at least some of the claims and its conflicting duties to coinsureds.

FSIC asserts that the unambiguous language of the FSIC policy establishes that FSIC has the discretion to settle any claim or suit under the FSIC Policy: Specifically, the policy states that "We (FSIC) may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result." When interpreting an insurance policy, courts should give the policy's words their plain, ordinary meaning. Nav-Its, Inc. v. Selective Insurance Co. of Am., 183 N.J. 110, 118 (2005). If the language of the policy is clear, the policy should be interpreted as written. FSIC argues that the language is clear and unambiguous and thus should be enforced as written.

In further support of its position that FSIC has the discretion to exhaust its policy limit and that FSIC is acting in good faith to settle the underlying claims, FSIC cites to Country Mutual Ins. Co. v. Anderson, 628 N.E.2d 499 (Ill.App.Ct.1993). In Anderson, Plaintiff Shoemaker sustained catastrophic injuries when the vehicle in which she was riding collided with a truck owned and driven by Anderson, leased by Lawrence, and transporting gravel under a contract with a corporation, Elmhurst. Shoemaker sued all three parties, Anderson, Lawrence and Elmhurst. Anderson was insured by Country Mutual under a policy that provided that anyone liable for the named insured's conduct at the time of the accident would be covered as an additional insured. Lawrence was insured by Pekin under a policy with a similar provision. Elmhurst was insured by Wausau. All three policies gave the insurers discretion to settle claims as they deemed appropriate, and all provided that payment of the coverage limit would terminate the insured's duty to defend or settle.

Shoemaker proposed a settlement under which all three parties would be released provided all three insurers paid their policy limits. Country Mutual and Pekin agreed, but Wausau did not. Wausau attempted to tender Elmhurst's defense to Pekin, maintaining that Elmhurst was an additional insured under Lawrence's policy. Country Mutual and Pekin proceeded to settle for the limits of their respective policies, and Anderson and Lawrence were released from liability. Counsel for Pekin requested that Elmhurst be included in the settlement but Shoemaker refused, given that neither Elmhurst nor Wausau had contributed to the settlement. Wausau then unsuccessfully attempted to tender Elmhurst's defense to Country Mutual. Elmhurst then filed a third party Complaint against Anderson and Lawrence in the Shoemaker suit, seeking indemnity from Anderson and Lawrence.

Country Mutual, having retained counsel under a reservation of rights to represent Anderson in Elmhurst's third-party suit, sought a declaratory judgment that its good faith settlement for the policy limits discharged its obligation to defend or indemnify Anderson or the putative additional insureds, Lawrence and Elmhurst. Pekin filed a cross-claim seeking a similar determination. After a substantial judgment was entered against Elmhurst in the Shoemaker litigation, Wausau countersued in Country Mutual's declaratory judgment action, asserting that Country Mutual's duty to defend and indemnify Elmhurst was coextensive with its duty to Anderson, and that Country Mutual's and Pekin's failure to secure a complete release from Shoemaker of all three parties constituted a breach of the duty of good faith.

Affirming the trial court's grant of summary judgment in favor of Country Mutual and Pekin, the appellate court acknowledged that an insurer must exercise good faith and deal fairly with all parties covered by its policies. The court also recognized that if an insurer acts negligently, fraudulently or in bad faith when negotiating a settlement on behalf of an insured, the insurer may be held liable for damages exceeding the policy limit. Anderson, supra, 628 N.E.2d at 503. Under the circumstances of that case, however, the court held that no bad faith was shown. Id. at 504. In that regard, the court concluded that it was the plaintiff Shoemaker who insisted that all three insurers pay their policy limits in satisfaction of her claims, and that to insist on the inclusion of Elmhurst in the release would have resulted in the loss of a settlement opportunity, thereby compromising the interests of both Anderson and Lawrence in capping their damages. Id. at 503. Nor did the court find bad faith in Country Mutual's and Pekin's failure to "'acknowledge' an obligation to defend Elmhurst" since it was unclear that any such acknowledgment would have altered Shoemaker's insistence that Wausau contribute to the settlement. Id. at 504. Finally, the court noted that "Elmhurst has received the maximum amount

it could have received from Country Mutual and Pekin, as it will have the benefit of their policy limits as a setoff against the Shoemaker judgment." Id.

Several other jurisdictions that have considered the issue have likewise deferred to a carrier's discretion to settle or pay claims in good faith on behalf of one insured, even if this results in actual exhaustion of the policy limits to the detriment of another insured. See, e.g., Travelers Indem. Co. v. Citgo Petroleum Corp., 166 F.3d 761, 768 (5th Cir.1999) (under Texas law, an insurer is not subject to liability for effecting a settlement on behalf of one insured, even if the settlement eliminates or reduces to a level insufficient for further settlement coverage for a coinsured); Anglo American Ins. Co. v. Molin, 670 A.2d 194, 199 (Pa.Commw.Ct.1995) (insurer should not be precluded from accepting reasonable settlement offer for fewer than all insureds when no evidence establishing that the proposed settlements are unreasonable; court found that insurer may be subject to bad faith action if evidence of unreasonable settlement); Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co., 959 S.W.2d 864, 871–72 (Mo.App.1997) (an insurer should not be precluded from accepting a reasonable settlement offer for fewer than all insureds; by accepting the offer the insurer would avoid being subjected to liability exceeding the policy limits due to its rejection of a reasonable offer). An exception to this general rule, not applicable here, is when an insured has already agreed to a settlement of claims with the insurer prior to the insurer exhausting the policy limits by paying a later claim of a second insured. Western Alliance Ins. Co. v. Northern Ins. Co., 176 F.3d 825, 829 (5th Cir.1999).

National Surety disagrees with the above reasoning. National Surety argues that if an insurer were permitted in good faith to apportion the entire policy limit to one insured while leaving the other insured exposed, global settlements would be discouraged. National Surety argues that this would lead to plaintiffs recovering in excess of the policy limit by receiving the

full policy limits in exchange for the release of one insured, while maintaining its action against one or more of the other insureds. In support of its position, National Surety cites to a pair of cases from California. Lehto v. Allstate Insurance Company, 31 Cal.App.4th 60 (1994), involved an automobile accident in which a son was driving a vehicle owned by his father and both were insureds under the same policy. The plaintiff offered to settle with the father alone in exchange for the policy limits. For a year and a half, the plaintiff steadfastly refused the insurer's offer to pay him the policy proceeds in return for a release of both insureds. Plaintiff filed suit contending that the insurer's insistence that both of its insureds be released in exchange for a tender of the policy limits was in bad faith. The Lehto court held that the auto insurer did not act in bad faith in refusing to accept the settlement offer which would have released its named insured for the full policy limits while permitting a third party plaintiff to maintain a tort action against the other insured as permissive driver of vehicle.

Similarly, in Strauss v. Farmers Ins. Exch., 26 Cal. App. 4th 1017 (1994), Plaintiff had been injured in an automobile accident. Plaintiff offered to settle with defendant for $100,000.00 plus the limit of the driver's personal automobile insurance in exchange for a release from liability of the driver, but not the owner of the company that employed the negligent driver. When defendant refused, plaintiff settled with the driver for the driver's policy limit and an assignment of any bad faith claim against the carrier. Plaintiff then brought a personal injury action against the driver, the company, and the owner, obtaining a judgment of $563,476 against the driver and the company. The insurer paid the $100,000 policy limit, and plaintiff pursued the bad faith action. The court held that defendant's rejection of plaintiff's settlement offer did not constitute bad faith because accepting plaintiff's offer would have left the company and the owner bereft of coverage and would have breached defendant's duty of good faith to them.

Contrary to National Surety's argument, neither Lehto nor Strauss further their position in this case. Rather, those cases simply underscore the more general position that insurance companies have broad discretion to decide when and if to settle. Significantly, in those cases, the additional insureds would have been left bereft of coverage had the carrier exhausted the policy in favor of one of the insureds. Here, in contrast, the Mall Defendants will have both a defense and liability coverage from their own primary and excess carrier. [i]Accordingly, the concerns about bad faith that drove the carriers' determinations in Lehto and Strauss are simply not squarely present in this case. [ii] Indeed, given the amount of coverage available to the Mall Defendants, it is in the court's judgment highly unlikely that an excess verdict would be rendered. Regardless, should the Mall Defendants feel an unfair settlement was effected, they have the option of later pursuing a bad faith claim. See Matter of Vitek, Inc., 51 F.3d 530, 537 (5th Cir. 1995) (noting that "far from standing for a broad principle that an insurer may never prefer one of its insureds over another (and thus may be enjoined from entering a settlement that would do so), the Smoral case merely indicates that an insured may seek damages under a breach of good faith cause of action if he believes that an unfair settlement has been effected.").

As no New Jersey court has directly addressed the issue at bar, both parties cite to cases in New Jersey involving multiple claims against a single insured as supporting their position. In Goughan v. Rutgers Cas. Ins. Co., 238 N.J. Super. 644 (Law. Div. 1989), several injured motorists sought underinsured motorist's coverage from the same policy of underinsurance. The court held that it would not interfere with an insurer's settlement of the claim of one of several persons injured by a tortfeasor notwithstanding the fact that the settlement may deplete or exhaust the insurance proceeds available to others. Similarly, in Liquori v. Allstate Ins. Co., 76 N.J.Super. 204, 212-14 (Ch. Div.1962), the court was faced with a non-judgment claimant

seeking to require an automobile liability insurer to show cause why it should not be restrained from consummating a settlement with a co-claimant. The court held that:

> While an insurer may wish to collect data on all the claims before negotiating settlement of any particular one, it is certainly under no legal compulsion to do so. Whether multiple claims are to be treated one at a time or collected and evaluated together, is a choice solely within the discretion of the insurer. Characterizing such a step-by-step approach as "piecemeal" is rhetoric without legal significance. When, as is the case here, a presumptively valid and adequate award has been made to one of several claimants, the fact that the remaining claimants, or any one of them, have not been taken into the confidence of the settling parties falls far short of establishing an adequate ground for equitable relief. This is especially true where to hold otherwise would interfere with the judicially[-]favored policy of avoiding unnecessary expense and delay through settlement practice.
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> Id. at 214.

Again, although factually distinguishable, these cases simply underscore the carrier's broad discretion to evaluate and settle claims in good faith as they see fit.

In this case, the court finds that there is no impediment to FSIC's exhaustion of its policy to settle the claims against UPS without also obtaining a release of the claims against the Mall Defendants. The plain language of the policy affords the carrier discretion to investigate occurrences and settle claims as they see fit, so long as the decision is made in good faith. As in Country Mutual Ins. Co. v. Anderson, supra, the two additional insureds in this case each have their own primary liability policies. As in Anderson, one of the additional insureds, namely the Mall Defendants, have rebuffed Plaintiff's request to make a meaningful contribution to a global settlement. As in Anderson, having failed despite extensive efforts to achieve a global settlement, the carrier has decided to effect a partial settlement to cap the exposure of UPS. Moreover, in this case, given the amount of coverage both primary and excess available to the Mall Defendants, the prospect that the settlement would be found in bad faith are in the court's judgment remote. Finally, National Surety's position that it will be entitled to a "credit" for half

of the FSIC policy is unsupported by any caselaw and is in the court's view utterly without merit. Accordingly, the court will grant the relief sought by FSIC and deny the relief sought by National Surety.

C. Duty to Defend

The FSIC policy states that FSIC's duty to defend the insureds ends when the policy limit is exhausted:

> Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverage A or B or medical expense under Coverage C.

National Surety argues that FSIC's duty to defend the Mall Defendants is not terminated by an FSIC settlement that does not release the asserted claims against the Mall Defendants. National Surety argues that an insurer may not enter into a settlement, which exhausts the policy limits, to avoid its obligations to defend its insureds under the applicable policy. Further, National Surety argues that the April 18, 2014 correspondence does not make clear that FSIC's duty to defend would terminate if the policy limit were used up upon a payment or settlement on behalf of another insured.

In support of its position, National Surety cites Farmers Ins. Co. of Washington v. Romas, 88 Wash. App. 801 (1997). Farmers involved a one-car accident in which both the driver and passenger were ejected. Jeff Paradiso died and Michael Romas was injured. A police officer that investigated the accident determined that Romas was driving at the time of the accident. In a criminal vehicular homicide trial, however, Romas contended that Paradiso was

driving and the jury acquitted him on the basis that they could not determine beyond a reasonable doubt that Romas was the driver.

Both the Estate of Paradiso and Romas asserted claims against Romas's $25,000.00 liability policy with Farmers Insurance Company. The automobile insurer filed an interpleader action and deposited its liability limits with the registry of the court. Romas gave Farmers a release of all claims in exchange for Farmers' promise to pay the full proceeds to whichever party was determined to be the driver. In addition, Romas agreed Farmers had no continuing duty to defend him. The Estate, however, did not agree to release Farmers from its obligation to defend it against Romas's claim. Based on those facts, the appellate court found that the insurer's unilateral payment of policy limits into registry of the court did not in and of itself relieve insurer of its duty to defend.

Farmers, however, is not persuasive as to the issue now before the court. The principal distinction is that in Farmers there was no definitive settlement with either party and the policy proceeds were not exhausted by way of settlement. FSIC in contrast does not intend to deposit its $2,000,000.00 policy into court; rather it intends to exhaust its policy by way of a settlement in exchange for a release of all claims against UPS. In addition, unlike the non-settling defendant Estate in Farmers, the Mall Defendants will not be deprived of a defense as they have their own coverage with Twin City.

In further support of its claims, National Surety relies on Smoral v. Hanover Ins. Co., 322 N.Y.S.2d 12 (App. Div. 1971). In Smoral, the plaintiff was operating a vehicle owned by a dealership when he was involved in an accident in which his passenger was severely injured. The passenger filed suit against the driver, the dealership, and its president. The Hanover policy that covered the dealership had a limit of $ 50,000. Hanover, seeing no defense to the action and

believing that the plaintiff's damages exceeded the policy limit, agreed to pay the entire $ 50,000 in return for a release to the dealership and its president. The release did not include Smoral as the driver. Moreover, the driver was given no notice of the settlement negotiations and gave no consent. Under those facts, the appellate court in Smoral held that Hanover was itself the driver's insurer and it owed a duty of good faith to defend him, which was breached when Hanover preferred one of its insureds while leaving the other completely exposed.

Here, in contrast, the Mall Defendants have had every opportunity and have in fact participated in settlement discussions. The Mall Defendants will have coverage both for defense and indemnity. Accordingly, the concerns that the court expressed in Smoral that the settlement was achieved in bad faith are simply not present in this matter.

FSIC cites to 1 Practical Tools for Handling Insurance Cases § 2:19 (July 2016), which provides that an insurer has no continuing defense obligation once it exhausts its full policy limit in a good-faith settlement or payment of a judgment, even if one of its insureds still faces liability for the claim. The practice tool cites Anderson for this proposition. In Anderson, supra, after holding that the insurer could settle the lawsuit for the policy limit without obtaining a release for an additional insured, the court held that the insurers were not obliged to defend the additional insured because the language of the policies unambiguously manifested insurers' intention to limit the duty to defend to the time before policy limits were properly exhausted, and the insurer clearly acted in good faith in tendering its policy limits to obtain a release on behalf of two of the named insureds.

FSIC also cites Bohn v. Sentry Ins. Co., 681 F. Supp. 357 (E.D. La. 1988), aff'd, 868 F.2d 1269 (5th Cir. 1989). The case arose out of an accident in which Craig Bohn, while riding a bicycle, was struck head-on by an automobile owned and operated by Brian Allee-Walsh, a

Times Picayune sports writer. Allee-Walsh was insured by Sentry Insurance Company (hereinafter "Sentry"). The Times Picayune was insured by Liberty Mutual Insurance Company (hereinafter "Liberty Mutual"). Bohn accepted Sentry's $ 50,000 policy limits, releasing Sentry and Allee-Walsh, but reserving his rights against The Times Picayune. Bohn's case against The Times Picayune and Liberty Mutual resulted in a jury verdict for the plaintiff in the amount of $514,000.00, against which a credit of $50,000 was applied.

Thereafter The Times Picayune and Liberty Mutual brought a claim against Sentry based on: (1) Sentry's alleged bad faith failure to effect a timely settlement of plaintiff's claims on behalf of both its named insured, Brian Allee-Walsh, and the Times Picayune, which claimed to be an additional insured under the Sentry policy; (2) Sentry's alleged bad faith failure to advise The Times Picayune of settlement offers within the policy limits; and (3) Sentry's alleged arbitrary failure to provide The Times Picayune with a defense once Sentry settled plaintiff's claims against Brian Allee-Walsh. In that regard, the court observed that given the amount of the exposure the decision to obtain a full release for its named insured was not unreasonable. Moreover, the court held that the automobile insurer was not required to defend the employer, who qualified as additional insured under the employee's policy, after the automobile insurer settled the claims against the employee for the policy limits.

Finally, FSIC cites Underwriters Guarantee Ins. Co. v. Nationwide Mut. Fire Ins. Co., 578 So. 2d 34 (Fla. Dist. Ct. App. 1991). The case arose from an accident in which the appellant's insured, Townes, struck and killed a bicyclist while driving a car owned by Nationwide's named insured Green. The decedent had substantial uninsured motorist coverage and recovered $13,000,000.00 by way of an arbitration award. The UM carrier exercised its subrogation rights by bringing an action against Townes and Greene. Nationwide had a

$100,000 liability policy insuring Greene as its named insured. Because Townes was a permissive user of Greene's car at the time of the incident, Townes was an additional insured under the terms of Nationwide's policy. Additionally, Townes had her own policy with appellant Underwriters. Nationwide settled with the UM carrier after suit was filed by paying its policy limit in return for a complete release of Greene. Nationwide then instituted a declaratory judgment action requesting the court to determine that it had no further duty to defend Townes, the additional insured under the policy. Townes answered and also cross-claimed against Underwriters, her insurer, claiming that if Nationwide did not have a duty to defend her, then Underwriters must defend her under her own policy.

Nationwide's policy provided that "after the liability limits of this policy have been exhausted by payment, we will not be obligated to defend any suit or pay any claim or judgment." On motion for summary judgment Nationwide contended that the terms of its policy were unambiguous with respect to its duty to defend, that it had complied with its terms, and therefore it was relieved of any duty to defend Townes further. The trial court agreed and entered summary judgment accordingly. In addition, it determined that Underwriters now had a duty to defend Townes under the terms of its policy.

The appellate court affirmed. In so holding, the court expressly distinguished the facts of cases such Bohn and Underwriters, which involve the determination of a carrier's contractual duties to its insureds, from cases such as Smoral, which deal with settlements achieved in bad faith. The court noted that the declaratory judgment action requested a declaration of contractual rights under the policy, and that neither the complaint nor the answer raised any issue of bad faith in the procurement of the settlement. (Fla. Dist. Ct. App. 1991).

Based on the foregoing authorities, it is clear that the lynchpin of the court's decision depends on whether the contemplated settlement is being achieved in good faith. The plain language of the policy clearly states that upon exhaustion of the policy FSIC's duty to defend any of the insureds under the policy terminates. As stated, above, there is no basis to conclude that the proposed settlement is unreasonable or made in bad faith. Rather, as in Anderson, supra, it is Plaintiff, not FSIC, that has refused the Mall Defendants' offers to settle. Moreover, it appears the achievement of a global settlement is unlikely. Accordingly, settlement negotiations have long been stalled. The court notes that the Mall Defendants will not be left bereft of coverage. The Mall Defendants were fortuitous in having FSIC defend them to this juncture; however, their preference that FSIC continue to do so is not a basis to conclude that FSIC's decision to achieve a partial settlement is in bad faith. To the contrary, under the facts of this case to at least partially settle the case appears reasonable given the potential exposure to its insureds.

III. Conclusion

For the foregoing reasons, FSIC's motion for summary judgment is GRANTED. FSIC has discretion to exhaust its policy limit in good faith to settle the underlying claims against one of its insureds even if that settlement does not extinguish the claims against its other insureds, and FSIC's duty to defend all of its insureds ends upon exhaustion of its limits of liability by way of judgment or settlement paid on behalf of any insured.

[i] The court also finds that neither Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474 (1974) nor Princeton Ins. Co. v. Qureshi, 380 N.J. Super. 495 (App. Div. 2005) have any bearing on the issues before the court. Both of those cases dealt with the scope of an insurer's duty to accept an offer to settle within the policy limits where there is clear potential for an excess verdict. Unlike the facts in Rova Farms and Qureshi. FSIC is not making a determination not to settle; rather FSIC is attempting to settle as least as to one insured based on its assessment of the potential exposure in this case.