XV. SUPPLEMENTAL APPENDIX

2020 INSURANCE BAD FAITH LAW UPDATES

4. *Linn v. Oklahoma Farm Bureau Mutual Insurance Company*, 2020 OK CIV APP 62, __ P.3d __, (December 7, 2020) (Farm and Ranch Policy)

Oklahoma Allows An Expert To Testify An Insurer's Claims-Handling Duty Was Performed In Bad Faith

¶7 OFB's first challenge argues that the question of whether an insurer's claims-handling duty was performed in good faith is not one upon which an expert should be allowed to testify, because a jury needs no assistance to recognize bad faith in this context. OFB cites two opinions of a federal trial court in the Northern District of Oklahoma as persuasive authority to that effect. These opinions if applied as characterized by OFB, directly contradict the holdings of the Oklahoma Supreme Court on this issue. Oklahoma has consistently recognized the assistance of experts in this area and the law of bad faith in the handling of insurance claims is a matter of individual state law unless an ERISA plan….

An Insurance Bad Faith Expert Need Not Be A Licensed Adjuster

¶8 OFB next argues that Daniel was not a "witness qualified as an expert by knowledge, skill, experience, training, or education" pursuant to the first part of § 2702. The main thrust of OFB's argument is that, although Daniel held several certifications in various areas of insurance and risk management, he was not a licensed adjuster, nor had actually worked as an adjuster.…any questions as to the relevance of his qualifications and experience go to the weight the jury should have accorded his testimony, not its admissibility, and OFB had the opportunity to explore these issues at trial.

Conflicting Evidence Of Fact Is Always A Question For The Jury, But A Legal Interpretation Of Policy Language May Be Determined By the Court

¶12 *Badillo* clearly states that when there is conflicting evidence from which *different inferences* may be drawn regarding the reasonableness of an insurer's conduct, what is reasonable is *always a question to be determined by the trier of fact.* This standard must be integrated with another doctrine, that of a "legitimate dispute as to coverage" precluding bad-faith….

¶13 …The question here was not primarily a legal dispute as to policy interpretation, but one of whether there was a reasonable and legitimate factual

dispute as to theft pursuant to the *Badillo* standard. In clear situations such as *Andres* where the dispute is primarily legal, *i.e.*, one based on the interpretation of policy language, it is often possible for a court to determine reasonableness as matter of law.

¶14 Here, the coverage dispute was purely factual dispute as to whether theft had "likely" occurred. In such a case, reasonableness tends more towards becoming a jury questions. The fact pattern here was complex and did not lend itself to resolution as a matter of law.

Evidence Of A Polygraph Test Relied Upon By The Insurer Is Inadmissible

¶17 Oklahoma law has conclusively established that the results of polygraph tests are inadmissible before a jury.

¶18 …OFB relies on *Conti v. Republic Underwriters Ins. Co.*, 1989 OK 128, 782 P.2d 1357 and *Williamson v. EMASCO Ins. Co.*, 696 F.Supp. 1583, (W.D. Okla. 1988) as contrary authority…. OFB attempts to go beyond the rule of *Conti*, however, and argue that not only should a *judge* be allowed to consider polygraph results in deciding a *directed verdict*, but also that a jury should be allowed to consider polygraph results in determining if an insurer acted in good faith. *Conti* rejected this very proposal….We find the Oklahoma precedents on this issue clear. Any contray view expressed by the federal Western District of Oklahoma in *Williamson v. EMASCO Ins. Co.,* 696 F.Supp. 1583, (W.D. Okla. 1988) was expressed prior to *Conti* and has no value in this inquiry.

The Insurer's Duty To Pay Continues Up Until Payment Or Judgment And All Damages Caused By The Delay Even After Suit Is Admissible Evidence

¶28 … "[A] substantial part of the right purchased by the insured is the right to receive benefits promptly. Unwarranted delay causes the sort of economic hardship which the insured sought to avoid by the purchase of the policy and results in possible mental stress which may result from the loss." Delay is clearly an element that factors into a jury determination in such a case. A bad faith plaintiff's consequential damages do not cease accruing on the date suit is filed. Any business harm done by non-payment of the claim continued to accrue, proximately caused by OFB's action. It would eviscerate the recognized tort of bad faith to hold that all damages cease to accrue at the moment suit is filed.

…

¶32 …

> It should logically make no difference when or how an insurer learns that policy benefits are owed; once it learns that benefits are owed, the insurer should pay them. Accordingly, the fact that the insurer is already being sued does not somehow insulate the insurer from having to pay what it knows that it owes. An insurer's duty of good faith might not, however, continue after a judgment is entered against the insurer.

Allen D. Windt, 2 Insurance Claims and Disputes § 9:28 (6th ed.).

Law Of Good Faith In Oklahoma Is Determined By Oklahoma Law

¶35 OFB further argues that common law of other states, including Ohio and Illinois, should be considered. A lack of good faith in the handling of an insurance claim is a quintessential matter of state law, and the common law of Oklahoma established by our Supreme Court is precedential on this question.

Special Damages Of Higher Interest Costs Suffered For Failure To Timely Pay The Claim Is Proper

40 …[The jury instruction] states that higher interest costs that the Linn's business allegedly suffered as a result of OFB's failure to pay their claim could be considered as a measure of special damages if properly proven. We find no error in this part of the instruction.

OUJI 22.2 Jury Instruction For Bad Faith In First Party Claims Adequately Reflects The Law Of Bad Faith In Oklahoma Without Additional Jury Instructions

¶46 The scope of OFB's argument that the current uniform instruction, standing alone, *does not accurately state the law* goes well beyond the current case. OFB inherently argues that a jury *cannot* decide a bad faith case in a manner consistent with the law of Oklahoma unless additional instructions beyond the standard uniform instruction are given. …

¶47 …[T]he last precedential cases involving a jury award for bad faith appear to be *Badillo* in 2005 and *McCoy* in 1992. We find no indication that either the Supreme Court or the Court of Civil Appeals has ever found any insufficiency in OUJI No. 22.2, but also find little or no indication that the adequacy of the

instruction has been directly challenged. We find no indication that Oklahoma Supreme Court Committee for Uniform Jury Instructions has recommended any change in OUJI No. 22.22. OFB asks us to declare that it is reversible error not to give its proposed additional instructions on the law, *i.e.*, that they are now *mandatory in a bad faith case*. We find no precedent indicating that this is so, and we decline to do so in this case.

Prevailing Party Attorney's Fees Are Awarded To The Insured Under § 3629 Where There Had Not Been A Written Offer Within The Statutory Time Period Separate And AP That Exceeded The Judgment

¶54 Recovery authorized by § 3629(B) embraces both contract and tort-related theories of liability so long as the "core element" of the damages sought and awarded is composed of the insured loss. *Taylor v. State Farm Fire & Cas. Co.,* 1999 OK 44, ¶2, ¶11, 981 P.2d 1253. The "written offer of settlement" noted in § 3629 is clearly the "written offer of settlement or rejection that must be made within 90 [now 60] days of receipt of that proof of loss," not the "offer of judgment pursuant to 12 O.S. § 1101 or 1101.1. Section 3629 therefore provides a specific basis for fees in an insurance bad faith case that is separate from the general basis for fees provided by § 1101.1.

Prejudgment Interest Under Section 3629(B) Runs From The Date The Loss Was "Fairly Ascertainable"

¶57 OFB further argues that § 3629(B), as written, violates the principle of *Taylor v. State Farm Fire & Cas. Co*., 1999 OK 44, 981 P.2d 1253, that:

> In sum, if a (property loss) demand's value is unascertainable until its quantum is judicially settled, no prejudgment interest is the victor's due. But if the value of the demand is fairly ascertainable before its settlement by judgment, prejudgment interest will accrue.

¶59 OFB argues that there was no sum that was "fairly ascertainable" because the Linns submitted more than one claim amount based on an evolving count of how many cattle were missing. As OFB states the matter, "the [contract] verdict was approximately $100,000 less than the first proof of loss." Hence, it argues, the verdict shows damages that were not "fairly ascertainable" before settlement by judgment. As the Linns state it, a later proof of loss submitted to OFB in the amount of $566,470 was functionally identical to the $566,000 in contract damages awarded

by the jury. We find this sufficient in this case to satisfy the requirements of § 3629(B).