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## The Insurance Aspects of *Damages*

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# The Insurance Aspects of *Damages*

Robert H. Jerry, II & Douglas R. Richmond\*

## I. INTRODUCTION

“[I]t is difficult . . . to imagine an event or transaction that does not involve insurance in some way.”<sup>1</sup> So it is with the most salient event in the lives of Tony and Donna Sabia, whose son Tony John Sabia, or “Little Tony,” was born with profound disabilities. In the final analysis, the ability of Tony and Donna to pay for the future medical care and living expenses needed by their son depends on whether they can reach the liability insurance coverage possessed by the health care providers who attended Donna and Little Tony at the time of his birth. It is also fair to assert that but for the *lack* of insurance, specifically, the Sabias’ lack of health insurance, the events described in Barry Werth’s *Damages*<sup>2</sup> might never have happened. But once the Sabias’ litigation odyssey is underway, insurance plays a prominent role at every major juncture. As aptly stated by Professor Mark Rahdert, “insurance usually determines whether tort cases are brought, whom plaintiffs sue, how much they claim, who provides the defense, how the case gets litigated, the dynamics of settlement, and how much plaintiffs ultimately recover.”<sup>3</sup> These truisms are powerfully presented in *Damages*. In this essay, we review how insurance shaped and affected the stories of Tony, Donna, and Little Tony Sabia.

## II. HEALTH INSURANCE: THE RELEVANCE OF ITS ABSENCE

The first mention of insurance occurs on the fourth page of *Damages*: “Donna Sabia, now several weeks pregnant, lacks private health insurance.”<sup>4</sup> Unlike most industrialized nations, the United States does not have universal health insurance and does not promise all citizens access to the health care system. In theory, all Americans should acquire health insurance through one of four routes: Medicare for the elderly and disabled; Medicaid for the indigent and some disabled citizens; employer-provided coverage, which is typically a group plan that provides coverage for the employees and their dependents; or an individually purchased policy if a person is ineligible for all of the three other categories. Because Donna was not disabled, Medicare was irrelevant to her. Tony had lost his job a short time before, and with his loss of employment vanished his employer-

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1. ROBERT H. JERRY, II, *UNDERSTANDING INSURANCE LAW* 1 (3d ed. 2001).

2. BARRY WERTH, *DAMAGES: ONE FAMILY’S LEGAL STRUGGLES IN THE WORLD OF MEDICINE* (1998).

3. MARK C. RAHDERT, *COVERING ACCIDENT COSTS: INSURANCE LIABILITY AND TORT REFORM* 1 (1995).

4. WERTH, *supra* note 2, at 12.

provided health insurance,<sup>5</sup> which would have also provided coverage for Donna. In the United States, employers are not required to provide health insurance for their employees. Thus, although Donna worked as a waitress, her employer did not provide and was not required to provide her with health insurance, an absence that is common with small employers and low-wage employment. The reasons why Tony and Donna are not covered by Medicaid is not explained by the author, but a reasonable inference is that they were not poor enough to qualify for the program. Medicaid covers less than one-half of the nation's indigent, let alone the nation's near-poor, and it appears that the Sabias did not meet the stringent tests for eligibility for this coverage. Thus, as the story begins, Donna Sabia is counted among the more than forty million Americans who lack health insurance, a group that represents almost a fifth of the nation's non-elderly population.

Where do the uninsureds obtain medical care? Emergency rooms are one source, albeit a particularly inefficient source, of charity health care in America. Additionally, physicians and hospitals provide a significant amount of *pro bono* or free medical care. However, much of the medical care received by the poor is subsidized by higher prices assessed by those with a greater ability to pay, which translates into higher insurance premiums for employers and individuals. Higher prices for health care have the perverse effect of making health care less available to the uninsureds. In this environment, public health clinics have become an increasingly important source of health care access for the uninsureds in America. It was at a public health clinic that Donna Sabia gained access to the health care system during her pregnancy.

Defining the scope of service provided by public health clinics is difficult as the label embraces a wide variety of health care services delivered in a variety of ways. Nevertheless, the stereotypical image of such clinics depicts them as places where the quality of services rendered is second-tier. Donna apparently understood that her lower economic status denied her access to the quality of care that the more economically fortunate have: "Donna . . . knew what to expect: crowded waiting rooms, grinding waits, harried nurses, now-you-see-them-now-you-don't doctors,"<sup>6</sup> all indicative of the weaknesses of any health care delivery system that tries to significantly increase access while simultaneously reducing costs.<sup>7</sup> Had Donna entered the health care delivery system at one of the gateways where provider reimbursements and compensation are more generous, one wonders whether the tragic events portrayed in *Damages* would have ever happened.<sup>8</sup>

*Damages* invites the making of another, related point about another kind of insurance that does not exist. In the world of theoretical insurance products, one might have insurance that compensates for losses arising out of medical accidents. Health insurance already provides partial coverage for such losses; to the extent a medical accident requires follow-up medical care, health insurance pays for it. In addition, to the extent a medical accident renders an insured disabled and unable

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5. *Id.* at 11.

6. *Id.* at 12.

7. *Id.* at 12-13.

8. Tony Sabia's health insurance coverage was reinstated on March 1, 1984, near the end of Donna's pregnancy. Although she could afford a private doctor at that point, Donna chose not to switch health care providers that late in her pregnancy. *Id.* at 14-15. She went into labor on April 1, 1984. *Id.* at 16.

to work, disability insurance purchased in the private market, or similar coverage provided through a workers' compensation system or Social Security, will reimburse the worker for some of his or her lost income. But accidents associated with childbirth can produce a lifetime of medical expenses and lost income running into the millions of dollars. Health insurance plans typically have lifetime caps of \$1 million or \$2 million, and insurance pools protecting against the full range of economic losses arising out of birth defects or accidents producing injury at birth do not exist. In some circumstances where the private market fails to provide insurance coverage, the government provides the coverage, essentially creating public insurance markets. But the social safety net for children like Little Tony is very shallow. For most families suffering the economic losses that result when an accident occurs at birth, the only recourse available is to pursue tort claims against anyone who might conceivably be liable for the injuries suffered by the newborn, hoping that the liability coverage of health care providers (nurses, physicians, clinics, hospitals, etc.) might become the means of paying for years of future medical expenses and living expenses.<sup>9</sup> This is the principal insurance story line in *Damages*.

### III. LIABILITY INSURANCE: AN ESSENTIAL KEY TO UNDERSTANDING THE STORY

#### *A. Basic Principles*

First-party insurance (for example, life, health, disability, and property insurance) provides coverage against the risk that a person will suffer damage to a life or thing in which he or she has an interest. Suppose, for example, the insured purchases property insurance coverage on the house that she owns; if a fire destroys the house, then the insurer will reimburse the insured for the insured's loss due to the damage to her interest in the house. In contrast, third-party insurance provides coverage against damage caused to a third party. If the third party suffers a loss for which the insured is liable—assuming the loss is of a kind that is within the policy's coverage—the insured can look to her insurer to pay the victim's loss to the extent of the insured's liability for that loss. Professional malpractice insurance is one specific kind of liability insurance. For example, a physician or other health care provider purchases professional malpractice insurance to provide protection against the tort claims of third parties, i.e., patients who claim injury as a result of the insured's actions.

Liability insurers, including malpractice insurers, owe their insureds two express contractual duties: a duty to defend the insured against claims or suits by third parties, and a duty to indemnify the insured with respect to covered claims or judgments. The duty to indemnify serves to protect the insured's assets, but it also serves an important function of compensating the victims of tortious conduct. To this extent, liability insurance is beneficial to both insureds and the victims. The duty to defend is not directly beneficial to victims, although it is sometimes possible for victims to exploit the existence of the duty in procuring a settlement. The

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9. *Id.* at 109 (referring to "unfortunate people like the Sabias, desperate for money, [having] only one recourse to pay for a lifetime of medical care—finding someone like [Humes] to blame . . .").

duty to defend is more beneficial to the insured, as this aspect of the coverage is the functional equivalent of "litigation insurance." If the insured is sued for a covered claim or occurrence, the insurer will bear the expense of the litigation, including the costs associated with employing an attorney to defend the suit.

In turn, insurers have a financial stake in bringing litigation against their insureds to successful conclusions. Modern liability insurance forms usually state that the insurer which undertakes the defense has a right to control how the defense is conducted. Courts have reaffirmed this right on many occasions.<sup>10</sup> The corollary of this right is the insured's explicit promise in the liability insurance contract to cooperate with the insurer in the defense of claims or suits brought against the insured. The costs of indemnifying judgments against insureds are an obvious concern of liability insurers, but defense costs also affect insurers' financial interests. Insurers can best ensure adequate representation at a reasonable cost by controlling their insureds' defenses, and the best way for insurers to control defense costs is to select the insureds' attorneys. To protect the insured's interest when a suit is filed, an insurer typically retains defense counsel from among a panel of firms with which the carrier regularly deals. Both the insurer and the insured benefit by the insurer's selection of counsel, because counsel are generally selected based on recognized knowledge and skill.

Insurance defense attorneys are generally specialists who do business and have on-going relationships with several insurers. Insurance defense counsel typically discount their hourly rates in exchange for business volume, and they work hard at developing future business. Conversely, few defense attorneys enjoy continuing relationships with the insureds they are hired to represent. This strong and perpetual economic linkage between insurers and their regular defense counsel sometimes concerns courts as well as insureds. The fear is that the defense attorney will focus on the interests of the insurer rather than the interests of the insured: that is, if forced to choose between a fee-paying client who is the source of continuing business, and the insured, the concern is that insurance defense counsel will necessarily side with the insurer if and when its interests and those of the insured diverge.

The question of to whom defense counsel owes duties is the most frequently asked question in the insurance defense context. Does defense counsel represent the insurer, the insured, or both? There are two basic approaches. Under what is known as the "dual client doctrine," the defense attorney represents both the insurer and the insured. As long as the interests of the insurer and insured coincide, both insurer and insured are clients of defense counsel and the attorney's fiduciary duty runs as such. Under the "sole client model," the defense attorney hired by the insurer only owes a fiduciary duty to the insured, the attorney's only client. The insurer is viewed simply as a third-party payor of the expenses of the defense.

Much has been written about these competing visions of the role of defense counsel, and the details of this debate are well beyond the scope of this discus-

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10. See *Paradigm Ins. Co. v. Langerman Law Offices*, 24 P.3d 593, 596 (Ariz. 2001); *McCormack Baron Mgmt. Servs., Inc. v. Am. Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 171 n.2 (Mo. 1999) (en banc); *Sherwood Brands, Inc. v. Hartford Accident & Indem. Co.*, 698 A.2d 1078, 1083 (Md. 1997); *Moeller v. Am. Guar. & Liab. Ins. Co.*, 707 So. 2d 1062, 1068 (Miss. 1996); *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1141 (Colo. 1984). See generally Douglas R. Richmond, *Liability Insurers' Right to Defend Their Insureds*, 35 CREIGHTON L. REV. 115 (2001).

sion.<sup>11</sup> But both the dual client doctrine and the sole client model probably assume too much. The existence of an attorney-client relationship is a question of fact. An insurer and the attorney it hires to defend its insured can share an attorney-client relationship in any given case depending on their conduct and understanding. The retainer agreement between insurer and defense counsel is important, as it should define this relationship. It may be that the agreement, whether express or implied, will cause the counsel's sole responsibility to run to the insured. In some states, the sole client model is required by judicial decision or the rule of a disciplinary commission.<sup>12</sup> In most situations, however, the dual client doctrine more accurately describes the actual relationship between an insurer, its insured, and defense counsel. This description is subject to the caveat that if a conflict arises that prevents dual representation, defense counsel, depending on the severity of the conflict, must either withdraw or continue to represent the insured as if the insured were the sole client.

Although many practitioners and judges, and some scholars, embrace the sole client model, we also, along with many others, endorse the dual client approach. Defense attorneys routinely advise insurers on case value, settlement value, the likelihood that the insured will be found liable, the likely assessment of comparative fault, whether there are other potential defendants who might be liable against whom cross-claims should be made, whether the case should be settled or tried, the probable makeup of the jury pool, the capability of opposing counsel, the trial judge's tendencies, what the likelihood of success on appeal is in the event of an unfavorable trial result, and so on. Insurers rely on their defense attorneys' advice. Moreover, because an insurance company pays claims, settlements, and judgments with its money, a defense attorney's advice to an insurer is advice *for* the insurer. Thus, a defense attorney generally should be deemed to have an attorney-client relationship with the insurer that hired her. Moreover, in the vast majority of situations, the interests of insurer and insured will coincide, so that no nonwaivable conflict will arise. Informed consent by both insurer and insured to joint representation, notwithstanding the existence of potential conflicts, is achievable. However, in the situation where a potential conflict of interest becomes actual, dual representation cannot continue, necessitating defense counsel to take steps in order to address the situation.

One approach to defending a suit is settling it. Modern liability policy forms typically give control over the decision to settle a lawsuit, that the insurer is obligated to defend, to the insurer, not the insured. This is not unreasonable, given that it is the insurer's resources that are generally on the line. But the insurer's discretion in responding to settlement offers is limited. If an insurer settles a lawsuit for more than the policy limits, then the insurer is committing the insured's resources, which it cannot do without securing the insured's consent. Moreover, rejecting a settlement offer within the policy limits may impair the insured's interests if the case goes to trial and the court or jury ultimately awards damages exceeding the policy limits. Thus, the variously-stated rule in all jurisdictions is that the insurer must act reasonably and in good faith in responding to plaintiffs' set-

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11. JERRY, *supra* note 1, at 916-31 (discussing competing approaches and citing to various authorities).

12. See Robert H. Jerry, II, *Consent, Contract, and the Responsibilities of Insurance Defense Counsel*, 4 CONN. INS. L.J. 153 (1997-98).

tlement offers.<sup>13</sup> It is a foreseeable consequence of an insurer's failure to do so that a judgment might be entered against the insured in excess of the policy limits; if the insurer breaches its settlement responsibilities when responding to a settlement offer, then the insurer will be held liable for the judgment against the insured, including that portion exceeding the policy limits.

Physicians and other professionals can also have a reputation interest at stake when an insurer settles a claim against the insured. Some malpractice policies require the insured's consent before the insurer may settle a lawsuit, but insureds pay a higher price for the coverage when the insurer's ability to control settlement is compromised. Alternatively, some policies give the insured the ability to veto a settlement that the insurer would fund, but the insured is responsible for paying for that portion of any resulting judgment in excess of the proposed settlement if the insurer was willing to accept and fund that settlement.

### B. *The Principles in Action*

The tension inherent in the triangular relationships of insurer, insured, and defense counsel is vivid in *Damages*. When the Sabias sued Dr. Maryellen Humes for malpractice in connection with the birth of Little Tony, Humes wanted to choose her attorney Arnold Bai, who had represented her in a prior malpractice action.<sup>14</sup> Aetna had been the only medical malpractice insurer in Connecticut until the early 1980s, and Bai had been one of the defense counsel regularly used by Aetna. But after Aetna left the state, St. Paul Fire & Marine Insurance Company moved into Connecticut, and St. Paul had its own preferred defense attorneys. The reading infers that Aetna no longer found the medical malpractice business in Connecticut to be profitable, implying the need for St. Paul's business plan "to keep down its legal costs,"<sup>15</sup> a goal that could be furthered if less expensive defense counsel were used to defend insureds. Bai was not one of St. Paul's preferred lawyers because St. Paul's local claims personnel categorized his services as overpriced.<sup>16</sup> Thus, St. Paul referred the case to the firm of Montstream & May. Humes was "riled" that St. Paul had not consulted her, and she viewed the firm's founder and lead partner, Bob Montstream, as "an eager captive not just of St. Paul, but of the entire insurance industry."<sup>17</sup> She "worried about whose interests Montstream would be serving, hers or St. Paul's."<sup>18</sup> (Later, one of Montstream's partners, April Haskell, would take over the case.)<sup>19</sup>

Frustrated over her inability to designate her own counsel, Humes retained Bai anyway.<sup>20</sup> As Humes' personal lawyer, Bai was expected to monitor the case and evaluate whether Montstream was providing the full defense which Humes theoretically bargained for when purchasing liability coverage from St. Paul. But it seems that Humes did not, even then, fully appreciate the nature of her bargain

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13. JERRY, *supra* note 1, at 898-901.

14. WERTH, *supra* note 2, at 74.

15. *Id.*

16. *Id.*

17. *Id.* at 74-75.

18. *Id.* at 75.

19. *Id.* at 148.

20. *Id.* at 76.

with St. Paul when she purchased liability insurance coverage from them. This is not surprising, given that most insureds invest little time in understanding the nature of their contract with an insurer before a loss occurs, while insurers similarly invest relatively little time and effort in explaining the details of the bargain to their insureds. Indeed, policyholders are generally unfamiliar with the insurance business and are typically not trained as lawyers. Accordingly, few policyholders focus on the fact that part of what they purchase when obtaining a liability insurance policy is “litigation insurance,” i.e., the insurer’s duty to defend. Fewer still understand that the insurer reserves the right to control the defense and that the insured promises to cooperate with the insurer in the provision of that defense at the peril of losing coverage if he or she does not do so. Exactly when Humes acquired a relatively complete and accurate understanding of this relationship is not clear, but the ramifications manifested repeatedly. For example, in October 1990, more than six years after the birth of Little Tony, Humes’ exasperation with the continued presence of the unresolved litigation in her own life led her to ask Madonna Sacco, an attorney in Bai’s office, to settle the case.<sup>21</sup> But Sacco explained that she did not have the power to do so because the right to control the defense rested with the insurer: “Again, [Humes] was reminded that it was not her but her insurance policy that the Sabias wanted, and thus it was the owner of that policy who made the decisions.”<sup>22</sup>

The insurer’s control of the defense not only affects the insured but also has relevance to the insurer’s relationship with defense counsel. Just as the insured can feel powerless in his relationship with the insurer, so can defense counsel. At one point, Haskell, the partner at Montstream & May who took over the *Sabia* case, self-describes her role as a “conduit” without “independent authority,” as “even now she had to ask St. Paul for permission to begin deposing the Sabias’ experts to find out what they thought Humes had done wrong.”<sup>23</sup> Haskell’s frustration is disturbingly common among defense lawyers. Because defense costs are a significant claim expense for liability insurers, most insurance companies actively manage litigation against their insureds and strictly control the activities of their defense attorneys. For example, insurers routinely limit the time that defense attorneys can spend on legal research without prior approval by insurance company personnel responsible for the case, forbid more than one attorney from attending depositions or hearings, require prior approval by company personnel of depositions to be taken or motions to be filed, refuse to pay for computerized legal research, forbid defense counsel from retaining expert witnesses without prior approval, limit or forbid attorney travel without prior approval, mandate the form and timing of status reports, and so on. Many defense attorneys chafe under these sort of restrictions. They wonder why the insurance companies that hire them do not trust them or do not value their professional judgment, and they resent attempts by insurance company personnel who are not lawyers to substitute their judgment for that of the lawyers who will ultimately try the case.

Although not an issue in *Damages*, billing practices are another source of tension between liability insurers and the lawyers they hire to defend their insureds.

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21. *Id.* at 166.

22. *Id.*

23. *Id.* at 183.



Insurers complain—quite properly in many instances—that defense lawyers send them bills with time entries that do not describe the work performed or that do not relate the work to any task in the case, that lawyers bill excessive time for given tasks, that young lawyers being trained spend excessive time on tasks for which the insurer should not be charged, and so on. On the other hand, defense lawyers complain that insurers insist on paying unreasonably discounted hourly rates (lawyers theoretically discounting their rates in exchange for business volume), curse insurers for long billing cycles (many insurers insist on quarterly billing and some want to be billed every six months), and are angered by insurers' unwillingness to pay for items such as computerized legal research and messenger service when they are already demanding discounted hourly rates and long billing cycles. A broader discussion of these subjects is beyond the scope of this essay.<sup>24</sup> Suffice it to say, there are lingering and unhealthy tensions between many liability insurers and the insurance defense bar, and *Damages* sets the table for a fuller reflection upon these important issues.

Norwalk Hospital, where Little Tony was delivered, was the second party sued by the Sabias. Norwalk was self-insured for claims of up to \$250,000 and had purchased an "excess policy" from Travelers Insurance to provide a layer of protection beyond the self-insured retention.<sup>25</sup> Norwalk was represented by Pat Ryan, with Travelers' own lawyer, Ronald Williams, "peering over Ryan's shoulder."<sup>26</sup> Furthermore, Ryan was assisted by another lawyer in his firm, Beverly Hunt.<sup>27</sup> Even though Norwalk was a defendant, St. Paul, as the insurer that contracted with Humes, owed Humes the obligation to provide her with a defense, an obligation that St. Paul could not lawfully delegate or shift to Norwalk, even though St. Paul and counsel appointed to represent Humes believed that Norwalk should indemnify Humes from liability.

In March 1991, the Sabias' lawyer, Michael Koskoff, filed two separate "offers of judgment" in the court, which were essentially offers to settle the litigation. Both offers were equal to the limits of the Travelers and the St. Paul insurance coverages—\$15 million and \$2 million, respectively.<sup>28</sup> This is a common tactic in tort litigation, as it is a strategy through which the plaintiff puts great pressure on the relationship between insurer and insured, exploiting the points where interests might diverge. For the insured, a settlement at or within policy limits is desirable because it removes the possibility that a judgment will be entered in excess of the policy limits for which the insured would be personally responsible. It is for this reason that Bai and Sacco, Humes' independent counsel, immediately pressed St. Paul to accept Sabias' lawyer's offers and settle the case.<sup>29</sup> The consequences to the insurer of misplaying its hand in response to a settlement offer are potentially huge. Under the general insurance law rule that the insurer must act reasonably and in good faith in responding to plaintiffs' settlement offers, if the insurer is found to have refused a settlement offer that, with the benefit of hindsight, it

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24. JERRY, *supra* note 1, at 931-34 (surveying the issues and citing to additional discussions).

25. WERTH, *supra* note 2, at 86.

26. *Id.*

27. *Id.* at 130. Hunt would later join the firm of the attorney retained by Travelers Insurance to replace Ryan on the case. *See id.* at 262.

28. *Id.* at 178.

29. *Id.* at 182.

would have accepted if it were acting reasonably, then the insurer will be liable not only for the amount of the policy limits but also for any judgment in excess of the policy limits. For plaintiffs, a policy limit settlement offer forces the insurer to consider whether, if it refuses the offer, it will later be exposed to liability for a possible excess judgment and other legal expenses, such as retaining independent counsel as Humes did.

In *Damages*, these tensions in the triangular relationship of insurer, insured, and defense counsel were evident. Bai responded on Humes' behalf as he should have, sending a "bad faith" letter to St. Paul in which he claimed that the case should be settled and that Humes would hold St. Paul responsible for any damages suffered as a result of St. Paul's refusal to settle.<sup>30</sup> The letter, a "naked threat":

[W]as meant to apply pressure by raising the specter of a costly future—precisely what insurance companies exist to avoid. Haskell had been faithful about trying to represent two clients with objectively opposing interests, but with Bai's letter, she also now had her own stake to protect. It was possible, given the litigious climate, that if she didn't respond seriously to the Koskoffs' offer, her clients could wind up suing each other or even her and Montstream.<sup>31</sup>

This set the backdrop for settlement negotiations that would ensue. Ultimately however, the determinative factor in the resolution of the Sabias' claims against Humes was the size of her policy:

With insurance claims, size is destiny. Humes had ceased to be the Koskoffs' main target as soon as they realized she couldn't afford to take care of Little Tony for the rest of his life. They reset their sights on Norwalk Hospital, which could afford it. If she had carried more insurance, Humes would have been more attractive as a defendant and the Koskoffs would have had more incentive to keep her in the case. She'd also have had more clout as an insured: St. Paul, with more to lose, might have been compelled to defend her more vigorously. Now it was the inadequacy of her coverage that decided her fate.<sup>32</sup>

Ultimately, the settlement price St. Paul paid for releasing Humes from the case was \$1.35 million.<sup>33</sup> One-third of this sum was paid to the Koskoffs as their fee; after the Koskoffs were reimbursed for their expenses, the compensation available for Little Tony from this settlement was \$853,000.<sup>34</sup> This left Norwalk as the remaining defendant.

The hospital had a \$250,000 self-insured retention (SIR)—meaning that it had to pay the first \$250,000 of any settlement or judgment out of its own funds.<sup>35</sup> Above its SIR, the hospital had an excess liability insurance policy issued by

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30. *Id.* at 184.

31. *Id.*

32. *Id.* at 205-06.

33. *Id.* at 211.

34. *Id.* at 211-12.

35. *Id.* at 86.

Travelers Insurance, both then and now one of the largest property and casualty insurers in the country. The Travelers policy had liability limits of \$15 million. Explaining the hospital's insurance scheme and its relationship with Travelers provides a deeper understanding behind the ultimate settlements.

The hospital maintained a SIR in an effort to reduce its liability insurance costs. By retaining the first \$250,000 of exposure, the hospital was able to purchase excess insurance to protect itself against catastrophic losses. This is important because excess insurance typically costs far less than primary liability insurance.<sup>36</sup> Excess insurance also costs less because it is primary insurers that generally are obligated to defend insureds, and defense expenses are a significant factor in determining the cost of primary liability insurance.<sup>37</sup> However, excess insurers retain to themselves via policy language the *right* to defend an insured even though the *duty* to defend rests with a primary insurer—or, in this case, the hospital, because its decision to self-insure likewise obligated it to pay for its own defense.<sup>38</sup> Excess insurers need this right to protect themselves where the exposure exceeds the limits of the primary policy or the insured's SIR. An excess insurer's right to defend is especially important where, as in the *Sabia* case, Travelers had the lion's share of the risk. In any probable scenario in the *Sabia* case, Travelers stood to lose far more at trial than did the hospital (\$15 million versus \$250,000). Similarly, Travelers' contribution to any settlement would dwarf the hospital's \$250,000 share.

By exercising its right to defend, an excess insurer can hire counsel of its choosing to act as co-counsel with the lawyers hired by the primary insurer or the insured, or in many cases simply to replace them. An excess insurer's exercise of its right to defend also allows it to control the strategic decisions in a case and better position it to create or seize settlement opportunities. The right to select defense counsel is very important to excess insurers. Most excess insurers have relationships with defense attorneys who they know have experience defending big cases. Indeed, excess insurers typically hire attorneys who have won big cases for them in the past, or who have otherwise achieved favorable results by way of settlement. When their money is at stake—when big money is at stake—excess insurers want their exposure in the hands of experienced attorneys in whom they have confidence, rather than in the hands of lawyers hired by a primary insurer or insured with whom they typically have no relationship (and thus little confidence).

Travelers, as the excess carrier, exercised its right to assume defense of the case in September 1992, when plaintiffs offered to settle the case for \$22 million. Concerned about its exposure, Travelers decided to replace Ryan with a lawyer of its choosing, Bill Doyle of Wiggin & Dana in New Haven, Connecticut.<sup>39</sup> The replacement of Doyle for Ryan underscores the importance of relationships in insurers' designation of defense counsel. Travelers' vice president for medical liability, after reviewing the file in the wake of a failed mediation session, invited "the chairman of the litigation department at his old firm . . . to take over the

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36. A primary policy provides the first layer of coverage; a primary policy attaches as soon as a claim is made or a suit is filed against the insured. Douglas R. Richmond, *Rights and Responsibilities of Excess Insurers*, 78 DENV. U. L. REV. 29 (2000).

37. *Id.*

38. *Id.* at 44-45.

39. WERTH, *supra* note 2, at 255.

case."<sup>40</sup> Ryan, in contrast, "had no ongoing relationship with [Travelers] claims people and little chance of developing one."<sup>41</sup> When the final settlement figure of \$6.25 million was reached on the plaintiffs' claims against Norwalk, Norwalk, like Humes before it, had no say over the settlement or its terms, as the control of this settlement rested with Travelers.<sup>42</sup>

#### IV. THE INSURANCE BUSINESS

That the insurance business, as distinct from principles of insurance law, is prominently mentioned in *Damages* should not be overlooked. In recent years, controversy over the increasing price of medical malpractice insurance has raged, with doctors blaming the plaintiffs' bar and sometimes the insurance industry, with trial lawyers blaming insurers and the health care establishment, and with insurers blaming the trial bar and the tort litigation system. These issues also resonate throughout the story line in *Damages*. Humes was deeply troubled by the soaring price of her own malpractice insurance, but her efforts to switch carriers were hampered by the pending litigation against her.<sup>43</sup> At another point, Humes corresponds with the Connecticut Insurance Commissioner, Peter Kelly, complaining about the high cost of malpractice insurance in the state.<sup>44</sup> That the price of medical malpractice insurance is also indirectly connected to broader issues of health care reform, a subject that dominated the national discussion during the years that the Sabias' claims moved through the civil justice system, is also noted in the text.<sup>45</sup> In this respect, facets of the story line in *Damages* stand as anecdotes relevant to the broader public discussions about health care policy in America.

#### V. FINAL THOUGHTS

We conclude where we began—with the observation that insurance determines whether tort claims are filed, who is sued, the amount of the claims, who defends, litigation strategy, how settlement proceeds, and how much plaintiffs recover. At the outset, we noted that the absence of health insurance may be the *raison d'être* for the entire Sabia story. But most of the story concerns liability insurance. Frequently, it is only the existence of liability insurance that stands between a defendant who can answer for wrongs and a judgment-proof defendant. If Humes and Norwalk lacked insurance, the Koskoffs' may not have even filed a claim on the Sabias' behalf. The available policy limits drove the Koskoffs' thinking about the size of the claim and the amount of the settlement offer. Except for Norwalk choosing its own attorney as a self-insured entity, the players on the defense side were chosen by the insurers, ultimately including the counsel for Norwalk. In determining settlement values, what mattered most to the defense were the views of the insurance companies, not the views of the defendants. Ultimately, the insurers determined how much the plaintiffs recovered. Thus, the

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40. *Id.* at 253.

41. *Id.*

42. *Id.* at 368.

43. *Id.* at 108, 165, 208-09.

44. *Id.* at 124, 165.

45. *Id.* at 191-93.

importance of insurance to the stories of Tony, Donna, and Little Tony Sabia cannot be overstated. This is itself an important observation, underscoring the vital importance of insurance in our society and confirming the insight of Justice Hugo Black, who sixty years ago said: "Perhaps no modern commercial enterprise directly affects as many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States."<sup>46</sup> That it touched the lives of Tony, Donna, and Little Tony is indisputable.

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46. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 (1944).