

1
2 **UNITED STATES COURT OF APPEALS**

3
4 **FOR THE SECOND CIRCUIT**

5
6 August Term, 2007

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9 (Argued: June 13, 2008 Decided: August 19, 2008)

10 Docket No. 07-2794-cv, 07-2818-cv

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14 BERNARD L. SCHWARTZ,

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17 Plaintiff-Counter-
18 Defendant-Appellee,

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21 TWIN CITY FIRE INSURANCE COMPANY,

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23 Defendant-Cross-Defendant-
24 Counter-Claimant-Appellee,

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26 ROYAL INDEMNITY COMPANY,

27
28 Defendant-Cross-Defendant,

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30 - v.-

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32 LIBERTY MUTUAL INSURANCE COMPANY,

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34 Defendant-Cross-Claimant-
35 Appellant,

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37 NORTH AMERICAN SPECIALTY INSURANCE
38 COMPANY,

39
40 Defendant-Counter-Claimant-
41 Cross-Claimant-Appellant.

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1 Before: JACOBS, Chief Judge, POOLER, Circuit
2 Judge, RESTANI,* Judge.

3
4 Excess insurers appeal from an amended judgment,
5 entered after a jury trial in the United States District
6 Court for the Southern District of New York (Castel, J.),
7 granting damages to their policy-holder and dismissing the
8 bad-faith claims they asserted as subrogees against the
9 primary insurer. Affirmed.

10 EDWARD M. SPIRO, Morvillo,
11 Abramowitz, Grand, Iason, Anello
12 & Bohrer, P.C., New York, NY
13 (Elkan Ambramowitz, Thomas M.
14 Keane, Sarah J. North, on the
15 brief), for Plaintiff-Counter-
16 Defendant-Appellee Bernard L.
17 Schwartz.

18
19 CATHERINE E. STETSON, Hogan &
20 Hartson L.L.P., Washington, DC
21 (William J. Bowman, Paul A.
22 Werner, Hogan & Hartson LLP, Ira
23 G. Greenberg, John F. McCarrick,
24 Edwards Angell Palmer & Dodge
25 LLP, on the brief), for
26 Defendant-Cross-Defendant-
27 Counter-Claimant-Appellee Twin
28 City Fire Insurance Company.

29
30 DAVID J. MARGULES, Bouchard
31 Margules & Friedlander, P.A.,
32 Wilmington, DE (Sean M.
33 Brennecke, of counsel, Joshua

* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

1 Dratel, Law Offices of Joshua
2 Dratel, New York, NY, on the
3 brief), for Defendant-Cross-
4 Claimant-Appellant Liberty
5 Mutual Insurance Company.

6
7 PETER A. STROILI, D'Amato &
8 Lynch, New York, NY (Robert E.
9 Kushner, on the brief), for
10 Defendant-Counter-Claimant-
11 Cross-Claimant-Appellant North
12 American Specialty Insurance
13 Company.

14
15 DENNIS JACOBS, Chief Judge:

16
17 The day before he was to testify as a defendant in a
18 securities class action, Bernard L. Schwartz agreed to a \$20
19 million settlement. He later brought suit in the United
20 States District Court for the Southern District of New York
21 (Castel, J.) against the four companies that covered him for
22 directors and officers liability. He sued the primary
23 insurer, Twin City Fire Insurance Company, for bad faith
24 refusal to settle and breach of contract, and he sued three
25 excess insurers, Royal Indemnity Company, Liberty Mutual
26 Insurance Company, and North American Specialty Insurance
27 Company, for breach of contract. Liberty and North
28 American, pleading equitable subrogation, asserted cross-
29 claims for bad faith against Twin City. Twin City and Royal
30 settled with Schwartz in the course of this litigation.

1 Liberty and North American appeal from an amended
2 judgment, entered after a jury trial, in favor of Schwartz
3 and Twin City. See Schwartz v. Twin City Fire Ins. Co., 492
4 F. Supp. 2d 308 (S.D.N.Y. 2007). The issues on appeal are
5 whether the jury's verdict in favor of Schwartz was
6 supported by sufficient evidence; whether Schwartz's
7 entitlement to prejudgment interest (under California law)
8 runs from the date he paid the \$20 million or from the date
9 the underlying layers of coverage were exhausted; and
10 whether the cross-claims against Twin City are governed by
11 New York law (which requires a showing of "gross disregard")
12 or by California law (which does not). For the reasons that
13 follow, we affirm.

14

15 **BACKGROUND**

16 Schwartz was chief executive officer of Globalstar
17 Telecommunications Ltd., a now-defunct public company in the
18 satellite telephone business. In that capacity, he was
19 covered by \$50 million in directors and officers liability
20 insurance. The primary layer of \$10 million was written by
21 Twin City; Royal, Liberty and North American, the first
22 three excess carriers, each provided \$5 million in coverage.

1 The remaining layers of coverage were not implicated.

2 In 2001, after Globalstar revealed that its satellite
3 technology had fizzled, a securities class action was filed
4 against Schwartz, Globalstar, and Loral Space &
5 Communications, Ltd. (a Globalstar investor also under
6 Schwartz's control), alleging violations of sections 10(b)
7 and 20(a) of the Securities Exchange Act of 1934 (the
8 "Globalstar Litigation"). Globalstar timely notified its
9 insurers of the litigation. With Twin City's approval,
10 Schwartz retained Francis Menton to defend him.

11 After Globalstar and Loral filed for bankruptcy in
12 2002, the Globalstar Litigation proceeded against Schwartz
13 alone.

14 Over the following two years, Menton worked with Twin
15 City, Royal, Liberty and North American to negotiate a
16 settlement with the Globalstar Litigation plaintiffs.
17 Counsel to Liberty and North American (the "Excess
18 Insurers") participated in negotiations at which the
19 plaintiffs offered to settle for \$15 million, but warned
20 that the demand would rise to \$20 or \$25 million once trial
21 began. Twin City's counter-offers never rose above
22 \$5 million. Settlement was not achieved.

1 Trial of the Globalstar Litigation began on July 6,
2 2005. Counsel for the Excess Insurers were in the courtroom
3 monitoring all of the proceedings.

4 After two weeks of testimony, the only remaining
5 defense witnesses were Schwartz and his damages expert.
6 Facing the prospect of a jury verdict in the hundreds of
7 millions of dollars, Schwartz decided to settle the case.
8 At 10:04 p.m. on Sunday, July 17, 2005, Menton wrote to the
9 four insurers seeking their consent to settle for
10 \$20 million.² Menton offered to discuss the settlement that
11 night or early the following morning.

12 On Monday, July 18, 2005, the district court approved
13 the \$20 million settlement and discharged the jury. In the
14 course of that day and the following week, all the insurers
15 refused consent.

16 Twin City refused consent on the stated ground that the
17 plaintiffs' evidence was too weak to merit more than "the
18 \$5 million average settlement for shareholder class action
19 lawsuits settled in 2004."

² At that stage of the litigation, \$3 million of Twin City's primary layer had been absorbed by defense fees and costs, leaving \$7 million available for settlement. The \$20 million figure therefore implicated four layers of coverage: Twin City, Royal, Liberty and North American.

1 Royal likewise declined to consent.

2 Liberty acknowledged receiving an email from Menton on
3 Saturday, July 16, relaying plaintiffs' \$20 million demand,
4 but said it was unaware of Menton's request for consent to
5 settle until Monday morning. Liberty could not "understand
6 why it would be reasonable to settle at \$20 million,
7 particularly in light of the positive developments at
8 trial"; in any event, its obligations had not been triggered
9 because the underlying layers of coverage had not yet been
10 exhausted.

11 North American's position was that the litigation
12 "should have been settled for an amount at or below
13 \$15 million"; that an opportunity to do so had been
14 "squandered" through "no fault of North American's"; that,
15 having "observed the trial closely," North American had seen
16 nothing "that would justify a \$5 million increase in the
17 plaintiffs' demand"; that it was "not included in the
18 negotiations of the last 5 days," or "kept apprised of these
19 negotiations in any material way"; and that in any event any
20 demand on it "would appear to be premature," given that the
21 underlying layers of coverage (Twin City, Liberty and Royal)
22 had not paid out their limits.

1 On August 24, 2005, Schwartz wrote a personal check to
2 the Globalstar plaintiffs for \$20 million.

3 Schwartz then filed this lawsuit, alleging two causes
4 of action: breach of contract against Twin City, Royal,
5 Liberty and North American; and a bad faith claim against
6 Twin City. Liberty and North American, as subrogees,
7 brought bad-faith cross-claims against Twin City. See
8 Commercial Union Assurance Cos. v. Safeway Stores, Inc., 26
9 Cal. 3d 912, 918 (1980) (explaining that under equitable
10 subrogation, an excess carrier "stands in the shoes of the
11 insured and should be permitted to assert all claims against
12 the primary carrier which the insured himself could have
13 asserted").

14 Before the coverage suit went to trial, Twin City and
15 Royal settled with Schwartz by paying their policy limits
16 (\$10 million and \$5 million, respectively).

17 On the remaining claims, the jury awarded Schwartz
18 \$5 million against Liberty and \$4,085,723.11 against North
19 American (the full amounts sought); and on the bad-faith
20 cross-claims against Twin City, the jury awarded Liberty
21 \$2 million and awarded North American \$3 million. The
22 district court entered judgment on January 29, 2007.

1 After post-trial briefing, the district court denied
2 the Excess Insurers' motions for judgment as a matter of law
3 (or, alternatively, a new trial), but amended the judgment
4 in two significant ways. As to the claim against the Excess
5 Insurers, the court awarded Schwartz prejudgment interest
6 measured from the date Schwartz paid the \$20 million
7 settlement. As to the bad-faith cross-claims against Twin
8 City, the court decided a choice of law issue that was
9 raised by the jury's finding (in response to a special
10 interrogatory) that Twin City had not acted in "gross
11 disregard" of Schwartz's interests. "Gross disregard" is a
12 requisite finding under New York law, but not under the law
13 of California. The court ruled that New York law applied,
14 and amended the judgment accordingly to dismiss the bad-
15 faith cross-claims.

16

17

DISCUSSION

18 Liberty and North American challenge the amended
19 judgment on three fronts. First, they seek judgment as a
20 matter of law on the breach of contract claims based on
21 Schwartz's failure to obtain their consent to settle the
22 Globalstar Litigation. Second, they contend that

1 prejudgment interest (on those claims) should run from the
2 date the underlying layers of insurance were exhausted, as
3 opposed to the date Schwartz paid the \$20 million
4 settlement. Third, they argue that California law (rather
5 than New York law) applies to their cross-claims against
6 Twin City.

7
8 **I**

9 We review de novo the Excess Insurers' challenge to the
10 denial of their motions for judgment as a matter of law,
11 "viewing the evidence, as the district court was required
12 to, in the light most favorable to the nonmoving party."
13 Sanders v. N.Y. City Human Res. Admin., 361 F.3d 749, 755
14 (2d Cir. 2004).

15 Several facts and propositions relevant to Schwartz's
16 claims of breach against the Excess Insurers are not in
17 dispute. First, it is undisputed that California law
18 applies to those claims. Schwartz v. Twin City Fire Ins.
19 Co., 492 F. Supp. 2d 308, 318 (S.D.N.Y. 2007). Second, it
20 is undisputed that the coverage agreements required Schwartz
21 to obtain the Excess Insurers' consent before settling a
22 claim. (The wording of the consent clauses is in the

1 margin.³) Lastly, it is undisputed that Schwartz did not
2 obtain the Excess Insurers' consent before settling the
3 Globalstar Litigation.

4 On appeal, the Excess Insurers advance a simple
5 argument: Schwartz's failure to satisfy the condition
6 precedent of consent to settle absolved of them of their
7 contractual duties. But the jury found that in refusing

³ This is the Liberty consent clause:

Defense and Settlement: The insureds shall not admit liability for, offer to settle any claim or incur costs of defense, where the liability, settlement and/or costs of defense are reasonably likely to involve the limit of liability of this Policy, without the Insurer's prior written consent, which consent shall not be unreasonably withheld.

This is the North American consent clause:

This insurance is subject to the same terms, conditions, agreements, exclusions and definitions as the "Underlying Insurance," except:

(1) We will have no obligation under this insurance with respect to any claim or suit that is settled without our consent; and

(2) With respect to any provisions to the contrary contained in this insurance.

1 consent, the Excess Insurers breached their duties of good
2 faith and fair dealing--duties that are absolute and
3 unconditional under California law.

4
5 **A**

6 "There is an implied covenant of good faith and fair
7 dealing in every contract that neither party will do
8 anything which will injure the right of the other to receive
9 the benefits of the agreement. This principle is applicable
10 to policies of insurance." Comunale v. Traders & Gen. Ins.
11 Co., 50 Cal. 2d 654, 658 (1958) (citation omitted). "An
12 insurer owes to its insured an implied-in-law duty of good
13 faith and fair dealing that it will do nothing to deprive
14 the insured of the benefits of the policy." Fletcher v. W.
15 Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 401 (4th Dist.
16 1970).

17 In Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566 (1973),
18 the California Supreme Court explained that this duty, "the
19 breach of which sounds in both contract and tort," id. at
20 573, "is unconditional and independent of the performance of
21 [the insured's] contractual obligations." Id. at 578. The
22 Gruenberg court concluded that the policy-holder's refusal

1 to "submit to an examination under oath and to produce
2 certain documents" as required by the insurance policies was
3 no bar to the policy-holder's bad-faith action. Id. at 581.
4 While an insurer and its insured can "define, by the terms
5 of the contract, their respective obligations and duties
6 . . . no matter how those duties are stated, the
7 nonperformance by one party of its contractual duties cannot
8 excuse a breach of the duty of good faith and fair dealing
9 by the other party." Id. at 578. Under California law, an
10 insurer's duty of good faith and fair dealing is "absolute."
11 Id.

12 In the context of this appeal, "the implied obligation
13 of good faith and fair dealing requires the insurer to
14 settle in an appropriate case although the express terms of
15 the policy do not impose the duty," and further, "in
16 determining whether to settle the insurer must give the
17 interests of the insured at least as much consideration as
18 it gives to its own interests." Crisci v. Sec. Ins. Co., 66
19 Cal. 2d 425, 429 (1967). In other words, "the insurer must
20 conduct itself as though it alone were liable for the entire
21 amount of the judgment." Johansen v. Cal. State Auto. Ass'n
22 Inter-Ins. Bureau, 15 Cal. 3d 9, 15 (1975). "Such factors

1 as the limits imposed by the policy, a desire to reduce the
2 amount of future settlements, or a belief that the policy
3 does not provide coverage, should not affect a decision as
4 to whether the settlement offer in question is a reasonable
5 one." Id. at 16. This rule recognizes the potential for
6 conflict between the interests of the insurer and those of
7 its insured:

8 [W]hen a settlement within policy limits is
9 offered by claimant, the previously parallel
10 interests of the assured and carrier diverge,
11 and a conflict of interest arises, for while
12 it is invariably to the assured's financial
13 interest to settle within policy limits,
14 settlement is only to the carrier's financial
15 interest when the relationship between
16 settlement offer and policy limits is
17 mathematically favorable in the light of the
18 probabilities of winning or losing the suit.

19
20 Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 869-70 (2d
21 Dist. 1973).

22 "In determining whether an insurer has given
23 consideration to the interests of the insured, the test is
24 whether a prudent insurer without policy limits would have
25 accepted the settlement offer." Crisci, 66 Cal. 2d at 429.
26 A policy-holder seeking recovery for "a judgment in excess
27 of the policy limits" need not show "actual dishonesty,
28 fraud, or concealment" on the part of the insurer. Id. at

1 430. Rather, "liability may exist when the insurer
2 unwarrantedly refuses an offered settlement where the most
3 reasonable manner of disposing of the claim is by accepting
4 the settlement." Id.

5 "Whether the insurer has acted unreasonably, and hence
6 in bad faith, in rejecting a settlement offer is a question
7 of fact to be determined by the jury." Cain v. State Farm
8 Mut. Auto. Ins. Co., 47 Cal. App. 3d 783, 792 (1st Dist.
9 1975); see also Allen v. Allstate Ins. Co., 656 F.2d 487,
10 489 (9th Cir. 1981) ("An insurer's 'good faith' is
11 essentially a matter of fact. . . . Thus, due deference must
12 be granted to the trier-of-fact[,] in this case the jury.").
13 The question is therefore whether the jury verdict in favor
14 of Schwartz was supported by sufficient evidence. We
15 conclude that it was.

16 At trial, the jury heard testimony from the attorneys
17 who represented Schwartz, Twin City, Royal, Liberty, North
18 American and the Globalstar plaintiffs, and the jury
19 reviewed the emails, letters and notes exchanged throughout
20 the Globalstar Litigation. Together, that evidence showed
21 that Liberty and North American took an active role in the
22 Globalstar Litigation: monitoring the claims, evaluating

1 settlement possibilities, participating in settlement
2 negotiations, and watching the trial unfold. Specifically,
3 the jury learned about the following series of events.

4 Liberty and North American participated in three
5 mediation sessions with Schwartz, Royal, Twin City and the
6 Globalstar plaintiffs. All three ended without success
7 after Twin City made settlement offers well below the
8 plaintiffs' \$15 million demand. Meanwhile, discovery
9 continued and the Globalstar Litigation progressed to trial.

10 At the second mediation session, in January 2005, Twin
11 City asked the other insurers to leave the room so that it
12 could settle the case within the primary layer. Twin City
13 then offered \$3 million in settlement--one fifth the
14 settlement demand of the Globalstar plaintiffs. The offer
15 was rejected.

16 The plaintiffs' \$15 million offer would have exhausted
17 the layers of Twin City and Royal, while Liberty "would have
18 to pay a small amount," and North American would pay
19 nothing. But after the January 2005 mediation session,
20 Menton warned Liberty and North American that Twin City's
21 "posture in this mediation" was risking exposure of their
22 layers of coverage. Menton testified to telling Liberty and

1 North American: "You need for Twin City to put up all of its
2 layer now; otherwise, the plaintiff will go up and your
3 layers are going to be endangered, and you need to be
4 thinking about and get on top of how you are going to
5 prevent that from happening."

6 The following month, North American wrote to Twin City,
7 asserting a bad-faith failure to settle: "Given the damages
8 numbers, the uncertain liability defenses and the
9 plaintiffs' words and deeds that confirm they will not
10 settle this case for less than \$10 million, any reasonable
11 party would settle this case for an amount at or above the
12 remaining [Twin City] limit of liability."

13 Liberty wrote to Twin City on March 3, 2005, to the
14 same effect:

15 Settlement for an amount up to \$12 million is
16 in our estimation reasonable and achievable.
17 Potential damages are, even in a reasonable
18 scenario, far in excess of this amount. We
19 have reviewed the strengths and weaknesses of
20 the Plaintiffs' claims and the Insured's
21 defenses and, notwithstanding [Twin City's]
22 optimism regarding the defensibility of this
23 action, we believe dismissal at summary
24 judgment highly unlikely. . . . [F]urther
25 discovery, including the deposition of Bernard
26 Schwartz, risks revelation of facts adverse to
27 the Insured, thereby driving up the value of
28 the case to the plaintiffs and ensuring that
29 this matter will be tried before a jury.
30

1 Liberty reminded Twin City that at the January mediation,
2 the case "appeared capable of settlement" for under
3 \$15 million, and warned that a lowball offer from Twin City
4 could "precipitate a move upward by the plaintiffs."

5 On March 10, Liberty and North American participated in
6 a conference call with Menton and the other insurers'
7 counsel. Menton presented three possible measures: (1) make
8 an offer between \$12 and \$13 million; (2) move for summary
9 judgment, with the risk of settling for \$20 million (or
10 more) if the motion failed; or (3) divide the cost of
11 settlement among several insurers, each contributing \$2 to
12 \$3 million. The second option was chosen.

13 Schwartz moved for summary judgment on June 10, 2005.
14 That same day, the parties met for a settlement conference
15 with the district court in New York. Plaintiffs offered to
16 accept \$15 million, but said the demand would rise if the
17 summary judgment motion was denied or the case went to
18 trial. Twin City counter-offered \$5 million. There was no
19 settlement.

20 Soon after, Menton wrote as follows to Twin City and
21 Royal, with a copy to Liberty and North American:

22 In light of the impending trial, [Twin City]
23 and Royal's unwillingness to resolve this

1 matter has been prejudicial to both Mr.
2 Schwartz and the other excess insurers, whose
3 layers are increasingly at risk. . . . Unless
4 this matter is settled on June 29, it will
5 proceed to trial immediately after the July 4
6 weekend. At that point, plaintiffs'
7 willingness to compromise the case for \$15
8 million will have been withdrawn and
9 plaintiffs' current demand of \$25 million or
10 some higher number will have replaced it. . . .
11 . [A] return by the plaintiffs to their demand
12 of \$25 million combined with our approximately
13 \$2 million in legal fees above the deductible
14 would mean that [Twin City], Royal, Liberty
15 and North American would each have to
16 contribute their entire policy limits to
17 settlement, and Starr [the next layer excess
18 insurer] would have to contribute a
19 significant portion of its layer.

20
21 Menton noted that at trial, the Globalstar plaintiffs would
22 "likely seek to prove \$600-\$800 million in damages," and
23 warned that it would be "a breach of duty to the insured to
24 subject [Schwartz] to the risk of such mammoth damages when
25 the opportunity to settle within [Twin City] and Royal's
26 limits has been pending for months."

27 In a separate letter to Liberty and North American,
28 Menton warned "that it may be necessary" for Liberty and one
29 or more of the excess carriers "to participate in the
30 ongoing effort to settle this matter."

31 For its part, Liberty wrote to Twin City and Royal,
32 accusing them of acting in bad faith. Liberty described the

1 likelihood of success on Schwartz's summary judgment motion
2 as "slim," and noted "that the possibility remains that
3 damages may be awarded in excess of your limits or indeed
4 the Globalstar program in its entirety."

5 Trial began on July 6, 2005. Counsel to Liberty and
6 North American monitored the Globalstar trial, attending
7 substantially all of the proceedings and participating in
8 ongoing discussions with Menton and the Globalstar
9 plaintiffs about settling the case.

10 On July 11, Menton alerted all four insurers to "a
11 window of opportunity" to settle the case while the
12 Globalstar plaintiffs felt "vulnerable" about pending
13 motions to exclude plaintiffs' damages expert and for a
14 directed verdict. Menton predicted that, after this
15 "watershed moment," Schwartz would "not have another
16 similarly attractive opportunity to settle this matter."
17 Menton received no response.

18 The following day, Liberty and North American
19 participated (along with the other parties) in a settlement
20 conference with the court. The trial judge advised that the
21 case would likely reach the jury, and that a plaintiff's
22 verdict could be eight or nine figures. Twin City again

1 offered \$3 million. The plaintiffs passed.

2 On Friday, July 15, after two weeks of testimony, two
3 defense witnesses remained: Schwartz and his damages expert.
4 At Royal's behest, Menton asked the Globalstar plaintiffs
5 whether the \$15 million settlement figure was still on the
6 table. Plaintiffs' counsel responded the following day:

7 The \$15 million number was [what] we would
8 have settled for prior to trial. In a good
9 faith effort to reach a settlement, even
10 though the trial was already underway, I
11 expressed to you . . . that we still would
12 accept \$15 million at that time, before any
13 ruling on the "directed verdict" motion.
14 There was no interest from your side after
15 that discussion. Since it is clear that the
16 directed verdict motion is not going to be
17 granted in full . . . the \$15 million number
18 is off the table. I reaffirmed this to you
19 and certain representatives of the carriers on
20 Thursday afternoon, stating that we were at
21 \$25 million to settle but it was not a firm
22 \$25 million. . . . We would accept \$20 million
23 to settle at this time; as the case progresses
24 towards a verdict, that number will only
25 increase.

26
27 Menton forwarded the message to counsel for Twin City,
28 Royal and Liberty on Saturday, July 16, adding: "My
29 observation is that you gentlemen, by making ridiculously
30 low bids, waiting until the last possible minute, and
31 bidding against yourselves repeatedly, have completely
32 undermined your insured's position in this matter. Please

1 advise by tomorrow about what you want to do." Menton
2 received no response.

3 On Sunday, July 17, Menton forwarded the full email
4 exchange to North American and advised: "It looks like this
5 has now become your problem as well. If you don't mind my
6 saying it, 'I told you so.'"

7 The same day, Menton and the Globalstar plaintiffs
8 agreed to settle the case for \$20 million. Menton formally
9 sought consent from Twin City, Royal, Liberty and North
10 American at 10:04 p.m. that night. Menton offered to
11 discuss the reasonableness of that figure later that night
12 or between 8:45 and 9:00 a.m. on Monday, July 18 at the
13 courthouse. Over the next days, all four insurers denied
14 consent.

15 The jury that heard this evidence could find (and
16 evidently did) that Liberty and North American had an
17 adequate opportunity to consider and evaluate the settlement
18 opportunities; that \$20 million was a reasonable sum; and
19 that Liberty and North American unreasonably withheld
20 consent. We therefore decline to disturb the jury verdict.

21
22

1 **B**

2 Notwithstanding the evidence supporting the jury's
3 verdict, Liberty and North American contend that Schwartz
4 forfeited any right to coverage as a matter of law. We are
5 unpersuaded.

6 A consent clause entitles an insurer "to notice of a
7 proposed settlement and an opportunity to determine, before
8 the settlement, whether it will grant or withhold consent."
9 Travelers Indem. Co. v. Eitapence, 924 F.2d 48, 50 (2d Cir.
10 1991). Here, the excess insurance contracts unambiguously
11 (and without exception) required that Schwartz obtain the
12 consent of Liberty and North American before entering into a
13 settlement. Schwartz did not get his insurers' consent to
14 settle, and gave them mere hours (over a Sunday night and
15 Monday morning) to decide whether to consent. So, the
16 argument goes, Schwartz forfeited his right to coverage.

17 In support of this argument, Liberty and North American
18 cite several cases in which California state courts enforced
19 consent clauses notwithstanding claims of excuse. See,
20 e.g., Gribaldo, Jacobs, Jones & Assocs. v. Agrippina
21 Versicherungen A. G., 3 Cal. 3d 434, 449 (1970) ("[I]t is
22 only when the insured has requested and been denied a

1 defense by the insurer that the insured may ignore the
2 policy's provisions forbidding the incurring of defense
3 costs without the insurer's prior consent, and under the
4 compulsion of that refusal undertake his own defense at the
5 insurer's expense."); Low v. Golden Eagle Ins. Co., 110 Cal.
6 App. 4th 1532, 1546-47 (1st Dist. 2003) (holding that, in
7 "the rare case where the insured tenders the defense and
8 then negotiates a settlement on its own, leaving the insurer
9 in the dark," the insured's breach "relieved the insurer of
10 posttender costs, too, including the settlement"); Jamestown
11 Builders, Inc. v. Gen. Star Indem. Co., 77 Cal. App. 4th
12 341, 346 (4th Dist. 1999) ("[I]nsureds cannot unilaterally
13 settle a claim before the establishment of the claim against
14 them and the insurer's refusal to defend in a lawsuit to
15 establish liability. . . . In short, the provision protects
16 against coverage by fait accompli.").

17 Based on these cases, Liberty and North American argue
18 that, under California law, the failure to obtain consent
19 can be excused only where the insurer breaches a contractual
20 duty to defend, Gribaldo, 3 Cal. 3d at 449, or "where the
21 previous payments were made involuntarily because of
22 circumstances beyond [the insured's] control" (such as

1 inability or exigency), Jamestown, 77 Cal. App. 4th at 348.
2 Here, the Excess Insurers have no duty to defend, and though
3 Schwartz's payment was made under the pressure of an ongoing
4 jury trial, it was not "involuntary" within the narrow
5 meaning of California law. Ergo, Schwartz's breach of the
6 consent clause was unexcused as a matter of contract law.

7 Liberty and North American also point to Eitapence, in
8 which we affirmed a ruling that an insured lost her coverage
9 by settling a lawsuit without first obtaining her insurer's
10 consent. We wrote:

11 The insurer, having insisted on the [consent]
12 clause, is entitled to notice of a proposed
13 settlement and an opportunity to determine,
14 before the settlement, whether it will grant
15 or withhold consent; the fact that in some
16 circumstances its withholding of consent can
17 be successfully challenged as lacking good
18 faith ought not to mean that it should be
19 deprived of the opportunity of assessing the
20 circumstances before the settlement occurs.

21
22 924 F.2d at 50.

23 None of these cases helps the Excess Insurers. In
24 Jamestown, Low and Gribaldo, the insurers had a duty to
25 defend; here, Liberty and North American had no such duty.
26 And in each of the cases cited by the Excess Insurers, the
27 insured either failed to provide notice of the claim or left
28 its insurer in the dark about a proposed settlement. And

1 there was no allegation that the insurers had acted in bad
2 faith. Here, Liberty and North American participated in
3 three mediation sessions and a settlement conference; sent
4 several letters urging Twin City and Royal to settle in
5 light of the risk that the plaintiffs would demand far more
6 than \$15 million at trial; and monitored the trial in the
7 courtroom. The record certainly does not require a finding
8 that Liberty and North American were blindsided by
9 Schwartz's request for consent to the \$20 million
10 settlement.

11
12 **C**

13 North American challenges the jury charge on the ground
14 that it allowed the jury to consider the facts and
15 circumstances set out above in deciding whether Schwartz
16 complied with the condition precedent of seeking (and
17 obtaining) his insurers' consent before settlement. Thus,
18 argues North American, the district court failed to instruct
19 the jury on the principle that an insurer must be given
20 "notice of a proposed settlement and an opportunity to
21 determine, before the settlement, whether it will grant or
22 withhold consent." Id. at 50.

1 We review jury instructions "as [a] whole to determine
2 if they provide a misleading impression or inadequate
3 understanding of the law," Phillips v. Bowen, 278 F.3d 103,
4 110 (2d Cir. 2002) (internal quotation marks omitted), "and
5 will reverse on this basis only if the [a]ppellants can show
6 that in viewing the charge given as a whole, they were
7 prejudiced by the error." Anderson v. Branen, 17 F.3d 552,
8 556 (2d Cir. 1994).

9 We see no error in the jury charge given here.
10 According to North American, the jury's attention should
11 have been focused exclusively on the eleven hours (starting
12 at 10:04 p.m. on Sunday night) that Menton gave the insurers
13 to decide whether to consent to the \$20 million settlement,
14 as though that was the interval in which the Excess Insurers
15 had to assess--for the first time--the risks, opportunities
16 and settlement demands at play in the Globalstar Litigation.
17 But the insurers' opportunity to consider settlement
18 extended over a prolonged course of consultation, monitoring
19 and negotiation, so that the settlement was in the nature of
20 anticlimax rather than surprise. The Excess Insurers had
21 participated in mediation sessions at which the parties were
22 expected to respond to settlement offers, accepting or

1 rejecting them on the spot. And at those sessions, the
2 Excess Insurers learned that the plaintiffs' demands would
3 rise to \$20 million or more at trial. The jury was properly
4 allowed to consider this, and much else, in deciding whether
5 the eleven-hour interval of time was sufficient.

6
7 **II**

8 The district court awarded Schwartz prejudgment
9 interest to run from the date Schwartz paid the \$20 million
10 settlement. The Excess Insurers argue that Schwartz's right
11 to prejudgment interest vested only when Twin City and Royal
12 exhausted the underlying layers of coverage several months
13 later. The issue is affected by choice of law.

14 The district court was sitting in diversity, and so it
15 properly applied the choice of law rules of New York, the
16 forum in which it sits. See Klaxon Co. v. Stentor Elec.
17 Mfg. Co., 313 U.S. 487, 496-97 (1941). "[U]nder New York
18 choice of law principles, the allowance of prejudgment
19 interest is controlled by the law of [the state] whose law
20 determined liability on the main claim." Entron, Inc. v.
21 Affiliated FM Ins. Co., 749 F.2d 127, 131 (2d Cir. 1984).
22 California law applied to Schwartz's claims against the

1 Excess Insurers; so the district court applied the
2 California statute on prejudgment interest:

3 Every person who is entitled to recover
4 damages certain, or capable of being made
5 certain by calculation, and the right to
6 recover which is vested in him upon a
7 particular day, is entitled also to recover
8 interest thereon from that day, except during
9 such time as the debtor is prevented by law,
10 or by the act of the creditor from paying the
11 debt.

12
13 Cal. Civ. Code § 3287(a).

14 California appellate courts review de novo a trial
15 court's award of prejudgment interest under § 3287(a). See
16 State Farm Fire & Cas. Co. v. D & G Autosound, Inc., 2007 WL
17 4442881, at *7 (2d Dist. Dec. 20, 2007) ("When the facts are
18 not in dispute, a trial court's determination as to whether
19 and when damages were certain or capable of being made
20 certain by calculation is reviewed de novo."); Sukumar v.
21 Wise, 2006 WL 1134771, at *6 (4th Dist. Apr. 28, 2006) ("We
22 therefore may appropriately review on a de novo basis the
23 trial court's application of [§ 3287(a)] to the facts as
24 established by the trial court."); Worthington Constr., Inc.
25 v. L.A. Contractors Corp., 2004 WL 2677088, at *14 (4th
26 Dist. Nov. 24, 2004) ("[W]e disagree with [defendant's]
27 assertion that the abuse of discretion standard applies in

1 cases involving an award of prejudgment interest under
2 [§ 3287(a)]. This is the standard of review to be used in
3 cases dealing with discretionary prejudgment interest for
4 unliquidated claims under [§ 3287(b)], or when there is a
5 breach of an obligation not arising from contract, which by
6 statute is a matter for the jury's discretion." (internal
7 quotation marks and citation omitted); KGM Harvesting Co.
8 v. Fresh Network, 36 Cal. App. 4th 376, 390-91 (6th Dist.
9 1995) ("As the facts are not in dispute, we independently
10 review whether and when buyer's damages were certain or
11 capable of being made certain by calculation. It is from
12 that day that buyer's entitlement to prejudgment interest
13 commences." (footnote omitted)); see also North Oakland Med.
14 Clinic v. Rogers, 65 Cal. App. 4th 824, 828 (1st Dist. 1998)
15 (stating that under § 3287(a) "the court has no discretion,
16 but must award prejudgment interest upon request, from the
17 first day there exists both a breach and a liquidated
18 claim").

19
20 **A**

21 Section 3287(a) applies where the dispute is over
22 liability rather than the amount of damages. See Canavin v.

1 Pac. Sw. Airlines, 148 Cal. App. 3d 512, 524 (4th Dist.
2 1983) (explaining that prejudgment interest is mandatory
3 "where there is essentially no dispute between the parties
4 concerning the basis of computation of damages if any are
5 recoverable but where their dispute centers on the issue of
6 liability giving rise to damage" (internal quotation marks
7 omitted)). The so-called "'certainty requirement of [§
8 3287(a)] has been reduced to two tests: (1) whether the
9 debtor knows the amount owed or (2) whether the debtor would
10 be able to compute the damages.'" Polster, Inc. v. Swing,
11 164 Cal. App. 3d 427, 434-35 (2d Dist. 1985) (quoting
12 Chesapeake Indus., Inc. v. Togova Enter., Inc., 149 Cal.
13 App. 3d 901, 911 (2d Dist. 1983)); see also Wisper Corp. v.
14 Calif. Commerce Bank, 49 Cal. App. 4th 948, 960 (4th Dist.
15 1996) ("Thus, where the amount of damages cannot be resolved
16 except by verdict or judgment, prejudgment interest is not
17 appropriate." (emphasis added)).

18 The Excess Insurers concede that Schwartz is entitled
19 to prejudgment interest under § 3287(a). Our only appellate
20 work on this score is to determine when Schwartz's
21 prejudgment interest clock began to tick. Schwartz says his
22 damages were "certain" on August 24, 2005, when he wrote a

1 check for twenty million dollars and no cents. The Excess
2 Insurers say that Schwartz's right to damages did not "vest"
3 until January 5, 2007, when Twin City and Royal settled the
4 coverage litigation and the underlying policy limits were
5 thus exhausted. This factual scenario appears to be one of
6 first impression under California law.

7 Prejudgment interest under § 3287(a) "runs from the
8 date when the damages are of a nature to be certain or
9 capable of being made certain by calculation and when the
10 exact sum due to the plaintiff is made known to the
11 defendant." Levy-Zentner Co. v. S. Pac. Transp. Co., 74
12 Cal. App. 3d 762, 798 (1st Dist. 1977); see also Polster,
13 164 Cal. App. 3d at 434-35 (citing Levy-Zentner test). Put
14 differently, § 3287(a) mandates prejudgment interest "from
15 the first day there exists both a breach and a liquidated
16 claim." North Oakland, 65 Cal. App. 4th at 828; 23 Cal.
17 Jur. 3d Damages § 98 (2008) ("This prejudgment interest on
18 damages runs from the date when the damages are certain or
19 are capable of being calculated to a certainty.")

20 On the day Schwartz wrote the check, there was a
21 breach: as the jury found, Liberty and North American had
22 unreasonably withheld consent to the settlement. And there

1 was a liquidated claim: Liberty and North American owed
2 Schwartz their share of his covered losses (and litigation
3 costs)--\$5 million and \$4.085 million, respectively. This
4 would seem to require interest from that date.

5 The Excess Insurers emphasize, however, that
6 prejudgment interest under § 3287(a) does not begin to run
7 until the "right to recover" damages has "vested," Cal. Civ.
8 Code § 3287(a), and that "[l]iability under an excess policy
9 attaches only after all primary coverage has been
10 exhausted." N. River Ins. Co. v. Am. Home Assurance Co.,
11 210 Cal. App. 3d 108, 112 (2d Dist. 1989).

12 The Excess Insurers rely on wording from Hartford
13 Accident & Indem. Co. v. Sequoia Ins. Co., 211 Cal. App. 3d
14 1285 (5th Dist. 1989), a case in which several policies
15 covered the loss, and in which the chief issue under the
16 "other insurance" clauses was which insurance was primary
17 and which was excess. After Hartford paid the full amount
18 to settle the underlying tort litigation in that case, it
19 sued Transamerica and Sequoia. The California appellate
20 court determined that Transamerica and Sequoia were excess
21 to Hartford's primary layer, and (as to Hartford's claim for
22 prejudgment interest) that "the amount of damages

1 recoverable" by Hartford against Transamerica and Sequoia
2 "was 'certain, or capable of being made certain by
3 calculation' and was 'vested' in Hartford on . . . the day
4 Hartford exhausted its primary policy limit"; prejudgment
5 interest began to accrue on that day. Id. (quoting Cal.
6 Civ. Code § 3287(a)) (emphasis added). The Excess Insurers
7 cite this wording for the proposition that an excess insurer
8 in a coverage dispute is not exposed to prejudgment interest
9 until after the underlying coverage is exhausted. But this
10 interpretation overreads Hartford. Hartford was an easier
11 case than ours because the settlement payment simultaneously
12 fixed the damages at sums certain and effected "vesting" by
13 the exhaustion of the primary layer.

14 In our case, unlike in Hartford, it becomes necessary
15 to allocate the loss caused by the time value of money in
16 the interval between settlement of the underlying claim and
17 exhaustion of underlying coverages--the interval in which
18 the policy-holder successfully litigated his claims for
19 coverage.

20 The jury's finding that the Excess Insurers breached
21 their duties of good faith and fair dealing simplifies the
22 allocation in this case. The covenant of good faith and

1 fair dealing "is a contract term that aims to effectuate the
2 contractual intentions of the parties." Cates Constr., Inc.
3 v. Talbot Partners, 21 Cal. 4th 28, 43 (1999). Although
4 "compensation for its breach has almost always been limited
5 to contract rather than tort remedies," Foley v. Interactive
6 Data Corp., 47 Cal. 3d 654, 684 (1988), California law
7 recognizes one notable exception: "tort remedies are
8 available for a breach of the covenant in cases involving
9 insurance policies," Cates, 21 Cal. 4th at 43; see also
10 Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 575 (1973)
11 (explaining that "when [an] insurer unreasonably and in bad
12 faith withholds payment of [a] claim of its insured, it is
13 subject to liability in tort"). That includes damages for
14 emotional distress, see id. at 580-81, as well as punitive
15 damages, see Betts v. Allstate Ins. Co., 154 Cal. App. 3d
16 688 (4th Dist. 1984).

17 The California Supreme Court has explained that "tort
18 recovery in this particular context is considered
19 appropriate for a variety of policy reasons":

20 Unlike most other contracts for goods or
21 services, an insurance policy is characterized
22 by elements of adhesion, public interest and
23 fiduciary responsibility. In general,
24 insurance policies are not purchased for
25 profit or advantage; rather, they are obtained

1 for peace of mind and security in the event of
2 an accident or other catastrophe. Moreover,
3 an insured faces a unique "economic dilemma"
4 when its insurer breaches the implied covenant
5 of good faith and fair dealing. Unlike other
6 parties in contract who typically may seek
7 recourse in the marketplace in the event of a
8 breach, an insured will not be able to find
9 another insurance company willing to pay for a
10 loss already incurred.

11
12 Cates, 21 Cal. 4th at 44 (internal citations omitted).

13 The same policy considerations justify taxing the
14 insurer with prejudgment interest for the period in which
15 the policy-holder successfully litigates a bad-faith claim
16 against it, notwithstanding an otherwise valid contract
17 defense based on unexhausted underlying limits. It follows
18 that Schwartz is able to recover prejudgment interest as for
19 a tort when his damages became fixed and known--the day he
20 wrote a personal check for \$20 million.

21 We need not consider whether an excess insurer would
22 begin to accrue responsibility for prejudgment interest
23 under California law prior to the exhaustion of underlying
24 coverages if it withholds payment based on that condition
25 precedent and not upon grounds found to have been asserted
26 in bad faith. It is enough in this case to predict that the
27 California Supreme Court would hold that § 3287(a) entitles
28 Schwartz to recover prejudgment interest from the Excess

1 Insurers from the date his losses were certain and
2 ascertainable, notwithstanding that the underlying layers of
3 coverage had not yet been exhausted.

4
5 **III**

6 Liberty and North American challenge the district
7 court's choice of New York State law (as opposed to
8 California law) to govern their cross-claims against Twin
9 City. At trial, the district court instructed the jury on
10 the elements of bad faith that are common to California law
11 and New York law, and then instructed the jury to decide
12 (separately) whether the Excess Insurers proved that Twin
13 City acted with "gross disregard" for the interests of the
14 Excess Insurers, a showing that is required for recovery
15 under New York law but not under the law of California. The
16 jury awarded Liberty \$2 million and North American \$3
17 million, but found that Twin City did not act with "gross
18 disregard." The district court initially entered judgment
19 in favor of Liberty and North American, but then considered
20 the choice of law issue, decided that the law of New York
21 applied to the Excess Insurers' cross-claims, and filed an
22 amended judgment in favor of Twin City.

1 We review the district court's ruling on a motion to
2 amend the judgment under Rule 59(e) for abuse of discretion.
3 Devlin v. Transp. Commc'n Int'l Union, 175 F.3d 121, 131-32
4 (2d Cir. 1999). We review the district court's choice of
5 law determination de novo. IBM v. Liberty Mut. Ins. Co.,
6 363 F.3d 137, 143 (2d Cir. 2004).

7
8 **A**

9 The district court had subject matter jurisdiction
10 based on diversity; therefore, "we must determine the body
11 of substantive law that applies here with reference to New
12 York's choice of law rules." Booking v. Gen. Star Mgmt.
13 Co., 254 F.3d 414, 419 (2d Cir. 2001) (citing Klaxon Co. v.
14 Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941)). Under
15 those rules, "[t]he first step . . . is to determine whether
16 there is an actual conflict between the laws of the
17 jurisdictions involved." In re Allstate Ins. Co., 81 N.Y.2d
18 219, 223 (1993).

19 New York law recognizes that "[i]nsurers owe a duty to
20 their insureds . . . to act in good faith when deciding
21 whether to settle . . . a claim, and . . . may be held
22 liable for breach of that duty." New England Ins. Co. v.

1 Healthcare Underwriters Mut. Ins. Co., 295 F.3d 232, 241 (2d
2 Cir. 2002) (internal quotation marks omitted). This duty is
3 also owed to excess insurers, and requires a primary insurer
4 to “giv[e] as much consideration to the excess carrier’s
5 interests as it does to its own.” Id. (citing Pinto v.
6 Allstate Ins. Co., 221 F.3d 394, 398 (2d Cir. 2000); Pavia
7 v. State Farm Mut. Auto. Ins. Co., 82 N.Y.2d 445, 453
8 (1993); St. Paul Fire & Marine Ins. Co. v. U.S. Fid. & Guar.
9 Co., 43 N.Y.2d 977, 978-79 (1987)).

10 To establish a prima facie case of bad faith, an excess
11 insurer must show that the primary insurer’s conduct
12 constituted a “gross disregard” of the excess insurer’s
13 interests. See Pavia, 82 N.Y.2d at 453. Under this New
14 York standard, the conduct must involve “a deliberate or
15 reckless failure to place on equal footing the interests of
16 [the excess insurer] with its own interests when considering
17 a settlement offer.” Id. Such showing is satisfied by
18 demonstrating that the primary insurer engaged in behavior
19 evincing a conscious or knowing indifference to the
20 probability that the excess insurer would also be held
21 accountable for a judgment if a settlement offer within the
22 primary insurer’s policy limits were not accepted. See id.

1 Under California law, by contrast, "gross disregard" is
2 not an element of a breach of the covenant of good faith and
3 fair dealing. See, e.g., Love v. Fire Ins. Exch., 221 Cal.
4 App. 3d 1136, 1151 (4th Dist. 1990) ("[T]here are at least
5 two separate requirements to establish breach of the implied
6 covenant: (1) benefits due under the policy must have been
7 withheld; and (2) the reason for withholding benefits must
8 have been unreasonable or without proper cause.").

9 This "actual conflict" between the laws of New York and
10 California requires a choice. New York applies a "grouping
11 of contacts" theory to contract claims, Auten v. Auten, 308
12 N.Y. 155, 160-62 (1954), looking to a "spectrum of
13 significant contacts--rather than a single possibly
14 fortuitous event," In re Allstate, 81 N.Y.2d at 226. "The
15 purpose of grouping contacts is to establish which State has
16 'the most significant relationship to the transaction and
17 the parties.'" Zurich Ins. Co. v. Shearson Lehman Hutton,
18 Inc., 84 N.Y.2d 309, 317 (1994) (quoting Restatement
19 (Second) of Conflict of Laws § 188(1) (1971)). Along with
20 "the traditionally determinative choice of law factor of the
21 place of contracting," the New York Court of Appeals has
22 endorsed the following factors (identified in the

1 Restatement): "the places of negotiation and performance;
2 the location of the subject matter; and the domicile or
3 place of business of the contracting parties." Zurich, 84
4 N.Y.2d at 317. In the insurance law context, New York
5 recognizes the precept that a court should apply "the local
6 law of the state which the parties understood was to be the
7 principal location of the insured risk . . . unless with
8 respect to the particular issue, some other state has a more
9 significant relationship . . . to the transaction and the
10 parties." Restatement (Second) of Conflict of Laws § 193
11 (1971); see, e.g., Zurich, 84 N.Y.2d at 318 (considering
12 "what the parties understood to be the location of the
13 risk"). However, "[i]t is commonplace for courts applying
14 New York choice-of-law rules to disregard (or at least
15 discount) the location of the insured risk when the risk is
16 located in two or more states." Maryland Cas. Co. v. Cont'l
17 Cas. Co., 332 F.3d 145, 153 (2d Cir. 2003); see also
18 Restatement (Second) of Conflict of Laws § 193 cmt. b
19 (1971). New York further recognizes that sometimes "the
20 policies underlying conflicting laws in a contract dispute
21 are readily identifiable and reflect strong governmental
22 interests, and therefore should be considered." In re

1 Allstate, 81 N.Y.2d at 226. In such cases, a court “may
2 properly consider State interests to determine whether to
3 apply New York law.” Id. at 227.

4 With these principles in mind, we turn to the Excess
5 Insurers’ bad-faith cross-claims against Twin City.

6 Some factors suggest that “the location of the insured
7 risk” under Globalstar’s directors and officers insurance
8 was New York, Maryland Cas., 332 F.3d at 153: At all
9 relevant times, Schwartz lived and worked in New York, and
10 all but one of Globalstar’s corporate officers worked in New
11 York. Other factors point to California: The primary
12 policy (of Twin City) was issued into California and
13 contained endorsements intended to conform to California
14 law, and most of Globalstar’s 900 employees worked at the
15 company’s facility in San Jose, California, making it
16 (arguably) the company’s principal place of business. Since
17 Globalstar’s directors and officers insurance “cover[ed] a
18 group of risks that are scattered throughout” both New York
19 and California, the “location of the insured risk” is not
20 determinative here. Restatement (Second) of Conflict of
21 Laws § 193 cmt. b (1971).

22 However, “the location of the subject matter” of the

1 bad-faith cross-claims points strongly toward New York.
2 Zurich, 84 N.Y.2d at 317. The Globalstar Litigation was
3 filed, tried and ultimately settled in New York. Prior to
4 settlement, the parties participated in a mediation session
5 and a settlement conference in New York. (The other two
6 mediation sessions occurred in Washington, DC.) The
7 underlying class action was tried in New York, and Twin
8 City's alleged misconduct was the refusal in New York to
9 settle that New York litigation. None of these events took
10 place in California.

11 New York policy considerations also militate in favor
12 of applying New York law. That state's "gross disregard"
13 standard reflects a policy of affording insurers latitude
14 "in investigating and resisting unfounded claims." Pavia,
15 82 N.Y.2d at 454. As a consequence, "there remains a strong
16 presumption in New York against a finding of bad faith
17 liability by an insurer." Hugo Boss Fashions, Inc. v. Fed.
18 Ins. Co., 252 F.3d 608, 624 (2d Cir. 2001). To apply
19 California law to the Excess Insurers' cross-claims, based
20 on an insurer's conduct that took place chiefly in New York,
21 would offend New York's policy choice.

22 The Excess Insurers plead (in their words) that "it

1 would be unduly confusing to apply the laws of one state to
2 bad faith claims and the laws of another state as to the
3 underlying breach of contract claims." This kind of
4 selectivity, called depeceage, "permits a more nuanced
5 handling of certain multistate situations and thus forwards
6 the policy of aptness." Corporacion Venezolana de Fomento
7 v. Vintero Sales Corp., 629 F.2d 786, 794 n.8 (2d Cir.
8 1980). And it is not altogether uncommon.⁴ Moreover, there
9 is no reason to think that the jurors were confused by the
10 application of California law to some claims and New York
11 law to others. After all, the verdict form covered less
12 than two pages.

13 According to North American's brief, the district

⁴See, e.g., Fieger v. Pitney Bowes Credit Corp., 251 F.3d 386, 397 n.1 (2d Cir. 2001) ("There is no conflict in applying New York law to one claim and Connecticut law to another. Under the doctrine of depeceage as applied by New York courts, the rules of one legal system are applied to regulate certain issues arising from a given transaction or occurrence, while those of another system regulate other issues." (internal quotation marks omitted)); Babcock v. Jackson, 12 N.Y.2d 473, 484 (1963) ("[T]here is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction. . . . [I]t is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn . . . on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented.").

1 court's choice of New York law "denied the excess carriers
2 the same right that [Schwartz] had under California law to
3 recover in bad faith against Twin City." "Under the
4 doctrine of equitable subrogation," the argument goes, "the
5 duty owed an excess insurer is identical to that owed the
6 insured," Peter v. Travelers Ins. Co., 375 F. Supp. 1347,
7 1350 (C.D. Cal. 1974), and so the Excess Insurers "stand[]
8 in the shoes" of Schwartz to assert his rights under
9 California law against Twin City, Commercial Union Assurance
10 Cos. v. Safeway Stores, Inc., 26 Cal. 3d 912, 918 (1980).

11 But Twin City settled with Schwartz before any choice
12 of law issue was litigated or decided. If Schwartz and Twin
13 City litigated under California law, it may be that each
14 thought it applied, or did not choose to contest it, or
15 thought it offered one or another advantage. In any event,
16 it is far from clear that the doctrine of equitable
17 subrogation requires that an excess insurer standing in the
18 shoes of its policy-holder gets the benefit (or detriment)
19 of the litigation choices its policy-holder made or chose to
20 accept.

21 Finally, North American argues that the district court
22 "improperly" invoked Federal Rule of Civil Procedure 59(e)

1 "to reverse the jury's award" in its favor. (The text of
2 the rule is set out in the margin.⁵) We see no merit in
3 this argument.

4 "[D]istrict courts may alter or amend judgment 'to
5 correct a clear error of law or prevent manifest
6 injustice.'" Munafo v. Metro. Transp. Auth., 381 F.3d 99,
7 105 (2d Cir. 2004) (quoting Collision v. Int'l Chem. Workers
8 Union, Local 217, 34 F.3d 233, 236 (4th Cir. 1994)).

9 "Rule 59(e) covers a broad range of motions, and the only
10 real limitation on the type of the motion permitted is that
11 it must request a substantive alteration of the judgment,
12 not merely the correction of a clerical error, or relief of
13 a type wholly collateral to the judgment." 11 Charles Alan
14 Wright et al., Federal Practice & Procedure § 2810.1 (2d ed.
15 2008) (footnote omitted).

16 Here, the district court substantively altered the
17 judgment to correct a clear error of law: New York law (as
18 opposed to California law) applies to the Excess Insurers'

⁵ "A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

1 bad-faith cross-claims. The district court acted well
2 within its discretion.

3 **CONCLUSION**

4 For the foregoing reasons, we affirm.