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OKLAHOMA INSURANCE BAD FAITH LAW

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Clifton D. Naifeh
NAIFEH & ASSOCIATES
A Professional Corporation
870 Copperfield Drive, Suite B
Norman, Oklahoma 73072
(405) 292-2244
E-Mail: cdn@naifehlawfirm.com

CLIFTON D. NAIFEH

Clifton D. Naifeh offices in Norman, Oklahoma. He received a Bachelor of Science degree in 1973 from Oklahoma State University and a Juris Doctorate degree in 1977 from Oklahoma City University.

Mr. Naifeh practices primarily in the area of civil litigation with special emphasis in insurance law, uninsured motorist, and products liability. He has served the Oklahoma Bar Association as a member of the Code of Professional Conduct Committee, the Civil Procedure Committee, and the Administration of Justice Committee, which committee he previously chaired; and he is a former member of the Professional Responsibility Tribunal. He is a member of the Oklahoma County Bar Association, and served on its Board of Directors, and a member of the Cleveland County Bar Association. Mr. Naifeh is also a member of the Oklahoma Association for Justice and previously served on its Board of Directors. He also previously served as OAJ's Secretary-Treasurer as well as a State Delegate to the Association of Trial Lawyers of America, now American Association for Justice. He is also a member of the American Association for Justice.

He frequently lectures in his practice areas and has authored several papers including The Annual Insurance Bad Faith Law Update, "The Anatomy of Plaintiff's Case-In-Chief", "Insurance Bad Faith -- Oklahoma Style", "Depositions -- Truth or Consequences" and "The Plaintiff's Primer".

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INTRODUCTION TO A COMPENDIUM OF QUOTABLE QUOTES

The tort of bad faith, or more appropriately the violation of the duty to deal fairly and in good faith, has been alive and well in this State for over half of the State's existence. The common law tort is of basically two types -- first-party claims and third-party excess liability claims. A first-party claim is one in which the insured makes a direct claim against his or her insurer whenever the covered contingency occurs and there is an unreasonable failure by the carrier to pay the insured. The traditional third-party excess liability claim is generally defined as where a third party makes claim against an insured for an amount greater than the liability policy. The carrier unreasonably fails to settle within the policy limits when given a reasonable opportunity to do so. The excess liability claim is brought by the insured against the carrier generally once judgment or settlement greater than the policy limits has been effected against the insured. Damages recoverable in both situations are policy limits, as well as consequential, and in a proper case, punitive damages.

How we got from the rough and ready days of yesteryear to the high-tech sophistication of today's unfair dealing law can be traced in the following compendium of quotable quotes.

I. DEFINING THE THEORY OF RECOVERY

A. HISTORICAL BACKGROUND

1. In The Beginning . . .

The first reported Oklahoma bad faith case was in a third-party or excess liability context.

Boling v. New Amsterdam Casualty Co., 1935 OK 587, 46 P.2d 916 (Automobile Liability Policy):

"It may be stated as a rule of law that where an insurance company agrees to indemnify against loss from personal injury claims, conditioned upon insured's surrendering

to the insurance company control of investigations, adjustments of claims, and defenses of lawsuits, and where the insurance company does, pursuant to such contract, take control of such matters, a relationship arises between insured and insurer which imposes on the insurer the duty owing to the insured to exercise skill, care, and good faith to the end of saving the insured harmless, as contemplated by the contract of indemnity. The insurer must act honestly to effectually indemnify and save the insured harmless as it has contracted to do -- to the extent, if necessary, that it must make whatever payment and settlement an honest judgment and discretion dictate, within the limits of the policy, and an abandonment of this duty to act subsequent to its assumption in part constituted bad faith." *Id.* at 919.

2. The Golden Rule Is The Law.

The next case came down in 1949.

National Mutual Casualty Co. v. Britt, 1948 OK 256, 200 P.2d 407 (Business Liability Policy):

"[T]he Defendant [carrier] was bound to give the rights of the [insureds] at least as much consideration as it did its own in determining whether or not to effect a settlement." P. 411.

"It was the right of the Defendant to exercise its own judgment upon the question of whether the claim should be settled or contested but its decision must be in good faith and with consideration of the interests of Plaintiff's. It should be the result of the weighing of probabilities in a fair and honest way after obtaining the facts upon which liability is predicated." P. 412.

"If based on a mere chance that the claim might be defeated and not on a bona fide belief that the action will be defeated a refusal of such an offer of settlement would not be good faith." P. 412.

Quoting a Vermont case, the Oklahoma Court first used the language "the relation became mutually fiduciary". *National Mutual, supra*, at 411.

American Fidelity & Casualty Company v. L. C. Jones Trucking Company, 1957 OK 287, 321 P.2d 685 (Business Liability Policy):

"It is the predominant weight of authority in this country that a public-liability insurer may be liable for the entire amount of a judgment obtained against the insured regardless of any policy limitation, if the insurer's handling of the claim, including a failure to accept a proffered settlement, was done in such a manner as to evidence bad faith. . . . [A]lmost all authorities, including Oklahoma, agree that the insured may recover on grounds of negligence, bad faith or fraud in the insurer's conduct with respect to its responsibility." P. 687.

"The predominant majority rule is that both parties' interests must be given the same faithful consideration. The fairest method of balancing the interests is for the insurer to treat the claim as if the insurer alone were liable for the entire amount." P. 687.

3. Famous Last Words Or First Party Claimants Are Not There Yet.

Renfroe v. Preferred Risk Mutual Insurance Company, 296 F.Supp. 1137 (N.D. Okla. 1969) (Automobile Collision Policy):

"There are no statutes in Oklahoma relating to an insurance company's bad faith refusal to pay an insured's claim.

. . .

"It appears to a legal certainty that the damages sought in plaintiff's third cause of action [claim of first party bad faith] are not recoverable under the settled law of Oklahoma." P. 1138.

Ledford v. The Travelers Indemnity Company, 318 F.Supp. 1333 (W.D. Okla. 1970) (Fire Policy):

"It appears that plaintiff's claim for punitive damages for the alleged oppressive manner in which his claim has been handled is defective for two reasons: First, his action herein is based and arises out of the contract of insurance with the Defendant, and Second, the losses pleaded by Plaintiff other than punitive damages appear to be covered by the terms of the policy, thus, no actual damage in tort is pleaded to support the claim for punitive damage."

Wilson v. Prudential Insurance Company of America, 1974 OK CIV APP 51, 528 P.2d 1135 (Group Medical and Hospitalization Policy):

"Punitive damages and other damages outside the scope of the insurance policy benefits were not recoverable, i.e., an insured's claim against an insurance company, in the case of an admittedly effective insurance policy, are limited to the terms and benefits provided in the insurance contract." P. 1140.

4. The Right To Punitive Damages In Bad Faith Cases Is Recognized.

Davis v. National Pioneer Insurance Company, 1973 OK CIV APP 9, 515 P.2d 580 (Automobile Liability Policy):

"In submitting the issue of punitive damages the trial court . . . stated that punitive damages could be awarded only if the conduct and actions of the defendant, resulting in the damages complained of, were so wantonly and grossly wrong as to work a reckless disregard for the rights of the plaintiff, or that defendant acted maliciously." P. 583.

B. <u>THE BAD FAITH THEORY OF RECOVERY IS FURTHER REFINED</u>

1. Bad Faith In First-Party Cases Is Recognized Or Premium Payers Can Receive Justice Too.

Christian v. American Home Assurance Company, 1977 OK 141, 577 P.2d 899 (Disability Policy):

"This is a distinct tort based upon an implied duty of the insurer to act in good faith and deal fairly with its insured. This duty is not consensual, it is imposed by law. Breach of the duty sounds in tort, notwithstanding that **it also constitutes a breach of contract**, and plaintiff insured may recover consequential and, in a proper case, punitive damages. The essence of the cause of action is bad faith." P. 901.

2. Special Relationship Between Insurer And Insured.

Christian v. American Home Assurance Company, 1977 OK 141, 577 P.2d 899 (Disability Policy):

"In [a California case] the Court discussed the special relationship between an insurer and its insured which gives rise to the duty of good faith and fair dealing. The Court observed that the industry has a quasi-public nature, that it involves the public interest and for that reason it is largely governmentally regulated. The consumer has no bargaining power and no means of protecting himself from the kinds of abuses set forth in appellant's petition. The following discussion of this special relationship between an insurance company and its insured, is relevant here:

> '. . . To some extent this special relationship and these special duties take cognizance of the great disparity in the economic situations and bargaining abilities of the insurer and the insured. . . . To some extent the special relationship and duties of the insurer exist in recognition of the fact that the insured does not contract ". . . to obtain a commercial advantage but to protect [himself] against the risks of accidental losses, including the mental distress which might follow from the losses. Among the considerations in purchasing . . . insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss . . ." The very risks insured against presuppose that if and when a claim is made, the insured will be disabled and in strait financial circumstances and, therefore, particularly vulnerable to oppressive tactics on the part of an economically powerful entity.' P. 902.
>
> . . . .
>
> "It is manifest . . . that in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to act is imminent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when an insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." *Christian* at 904.

3. A Duty Of Good Faith Exists Because Of A "Special Relationship" Under A Contract And Not Just The Insurance Contract.

Embry v. Innovative Aftermarket Systems LP*, *LP, Twin City Fire Insurance Company and Hartford Fire Insurance Company, 2010 OK 82, 247 P.3d 1158 (11/23/10, rehearing denied 02/28/11) (Gap Protection Contract):

"¶6 This Court has indeed expressed reluctance to extend tort recovery for bad faith beyond the insurance field. [Citation omitted.] However, an insurance contract is not required to support tort liability for bad faith but instead such liability depends upon the existence of a 'special relationship' under a contract (like the 'special relationship' of an insurer and insured). [Citation omitted.]

¶7 The 'special relationship' that gives rise to tort liability for bad faith is marked by (1) a disparity in bargaining power where the weaker party has no choice of terms, also called an adhesion contract, and (2) the elimination of risk. [Citation omitted.] Tort liability is allowed in these types of contracts, because bad faith, or, more properly, breach of the implied duty to deal fairly and in good faith, precipitates the precise economic hardship the contract was intended to avoid. . . .

. . .

¶10 Clearly, the contract to pay the deficiency involves the 'special relationship' necessary to support tort recovery for bad faith. In addition, the defendants' failure to pay the full deficiency in accordance with the term and representations for computing the amount of the deficiency precipitated the precise economic hardship to plaintiff that the contract was intended to avoid. Because the 'special relationship' is present, the defendants' subjective belief concerning the nature of the contract, or disclaimers that the contract is not insurance, are not dispositive of the issue of whether tort liability lies for defendants' alleged bad faith.

¶11 This is not to say that defendants' subjective belief is irrelevant to determining liability. 'The central issue [in a bad faith case] is whether the [party in breach] had a good faith belief in some justifiable reason for the actions it took or omitted to take that are alleged to be violative of the duty of good faith and fair dealing.'"

4. Insurers Are Fiduciaries In Dealing With A Third Party Claim Made Against Its Insured.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability Policy):

¶26. "In dealing with third parties, however, the insured's interests must be given faithful consideration and the insurer must treat a claim being made by a third party against its insured's liability policy 'as if the insurer alone were liable for the entire amount' of the claim. See *American Fidelity and Casualty Co. v. L.C. Jones Trucking Co.*, 1957 OK 287, 321 P.2d 685, 687. (emphasis added)"

¶27. "In other words, insurers were required to approach settlement as if the $10,000.00 policy limits did not exist and to ignore the policy limits during settlement negotiations. See *Berglund v. State Farm Mutual Auto Insurance Co.*, 121 F.3d 1225, 1227-1228 (8th Cir 1997). **The reason for the rule is that an insurance company, in dealing with a third-party claim against its insured, is acting in a fiduciary capacity toward its insured** by virtue of the terms of the insurance policy which give the insurer the authority to determine whether an offer of compromise or settlement should be accepted or rejected. [*American Fidelity and Casualty Co. v. G.A. Nichols Co.*, 173 F.2d 830, 832 (10th Cir 1949)], or the insurer is acting as an agent of the insured, the carrier being in control of disposition of the claim. See *American Fidelity and Casualty Co. v. L.C. Jones Trucking Co.*, 321 P.2d at 687. (emphasis added)"

5. The Reasonableness Of The Insurer's Conduct (Including Evaluations) Always Goes To The Jury.

***McCorkle v. Great Atlantic Ins. Co.*,** 1981 OK 128, 637 P.2d 583 (Fire Policy):

"[T]he essence of the intentional tort of bad faith with regard to the insurance industry is the insurer's unreasonable, bad faith conduct, including the unjustified withholding of payment due under a policy, and if there is conflicting evidence from which different inferences may be drawn regarding the reasonableness of insurer's conduct, then what is reasonable is always a question to be determined by the trier of fact by a consideration of the circumstances in each case." P. 587. (Emphasis added.)

. . .

"We trust that the trier of fact will award [punitive damages] only in a proper case, with the focus always on the unreasonableness of the insurer's conduct." P. 588.

6. Court Must Defer To Jury On Questions Of Fact In Bad Faith Cases.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability Policy):

¶ 3. "In plain language, we are not allowed to substitute our judgment for that of the jury merely because we would have decided or viewed disputed material questions differently from the jury."

7. The Duty To Insureds Under First And Third Party Claims Is The Same.

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

"[T]here is a single duty to deal fairly with the insured and third parties arising from the relationship established by the contract of insurance:

> 'Thus in [California cases it was made] clear that '[l]iability' is imposed [on the insurer] not for a bad faith breach of contract but for failure to meet the duty to

accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing.'

"In those two cases, we considered the duty of the insurer to act in good faith and fairly in handling the claims of third persons against the insured, described as a "duty to accept reasonable settlements"; in the case before us we considered the duty of an insurer to act in good faith and fairly in handling the claim of an insured, namely a duty not to withhold unreasonably payments due under a policy. These are merely two different aspects of the same duty. . . . . It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. . . ." (Emphasis that of the Court.) P. 911.

8. No "Evil Intent" Or "Bad" Faith Required.

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

"The gravamen of a *Christian*-type tort is failure to deal fairly and in good faith. Failure to abide by the implied duty imposes liability. The trial court did not err in refusing the requested instruction because to limit recovery or *Christian*-type actions to "an actual existing evil intent to mislead or deceive" limits recovery substantially beyond that required proof of failure to deal fairly and in good faith." *Timmons* at 914.

9. Mental Suffering Need Not Be "Severe" Or "Outrageous".

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

"[W]here mental suffering is alleged to be one of the items of damage resulting from an otherwise actionable transgression, recovery of damages for that aggravation does not require either "severe" mental distress or "outrageous" conduct to be actionable . . . . [T]he damages sought for mental suffering are but one element of damage sought for failure to deal fairly and in good faith." *Timmons* at 916.

10. Future Lost Profit May Be An Element Of Damage In Bad Faith Cases.

Aduddell Lincoln Plaza Hotel d/b/a Renaissance Center LLC v. Certain Underwriters at Lloyd's of London, 2015 OK CIV APP 34, 348 P.3d 216 (10/6/14, rehearing denied 11/25/14, cert. dismissed 4/1/15, mandate issued 4/15/15) (Commercial Property Insurance):

¶28 Instruction No. 9 was a modified version of OUJI No. 22.4 governing the measure of damages for insurance bad faith cases. The instruction is correct because it followed 23 O.S. 2011 § 61, which provides, "For the breach of an obligation not arising from contract, the measure of damages except where otherwise expressly provided by this chapter, is the amount which will compensate for all detriment proximately caused thereby,

whether it could have been anticipated or not." This section sets forth the measure of damages for a tort claim, including breach of the duty of good faith and fair dealing. For such a claim, loss of future income or profits is a proper element of damages.

11. It's A Bird, It's A Plane, No, It's A Hybrid Tort.

Lewis v. Farmers Insurance Company, 1983 OK 100, 681 P.2d 67 (Standard Fire Policy):

"A common law duty to perform with care, skill, reasonable expediency, and faithfulness accompanies every contract. Negligent failure to observe any of these conditions will give rise to an action *ex delicto* as well as an action *ex contractu*." P. 69.

Justice Opala's dissent:

"[T]he instant case clearly falls under the rubric of hybrid actions that lies somewhere in the gray area separating pure tort from classic contract cases. The class may be described as 'torts arising out of contractual relationships.' (Citations omitted.) Claims of this genre exhibit characteristics of both tort and contract actions. A tort will be deemed to arise out of a contractual relationship if the delictual duty breached and the contract are so intertwined that one cannot be viewed in isolation from the other because the detriment sought to be vindicated arose directly from performance or non-performance of the contract." (Citations omitted.) P. 70.

12. Breach Of Duty Of Good Faith And Fair Dealing Is An Independent Tort.

Martin v. Gray and Goodville Mutual Casualty Company, 2016 OK 114, 385 P.3d 64, (Uninsured Motorist Coverage):

This Court holds that a claimed violation of an insurer's implied-in-law duty of good faith and fair dealing presents an <u>independent</u> tort pursuant to *Christian v. American Home Assurance Company* and *McCorkle v. Great Atlantic Insurance Company,* requiring application of the law of the state with the most significant relationship to the alleged violation. ¶7

. . .

In 1977, this Court approved and adopted the rule "that an insurer has an implied duty to deal fairly and act in good faith with its insured and that the violation of this duty gives rise to an action in tort for consequential and, in a proper case, punitive damages may be sought." *Christian v. American Home Assurance Co. 1977 OK 141, 25, 577 P.2d 899, 904. "*This is distinct tort based upon an implied duty of the insurer to act in good faith and deal fairly with its insured. This duty is not consensual, it is imposed by law." Id., 6, 577 P.2d at 901. A few years later, in *McCorkle v. Great Atlantic Insurance Company,* 1981 OK 128, 27, 637 P.2d 583, 588, this Court reaffirmed *Christian* and held that it applies to all types of insurance companies. In doing so, this Court emphasized the tort of bad faith is an "independent and intentional tort." Id., 22, 637 P.2d at 587. Thus, it is well-established that a bad-faith claim presents a tort. ¶9

A Multi-State Bad Faith Claim Must Undergo the "Most Significant Relationship" Test.

Martin v. Gray and Goodville Mutual Casualty Company, 2016 OK 114, 385 P.3d 64, (Uninsured Motorist Coverage):

The choice of law applicable to a tort claim is the "most significant relationship" test adopted in *Brickner v. Gooden,* 1974 OK 91, 525 P.2d 632. There, this Court abandoned the rule that the place of the wrong governs the applicable law on all issues of multi-state tort actions and held as a general principle:

> The rights and liabilities of parties with respect to a particular issue in tort shall be determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties. The factors to be taken into account and to be evaluated according to their relative importance with respect to a particular issue, shall include: (1) The place where the injury occurred, (2) The place where the conduct causing the injury occurred, (3) The domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) The place where the relationship, if any, between the parties occurred, Id., 23. ¶ 10

Williamson v. Emcasco Insurance Company, 696 F.Supp. 1583 (W.D. Okla. 1988) (Fire Policy):

"Under Oklahoma law, an insurer's denial of a claim by an insured constitutes bad faith justifying punitive damages only where the denial is unreasonable under the circumstances."

13. Lack Of Claims Manual, Written Guidelines Or Training Regarding Oklahoma Law Is Bad Faith.

Vining v. Enterprise Financial Group Inc., 148 F.3d 1206 (10th Cir.1998) (Credit Life Policy):

"Enterprise does not have a claims manual or any written guideline specifying when a claim is payable or not, and it never informed [its claims examiner] of any applicable Oklahoma law or regulation pertaining to when a policy may be rescinded. Enterprise had no system of tracking whether any of its agents routinely sold policies to ineligible applicants."

a. Insurer May Be In Bad Faith Where It Disregards The Opinion Of Plaintiff's Treating Physician, Where Defendant Fails To Disclose Medical Reviewer Reports, Then Influences The Medical Reviewer To Change His Opinion, Or Fails To Have Formal Training And Knowledge Regarding The Terms Of The Policy.

Tomlinson v. Combined Underwriters Life Insurance Company, et al., 708 F.Supp.2d 1284, (N.D. Okla. 2010) (Cancer and Dread Disease Policy):

"Under the facts most favorably construed against the insurer, the insurer's conduct in denying coverage could reasonably perceived as tortious as there is some conflicting evidence from which different inferences may be drawn regarding the reasonableness of the insurer's conduct. Specifically, Defendants' disregard for the opinion of Plaintiff's treating oncologist, Defendants' interaction with MRIA to obtain a medical review of the issue, together with statements by Defendant employees handling Plaintiff's claim as to their knowledge, or lack thereof, regarding the terms of the Policy are issues for the trier of fact to consider." *Id.* at 1296.

b. To Be Bad Faith The Failure By An Insurance Company To Adopt Standards Or Provide State Specific Training Must Be A Direct Cause Of Damages.

Flores v. Monumental Life Insurance Company, 620 F.3d 1248 (10th Cir. 9/27/10) (Accidental Death Insurance Certificate):

"As for Plaintiff's first two allegations of bad faith, we are not persuaded an insurer acts in bad faith under Oklahoma law by simply failing to adopt written standards or provide state-specific training to its employees. We see no basis in the record for a finding of bad faith with respect to Defendant's general handling of claims and training of employees." *Id.* at 1256.

c. Where There Is No Controlling Decision Upon Which The Insurer Bases Its Denial There May Be A Legitimate Dispute.

Oldenkamp v. United American Insurance Company, 619 F.3d 1243 (10th Cir. 9/28/10) (Limited Benefit Hospital and Surgical Expense Policy):

"Although the district court held in favor of the Oldenkamps on their breach of contract claim, it granted partial summary adjudication in favor of United on the bad faith claim, primarily because the district court concluded that United had raised a legal argument on which there was no controlling decision by the Oklahoma Courts which would have shown that the argument was unreasonable. We agree with the district court's ruling on this point. . . . Indeed, because we have held that United did not breach the insurance contract by denying coverage under these circumstances, it follows that we necessarily agree that United's denial of coverage was reasonably based." *Id.* at 1249.

d. A Claim Representative's Lack Of Knowledge Of An Inapplicable Regulation Is Not Bad Faith.

Oldenkamp v. United American Insurance Company, 619 F.3d 1243 (10th Cir. 9/28/10) (Limited Benefit Hospital and Surgical Expense Policy):

"The Oldenkamps argue that United's position was not reasonable because a claim representative testified in deposition that she was unaware of the regulation. United was nevertheless aware that its policy at least arguably excluded coverage for the claim. We can hardly say that United's position was unreasonable when we have been persuaded that it is, in fact, correct." *Id.* at 1249.

14. Basing Denial Upon A Belief Without Investigating Is Bad Faith.

Vining v. Enterprise Financial Group Inc., 148 F.3d 1206 (10th Cir.1998) (Credit Life Policy):

"[The claims examiner] felt it appropriate to rescind a policy even if the agent issued the policy with full knowledge of an applicant's medical history.

[The claims examiner] never paid a claim if she had any reason to doubt whether a person's medical history was inconsistent with the health disclaimer included on the insurance application. . . . [The claims examiner] did not investigate whether [the selling agent] was informed of [plaintiff's decedent's] medical history, did not contact either [the selling agent] or [plaintiff], and did not contact Dr. Sullivan to discuss his notes before rescinding the policy."

15. Reasonableness Is Still The Standard For The Breach Of The Duty Of Good Faith And Fair Dealing.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability Policy):

¶ 28. "The essence of an action for breach of the duty of good faith and fair dealing 'is the insurer's unreasonable, bad-faith conduct... and if there is conflicting evidence from which different inferences may be drawn regarding the reasonableness of insurer's conduct, then what is reasonable is always a question to be determined by the trier of fact by a consideration of the circumstances in each case.' *McCorkle v. Great Atlantic Insurance Co.*, 1981 OK 128, 637 P.2d 583, 587."

16. Simple Negligence Is Not Enough For Unfair Dealing.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability Policy):

¶ 28. "...To the extent *American Fidelity and Casualty Co. v. L.C. Jones Trucking Co.*, 321 P.2d at 687, may have implied that a simple negligent standard was approved or adopted as to the level of culpability necessary to be shown for liability to attach to an insurer for breach of the duty of good faith and fair dealing in relation to the handling of a third-party claim made against the insured, i.e., the situation involved here, that case is expressly overruled, but only to such extent. In our view, under *Christian* and later cases, the minimum level of culpability necessary for liability against an insurer to attach is more than simple negligence, but less than the reckless conduct necessary to sanction a punitive damage award against said insurer."

17. An Insurer Has No General Negligence Duty To Use Reasonable Care In The Performance Of A Contract.

Embry v. Innovative Aftermarket Systems LP*, *LP, Twin City Fire Insurance Company and Hartford Fire Insurance Company, 2010 OK 82, 247 P.3d 1158 (11/23/10, rehearing denied 02/28/11) (Gap Protection Contract):

"¶14 We reach a different conclusion, however, concerning elimination of negligence as a theory of recovery. There is simply no general duty to use reasonable care in the performance of a contract. The duty of a party to a contract to act reasonably and diligently in the performance of a contract are encompassed within the implied covenant of fair dealing and good faith. 'Fair dealing' in the implied covenant emphasizes 'reasonable action' [citation omitted], while 'good faith' is marked by 'the exercise of reasonable diligence.' [Citations omitted.] The duty to act in good faith also requires a party to abstain from taking unfair advantage of another. 25 O.S. 2001 § 9. Any neglect and lack of diligence on the part of the defendants is simply proof of their breach of the implied duty to deal fairly and in good faith, and not an independent theory of recovery."

18. In Third Party Situations Insurers Must Respond To Reasonable Requests And May Be Required To Act Affirmatively.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability Policy):

¶30. "Rather than only involving offering the policy limits or responding to unconditional settlement offers, the duty of good faith and fair dealing in this third party situation required insurers to reasonably respond to reasonable requests from Smith's lawyers in an effort to settle the case for the protection of their insured, the person whose financial life or health was hanging in the balance. (emphasis added)"

. . .

¶31. "The statement request also implicated the extent to which insurers were required to consult, communicate with and inform their insured regarding that request and its potential impact on settlement negotiations/discussions insurers were involved in, as it was insured's assets and his potential bankruptcy (i.e., his financial future) at issue if the matter did not settle for the policy limits. Surely, a rational jury could conclude based on the evidence that insurers failed in their communicative/consultative duty."

. . .

¶33. "Contrary to insurers' position(s), a carrier's duty of good faith and fair dealing in the situation reasonably shown by this record involves more than making an offer to settle for or within policy limits, or simply not refusing unconditional settlement offers within those limits. It has even been held, if an insured's liability is clear and the injuries of a claimant are so severe that a judgment in excess of policy limits is likely, the insurer has **an affirmative duty to initiate settlement negotiations**. (emphasis added)"

19. An Unconditional Offer Of Settlement Is Not Required Before An Insurer Must Act.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability Policy):

¶34. "Also, a legally binding, unconditional offer of settlement from the claimant is not a prerequisite to maintaining an action of this type where the insured has been exposed to an excess verdict. [Citation omitted.] In the circumstances here, insurers could be found to have had an affirmative duty to seize a reasonable opportunity to protect insured from the potential for excess liability and their duty consisted of more than merely playing a passive role in the settlement process."

20. An Insurer Must Timely And Adequately Inform Insured Of Progress Of Settlement Negotiations.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability Policy):

¶ 36. "In this third-party type situation, an insurer's duty of good faith and fair dealing includes the duty to act in a diligent manner in relation to investigation, negotiation, defense and settlement of claims being made against the insured. [Citation omitted.] 'The duty to inform the insured of settlement opportunities is one of the duties subsumed within the duty of good faith owed by an insurer to an insured.' [Citation omitted.] Although failure to so inform does not automatically establish breach of the duty of good faith and fair dealing, it is one factor the jury may consider in deciding whether the insurer acted in violation of the duty of good faith and fair dealing."

21. Insurers Sell More Than Payment Of Claims.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability Policy):

Special Concurring Opinion.

¶2. "Through its advertising, the insurance company beckons the consumer to do business with it based upon slogans that suggest the liability insurance company will look after its customer's best interest. The insurance company promises the customer will be in good hands and treated with caring and neighborly concern. Soothing and comforting music plays in the background of these advertisements. Based on these advertisements, it

is only reasonable for customers to rely on the insurance company to handle claims with care and concern for the customer's financial and legal interest."

¶3. "These reassurances are a part of the insurance contract requiring an insurance company to act in good faith and fair dealing toward its customers. (citation omitted) The insurance contract places more responsibility on the insurance company than just paying claims."

. . .

¶4. When a liability insurance policy is purchased, the customer is buying more than just the payment of a potential claim. The customer is buying coverage. The customer is buying comfort. The customer is buying peace of mind. The customer is buying the skill of the insurance company to negotiate and settle claims in his best legal and financial interest. The customer is buying the right to counsel and the best advise the insurance company has to offer.

. . .

¶9. "If insurance companies wish to prevent bad faith cases, then they must govern themselves in accordance with the law and the terms of the insurance products they market and sell. When that day comes, then bad faith cases will become a relic of the past."

22. Primary Liability Insurers Owe An Immediate Affirmative Duty To Their Insureds.

SRM, Inc. v. Great American Insurance Company, 798 F.3d 1322 (10th Cir. 8/25/15) (Excess Liability Policy):

Under Oklahoma law, which we apply to this diversity action, primary insurers like Bituminous generally are immediately responsible for investigating and defending the insured against third-party claims. [Citations omitted.] In performing its contractual obligations, a primary insurer owes its insured a duty of good faith and fair dealing. See *Christian v. American Home Assurance Co.*, 577 P.2d 899, 904 (Okla. 1977) (quoting *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 108 Cal.Rptr 480, 510 P.2d 1032, 1038 (1973)).

This implied duty includes "an affirmative duty to initiate settlement negotiations" if "an insured's liability is clear and injuries of a claimant are so severe that a judgment in excess of policy limits is likely." *Badillo v. Mid Century Insurance Co.*, 121 P.3d 1080, 1095 (Okla. June 21, 2005), as corrected, (June 22, 2005). In addition, any settlement decision must be "based on a thorough investigation of the underlying circumstances of the claim." *Id.* 1325-1326.

. . .

[O]klahoma's duty of good faith and fair dealing requires *primary* insurers to do "more than . . . simply not refus[e] unconditional settlement offers within [its policy] limits." *Badillo*, 121 P.3d at 1095. "[I]f an insured's liability is clear and the injuries of a claimant are so severe that a judgment in excess of policy limits is likely," a primary "insurer has an affirmative duty to initiate settlement negotiations." **1329.**

23. Excess Insurer Owes Its Insured A Duty To Act Reasonably In Evaluating Offers Or Agreement Negotiated By Primary Insurer.

SRM, Inc. v. Great American Insurance Company, 798 F.3d 1322 (10th Cir. 8/25/15) (Excess Liability Policy):

[A]n excess insurer owes its insured a duty to act reasonably when evaluating a plaintiff's settlement offer or a settlement agreement negotiated by the primary insurer. But here, the railroad and its workers made no settlement offers or demands until the mediation – just a week before Great American paid its policy limits to settle the case. And SRM's primary insurer did not negotiate a settlement that Great American refused to join.

Although the facts of the cases SRM cites vary, as do the legal questions they address, each of the cases involved an excess insurer that exposed its insured or a primary insurer to liability by rejecting within-limits settlement offers. Under those circumstances courts have held that excess insurers owe their insureds a duty to "exercise good faith . . . *in considering any offer of compromise* within the limits of [their] polic[ies]." *Kelley*, 34 Cal.Rptr at 569 (emphasis added). Others have held more broadly that excess insurers owe their insureds a "duty of good faith in *evaluating any settlement offers* coupled with a duty not to "arbitrarily reject a reasonable settlement." [Citations omitted.]

These duties may require an excess insurer to consider various factors, including the maximum likely recovery at trial, costs of defense, and the burdens of trial "*in evaluating the reasonableness of a settlement negotiated by the primary insurer." Diamond Heights*, 277 Cal.Rptr at 916 (emphasizing that "excess insurer does not have the absolute right to veto arbitrarily a reasonable settlement") (emphasis added). And "if an excess insurer, like a primary insurer, *fails to accept a reasonable settlement offer within its policy limits,* it may be liable to the other insurer for any excess liabilities" under a claim for equitable subrogation. [Citations omitted.] **1328.**

24 . Excess Carrier Has No Obligation To Investigate, Settle Or Defend Until Primary Insurer Exhausts Its Policy Limits.

SRM, Inc. v. Great American Insurance Company, 798 F.3d 1322 (10th Cir. 8/25/15) (Excess Liability Policy):

Great American's contractual duties to investigate, settle, or defend claims against SRM did not kick in until SRM's primary insurer exhausted its policy limits by actually paying claims.

. . .

While the duty of good faith and fair dealing is an obligation "'deemed to be imposed by law,'" the insurer's duty is to "'act fairly and in good faith *in discharging its contractual responsibilities*'" *Christian*, 577 P.2d at 904 (quoting *Gruenberg*, 108 Cal.Rptr 480, 510 P.2d at 1037) (emphasis added). . . .

"An excess insurer" like Great American "has a reasonable economic expectation that it will not be responsible on its policy until the insurance at the level lower to [it] has been exhausted in accordance with the express provisions and obligations in the insurance contract." *Steadfast*, 304 P.3d at 750. Likewise, "the duty of an excess insurer to participate in the insured's defense is triggered only by exhaustion of the primary policy," even if the "claim against the insured is for a sum greater than the primary coverage." *U.S. Fidelity & Guaranty*, 37 P.3d at 833.

Under its policy with SRM, Great American had no obligation to investigate, settle or defend a claim until the primary insurer exhausted its policy limits by paying claims. **1327.**

25. COCA Appears To Require Exposure To Financial Loss When Oklahoma Law Does Not.

Milroy v. Allstate Insurance Company, 2007 OK CIV APP 6, 151 P.3d 922 (Sept. 19, 2006) (cert. denied 1/9/07) (Automobile Liability Policy):

¶32. "In the context of a third-party claim made against the insured, Oklahoma law requires exposure to financial loss due to the insurer's handling of the claim as an element of a *prima facie* case for breach of the duty of good faith and fair dealing. *Badillo,* 2005 OK 48 at ¶25, 121 P.3d at 1093.

26. Failure To Investigate Critical Fact Is Bad Faith.

Hall v. Globe Life and Accident Insurance Company, 1998 OK CIV APP 161, 968 P.2d 1263 (Life Insurance Policy):

"Once Globe Life had a reasonable basis to believe Mr. Hall had been treated for cirrhosis during the relevant period, the critical element became Mrs. Halls' knowledge of that fact. The jury could have concluded the Globe Life conducted no investigation of that critical fact. . . . A jury question was created by the evidence."

27. A Jury Verdict For The Tortfeasor Does Not Foreclose A Bad Faith Claim. Evidence Of The Verdict Is Not Relevant Or Admissible.

Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company, 2007 OK 16, 157 P.3d 117 (Uninsured Motorist Coverage):

"¶35. OneBeacon asserts that it has a right to litigate contested claims, a right to intervene, and that the jury's verdict for Patel forecloses, as a matter of law, any bad-faith claim. It argues that an insurer's methods in investigating and litigating a UM claim may be conclusively justified if a court subsequently determines that no UM payment is owed. In other words, it seeks for a "means justified by ends" rule of law for an UM insurer's handling of UM claims. A related complaint is made by Brown concerning OneBeacon's use of information that OneBeacon did not possess until after OneBeacon's intervention. Evidence relating to facts that OneBeacon did not have or rely on until after the time period in question, that is, from the time of OneBeacon's notice of the collision until the intervention, is not relevant to an adjudication of a bad-faith claim concerning the

intervention. *Newport v. USAA*, 2000 OK 59, ¶10, ¶¶36-37, 11 P.3d 190, 195, 200 (an insurer's good faith belief is measured by facts known, or relied on, by the insurer at the time of the conduct challenged as showing bad faith on the part of the insurer)."

28. Plaintiff Does Not Necessarily Need To Win A Breach Of Contract Action To Maintain A Bad Faith Claim.

Vining v. Enterprise Financial Group Inc., 148 F.3d 1206 (10th Cir.1998) (Credit Life Policy):

"No court has held that an insured must actually prevail on a separate underlying breach of contract claim in order to maintain a successful bad faith claim, and we cannot predict that Oklahoma would impose such a condition precedent to a bad faith claim."

29. The Duty Of Good Faith Ends When There Is Payment Of The Claim.

Skinner v. John Deere Insurance Company, 2000 OK 18, 998 P.2d 1219 (Uninsured Motorist Coverage):

"Because withholding payment is a necessary element of a claim for bad faith in refusing to pay a legitimate claim, the actions of an insurer after payment is made cannot be the basis of the bad faith claim. . . .

"Thus, the plaintiff's bad faith claim could not have been based on Deere's action after it filed the federal case and interpleaded the $500,000.00 with the court. Even though the plaintiff may not have received the payment immediately, once Deere placed the money with the court, it met its obligation to pay the claim."

30. Lowball Offers To An Insured Are Bad Faith.

Newport v. USAA, 2000 OK 59, 11 P.3d 190 (Uninsured Motorist Coverage):

"An insurer may not treat its own insured in the manner in which an insurer may treat third-party claimants to whom no duty to good faith and fair dealing is owed. . . . .

The duty of good faith and fair dealing merely prevents an insurer from offering less than what its own investigation reveals to be the claim's value. . . .

[A]n offer to make an insufficient payment is equivalent to a denial of that portion of the claim lying between the insurer's offer and the value or range of value which the insurer has assigned to the claim. Offers below the insurer's own calculation of the value of the claim are not a valid justification for withholding payment."

31. An Insurer Must Make An Offer To Its Insured Within The Insurer's Range Of Values.

Miller v. Liberty Mutual Fire Insurance Company, 2008 OK CIV APP 65, 191 P.3d 1221 (Uninsured Motorist Coverage):

"¶16. Liberty Mutual had the duty to promptly settle Miller's initial claim 'for the value or within the range assigned to the claim as a result of its investigation.' *Newport v.*

USAA, 2000 OK 59, ¶16, 11 P.3d 190, 196. The Court in *Newport* explained that the duty of good faith and fair dealing 'prevents an insurer from offering less than what its own investigation reveals to be the claim's value.' *Id.*

32. Low Balling And Then Offering Policy Limits After A Bad Faith Fawsuit Is Filed May Be Evidence Of Defendant's Negotiation Bad Faith.

Falcone v. Liberty Mutual Insurance Company, 2017 OK 11, 391 P.3d 105 (Uninsured Motorist Coverage):

¶11 A jury's determination of the facts is necessary to determine whether a lack of good faith is shown by Defendant's offers to Plaintiff over the course of 1 year, which ultimately led to Plaintiff's lawsuit and the offer by Defendant of the policy's UM limits of $100,000. We hold the significance of the undisputed facts, and whether Defendant's actions over the course of their negotiations constituted bad faith, are questions for the trier of fact.

33. It May Be Bad Faith For An Insurer To Condition Payment Upon A Release Of Future Liability.

Miller v. Liberty Mutual Fire Insurance Company, 2008 OK CIV APP 65, 191 P.3d 1221 (Uninsured Motorist Coverage):

"¶15. . . . Second, Miller contends that Liberty Mutual breached this duty [of good faith and fair dealing] by intending to make the actual payment of the amount offered contingent on a release of future liability."

. . .

"¶16. . . . The [*Newport*] Court stated:

> [A]n offer to make an insufficient payment is equivalent to a denial of that portion of the claim lying between the insurer's offer and the value or range of value which the insurer has assigned to the claim. Offers below the insurer's own calculation of the value of the claim are not a valid justification for withholding payment." *Id.* at ¶17, 11 P.3d at 197. *Newport*, therefore, . . . does not preclude the second aspect of the bad faith claim Miller articulates." (Emphasis added.)

34. Insurer Including Terms In A Release That Were Not Discussed Including Releasing A Bad Faith Claim Supports An Inference That The Insurer Acted In Bad Faith.

***Trotter v. American Modern Select Insurance Company*,** 220 F.Supp.3d 1266 (W.D. Okla. 2016) (Commercial Insurance Policy):

*7 "At the settlement conference the parties did not reach an agreement that Trotter Doors would release its indemnity claim against American Modern. So far as appears from the parties' current submissions, the issue was not discussed. Ms. Woods [the adjuster] simply assumed Mr. Trotter agreed to her release but admitted she "did not tell him he had to sign a policy release." The settlement agreement does not mention a release of any type. Nonetheless, American Modern subsequently indicated it would withhold payment of its portion of the settlement payment unless the agreement included language in which Mr. Trotter and Trotter Doors released any claims including a bad faith claim, they might have against American Modern under policy #Q61020359 or related to the TOD lawsuit. This evidence supports an inference that, motivated at least partially by the "bad faith

implication letter from Plaintiff sent …by insured's counsel," 17 the insurer threatened to upend a hard wrought settlement.

. . .

"The Court concludes American Modern's conduct in conjunction with its attempt to obtain a release creates a fact question precluding summary judgment on Plaintiff's bad faith claim."

Footnote 17

"Under Oklahoma's Unfair Settlement Act, it is an unfair claims settlement practice to "[r]equest [] a claimant to sign a release that extends beyond the subject matter that gave rise to the claim payment." 36 Okla. Stat. § 1250.5 (8).

35. Failure To Pay Funeral And Medical Bills From UM Coverage Is Bad Faith.

Newport v. USAA, 2000 OK 59, 11 P.3d 190 (Uninsured Motorist Policy):

"Payment of the medical and funeral expenses was sought as part of the Newport's claim for the losses incurred as a result of Mr. Newport's collision with an uninsured motorist, not as med-pay coverage. . . .

USAA promised to make the uninsured motorist coverage available, made a small advance towards that end, and then refused to make further payment on the claim outside a settlement far below the dollar value placed on the claim based on its own investigation. USAA's actions in handling the Newport's claim could reasonably be perceived as unreasonable and in bad faith."

36. No Legitimate Dispute Where Insurer Ignores Its Own Policy Provisions, The Oklahoma Law Regarding The Provisions Or Fails To Investigate The Oklahoma Law Regarding The Purported Defense.

Haberman v. The Hartford Insurance Group, 443 F.3d 1257 (10th Cir. Okla. 2006) (Uninsured/Underinsured Business Automobile Policy):

"During the proceedings before the district court, Haberman presented evidence suggesting that the Hartford ignored the provisions of its own policy and ignored Oklahoma law. Haberman showed that the Hartford denied her claims for uninsured motorist and medical pay benefits. The Hartford delayed payment of Haberman's medical payments coverage until just weeks before trial. The Hartford did not evaluate Haberman's claim until the third day of trial, and did not offer her any amount of money for her uninsured motorist claim. The Hartford did not check to see if Oklahoma law would permit tying the policy's uninsured motorist coverage for an individually named insured to specific vehicles. These facts, construed most favorably against the Hartford, can reasonably be perceived to be tortious." *Haberman* at 1270.

37. The § 3629(B) 90-Day Offer Time Period Affects Attorney's Fees, Not Bad Faith Liability.

Hale v. A.G. Insurance Company, 2006 OK CIV APP 80, 138 P.3d 567 (cert. denied 7/12/06) (Commercial Property Insurance Policy):

¶6. "Section 3629 is a prevailing party attorney fees provision. It serves to encourage prompt resolution of insurance claims by keying entitlement to an award of fees

to a particular date. [Citation omitted.] However, the 90 day time period in § 3629 does not trigger liability under the policy. *Shinault v. Mid-Century Insurance Co.*, 1982 OK 136, 654 P.2d 618. In *Shinault*, the Oklahoma Supreme Court held that §3629 affects the right to prevailing party attorney fees only, and states that the bad faith remedy is available for cases where the insurer's conduct is malicious or indifferent to the claim. *Id.* at 619. Nothing in *Shinault* suggests bad faith is triggered by the expiration of the 90 days in the attorney fees statute."

38. Litigation Conduct Of An Insurer By Asserting A Subrogation Right Without Making Payment Under A UM Claim May Be Bad Faith.

Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company, 2007 OK 16, 157 P.3d 117 (Uninsured Motorist Coverage):

"¶11. The bad-faith action may also be based upon an insurer's failure to perform an act that is derivative or secondary in nature; that is, an insurer's duty that owes its existence to a pre-existing implied contractual, or statutory, or status-based duty arising from the insurer-insured relationship. . . .

¶12. In our case today, this latter category of derivative or secondary duties is raised by Brown, in that he asserts bad faith is shown by OneBeacon's litigation efforts to both press a subrogation claim while denying that such a claim exists, all without either granting or denying a UM claim. Specifically, Brown asserts that OneBeacon acted in bad faith by intervening in Brown's action against Patel and asserting a subrogation claim against Patel and adopting Plaintiff's allegations, and secondly, that OneBeacon acted in bad faith by asserting a subrogation interest 'as a ruse to actually harm' Brown by OneBeacon's litigation conduct in defending Patel.

. . .

¶20. Conventional (or contractual) subrogation is created by an agreement or contract between parties granting the right to pursue reimbursement from a third party in exchange for payment of a loss. [Citation omitted.] Equitable subrogation allows a party who has paid to stand in the shoes of the party to whom the amount was owed and proceed against the third party primarily responsible for the amount paid. [Citation omitted.] In both circumstances the subrogation is based upon payment.

¶21. An insurer's *payment* on a policy of insurance clearly creates a subrogation interest for the purpose of intervention. If OneBeacon, as a UM carrier, desired to litigate a subrogation interest against Patel in Brown's action against Patel and intervene as a matter of right pursuant to 12 O.S. § 2024(A)(2), then OneBeacon was required to make payment to Brown prior to its intervention. We agree with Brown that a *potential* subrogation interest against an insured's alleged tortfeasor, by itself, is too remote to justify an insurer's right to intervene as a matter of right."

39. No Litigation Bad Faith Where Litigation Conduct by Counsel Is Appropriate under the Circumstances.

Andres v. Oklahoma Farm Bureau Mutual Insurance Company, 2012 OK CIV APP 93, 290 P.3d 15 (released for publication 06/12/12; cert. denied 09/17/12) (Homeowner's Insurance Policy):

"¶10. [T]he essence of Plaintiff's bad faith cause of action here is her contention that OFB failed to initiate and pursue an independent investigation to evaluate her claim once the appeal in *Andres I* was concluded. The parties do not cite, and we do not find, authority in Oklahoma or elsewhere involving a claim of bad faith arising from an insurer's exercise of its duty to an insured plaintiff on remand after coverage has been judicially determined. However, Oklahoma law is clear that an insurance company has a duty to its insured to conduct an investigation of a claim that is 'reasonably appropriate under the circumstances,' and to 'promptly settle the claim for the value or within the range of value assigned to the claim as a result of its investigation.' *Newport v. USAA*, 2000 OK 59, ¶16, 11 P.3d 190, 196-97.

¶11. What is 'reasonably appropriate under the circumstances,' in terms of an investigation, of necessity will differ depending on the facts of a particular case. In this regard, it has been noted that '[o]nce a court . . . proceeding is commenced seeking insurance benefits, normal claim handling is superseded by the litigation proceeding.' Allan D. Windt, *2 Insurance Claims and Disputes 5th: Representation of Insurance Companies & Insureds, § 9:28* (Database updated March, 2012). The article continues:

> The insurer retains counsel, and the insurer then relies upon its counsel to handle discovery in the context of the litigation proceeding. Accordingly, properly analyzed, an insurer cannot be guilty of bad faith because it does not conduct its own investigation, but instead relie[s] upon its counsel to conduct an investigation that is appropriate in a litigation context**."**

40. Where Insurer Has A Legitimate Dispute Over The Value Of The Claim, It Is Not Bad Faith.

Garnett v. Government Employees Insurance Co., 2008 OK 43, 186 P.3d 935 (Underinsured Motorist Coverage):

"¶ 20. The insurer contends that the amount in question was not 'undisputed' and that because there was a legitimate dispute over the value of UIM claim, its refusal to pay the amount did not constitute bad faith.

. . .

¶ 23. . . . Because a legitimate dispute existed between the parties as to the value of the UIM claim, the trial court did not err by granting summary judgment to the insurer on the issue of whether the insurer's failure to tender the 'undisputed amount' constituted bad faith."

41. Appeal Of Bad Faith Dismissal Can Await Ruling On Motion For New Trial Of Contract Claim.

Onyekuru v. Farmers Insurance Company, Inc., 2000 OK 81, 20 P.3d 812 (Renter's Insurance Policy):

"[B]ecause Rule 1.12(b) provides that no party shall appeal if a timely motion for new trial is filed and the time to appeal shall not begin to run until the motion is disposed of, the insured properly waited to appeal until the trial court ruled on the insurance company's motion for new trial. Thus, the insured's appeal was not untimely and should not have been dismissed." ¶5.

42. An Insurer May Be In Bad Faith For Not Considering Statutorily Mandated Coverage Be Included Even Where The Department Of Insurance Has Concluded The Claim Was Handled Within Policy Terms.

Tomlinson v. Combined Underwriters Life Insurance Company, et al., 708 F.Supp.2d 1284, (N.D. Okla. 2010) (Cancer and Dread Disease Insurance Policy):

"A reasonable person in the position of the Plaintiff would have understood the Policy to provide coverage for submitted charges related to her breast reconstruction. Defendants claim that the Policy covers only the actual charge or a prosthesis and the implantation of the prosthesis . . . .

Defendants' rationale for denying the claim overlooks the Oklahoma Breast Cancer Patient Protection Act . . . . *Id.* at 1293.

. . .

"They also argue that the DOI [Department of Insurance] agreed with them on this issue twice." *Id.* at 1296.

"The Court does not rely on the DOI's respons]es to Plaintiff's complaints as any determination that the Defendants' interpretation is correct or reasonable. The Court has found that Defendants' interpretation of the applicable policy provision was too narrow and in conflict with statutory law in Oklahoma. Given the statute, other provisions of the Policy, and Defendants' representations to Plaintiff, a reasonable fact-finder could deem Defendants' denial of coverage as to this claim a violation of the duty of good faith and fair dealing." *Id.* at 1296.

43. To Be In Bad Faith The Claimed Unfair Act Must Cause Damage.

Oldenkamp v. United American Insurance Company, 619 F.3d 1243 (10th Cir. 9/28/10) (Limited Benefit Hospital and Surgical Expense Policy):

"The Oldenkamps also allege that a letter from United falsely stated that the claim had been reviewed by a physician. . . . The district court held that the Oldenkamps had not, in any event, shown that the use of the physician's name caused their damages citing *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080, 1093 (Okla. 2005), for the proposition that they must show that the alleged violation of the duty of good faith and fair dealing was the direct cause of damages." *Id.* at 1250.

44. The Decisive Question in a Bad Faith Case Is Whether the Insurer's Denial Was Based on a Good-Faith Reason at the Time of Denial under a Reasonably Appropriate Investigation.

Bannister v. State Farm Mutual Automobile Insurance Company, 692 F.3d 1117 (10th Cir. Okla. 9/5/12) (Uninsured Motorist Coverage):

"The law of bad faith was properly encapsulated by Jury Instruction No. 10 in this case. The instruction on the elements of Bannister's bad faith claim (i.e., breach of the duty

of good faith and fair dealing) was that [*Bannister*] *must prove each* of the following elements by the greater weight of the evidence":

> FIRST: That State Farm was required under the insurance policies to pay Mr. Bannister's uninsured motorist claim;
>
> SECOND: That *State Farm's refusal to pay the claim was unreasonable under the circumstances because*
>
> 1) State Farm *did not perform a proper investigation,*
> 2) State Farm *did not evaluate the results of the investigation properly, or*
> 3) State Farm *had no reasonable basis for the refusal.*
>
> THIRD: That State Farm did not deal fairly and in good faith with Mr. Bannister; and,
>
> FOURTH: That the violation by State Farm of its duty of good faith and fair dealing was the direct cause of the damages sustained by Mr. Bannister and sought to be recovered in this action. . . .

The instruction went on to state:

In determining whether the insurer had a good faith belief in some justifiable reason for denying payment at the time it made its decision on the insurance claim, you [the jury] may only consider evidence which the insurer had at the time it decided to deny the claim. In this action there is a factual dispute about when that decision was made. *An insurer's refusal to pay a claim is not bad faith when there is a legitimate dispute concerning coverage. However, merely because there is a reasonable basis that an insurance company could invoke to deny a claim does not necessarily immunize the insurer from a bad faith claim if, in fact, it did not actually rely on that asserted reasonable basis and instead took action in bad faith.* The insurer is not required to show that its good faith belief was correct." P. 1126-27.

"The Court correctly acknowledged that the decisive questions are whether State Farm's denial of coverage was based on a good-faith reason at the time it decided to deny coverage, and also whether State Farm conducted an investigation reasonably appropriate under the circumstances to determine the validity of Bannister's claim. See *Buzzard v. Farmers Insurance Co., Inc.*, 824 P.2d 1105, 1109 (Okla. 1991)." P. 1127.`

45. An Insurer Who Requires Multiple Claims and Deductibles for a Single Occurrence Discovered Over Time, May Be in Bad Faith.

McCrary v. County Mutual Insurance Company d/b/a County Financial, 180 F.Supp. 3d 918 (N.D.Okla. 2016) (Homeowners' Insurance Policy):

Although the losses to Plaintiffs' home were not covered under the CMIC policy in light of the exclusions discussed above the Plaintiffs have presented evidence of genuine disputes of material fact regarding two related issues: (1) whether the multiple claims relating to the defective sewer line under their home should have been treated as a single

"occurrence" under the policy, such that Plaintiffs should not have been either required to file separate claims or assessed multiple deductibles; and (2) whether CMIC improperly denied coverage for access--that is, the cost of gaining access and the damages from such access--in relation to the additional damage found under the slab and claimed in May 2013 after the policy was discontinued. P. 922-923

. . .

[T]he … evidence is also consistent with Plaintiffs' arguments that the drain line failure, the full extent of which was discovered piecemeal over the course of less than a year, was a single "occurrence" such that multiple claims should not have been required and the May 2013 claim should have been considered "related to the older claims" and, thus, covered. CMIC took the position with the Plaintiffs' that the leaks were "in separate location [sic] of [plaintiffs'] home and are not related" such that separate claims would be required. However, reasonable inferences from the evidence present an issue of fact as to whether CMIC was actually concerned about the relatedness of the claims and the failure of the entire drain line under the Plaintiffs' home even before it terminated the policy coverage on Plaintiffs' home. There is evidence from which it could reasonable [sic] be inferred that CMIC terminated policy coverage for Plaintiffs' home--not because of its stated reason of "claims frequency"-- but because of its concern about the overall failure of the entire drain line and the costs that CMIC would have to cover. P. 923

. . .

Accordingly, Summary Judgment is inappropriate on Plaintiffs' claims for breach of contract and insurance bad faith relating to all CMIC's treating each drain line issue as a separate occurrence requiring multiple deductibles and CMIC's denial of coverage for "access" in May 2013. P. 924

C. INSTRUCTING THE JURY

1. Essential Elements Of A Bad Faith Claim Are As Found In OUJI.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability Policy):

¶ 25. "The essential elements insured was required to show to make out a *prima facie* case were as follows: 1)he was covered under the automobile liability insurance policy issued by MCIC and that insurers were required to take reasonable actions in handling the Smith claim; 2) the actions of insurers were unreasonable under the circumstances; 3) insurers failed to deal fairly and act in good faith toward him in their handling of the Smith claim; and 4) the breach or violation of the duty of good faith and fair dealing was the direct cause of any damages sustained by insured. See OUJI-Civ (2nd) 22.3."

2. Extensive, Detailed Instructions Are Proper.

Davis v. National Pioneer Insurance Company, 1973 OK CIV APP 9, 515 P.2d 580 (Automobile Liability Policy):

"The tort of bad faith for unreasonable failure to settle within the policy limits is not one capable of simple or concise definition. . . . We think extensive treatment of the tort [in jury instructions] is justified by its complex nature." P. 582.

"[I]n fact [detailed instructions] are more helpful to jurors in understanding the law and how to apply it than abstract and sterile statements of the law without reference to the facts ever could be." P. 583.

3. Instructions Which Identify Specific Types Of Bad Faith Conduct Or Duties Are Better.

Buzzard v. Farmers Insurance Company, Inc., 1991 OK 127, 824 P.2d 1105 (Underinsured Motorist Coverage):

"Farmers urges that the Instructions 37 and 38 were misleading and unsupported by case law. Farmers complains that the former listed specific types of conduct which could be considered bad faith, such as delay of payment to await settlement with other insurer, and failure to investigate. The latter imposed a duty to settle if the parents' claim could have been reasonably foreseen by the Company to have exceeded the City's liability coverage of $50,000.00. At trial, Farmers submitted an instruction which contained a general statement of the law rather than specific acts which could constitute bad faith.
. . . .
In *Davis v. National Pioneer Insurance Company* (citation omitted), the trial court gave fact-specific instructions in a bad-faith case. . . . [W]e believe the instructions here sufficiently inform the jury of the issues in the case, and did not constitute grounds for reversal as are found in 20 O.S. 1981 § 3001.1." P. 1114.

Alsobrook v. National Travelers Life Insurance Company, 1992 OK CIV APP 168, 852 P.2d 768 (Health Insurance Policy):

"Footnote 2:
"The trial court adequately instructed the jury on the bad faith issue. Instructions 10 and 11 given by the court are as follows:

Instruction No. 10:

> 'An insurer has an implied duty to deal fairly and act in good faith with its insured and the violation of this duty gives rise to an action in tort for which consequential and, in a proper case, punitive damages may be sought.
> The essence, of the tort of bad faith is the insurer's unreasonable, bad faith conduct, including the unjustified withholding of payment due under a policy.
> The obligation of an insurance company is not for the payment of money only, it is the obligation to pay the policy amount immediately upon receipt of proper proof of loss or to defend in good faith and to deal fairly with its insured.
> "When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability.
> If you find from the facts and evidence that the Defendant acted reasonably and in good faith in its conduct toward the Plaintiff, you must find for the Defendant.'

Instruction No. 11:

> 'Bad faith or the failure to deal fairly and in good faith is defined as a denial of insurance coverage without reasonable justification. The essence of the failure to deal fairly and in good faith with an insured depends on the entire course of conduct between the parties.'"

4. Jury Instructions Must Correctly State The Law And Not Mislead.

Plaza Hotel d/b/a Renaissance Center LLC v. Certain Underwriters at Lloyd's of London, 2015 OK CIV APP 34, 348 P.3d 216 (10/6/14, rehearing denied 11/25/14, cert. dismissed 4/1/15, mandate issued 4/15/15) (Commercial Property Insurance):

¶6 The instructions need not be ideal but must reflect Oklahoma law regarding the subject at issue (citation omitted). The test for error in instructions is whether the jurors were probably misled regarding the legal standards they should apply to the evidence.

. . .

Jury Instruction No. 12 provided:

WAIVER OF CONDITION

Lloyd's issued the policy without reservation and had the opportunity to know of the condition of the complex including the roofs. You are instructed that Lloyd's cannot avoid or limit payment by suggesting the roof was in poor condition.

¶7 This instruction did not correctly state the law, and it probably affected the jury's verdict to the degree that Lloyd's did not have a fair trial.

. . .

¶16 Lloyd's did not, as a matter of law, agree to pay damages that were in existence before it issued the policy merely because it had the opportunity to know the condition of the insured premises.

. . .

¶21 We hold that Lloyd's defense, that it paid what it owed under the policy, was so undermined by the "waiver of condition" instruction that it probably caused a miscarriage of justice.

5. Modifications To OUJI Must Be Impartial And Free From Argument.

Aduddell Lincoln Plaza Hotel d/b/a Renaissance Center LLC v. Certain Underwriters at Lloyd's of London, 2015 OK CIV APP 34, 348 P.3d 216 (10/6/14, rehearing denied 11/25/14, cert. dismissed 4/1/15, mandate issued 4/15/15) (Commercial Property Insurance):

¶23 Any modification to a jury instruction must accurately state the law and be simple, brief, impartial, and free from argument. 12 O.S. 2011 § 577.2. Jury Instruction No. 8 fails to meet this standard. Footnote 7:

Jury Instruction No. 8 stated:

> Lincoln Plaza claims Lloyd's of London violated its duty of good faith and fair dealing through a number of acts. In order for Lincoln Plaza to recover damages for this claim it must show by the greater weight of the evidence that:
>
> 1. Lloyd's was required under the insurance policy to pay Lincoln Plaza's claim;
>
> 2. Lloyd's refusal to pay the claim in full was unreasonable under the circumstances, because of at least one of the following: (a) denying portions of the claim without a reasonable basis; (b) inadequately investigating the claim; (c) unreasonably delaying investigation and/or payment of the claim; (d) unreasonably withholding pertinent information from Lincoln Plaza; (e) <u>taking advantage of</u>

> Lincoln Plaza's vulnerable position after the storm; (f) conditioning payment of undisputed portions of the claim on settlement of the disputed portions; (g) engaging Rimkus Engineering to inspect the damage to Lincoln Plaza; (h) ignoring the law in investigating and paying the claim; (i) failing to take reasonable steps to prevent further damage to the property while it investigated the claim; and (j) issuing a notice of cancellation. (Emphasis added.)
>
> 3. Lloyd's did not deal fairly and in good faith with Lincoln Plaza; and
>
> 4. The violation of Lloyd's of its duty of good faith and fair dealing was the direct cause of the injury sustained by Lincoln Plaza.

Clauses (a) through (d) of Subsection (2) are appropriately neutral. Clauses (e) and (h) are biased and argumentative. Clause (f) is adequately covered by clause (c). Clause (h) is adequately covered by clauses (b) and (c). Clauses (g) and (j) misstate the law because those actions cannot be said to be categorically unreasonable. For example, hiring an engineer to inspect damages is not necessarily unreasonable under the law. Clause (i) misstates the law by placing the entire duty to mitigate damages upon Lloyd's, while the party's contract, in Section (E)(3)(a)(4) of the Building and Personal Property Coverage Form, places the duty on hotel to "take all reasonable steps to protect the Covered Property from further damage." This error was prejudicial to Lloyd's defense, and materially misled the jury.

. . .

¶27 The trial court should have given OUJI No. 22.1 instead of Instruction No. 7.

> Footnote 11:
> Jury Instruction No. 7 stated:
>
> > Oklahoma law provides that an insurer like Lloyd's has a duty to deal fairly and act in good faith with its insured. Further, the law presumes an insurer like Lloyd's knows the applicable law, and the reasonableness of its decision must be judged in light of that law. The special relationship between the insurer and its insured gives rise to the duty of good faith and fair dealing, especially in light of the unequal bargaining power of the parties. Of particular importance is the position of the insured after a loss is incurred, since the very risks insured against presuppose that if and when a claim is made, the insured will be disabled and, therefore, particularly vulnerable to an economically powerful entity.

. . .

The first sentence of Instruction No. 7 was consistent with OUJI No. 22.1. But the trial court modified the uniform instruction by adding three sentences that suggested to the jury that (1) Lloyd's should have known the law, (2) Lloyd's had superior bargaining power, (3) Lloyd's was economically powerful, and (4) Hotel was disabled and vulnerable after the loss. The additional language of Instruction No. 7 violated § 577.2 because it was neither impartial nor free from argument. (¶ 27.)

6. Future Lost Profit May Be An Element Of Damage In Bad Faith Cases.

Aduddell Lincoln Plaza Hotel d/b/a Renaissance Center LLC v. Certain Underwriters at Lloyd's of London, 2015 OK CIV APP 34, 348 P.3d 216 (10/6/14, rehearing denied

11/25/14, cert. dismissed 4/1/15, mandate issued 4/15/15) (Commercial Property Insurance):

¶28 Instruction No. 9 was a modified version of OUJI No. 22.4 governing the measure of damages for insurance bad faith cases. The instruction is correct because it followed 23 O.S. 2011 § 61, which provides, "For the breach of an obligation not arising from contract, the measure of damages except where otherwise expressly provided by this chapter, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not." This section sets forth the measure of damages for a tort claim, including breach of the duty of good faith and fair dealing. For such a claim, loss of future income or profits is a proper element of damages.

7. The Unfair Claims Settlement Practice Act Does Not Establish Standards of Conduct For Insurer.

Aduddell Lincoln Plaza Hotel d/b/a Renaissance Center LLC v. Certain Underwriters at Lloyd's of London, 2015 OK CIV APP 34, 348 P.3d 216 (10/6/14, rehearing denied 11/25/14, cert. dismissed 4/1/15, mandate issued 4/15/15) (Commercial Property Insurance):

¶24 Jury Instruction No. 14, entitled "Unfair Claims Settlement Practices Act – Standard of Care" is contrary to law and prejudicial. The Unfair Claims Settlement Practices Act (Act), 36 O.S. 2011 §§ 1250.1-1250.17, does not establish standards of care or standards of conduct for measuring whether an insurer has violated its duty of good faith and fair dealing.

. . .

¶25 In order to be an unfair practice, the breach must be committed (1) flagrantly and in conscious disregard of the Act, or (2) with such frequency as to constitute a business practice. § 1250.5 and § 1250.3. This statutory condition was not included in Instruction No. 14.

. . .

¶26 Hotel argues that Instruction No. 14 permissibly advised the jury that it could *consider* the prescribed violations, together with all other facts and circumstances in evidence, in determining bad faith, Hotel relies on *Beers v. Hillory*, 2010 OK CIV APP 99, 241 P.3d 285. . . . The Unfair Claims Settlement Practices Act may provide guidance to a Court in determining whether to grant summary judgment, but it does not function as an appropriate guide for a jury to determine bad faith. (¶ 26.)

8. Federal Judge Has Discretion To Give Instruction Which Identifies Unfair Settlement Practices Act As Normative Behavior.

Thompson v. State Farm Fire and Casualty Co., 34 F.3d 932 (10th Cir. 1994) (Fire Insurance Policy):

"Given the fact that the Oklahoma Supreme Court squarely negates the [Unfair Settlement Practices] Act as a source of recovery and the principle that jurors may properly be viewed as capable of evaluating good and bad faith (just as they regularly determine what constitutes the conduct of a 'reasonable' person) by bringing their own common sense and life experience to bear, we view it as well within the district judge's discretion to have refused an added instruction offered only to demonstrate normative behavior -- and thus offered to complement a standard that the jury could readily apply on its own. . . ."

D. <u>WHAT ACTS ARE UNFAIR DEALING?</u>

From the reported cases we can discern what acts have proven sanctionable. Because creative insurers continue to create methods of unfair dealing, this listing can never be all-inclusive.

1. Inadequate investigation. *See Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 157 Cal.Rptr. 482, 620 P.2d 141 (1979); *McCormick v. Sentinel Life Insurance Co.*, 153 Cal.App.3d 1030, 200 Cal.Rptr. 732 (1984); *Rawlings v. Apodoca and Farmers*, 726 P.2d 565 (Ariz. 1986); *Craft v. Economy Fire & Casualty Co.*, 572 F.2d 565 (7th Cir. 1978); *National Mutual Casualty Co. v. Britt*, 1948 OK 256, 200 P.2d 407 (rehearing denied 2/1/49); *Harrell v. Old American Insurance Company*, 1991 OK CIV APP 91, 829 P.2d 75; *Ballinger v. Security Connecticut Life Insurance Company,* 1993 OK 69, 862 P.2d 68; *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105*; Rose v. Prudential Property & Casualty Insurance Company,* 992 F.2d 1223 (10th Cir. 1993); *Willis v. Midland Risk Insurance Company*, 42 F.3d 607 (10th Cir. 1994); *Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange,* Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96); *Matlock v. Texas Life Insurance Company,* 404 F.Supp.2d 1307 (W.D. Okla., 2005) at 1314; *Tomlinson v. Combined Underwriters Life Insurance Company, et al.*, 708 F.Supp.2d 1284, (N.D. Okla. 2010); *Benson v. Leader Life Insurance Company*, 2012 OK 111; *Automax Hyundai South LLC v. Zurich American Insurance Company and Universal Underwriters Insurance Company*, 720 F.3d 798 (10th Cir. 6/26/13); *Watson v. Farmers Ins. Co.,* 23 F.Supp.3d 1342 (N.D. Okla. 2014). *Falcone v. Liberty Mutual Insurance Company***,** 2017 OK 11, 391 P.3d 105).

2. Failure to promptly investigate a claim. 36 O.S. § 1256(C); 36 O.S. § 1222(3); *Firemen's Fund Ins. Co. v. Security Ins. Co. of Hartford*, 72 N.J. 63, 367 A.2d 864 (N.J. 1976); *Craft v. Economy Fire & Casualty Co.*, 572 F.2d 565 (7th Cir. 1978); *McCorkle v. Great Atlantic Ins. Co.*, 1981 OK 128, 637 P.2d 583; *Christian v. American Home Assurance Company,* 1977 OK 141, 577 P.2d 899; *Neal v. Farmers Exchange,* 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980 (1978); *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105*; Matlock v. Texas Life Insurance Company,* 404 F.Supp.2d 1307 (W.D. Okla., 2005); *Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company*, 2007 OK 16, 157 P.3d 117.

3. Failure to properly, thoroughly and reasonably investigate a claim as to liability and damages, if any. 36 O.S. § 1222(3); *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 157 Cal.Rptr. 482, 620 P.2d 141 (1979); *Craft v. Economy Fire & Casualty Co.*, 572 F.2d 565 (7th Cir. 1978); *McCormick v. Sentinel Life Insurance Co.*, 153 Cal.App.3d 1030, 200 Cal.Rptr. 732 (1984); *National Mutual Casualty Co. v. Britt*, 1948 OK 256, 200 P.2d 407 (rehearing denied 2/1/49); *Harrell v. Old American Insurance Company*, 1991 OK CIV APP 91, 829 P.2d 75; *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105*; Willis v. Midland Risk Insurance Company*, 42 F.3d 607 (10th Cir. 1994); *Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange,* Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96); *Matlock v. Texas Life Insurance Company,* 404 F.Supp.2d 1307 (W.D. Okla., 2005); *Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company*, 2007 OK 16, 157 P.3d 117; *Automax Hyundai South LLC v. Zurich American Insurance Company and Universal Underwriters Insurance Company*, 720 F.3d 798 (10th Cir. 6/26/13); *Falcone v. Liberty Mutual Insurance Company***,** 2017 OK 11, 391 P.3d 105.

4. Failure to fairly and reasonably evaluate facts of liability. 36 O.S. § 1222(4); *Firemen's Fund Ins. Co. v. Security Ins. Co. of Hartford*, 72 N.J. 63, 367 A.2d 864 (N.J. 1976)*; Craft v. Economy Fire & Casualty Co.*, 572 F.2d 565 (7th Cir. 1978); *McCormick v. Sentinel Life Insurance Co.*, 153 Cal.App.3d 1030, 200 Cal.Rptr. 732 (1984); *Buzzard v. The Honorable Mike McDanel*, 1987 OK 28, 736 P.2d 157; *National Mutual Casualty Co. v. Britt*, 1948 OK 256, 200 P.2d 407 (rehearing denied 2/1/49); *Christian v. American Home Assurance Company,* 1977 OK 141, 577 P.2d 899; *Harrell v. Old American Insurance Company*, 1991 OK CIV APP 91, 829 P.2d 75; *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105*; Rose v. Prudential Property & Casualty Insurance Company,* 992 F.2d 1223 (10th Cir. 1993); *Willis v. Midland Risk*

Insurance Company, 42 F.3d 607 (10th Cir. 1994); *Benson v. Leader Life Insurance Company*, 2012 OK 111 ; *Watson v. Farmers Ins. Co.,* 23 F.Supp.3d 1342 (N.D. Okla. 2014).

5. Failure to offer settlement within a reasonable time after reasonable investigation and evaluation in favor of its insured, if such occurs. *Craft v. Economy Fire & Casualty Co.*, 572 F.2d 565 (7th Cir. 1978); *McCorkle v. Great Atlantic Ins. Co.*, 1981 OK 128, 637 P.2d 583*; Firemen's Fund Ins. Co. v. Security Ins. Co. of Hartford*, 72 N.J. 63, 367 A.2d 864 (N.J. 1976)*; McCormick v. Sentinel Life Insurance Co.*, 153 Cal.App.3d 1030, 200 Cal.Rptr. 732 (1984); *Christian v. American Home Assurance Company,* 1977 OK 141, 577 P.2d 899*; Buzzard v. Mike McDanel, 1987 OK 28, 736 P.2d 157; Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105*; Oliver v. Farmers Insurance Group of Companies and Farmers Group, Inc.*, 1997 OK 71, 941 P.2d 985; *Massey v. Farmers Insurance Group,* 986 F.2d 1428, (10th Cir. Okla. 1993); *Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company*, 2007 OK 16, 157 P.3d 117.

6. Requiring an insured to pursue a claim against any other party before offering settlement, where settlement is required. 36 O.S. § 1256(D); 36 O.S. § 1222(5); *Associated Indemnity Corp. v. Canon,* 1975 OK 87, 536 P.2d 920; *Keel v. MFA Insurance Co.,* 1976 OK 86, 553 P.2d 153; *Christian v. American Home Assurance Company,* 1977 OK 141, 577 P.2d 899; *Firemen's Fund Ins. Co. v. Security Ins. Co. of Hartford*, 72 N.J. 63, 367 A.2d 864 (N.J. 1976)*; McCormick v. Sentinel Life Insurance Co.*, 153 Cal.App.3d 1030, 200 Cal.Rptr. 732 (1984); *Everaard v. Hartford Accident and Indemnity Co.*, 842 F.2d 1186 (10th Cir. Okla. 1988); *Buzzard v. The Honorable Mike McDanel*, 1987 OK 28, 736 P.2d 157; *Townsend v. State Farm Mutual Automobile Insurance Company,* 1993 OK 119, 860 P.2d 236; *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105; *Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company*, 2007 OK 16, 157 P.3d 117. *Insurance Group and Employers Fire Insurance Company*, 2007 OK 16, 157 P.3d 117.

7. Delay in payment to await settlement with a third-party insurer. 36 O.S. § 1256(D); 36 O.S. § 1222(4); *Everaard v. Hartford Accident and Indemnity Co.*, 842 F.2d 1186 (10th Cir. Okla. 1988); *Neal v. Farmers Exchange,* 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980 (1978); *Associated Indemnity Corp. v. Canon,* 1975 OK 87, 536 P.2d 920; *Keel v. MFA Insurance Co.,* 1976 OK 86, 553 P.2d 153; *Christian v. American Home Assurance Company,* 1977 OK 141, 577 P.2d 899; *McCorkle v. Great Atlantic Ins. Co.*, 1981 OK 128, 637 P.2d 583*;Firemen's Fund Ins. Co. v. Security Ins. Co. of Hartford*, 72 N.J. 63, 367 A.2d 864 (N.J. 1976)*; McCormick v. Sentinel Life Insurance Co.*, 153 Cal.App.3d 1030, 200 Cal.Rptr. 732 (1984); *Buzzard v. The Honorable Mike McDanel*, 1987 OK 28, 736 P.2d 157; *Townsend v. State Farm Mutual Automobile Insurance Company,* 1993 OK 119, 860 P.2d 236; *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105; *Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company*, 2007 OK 16, 157 P.3d 117.

8. Requiring an insured to exhaust the policy limits of a third-party insurer prior to offering settlement in an uninsured motorist claim. 36 O.S. § 1256(D); 36 O.S. § 3636; *Burch v. Allstate Insurance Company,* 1998 OK 129, 977 P.2d 1057; *Everaard v. Hartford Accident and Indemnity Co.*, 842 F.2d 1186 (10th Cir. Okla. 1988); *Christian v. American Home Assurance Company,* 1977 OK 141, 577 P.2d 899; *McCorkle v. Great Atlantic Ins. Co.*, 1981 OK 128, 637 P.2d 583*;Firemen's Fund Ins. Co. v. Security Ins. Co. of Hartford*, 72 N.J. 63, 367 A.2d 864 (N.J. 1976)*; McCormick v. Sentinel Life Insurance Co.*, 153 Cal.App.3d 1030, 200 Cal.Rptr. 732 (1984); *Associated Indemnity Corp. v. Canon,* 1975 OK 87, 536 P.2d 920; *Keel v. MFA Insurance Co.,* 1976 OK 86, 553 P.2d 153; *Neal v. Farmers Exchange,* 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980 (1978); *Buzzard v. The Honorable Mike McDanel*, 1987 OK 28, 736 P.2d 157; *Townsend v. State*

Farm Mutual Automobile Insurance Company, 1993 OK 119, 860 P.2d 236; *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105*; Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange,* Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96); *Brown v. Patel and Commercial Union Insurance Company, OneBeacon*

9. Failure to fairly and reasonably evaluate damages. *Craft v. Economy Fire & Casualty Co.*, 572 F.2d 565 (7th Cir. 1978); *McCormick v. Sentinel Life Insurance Co.*, 153 Cal.App.3d 1030, 200 Cal.Rptr. 732 (1984); *McCorkle v. Great Atlantic Ins. Co.*, 1981 OK 128, 637 P.2d 583; *Oliver's Sports Center v. National Standard Insurance Company*, 1980 OK 120, 615 P.2d 291; *Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange,* Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96); *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105; *Massey v. Farmers Insurance Group,* 986 F.2d 1428, 1993 WL 34770 (10th Cir. Okla. 1993); *Miller v. Liberty Mutual Fire Insurance Company*, 2008 OK CIV APP 65, 191 P.3d 1221; *Melot v. Oklahoma Farm Bureau Mutual Insurance Company*, 2004 OK CIV APP 25, 87 P.3d 644; *Burgess v. Farmers Insurance Co., Inc., Farmers Insurance Exchange, Farmers Insurance Group of Companies and Farmers Group, Inc.*, 2006 OK 66, 151 P.3d 92 ; *Watson v. Farmers Ins. Co.,* 23 F.Supp.3d 1342 (N.D. Okla. 2014), *Falcone v. Liberty Mutual Insurance Company***,** 2017 OK 11, 391 P.3d 105.

10. Delay. See *Gary v. American Casualty Company of Reading*, 753 F.Supp. 1547 (W.D. Okla. 1990); *Christian v. American Home Assurance Company,* 1977 OK 141, 577 P.2d 899; *McCorkle v. Great Atlantic Ins. Co.*, 1981 OK 128, 637 P.2d 583; *Lewis v. Farmers Insurance Company*, 1983 OK 100, 681 P.2d 67*; Neal v. Farmers Exchange,* 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980 (1978); *Delos v. Farmers Insurance Group, Inc.*, 155 Cal.Rptr. 843, 93 Cal.App.3d 642 (1979); *McCormick v. Sentinel Life Insurance Co.*, 153 Cal.App.3d 1030, 200 Cal.Rptr. 732 (1984); *Fletcher v. Western Nat'l Life Ins. Co.,* 10 Cal.App.3d 376, 89 Cal.Rptr. 78, 47 A.L.R.3d 286 (1970); *Harrell v. Old American Insurance Company*, 1991 OK CIV APP 91, 829 P.2d 75; *Ballinger v. Security Connecticut Life Insurance Company,* 1993 OK 69, 862 P.2d 68; *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105*; Goodwin v. Old Republic Insurance Company*, 1992 OK 34, 828 P.2d 431; *McCoy v. Oklahoma Farm Bureau Mutual Insurance Company,* 1992 OK 43, 841 P.2d 568; *Rose v. Prudential Property & Casualty Insurance Company,* 992 F.2d 1223 (10th Cir. 1993); *Massey v. Farmers Insurance Group,* 986 F.2d 1428, 1993 WL 34770 (10th Cir. Okla. 1993); *Haberman v. The Hartford Insurance Group,* 443 F.3d 1257 (10th Cir. Okla., 2006) at 1270; *Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company*, 2007 OK 16, 157 P.3d 117.

11. Delaying a denial which causes emotional distress. *Gary v. American Casualty Company of Reading*, 753 F.Supp. 1547 (W.D. Okla. 1990).

12. Attempt to condition payment of an undisputed portion of a claim on the favorable settlement of a separate, disputed portion. *Thompson v. Shelter Mutual,* 875 F.2d 1460 (10th Cir. 1989); *Neal v. Farmers Exchange,* 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980 (1978); *Newport v. USAA*, 2000 OK 59, 11 P.3d 190; *Miller v. Liberty Mutual Fire Insurance Company*, 2008 OK CIV APP 65, 191 P.3d 1221.

13. Unreasonably refusing to waive subrogation or make a proper substitution in uninsured motorist cases. *Barnes v. Oklahoma Farm Bureau Mutual Insurance Company***,** 2000 OK 55, 11 P.3d 162; *Hixson v. State Farm*, Oklahoma Court of Appeals, Div. 4, Case No. 72263 (not for publication) (5/28/91, cert. denied 10/1/91, mandated issued 10/10/91); *Oliver v. Farmers Insurance Group of Companies and Farmers Group, Inc.*, 1997 OK 71, 941 P.2d 985; *Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company*, 2007 OK 16, 157 P.3d 117.

14. Deception. 36 O.S. § 1222(1); 36 O.S. § 1254(2); *Delos v. Farmers Insurance Group, Inc.*, 155 Cal.Rptr. 843, 93 Cal.App.3d 642 (1979); *Timmons v. Royal Globe Insurance Company*, 1982 OK 97, 653 P.2d 907*; McCarty v. First of Georgia Insurance Company,* 713 F.2d 609 (10th Cir. Okla. 1983); *Coble v. Bowers First State Bank, and First Life Assurance Company,* 1990 OK CIV APP 109, 809 P.2d 69; *Christian v. American Home Assurance Company,* 1977 OK 141, 577 P.2d 899*; Rose v. Prudential Property & Casualty Insurance Company,* 992 F.2d 1223 (10th Cir. 1993); *Rucker v. Mid Century Insurance Company,* 1997 OK CIV APP 47, 945 P.2d 507; *Burgess v. Farmers Insurance Co., Inc., Farmers Insurance Exchange, Farmers Insurance Group of Companies and Farmers Group, Inc.*, 2006 OK 66, 151 P.3d 92; ***Vickers v. Progressive Northern Insurance Company,*** 353 F. Supp. 3rd 1153 (N.D. Okla. 2018).

15. Intentional misreading or misconstruing of claims file documents or of policy provisions. *Fletcher v. Western Nat'l Life Ins. Co.,* 10 Cal.App.3d 376, 89 Cal.Rptr. 78, 47 A.L.R.3d 286 (1970); *McCarty v. First of Georgia Insurance Company,* 713 F.2d 609 (10th Cir. Okla. 1983); *Everaard v. Hartford Accident and Indemnity Co.*, 842 F.2d 1186 (10th Cir. Okla. 1988); *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105*; Rucker v. Mid Century Insurance Company,* 1997 OK CIV APP 47, 945 P.2d 507; *Wolf v. Prudential Insurance Company of America*, 50 F.3d 793 (10th Cir. 1995); *Burgess v. Farmers Insurance Co., Inc., Farmers Insurance Exchange, Farmers Insurance Group of Companies and Farmers Group, Inc.*, 2006 OK 66, 151 P.3d 92.

16. Failing to have knowledge or formal training regarding the terms of the policy. *Tomlinson v. Combined Underwriters Life Insurance Company, et al.*, 708 F.Supp.2d 1284, (N.D. Okla. 2010).

17. Non-disclosure of information. 36 O.S. § 1254(1) and (2); 36 O.S. § 1256; *Thompson v. Shelter Mutual,* 875 F.2d 1460 (10th Cir. 1989); *Timmons v. Royal Globe Insurance Company*, 1982 OK 97, 653 P.2d 907; *McCarty v. First of Georgia Insurance Company,* 713 F.2d 609 (10th Cir. Okla. 1983); *MFA Mutual Insurance Co. v. Flint*, 574 S.W.2d 718 (Tenn. 1978); *Lewis v. Farmers Insurance Company*, 1983 OK 100, 681 P.2d 67*; Phillips v. New Hampshire Insurance Company*, 263 F.3d 1215 (10th Cir. W.D. Okla. 2001); *Burgess v. Farmers Insurance Co., Inc., Farmers Insurance Exchange, Farmers Insurance Group of Companies and Farmers Group, Inc.*, 2006 OK 66, 151 P.3d 92; *Tomlinson v. Combined Underwriters Life Insurance Company, et al.*, 708 F.Supp.2d 1284, (N.D. Okla. 2010).

18. Failure to inform insured of additional benefits due under the policy. *MFA Mutual Insurance Co. v. Flint*, 574 S.W.2d 718 (Tenn. 1978); *Phillips v. New Hampshire Insurance Company*, 263 F.3d 1215 (10th Cir. W.D. Okla. 2001); *Burgess v. Farmers Insurance Co., Inc., Farmers Insurance Exchange, Farmers Insurance Group of Companies and Farmers Group, Inc.*, 2006 OK 66, 151 P.3d 92; ***Vickers v. Progressive Northern Insurance Company,*** 353 F. Supp. 3rd 1153 (N.D. Okla. 2018).

19. Impeding insured by imposing burdensome documentation demands not required by the facts or the policy. *Hale v. Farmers Ins. Exch.*, 42 Cal.App.3d 681, 117 Cal.Rptr. 146 (1974); *Davis v. Allstate Insurance Co.*, 101 Wis.2d 1, 303 N.W.2d 596 (1981); *Timmons v. Royal Globe Insurance Company*, 1982 OK 97, 653 P.2d 907; *Ballinger v. Security Connecticut Life Insurance Company,* 1993 OK 69, 862 P.2d 68.

20. Interference with recovery of that portion of the loss which is uninsured. *Rawlings v. Apodoca and Farmers*, 726 P.2d 565 (Ariz. 1986).

21. Fraudulent, intrusive or harassing investigative methods. *Thompson v. Shelter Mutual,* 875 F.2d 1460 (10th Cir. 1989); *Timmons v. Royal Globe Insurance Company*, 1982 OK 97, 653 P.2d 907; *Vickers v. Progressive Northern Insurance Company,* 353 F. Supp. 3rd 1153 (N.D. Okla. 2018).

22. Attempts to take something off the top (lowballing). *Hawkins v. Allstate Ins. Co.,* 733 P.2d 1073 (Ariz. 1987); *Oliver's Sports Center v. National Standard Insurance Company*, 1980 OK 120, 615 P.2d 291; *Oliver v. Farmers Insurance Group of Companies and Farmers Group, Inc.*, 1997 OK 71, 941 P.2d 985; *Newport v. USAA*, 2000 OK 59, 11 P.3d 190; *Melot v. Oklahoma Farm Bureau Mutual Insurance Company*, 2004 OK CIV APP 25, 87 P.3d 644.

23. Unwarranted disputes concerning value of loss. *Newport v. USAA*, 2000 OK 59, 11 P.3d 190; *McCorkle v. Great Atlantic Ins. Co.*, 1981 OK 128, 637 P.2d 583*; Oliver v. Farmers Insurance Group of Companies and Farmers Group, Inc.*, 1997 OK 71, 941 P.2d 985; *Melot v. Oklahoma Farm Bureau Mutual Insurance Company*, 2004 OK CIV APP 25, 87 P.3d 644; *Burgess v. Farmers Insurance Co., Inc., Farmers Insurance Exchange, Farmers Insurance Group of Companies and Farmers Group, Inc.*, 2006 OK 66, 151 P.3d 92. *Miller v. Liberty Mutual Fire Insurance Company*, 2008 OK CIV APP 65, 191 P.3d 1221; *Watson v. Farmers Ins. Co.,* 23 F.Supp.3d 1342 (N.D. Okla. 2014), *Falcone v. Liberty Mutual Insurance Company***,** 2017 OK 11, 391 P.3d 105.

24. Accusations of arson. *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973).

25. Wrongful threats of non-payment. *Fletcher v. Western Nat'l Life Ins. Co.,* 10 Cal.App.3d 376, 89 Cal.Rptr. 78, 47 A.L.R.3d 286 (1970).

26. Creating issues simply to compromise the duty to pay the full amount. *Barnes v. Oklahoma Farm Bureau Mutual Insurance Company***,** 2000 OK 55, 11 P.3d 162; *Britton v. Farmers Insurance Group*, 721 P.2d 303 (Mont. 1986); *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985); *Ballinger v. Security Connecticut Life Insurance Company,* 1993 OK 69, 862 P.2d 68; *Rucker v. Mid Century Insurance Company,* 1997 OK CIV APP 47, 945 P.2d 507; *Melot v. Oklahoma Farm Bureau Mutual Insurance Company*, 2004 OK CIV APP 25, 87 P.3d 644; *Burgess v. Farmers Insurance Co., Inc., Farmers Insurance Exchange, Farmers Insurance Group of Companies and Farmers Group, Inc.*, 2006 OK 66, 151 P.3d 92, *Falcone v. Liberty Mutual Insurance Company***,** 2017 OK 11, 391 P.3d 105.

27. Designing a scheme to not pay insureds rightful benefits. *Barnes v. Oklahoma Farm Bureau Mutual Insurance Company***,** 2000 OK 55, 11 P.3d 162; *Delos v. Farmers Insurance Group, Inc.*, 155 Cal.Rptr. 843, 93 Cal.App.3d 642 (1979); *Neal v. Farmers Exchange,* 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980 (1978).

28. Failure to comply with industry standards. *Rawlings v. Apodoca and Farmers*, 726 P.2d 565 (Ariz. 1986); *McCoy v. Oklahoma Farm Bureau Mutual Insurance Company,* 1992 OK 43, 841 P.2d 568; *Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange,* Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96); *Burgess v. Farmers Insurance Co., Inc., Farmers Insurance Exchange, Farmers Insurance Group of Companies and Farmers Group, Inc.*, 2006 OK 66, 151 P.3d 92.

29. Using factual basis or legal principle not used for the basis for the denial or for the delay. *Britton v. Farmers Insurance Group*, 721 P.2d 303 (Mont. 1986); *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985); *Ballinger v. Security Connecticut Life Insurance Company,* 1993 OK 69, 862 P.2d 68; *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105; *Haberman v. The Hartford Insurance Group,* 443 F.3d 1257 (10th Cir. Okla., 2006) at 1270-1271.

30. Concealment of facts. *Christian v. American Home Assurance Company,* 1977 OK 141, 577 P.2d 899*; Coble v. Bowers First State Bank, and First Life Assurance Company,* 1990 OK

CIV APP 109, 809 P.2d 69; *Thompson v. Shelter Mutual,* 875 F.2d 1460 (10th Cir. 1989); *Rose v. Prudential Property & Casualty Insurance Company,* 992 F.2d 1223 (10th Cir. 1993); *Phillips v. New Hampshire Insurance Company*, 263 F.3d 1215 (10th Cir. W.D. Okla. 2001); *Burgess v. Farmers Insurance Co., Inc., Farmers Insurance Exchange, Farmers Insurance Group of Companies and Farmers Group, Inc.*, 2006 OK 66, 151 P.3d 92; *Tomlinson v. Combined Underwriters Life Insurance Company, et al.*, 708 F.Supp.2d 1284, (N.D. Okla. 2010); ***Vickers v. Progressive Northern Insurance Company,*** 353 F. Supp. 3rd 1153 (N.D. Okla. 2018).

31. Use of oppression. *Thompson v. Shelter Mutual,* 875 F.2d 1460 (10th Cir. 1989); *Neal v. Farmers Exchange,* 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980 (1978); *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105; *Rucker v. Mid Century Insurance Company,* 1997 OK CIV APP 47, 945 P.2d 507; *Oliver v. Farmers Insurance Group of Companies and Farmers Group, Inc.*, 1997 OK 71, 941 P.2d 985; *Massey v. Farmers Insurance Group,* 986 F.2d 1428, 1993 WL 34770 (10th Cir. Okla. 1993).

32. Treating insureds who hire attorneys as adversaries. *Timmons v. Royal Globe Insurance Company*, 1982 OK 97, 653 P.2d 907; *Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange,* Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96).

33. Failure to convey settlement demands of adversary in liability cases. *Young v. American Casualty Co.*, 416 F.2d 906 (2nd Cir. 1969), cert. dismissed 396 U.S. 997 (1970); *Riske v. Truck Insurance Exchange*, 490 F.2d 1079 (8th Cir. 1974).

34. Attempts to obtain contribution from the insured. *Boling v. New Amsterdam Casualty Co.*, 1935 OK 587, 46 P.2d 916; *Rucker v. Mid Century Insurance Company,* 1997 OK CIV APP 47, 945 P.2d 507.

35. Altering or changing coverage without consent of insured. *Coble v. Bowers First State Bank, and First Life Assurance Company,* 1990 OK CIV APP 109, 809 P.2d 69.

36. Biased investigation. *McCoy v. Oklahoma Farm Bureau Mutual Insurance Company,* 1992 OK 43, 841 P.2d 568; *Rose v. Prudential Property & Casualty Insurance Company,* 992 F.2d 1223 (10th Cir. 1993); *Massey v. Farmers Insurance Group,* 986 F.2d 1428 (10th Cir. Okla. 1993); *Benson v. Leader Life Insurance Company*, 2012 OK 111.

37. Failure to reasonably construe the law. *Barnes v. Oklahoma Farm Bureau Mutual Insurance Company***,** 2000 OK 55, 11 P.3d 162; *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105*; Willis v. Midland Risk Insurance Company*, 42 F.3d 607 (10th Cir. 1994); *Wolf v. Prudential Insurance Company of America*, 50 F.3d 793 (10th Cir. 1995); *Kelly v. Farmers Insurance Company, Inc.*, 281 F.Supp.2d 1290 (W.D. Okla. 2003); *Haberman v. The Hartford Insurance Group,* 443 F.3d 1257 (10th Cir. Okla., 2006) at 1270; *Automax Hyundai South LLC v. Zurich American Insurance Company and Universal Underwriters Insurance Company*, 720 F.3d 798 (10th Cir. 6/26/13).

38. Dual representation by the same claims person handling conflicting claims. *Garnett v. Government Employees Insurance Co.*, 2008 OK 43, 186 P.3d 935 (05/06/08)*; Rucker v. Mid Century Insurance Company,* 1997 OK CIV APP 47, 945 P.2d 507; *Watson v. Farmers Ins. Co.,* 23 F.Supp.3d 1342 (N.D. Okla. 2014).

39. Violating the normal procedures called for in claims manuals. *Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange,* Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96); *Massey v. Farmers Insurance Group,* 986 F.2d 1428 (10th Cir. Okla. 1993); *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105.

40. Attempting to shift burden of investigation onto lawyer for insured. *Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange,* Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96);

41. Suing insured to recover amounts paid and taking affirmative steps to harm insured. *Brooks v. Farmers Insurance Company, Inc*., Court of Appeals, Div. 2, State of Oklahoma, Case No. 83,293, (not for publication) (5/2/95, mandate issued 7/20/95).

42. Cancelling insured's policies where insured not at fault. *Brooks v. Farmers Insurance Company, Inc*., Court of Appeals, Div. 2, State of Oklahoma, Case No. 83,293, (not for publication) (5/2/95, mandate issued 7/20/95)*; Massey v. Farmers Insurance Group,* 986 F.2d 1428 (10th Cir. Okla. 1993).

43. Lack of claims manual, written guidelines or training regarding Oklahoma law. *Vining v. Enterprise Financial Group Inc.*, 148 F.3d 1206 (10th Cir.1998).

44. Failure to investigate critical fact. *Hall v. Globe Life and Accident Insurance Company*, 1998 OK CIV APP 161, 968 P.2d 1263 ; *Benson v. Leader Life Insurance Company*, 2012 OK 111; *Automax Hyundai South LLC v. Zurich American Insurance Company and Universal Underwriters Insurance Company*, 720 F.3d 798 (10th Cir. 6/26/13); *Watson v. Farmers Ins. Co.,* 23 F.Supp.3d 1342 (N.D. Okla. 2014).

45. Unreasonably handling claim causing insured to litigate unnecessarily. *Christian v. American Home Assurance Company,* 1977 OK 141, 577 P.2d 899*; Timmons v. Royal Globe Insurance Company*, 1982 OK 97, 653 P.2d 907; *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK 127, 824 P.2d 1105; *Barnes v. Oklahoma Farm Bureau Mutual Insurance Company***,** 2000 OK 55, 11 P.3d 162; *Haberman v. The Hartford Insurance Group,* 443 F.3d 1257 (10th Cir. Okla., 2006*).*

46. Failure to timely produce potentially applicable policies. *Phillips v. New Hampshire Insurance Company*, 263 F.3d 1215 (10th Cir. W.D. Okla. 2001).

47. Ignoring policy provisions, Oklahoma law regarding the policy provisions or failing to investigate Oklahoma law regarding a purported defense. *Haberman v. The Hartford Insurance Group,* 443 F.3d 1257 (10th Cir. Okla., 2006); *Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company*, 2007 OK 16, 157 P.3d 117; *Automax Hyundai South LLC v. Zurich American Insurance Company and Universal Underwriters Insurance Company*, 720 F.3d 798 (10th Cir. 6/26/13), *Falcone v. Liberty Mutual Insurance Company***,** 2017 OK 11, 391 P.3d 105.

48. Failing to consider and include statutorily mandated coverage. *Tomlinson v. Combined Underwriters Life Insurance Company, et al.,* 708 F.Supp.2d 1284, (N.D. Okla. 2010).

49. Unreasonable failure to pay a Workers' Compensation award. *Sizemore v. Continental Casualty Company*, 2006 OK 36, 142 P.3d 47.

50. Maintaining mutually inconsistent positions by which the insurer neither denies or approves the claim. *Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company*, 2007 OK 16, 157 P.3d 117.

51. Influencing medical reviewer to change opinion. *Tomlinson v. Combined Underwriters Life Insurance Company, et al.*, 708 F.Supp.2d 1284, (N.D. Okla. 2010).

52. The acts of the carrier stink. *John Q. Juror*.

Although there may not be a suit under the "Act", the Unfair Claims Settlement Practices Act, 36 O.S. § 1250.5, enumerates specific claims handling standards which usually are adopted by insurers as their own claims handling standards and therefore may constitute unfair claim settlement practices by any insurer. See also Oklahoma Constitution, Article II, § 6; 76 O.S. § 1; 23 O.S. § 3; Restatement (Second) of Torts, § 286 and § 874A (1965); Prosser and Keaton on Torts, 5th Ed., pp. 220-230; 74 Am.Jur.2d, TORTS, § 3. Those specific prohibited acts are:

1. Failing to fully disclose to first party claimants, benefits, coverages, or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim;

2. Knowingly misrepresenting to claimants pertinent facts or policy provisions relating to coverages at issue;

3. Failing to adopt and implement reasonable standards for prompt investigations of claims arising under its insurance policies or insurance contracts;

4. Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;

5. Failing to comply with the provisions of Section 1219 of this title;

6. Denying a claim for failure to exhibit the property without proof of demand and unfounded refusal by a claimant to do so;

7. Except where there is a time limit specified in the policy, making statements, written or otherwise, which require a claimant to give written notice of loss or proof of loss within a specified time limit and which seek to relieve the company of its obligations if such a time limit is not complied with unless the failure to comply with such time limit prejudices an insurer's rights;

8. Requesting a claimant to sign a release that extends beyond the subject matter that gave rise to the claim payment;

9. Issuing checks or drafts in partial settlement of a loss or claim under a specified coverage which contain language which releases an insurer or its insured from its total liability. [This one seems especially appropriate for third-party claimants.];

10. Denying payment to a claimant on the grounds that services, procedures or supplies provided by a treating physician or a hospital were not medically necessary unless the health insurer or administrator, as defined in Section 1442 of this title, first obtains an opinion from any provider of health care licensed by law and preceded by a medical examination or claim review, to the effect that the services, procedures or supplies for which payment is being denied were not medically necessary. Upon written request of a claimant, treating physician or hospital, such opinion shall be set forth in a written report, prepared and signed by the reviewing physician. The report shall detail which specific services, procedures or supplies were not medically necessary, in the opinion of the reviewing physician, and an explanation of that conclusion. A copy of each report of a reviewing physician shall be mailed by the health insurer, or administrator, postage prepaid, to the claimant, treating physician or hospital requesting same within fifteen (15) days after receipt of such written request. As used in this subsection, "physician" means a person holding a valid license to practice medicine and surgery, osteopathy, podiatry, chiropractic or optometry, pursuant to the state licensing provisions of Title 59 of the Oklahoma Statutes;

11. Compensating a reviewing physician on the basis of a percentage of the amount by which a claim is reduced for payment;

12. Violating the provisions of the Health Care Fraud Prevention Act;

13. Compelling, without cause, policyholders to institute suits to recover amounts due under its insurance policies or insurance contracts by offering substantially less than the amounts ultimately recovered in suits brought by them, when such policyholders have made claims for amounts reasonably similar to the amounts ultimately recovered;

14. Failing to maintain a complete record of all complaints which it has received during the preceding three (3) years or since the date of its last examination by the Commissioner, whichever time is shorter. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of each complaint, and the time it took to process each complaint. For the purposes of this paragraph, "complaint" means any written communication primarily expressing a grievance; or,

15. Requesting a refund of all or a portion of a payment of a claim made to a claimant or health care provider more than twenty-four (24) months after the payment is made. This paragraph shall not apply:

a. if the payment was made because of fraud committed by the claimant or health care provider, or

b. if the claimant or health care provider has otherwise agreed to make a refund to the insurer for overpayment of a claim.

Other duties provided by Statute are found at 36 O.S. § 1250.7 and 25 O.S. § 9. Title 25 O.S. § 9 defines "Good Faith" as "an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious."

E. STATUTE OF LIMITATIONS

1. Contract Statute Of Limitations Not Determinative Of Unfair Dealing Claim.

McCarty v. First of Georgia Insurance Company, 713 F.2d 609 (10th Cir. Okla. 1983) (Fire Insurance Policy):

"When the Oklahoma Supreme Court held that claimants must make a 'clear showing that the insurer unreasonably, and in bad faith, withholds payment', 577 P.2d at 905, it was simply emphasizing the obvious: if the insured were not entitled to payment, a cause of action for wrongful denial of the claim could not arise. The company's argument that the contractual claim must not only be meritorious but concurrently cognizable in a court of law obfuscates the critical issue. The gravamen of the tort theory is not the continuing refusal to honor the claim, but the company's bad faith in withholding payment from the start. Appellants' failure to commence their breach of contract action within the statutory time limit is thus independent of the fact which is determinative of the outcome in this case, namely, whether the company met 'the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities.'" *Id*. at 904. P. 612.

2. The Hybrid Tort Of Bad Faith Has A Two-Year Statute Of Limitations.

Lewis v. Farmers Insurance Company, 1983 OK 100, 681 P.2d 67 (Standard Fire Policy):

"We find that the homeowner's alleged cause of action is founded in tort, and that the two-year statute of limitations is applicable." P. 69.

3. Statute of Limitations For Bad Faith Is Two Years On A Fire Loss Contract Rather Than The One-Year Statutory And Contractual Limitation.

Gray & Tarr v. Holman and Republic Underwriters Insurance Co., 1995 OK 118, 909 P.2d 776 (Fire Policy):

Footnote 8:
"By resting its March 7 order upon the one-year limitation in the insurance contract, the trial court attempted to avoid ruling on whether Tarr's tort remedy against Republic and Holman was timely invoked. Its order erroneously reasons that since the *insureds' claim* was brought more than one year after the operative event . . . *it was contractually barred regardless of which theory is urged*. Because our jurisprudence affords a two-year limitation for a tort action based on bad-faith refusal to settle a claim [citations omitted] the trial court's reasoning is clearly flawed."

4. Bad Faith Claim Is Not Time Barred Even Though a Breach of Contract Claim May Be Time Barred.

Hayes v. State Farm Fire and Casualty Company, 855 F.Supp.2d 1291 (W.D. Okla. 2012) (Homeowner's Insurance Policy):

"Plaintiff can pursue a bad faith claim with respect to defendant's handling of his September 13, 2008, loss, even though his breach of contract claim is time-barred. See *McCarty v. First of George Insurance Co.*, 713 F.2d 609, 612 (10th Cir. 1983) ('In short, the prior dismissal of the contractual claim on the statute of limitations ground does not trench upon the merit of the instant tort action. The breach of fair dealing claim is cognizable if Appellants can prove that they were entitled to payment on the underlying insurance claim.')" P. 1301.

5. The Discovery Rule Applies To The Statute Of Limitations In Homeowner Bad Faith Claims.

Lee v. Phillips and Lomax Agency, Inc. and Country Preferred Insurance Co., 2000 OK 65, 11 P.3d 632 (Homeowner's Insurance Policy):

"The trial court erred by summarily disposing of Homeowner's tort claims against Agent and Insurer by applying the statute of repose. Those decisions are reversed. In doing so, this Court expresses no opinion as to the merits of Homeowner's claims. On remand the trial court is directed to apply the two-year statute of limitations found at § 95(Third) of Title 12 subject to the discovery rule." ¶10.

6. The Discovery Rule Applies To Bad Faith Statute Of Limitations.

Miller v. Liberty Mutual Fire Insurance Company, 2008 OK CIV APP 65, 191 P.3d 1221 (Uninsured Motorist Coverage):

"¶ 21. It is undisputed that the applicable limitations period is two years, 12 O.S. 2001 § 95(3), and that Miller filed his bad faith claim more than two years after his initial claim was resolved. Nonetheless, summary judgment based on application of the statute

of limitations is precluded in this case. As Miller correctly argues, the discovery rule applies to the two-year statute applicable to bad faith claims. *Funnell v. Jones*, 1985 OK 73, ¶6, 737 P.2d 105, 107. The period of time a statute of limitations is tolled pursuant to the discovery rule is generally a question of fact. *Samuel Roberts Noble Foundation, Inc. v. Vick*, 1992 OK 140, ¶30, 840 P.2d 619, 626. To toll the limitations period beyond the filing of his bad faith claim, Miller must prove facts that support his claim that he did not discover and could not have discovered Liberty Mutual's 'lowball' offer until he received responses to his discovery requests in this case."

7. **Discovery Rule Does Not Toll The Statute of Limitation For Bad Faith Claim Where Plaintiff Knew Of Facts Giving Rise To Claim Even Though Not Understood As Bad Faith.**

Blue v. Universal Underwriters Life Insurance Company, 612 F.Supp.2d 1201 (N.D. Okla. 2009) (Credit Life and Disability Coverage):

The discovery rule provides that "the limitations period does not begin to run until the date the Plaintiff knew or should have known of the injury." Page 1203.

. . .

The statute of limitations is not tolled simply because a Plaintiff "negligently refrain[s] from prosecuting inquiries plainly suggested by the facts." Page 1203.

. . .

"The discovery rule, as interpreted by the Oklahoma Supreme Court and [the Tenth Circuit Court of Appeals], tolls the limitation period only until a Plaintiff learns of an injury and, through prudent investigation, can obtain sufficient facts to state a cause of action."

. . .

In the instant case, Plaintiff was aware of the facts which could have given rise to a claim on December 31, 2003. It is irrelevant she did not realize such conduct may have supported a bad faith claim. Plaintiff's cause of action for bad faith is therefore barred as a matter of law." Page 1204.

8. The Statute Of Limitations In A UM Claim Accrues And Begins To Run When A Breach Of The Insurance Contract Occurs Rather Than On The Date Of The Accident.

Wille v. Geico Casualty Company, 2000 OK 10, 2 P.3d 888 (Uninsured Motorist Coverage):

"[U]ntil a breach of the insurance contract occurs, there is no controversy under the contract upon which a party may sue. We have crossed that bridge. In *Uptegraft*, we held that the insurer's refusal to pay its insured on a valid claim constituted a breach of contract.

An insured may not be aware until long after the accident that a claim against his or her UM insurer is necessary or needed. At the time of the accident an insured may not know the extent of the injuries suffered, the amount of the tortfeasor's available coverage or whether the cost of medical treatment will exceed the value of the tortfeasor's insurance policy and available assets."

Note 12 . . . [I]t is the insurer who can control when a breach of contract occurs by unreasonably denying a claim. Both the insurer and the insured occupy a statutory relationship imputed with a duty of good faith and fair dealing.

9. Statute Of Limitations Clock On Bad Faith Claim Begins To Run From Date Plaintiff Can Prove The Elements Of The Claim.

Trinity Baptist Church v. GuideOne Elite Insurance Company, 654 F.Supp.2d. 1316 (W.D. Okla. 2009) (Commercial Property Coverage):

B. Timeliness of Plaintiff's Action

The two-year limitations clock began to run when Plaintiff's claim of insurer's bad faith accrued. "A cause of action in tort arose when the insurer breached the implied duty to deal fairly and in good faith with its insured." *Lewis v. Farmers Insurance Co.*. 681 P.2d 67, 70 (Okla. 1983); see also *Lee v. Phillips and Lomax Agency, Inc.*, 11 P.3d 632, 634 (Okla. 2000). (Limitations period begins to run at "the point in time a plaintiff can successfully prove the elements of a tort claim."). P. 1325-26.

. . .

With one exception, the Court is not persuaded by Plaintiff's arguments under the summary judgment record presented for decision. . . . P. 1326.

It is unclear, however, when Mr. Brendle reached a conclusion that the full amount of the extended "ordinance and law" or code enforcement coverage was owed; the statement appears in a communication dated March 17, 2005. . . . Defendant acknowledges in its reply brief that, when Plaintiff filed suit, the construction of the new church building "was not far enough advanced for Plaintiff to comply with the terms of the code upgrade provisions." [Citations omitted.] Thus, with respect to the policy's additional "ordinance or law" coverage, the Court finds that Plaintiff has demonstrated a genuine factual dispute regarding whether a bad faith claim based on Defendant's alleged delay in payment or failure to pay this coverage benefit accrued before August 25, 2004. P. 1327.

10. The Statute Of Limitations On A Bad Faith Claim Begins On The Date Of The Alleged Offending Conduct Or The Latest Date The Bad Faith Should Have Been Discovered.

Morgan v. State Farm Mutual Automobile Insurance Company, 377 F. Supp. 3d. 1282 (W.D. Okla. 2019) (Automobile Liability Coverage):

The undisputed facts establish that Morgan's alleged bad faith claim arises not from an excess judgement but from "State Farm's failure to fulfill its duty to ensure [the] subrogation claim of New York Marine was protected." ("It is admitted that NYM sued Morgan due to State Farm's improper action and failed to protect Morgan.") The "improper action" alleged by Plaintiff is State Farm's settlement with Mr. Atkins [the injured Plaintiff] without notifying or obtaining a release from NYM. …

… "Oklahoma follows the discovery rule allowing limitations in court cases to be tolled until the injured party knows, or in the exercise of reasonable diligence, should have known of the injury" or "would have discovered the act which gives rise to the claim."

(citations omitted) "The discovery rule applies to the two-year statute of limitations applicable to bad faith claims." (citations omitted) "Thus, the two-year limitations. For filing a bad faith claim is tolled until such time as the party knows or should have known the factual basis for a bad faith claim."

The parties agree that the "first time Plaintiff Morgan was made aware there were additional claims pending against him that had not been protected by Defendant State Farm was when he was sued by New York Marine in the District Court of Garfield County, … " …Morgan was served with, or received notice of, NYM's lawsuit on January 6, 2012. …Thus, it is undisputed that Morgan had notice of State Farm's alleged breach of duty to act in good faith on January 6th, 2012. …

"Morgan was aware of, or should have discovered with the exercise of reasonable diligence" all the facts on which his bad faith claim was based on January 6th, 2012. (citation omitted) Therefore, the two-year statute of limitations on Morgan's claim for breach of the duty of good faith and fair dealing began to run on January 6th, 2012. *See Zewdie v. Safeco Ins. Co. of Am.*, 304 F. Supp. 3d. 1101, 1112 (W.D. Okla. 2018) (finding that statute of limitations began to run no later than when Plaintiff had knowledge of the facts upon which he based his bad faith claim) A Plaintiff is "charged with having knowledge of those facts which ought to have been discoverable in the exercise of reasonable diligence" and the "statute of limitations is not tolled simply because a plaintiff 'negligently refrain[s] from prosecuting inquiries plainly suggested by the facts'" *Ake v. Cent. United Life Ins. Co.,* 2018 WL 598676, at *3 (W.D. Okla. Nov. 14, 2018) …; *Blue v. Universal Underwriters Life Ins. Co.,* 612 F. Supp 2d. 1201, 1204 (N.D. Okla. 2009) ("It is irrelevant whether the plaintiff understood that the defendant's actions constituted a [legal cause of action] as long as the plaintiff knew of the facts which could give rise to such a claim.")(citation omitted) Therefore, the deadline for Morgan to file bad faith claim was January 7, 2014.

For these reasons, the Court finds that Morgan's bad faith claim is untimely as having been filed more than three years after Morgan had notice of the facts upon which he bases his claim. Page 1289-1290

11. Bad Faith Claim Accrued For Purposes Of Statute Of Limitations No Later Than Date Insured's Attorney Indicates A Bad Faith Claim Was A Topic For discussion.

***Zewdie v. Safeco Insurance Company of America*,** 304 F.Supp.3d 1101, (W.D. Okla. 2018) (Homeowner's Insurance Policy).

In Oklahoma, the statute of limitations "begins to run when the cause of action accrues" and "[a] cause of action accrues when a litigant could first maintain an action to a

successful conclusion." *Stephens v. Gen. Motors Corp.,* 905 P.2d 797, 799 (Okla. 1995)*; Lee v. Phillips & Lowax Agency, Inc*., 11 P.3d 632, 634 (Okla., 2000) (Statute of limitations does not begin to run until the Plaintiff can successfully prove the elements of his or her claim). As evidenced by his attorney's letters, Plaintiff was aware of the facts on which his bad faith claim is based as early as November 2012, and certainly no later than February 27, 2013. On that date his attorney sent a letter to Safeco's counsel confirming Safeco's participation in a mediation "to discuss settlement of certain outstanding coverage claims by the insureds. … She expressly refers to both Safeco's failure to process covered losses, and its negligent and/or willful failure to deal fairly and in good faith with the Zewdies. She specifically references the fact that because Safeco failed to process the Zewdies' claim, they were forced to pay for the repairs themselves and to "hire counsel and pursue their damages directly from [their contractor]."

Similar statements regarding Safeco's conduct can be found in … earlier letters. On November 1 she referred to the fact that Safeco "HA[D] NOT PAID OUT" any monies to its insured and that the insured had "incurred attorney's fees and costs"… She informed Defendant on November 16 that if it elected to attend the December mediation it should "send a representative with full authority to settle <u>all</u> of the Insured's claims against Safeco, i.e., the Insured's claim for the extensive water damage to the Insured's home, as well as the Insured's claim against Safeco for its failure to deal fairly and in good faith with the insured." (Emphasis that of the Court).

Plaintiff relies on the same conduct … discussed in her letters and the basis for his bad faith claim in his Petition. … As both Safeco's conduct and the injury to Plaintiff … had occurred by November 2012, the limitations period for Plaintiff's bad faith claim commenced at the latest by November 16, 2012. P. 1112.

12. To Avoid Statute Of Limitation On Bad Faith Claim; Insured Must Offer Evidence Of Conduct That Would Estop The Insurer From Asserting Statute Of Limitations.

***Zewdie v. Safeco Insurance Company of America*,** 304 F.Supp.3d 1101, (W.D. Okla. 2018) (Homeowner's Insurance Policy):

Safeco's actions, which Plaintiff contends affect when the statute commences–its post-November 2012 payments under the policy and discussions and negotiations will Plaintiff– potentially affect when the limitations period expires, but not when the claim accrues.

Because the court has determined that Plaintiff's bad faith claim accrued no later than November 16, 2012, he had to file his lawsuit by November 16, 2014, to avoid the limitations period unless, as he asserts, defendant is estopped from asserting the defense.

For Plaintiff to prevent Defendant from successfully raising the statute of limitations defense to a bad faith claim under Oklahoma law, he must show that:

> ...the defendant had made (a) some assurance of settlement negotiations reasonably calculated to lull the Plaintiff into a sense of security and delay action beyond the statutory period, or (b) an express and repeated admission of liability in conjunction with promises of payment, settlement or performance, or (c)any false, fraudulent, or misleading conduct or some affirmative act of concealment to exclude suspicion and preclude inquiry, which induces one to refrain from timely bringing an action.

Jarvis v. City of Stillwater, 732 P.2d 470, 472-73 (Okla. 1987). Plaintiff has offered no evidence of conduct by Defendant that falls within categories (b) or (c) Safeco neither expressly and repeatedly admitted liability nor engaged in some type of misconduct. As has been discussed previously, plaintiff also has offered no evidence that might have lead plaintiff to believe Safeco was still negotiating regarding his claims after March 2013 which was well before November 11, 2014, the date the limitations period ran on his bad faith claim. Plaintiff's bad faith claim, along with his breach of contract claim, is therefore barred by the applicable two year limitations period. P. 1112-1113.

13. A "No Action" Cause Does Not Toll The Statute of Limitation On A First Party Bad Faith Claim.

Morgan v. State Farm Mutual Automobile Insurance Company, 377 F. Supp. 3d. 1282 (W.D. Okla. 2019) (Automobile Liability Coverage):

Finally, Morgan argues that the "no action" clause in the Policy prohibits filing of any lawsuit against State Farm prior to appeals of any judgment awarding damages "an insured is legally liable to pay" or if there is any agreement between the claimant and [State Farm]." …Morgan asserts that the "no action" clause tolled the statute of limitations until all appeals of NYM's judgment against him were complete. However, the Tenth Circuit has clearly held that its interpretation of Oklahoma law is that similar "no action" clause language "is intended to apply only to claims made by third parties." *Paul Holt Drilling, Inc. v. Liberty Mutual Insurance Co.*, 664 F. 2d. 252, 254 (10th Cir. 1981). … This Court has likewise rejected an insurer's argument that the "no action" provisions in the policy precluded suit by an insured as such provisions are "designed to preclude an action against the insurer by a third party, not the insured." *Trotter v. Am Modern Select Ins. Co.* 220 F. Supp 3d. 1266, 1270 (W.D. Okla. 2016) (quoting *Paul Holt Drilling Inc*., 664 F. 2d. at 254). Page 1290-1291.

14. No Duty To Notify Of Statute Of Limitations In Workers' Compensation Claim.

Wyman v. Commercial Union Assurance Co., 656 F.2d 603 (10th Cir. Okla. 1981) (Workers' Compensation Insurance Policy):

"An employer's failure to disclose [that] a cause of action exists in favor of an employee, absent actual artifice to prevent knowledge of facts, does not prevent [the] running of [the] statute of limitations." P. 605.

15. A Statute Of Limitations For A Workers' Compensation Bad Faith Claim Against The State Insurance Fund May Be Either Two Years As A Tort Or One Year Under The Governmental Tort Claims Act From The Date Of The Act Of Bad Faith.

McGehee v. State Insurance Fund, 1995 OK 85, 904 P.2d 70 (Workers' Compensation Insurance Policy):

"The employee contends that he could not have known that the Fund's denial was in bad faith until he won on appeal, ...

. . .

The Workers' Compensation Court issued its order on September 26, 1989, four years before McGehee filed the present cause. The limitations period for a tort claim, if brought pursuant to the [Governmental Tort Claims] Act, is governed by 51 O.S. 1991 § 156 B which requires notice of a tort claim to be filed within one year of loss. . . . A bad faith tort claim which is not brought under the Act is governed by 12 O.S. 1991 § 95, the two-year tort limitation period. We find that the employee's attempted bad faith claim is untimely under either 12 O.S. 1991 § 95 or the Governmental Tort Claims Act, 51 O.S. 1991 § 151, et seq.

Assuming that the employee's alleged bad faith claim arose at the latest possible date when he knew or should have known that the Fund was acting in bad faith when it denied his claim, it accrued sometime prior to the Workers' Compensation Court's issuance of its order finding that the Fund was estopped from denying McGehee's coverage under the Alliance policy." (Emphasis added.)

16. Statute Of Limitations On A Marine Insurance Policy Is One Year.

Burwell v. Mid-Century Insurance Company, 2006 OK CIV APP 97, 142 P.3d 1005, 06/16/06 (Boat Owner's Policy):

"¶ 8. Section 3617 of Title 36, O.S., provides in pertinent part:

'No policy delivered or issued for delivery in Oklahoma and covering a subject of insurance resident, located or to be performed in Oklahoma, shall contain any condition, stipulation or agreement . . . limiting the time within which an action may be brought to a period of less than two (2) years from the time the cause of action accrues in connection with all insurances other than property and marine and transportation insurances; in property and marine and transportation policies such time shall not be limited to less than one (1) year from the date of occurrence of the event resulting in the loss.

. . .

In 1993, the Oklahoma Supreme Court rejected an Article V, § 46 'special law' challenge to § 3617 and held a one-year commencement-of-action provision contained in a fire insurance policy constitutionally valid. *Walton v. Colonial Penn Insurance Co.*, 1993 OK 115, ¶ 13, 860 P.2d 222, 226. We consequently reject the same constitutional challenge to the one-year commencement-of-action provision contained in the instant policy.

II. STANDING AND PARTIES

A. BASES CREATING DUTY

1. Duty Of Good Faith Arises From A Contractual Relationship.

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

"[I]t is clear that the cause will not lie against a stranger to the contract. This is not to say, however, that the acts of the agent may not be material to a determination of the existence of a breach of [the] duty [of good faith and fair dealing]." P. 913.

2. No Bad Faith For Failing To Investigate At The Time Of The Application Any Misrepresentations By The Applicant.

Claborn v. Washington National Insurance Company, 1996 OK 8, 910 P.2d 1046 (Health Insurance Policy):

"Washington National rescinded Mr. Claborn's contract based on the material misrepresentations in the application to which he admitted. Such a defense is provided by Oklahoma statute. These facts made him uninsurable without a rider covering the seizure disorder. . . .

Claborn also argues that by selling an insurance policy, which did not contain the same benefits as the pre-existing State Farm policy, Washington National acted in bad faith. However, as previously stated, the conduct of the insurer and the agent in selling and issuing the policy, cannot give rise to the tort of bad faith breach of an insurance contract."

3. No Duty Of Good Faith For Lack Of A Pre-Policy Investigation.

Hays v. Jackson National Life Insurance Company, 105 F.3d 583 (10th Cir. 1997) (Life Insurance Policy):

"The tort of bad faith breach of an insurance contract must be based upon an insurer's wrongful denial of a claim; it cannot be based upon the conduct of the insurer in selling and issuing the policy. (Citation omitted.) Therefore, whether Jackson National conducted a pre-policy investigation is not relevant to whether Jackson National acted tortiously in disputing plaintiffs' claim."

4. Where There Is No Coverage, There Is No Duty Of Good Faith And Fair Dealing.

IDG, Inc. and Johnson v. Continental Casualty Company, Transportation Insurance Company, and Valley Forge Insurance Company, 275 F.3d 916 (10th Cir. 2001) (Commercial Insurance Policy Advertising Coverage):

"The Supreme Court of Oklahoma has stated that while an insurer's duty to defend its insured is broader than its duty to indemnify, this duty 'is not unlimited.' *First Bank of Turley v. Fidelity and Deposit Ins. Co. of Maryland,* 928 P.2d 298, 303 (Ok. 1996). Rather, 'the defense duty is measured by the nature and kinds of risks covered by the policy as well as by the reasonable expectations of the insured.' *Id.* Accordingly, 'an insurer has a duty to defend an insured whenever it ascertains the presence of facts that give rise to the *potential of liability* under the policy.' *Id.* (Emphasis in original.) To have the 'potential of liability,' the 'complaint [must] state a cause of action that gives rise to the possibility of a recovery under the policy; there need not be a probability of recovery.' *Id.* at 303, note 14. (Citation omitted.) This determination is made 'on the basis of information gleaned from the petition (and other pleadings), from the insured and from other sources available to the insurer at the time the defense is demanded (or tendered) rather than by the outcome of the third-party action.' *Id.* at 303-04.

Keeping these standards in mind, the question in this appeal becomes whether the Burson Lawsuits gave rise to the 'possibility of' coverage under the insurance policies at the times IDG requested a defense from CNA. Because the only basis for coverage under the policies is for 'advertising injury,' the answer to this question necessarily entails an analysis of the meaning of that contractual term under Oklahoma law." P. 920-921.

. . .

CNA concedes the existence of a predicate offense, and does not dispute that the Burson's Lawsuits alleged copyright infringement as enumerated therein.

> N3 [T]he CGL policies issued to IDG states that 'advertising injury' means injury arising out of one or more of the following offenses:
>
> . . .
>
> d. *Infringement of copyright*, title or slogan.' P. 921.
>
> . . .

[T]he record clearly reveals that Burson sued IDG for *copyright infringement* arising out of IDG's copying and sale of SuperVision, and *not out of its promotional activity*. P. 922.

Third, IDG fails to demonstrate that CNA was ever made aware of – or that CNA should have been aware of – IDG's practice of distributing free samples at the time coverage was requested. See *First Bank of Turley,* 928 P.2d at 303-04 (noting that insurer's duty to defend is determined 'on the basis of information gleaned from the petition and other pleadings', from the insured and from other sources *available to the insurer at the time the defense is demanded* (or tendered).) . . . See *Id.* at 304, N.19 ('The correctness of an insurer's decision to (or not) defend cannot be determined by "later revealed facts" of which the insurer had no knowledge or notice . Morever, IDG fails to demonstrate that it made any information available to CNA at the time it requested coverage which could have led CNA to conclude that there was a possibility that Burson's alleged injuries had anything to do with advertising.' P. 923.) *Id.* at 304. ('It is the insured's [IDG's] *sole* duty to give its insurer [CNA] timely *and adequate* notice of a third party claim to aid the insurer in the discovery of facts bearing on coverage.')"

5. No Coverage, No Bad Faith.

McCrary v. County Mutual Insurance Company d/b/a County Financial, 180 F.Supp. 3d 918, (N.D. Okla. 2016) (Homeowner's Insurance Policy):

Plaintiffs have not presented any evidence or authorities to dispute that much of the damage to their home- including foundation, floor, and wall damage-was the result of settling, which is not covered by the plain unambiguous terms of exclusion number 19 (g). Under 19 (g), the policy excludes coverage for any "loss caused directly or indirectly by … [s]ettling, shrinking, bulging or expansion, including resultant cracking of bulkheads, pavements, patios, footings, foundations, walls, floors, roofs or ceilings." … P.921

Plaintiffs have also not provided any argument or evidence that the "Seepage or Leakage" exclusion is inapplicable, except a single sentence in their response brief in which they assert that "The leakage was not water or steam, but sewage." P. 922

. . .

The water damage exclusion also unambiguously excludes coverage for the damage to Plaintiffs' home. In pertinent part, it provides that CMIC does "not insure for loss caused directly or indirectly by … Water or water-borne material including sewage, which backs up through sewers or drains or which overflows or is discharged from a sump, sump pump or related equipment;" … Under that policy section, water-borne material expressly includes "sewage," and any "water-borne material, *regardless of its source*, below the surface of the ground." It is undisputed here that the sewage line under the home was the cause of the loss, and that policy exclusion accordingly also applies to the damage to Plaintiff's home.

. . .

Accordingly, the summary judgment motion is granted as to damages for repair to the faulty drain line system and foundation, ceiling and floor cracks, settling, and the like. P.922

6. No Coverage, No Bad Faith, Still.

David Edens and Rhonda Edens, Individually and as next of kin of Zachery Edens, deceased; Edens Structural Solutions, LLC v. The Netherlands Insurance Company, 834 F.3d 1116 (10th Cir. Okla. 2016) (Business Auto Policy Uninsured/Underinsured Motorist Coverage)

We conclude that Plaintiffs must show that the Policy covered Zachery Edens's accident before they may proceed against Netherlands on their bad-faith claim. Because the Policy provides no coverage here, the District Court properly dismissed the bad-faith claim. P. 1128

. . .

To "make out a prima facie case" of bad faith under Oklahoma law, and insured must prove the following elements:

> (1) *He was covered under the automobile liability insurance policy* … and that insurers were required to take reasonable actions in handling the … claims; (2) The actions of insurers were reasonable under the circumstances; (3) Insurers failed to deal fairly and act in good faith toward [the insured] in their handling of the … claims; and (4) The breach or violation of the duty of good faith and fair dealing was the direct cause of any damages sustained by insured.

Badillo v. Med Century Ins. Co. 121 P. 3d 1080, 1093 (Okla. 2005) (emphasis added); See *Bannister v. State Farm Mutual Auto Insurance Co.* 692 F. 3d 1117, 1126-27 (10th Cir 2012) (noting that jury instructions "properly stated the elements of the tort of bad faith" under Oklahoma law were the instruction's first element was that the insurer "was required under the insurance policies to pay [the insured's] uninsured motorist claim"). P. 1128

7. A Breach Of Contract Is A Prerequisite For Bad Faith.

Gillogly v. General Electric Capital Assurance Company, 430 F.3d 1284 (10th Cir. Okla. 2005) (Long-Term Care Nursing Home Indemnity Insurance Policy):

"[W]e also reverse the district court's judgment that GECA acted in bad faith. See *Davis v. GHS Health Maintenance Organization Inc.,* 22 P.3d 1204, 1210 (Okla. 2001) ('[A] determination of liability under the contract is a prerequisite to a recovery for bad faith breach of an insurance contract.'); *Expertise, Inc. v. Aetna Financial Company*, 810 F.2d 968, 972 (10th Cir. 1987)('[T]he plaintiff obviously must establish that a binding agreement has been breached to invoke this theory [of bad faith breach of contract under Oklahoma law]. Because we have held that the plaintiff failed to establish a breach of an enforceable agreement, we must also conclude that it failed to establish a *prima facie* case of bad faith breach of contract.'); *McCarty v. First of Georgia Insurance Co.*, 713 F.2d 609, 612 (10th Cir. 1983) (noting that '[w]hen the Oklahoma Supreme Court held that claimants must make a 'clear showing that the insurer unreasonably, and in bad faith, withholds payment,' it was

simply emphasizing the obvious: if the insured were not entitled to payment, a cause of action for wrongful denial of the claim could not arise') (citation omitted). *Gillogly* at 1293.

8. No Coverage, No Breach, No Bad Faith.

Davis v. Federal Insurance Company, 382 F. Supp. 3d. 1189 (W. D. Okla. 2019) (Accidental Death and Dismemberment Policy):

Plaintiffs have failed to show that Ms. Mosley's death qualified as a covered loss under the Policy's terms. Thus, Defendant's denial of Plaintiffs' insurance claim did not breach the Policy, and the Defendant is entitled to summary judgment on Plaintiffs' breach of contract claim. As Plaintiffs cannot establish breach of the insurance contract, Defendant is also entitled to summary judgment on Plaintiffs' bad faith tort claim. *See Stonebridge, 2015* W.L. 137261, at *7 (citing *Davis v. G.H.S Health Maint. Org. Inc.,* 2001 OK 3, ¶16, 22 P. 3d. 1204, 1210) ("Because Plaintiff[s] ha[ve] failed to establish a breach of contract, [they] also cannot prevail on [their] bad faith claim as a matter of law.") (citing Oklahoma law); (*See also Gillogly v. Gen. Elec. Capital Assurance Co.,* 430 F. 3d. 1284, 1293, 10th Cir. 2005) (Noting that Plaintiffs must establish breach of an enforceable contract to invoke the theory of bad faith). Page 1199

B. STANDING TO SUE

1. Common Law Third-Party Claimants Lack Standing.

Allstate Insurance Company v. Amick, 1984 OK 15, 680 P.2d 362 (automobile liability policy):

"[I]n the absence of a contractual or statutory relationship, there is no duty which can be breached. "

[Third party plaintiffs] have no relationship with Allstate. They are strangers to the insurance contract between Allstate and [the insured], and Allstate had no duty of dealing fairly and in good faith toward [the third party plaintiff]." Pp. 364-365.

Wilson v. Gipson, 1988 OK 35, 753 P.2d 1349 (School Liability Policy):

"A party may assert his own legal rights and interest, but may not assert a claim based on the rights or interests of third parties." P. 1356.

Gianfillippo v. Northland Casualty Company, 1993 OK 125, 861P.2d 308 (Automobile Liability Policy):

"The second issue is whether a passenger who is covered under the driver's motor vehicle liability policy may bring a bad faith action against the insurer. A similar issue was recently addressed in the context of uninsured motorist coverage in *Townsend v. State Farm* (citation omitted).

Gianfillippo was covered under a liability policy because she occupied an insured vehicle. She did not enjoy the statutory relationship that Townsend enjoyed. . . .

Thus, her standing to bring a bad faith claim would have to come from the contract of insurance. . . .

Gianfillippo's relationship to the insurer in this matter is very much like that of the passenger's in ***Amick***. The only difference is that Gianfillippo was a passenger in the same car with the driver whose insurer was being sued.

Walker's insurance policy was not made for the express benefit of Gianfillippo. The policy was intended for the protection of the insured. It benefitted Gianfillippo only incidentally. Gianfillippo was merely a third-party claimant who lacked standing to bring a bad faith claim."

2. Even Though Also A Defined Insured, A Third Party Claimant Under A Liability Policy Is Not Owed the Duty Of Good Faith and Fair Dealing By The Insurer.

Colony Insurance Company v. Burke Special Administrator of the Estate of Aurora Espinal-Cruz and Deanza Jones, 698 F.3d 1222 (10th Cir. Okla.) (10/17/12) (Foster Care Liability Insurance):

"The policy's declarations identify the 'Named Insured' as "'Foster Parents' licensed and/or certified under the [DHS]," and the policy also identifies the insured as including [p]ersons under the age of 18 in the care and custody of th[e] Named Insured.' . . . However, the critical point is that, because the policy is a *liability policy*, even if a foster child is an 'insured' under the policy, the foster child is contractually covered, and thus a 'first party', *only* with respect to claims by others *against* the foster child, not claims brought by the foster child against another insured. . . . In other words, where a person making a third-party claim under a given liability policy also happens to be an insured, the insurer's duty to that person, with respect to that claim, is defined not by the person's status as insured, but by the person's status as claimant." (Italics that of the Court.) *5.

3. To Establish Bad Faith There Must Be Evidence Of Being An Insured.

Clinesmith v. Harrell, 1999 OK CIV APP 121, 992 P.2d 926 (Uninsured Motorist Coverage):

"Even if we were to conclude that a liability insurer investigating and settling a liability claim has such a duty where there is also uninsured motorist coverage available for a Class 2 insured, which we do not decide here, the evidentiary material in this record does not establish the existence of any uninsured motorist coverage. . . . Without such evidentiary material, there was no 'duty to disclose,' and plaintiff has failed to raise a fact question concerning whether the release was obtained fraudulently."

4. There Cannot Be Bad Faith If The Policy Properly Cancelled Before The Occurrence.

Kutz v. State Farm Fire and Casualty, 2008 OK CIV APP 60, 189 P.3d 740 (Automobile Liability Insurance Policy):

"¶6. [T]he Kutzes disputed two material facts out of State Farm's list of 20 undisputed facts: (7) State Farm mailed the Kutzes a balance due notice April 30, 2004; and (11) State Farm mailed the Kutzes a cancellation notice August 26, 2004. . . . State Farm was required to follow the terms of the policy in cancelling it. *Midwestern Insurance Company v. Cathey*, 1953 OK 169, 262 P.2d 434, 436.

. . .

¶11. The Kutzes argue that [State Farm's] affidavit fails to aver that the cancellation notice was actually placed in the mail. They assert that if State Farm's evidence is sufficient to establish that it mailed the notice, then they have no claim for bad faith against State Farm. The Kutzes rely on an unpublished decision of the Tenth Circuit Court of Appeals which affirmed a lower court finding that mailing the notice of cancellation, rather than actual receipt of the notice is all that is required for cancellation for non-payment to be effected. See *State Farm Fire and Casualty Co. v. Van Horn*, 139 F.3d 912, 1998 WL 58187 (10th Cir. 1998). In *Van Horn*, the Circuit Court cited *Cathey*, *supra*, for its holding that strict compliance withe the policy's cancellation term is all that is required of an insurance company, and after such compliance, the risk of non-receipt falls on the insured.

. . .

¶14. Because we find the undisputed evidence shows State Farm strictly complied with the cancellation provision in the policy, State Farm is entitled to judgment as a matter of law on the Kutzes' claims against it."

5. No Bad Faith for Non-Renewal Where There Is an Increase in the Hazard Even Where Agent Said He Would Take Care of It.

Gibson v. The Automobile Insurance Company of Hartford and Hawk Insurance and Associates, 2011 OK CIV APP 16, 247 P.3d 1208 (released for publication by order of the Court of Civil Appeals Jan. 7, 2011) (Homeowner's Insurance Policy):

"¶9. In this case, Insurer sent a non-renewal notice to the Gibsons. Even if Agent indicated to Dewayne Gibson that the notice was a mistake and 'he would take care of it' the Gibsons did not receive any further contact from Insurer to indicate that the policy was in fact renewed. In this case, the Gibsons were on notice that the policy was not being renewed. We find no question of material fact on whether Insurer was bound by Agent's statements."

"¶10. An insurance company has an implied duty to deal fairly and in good faith with its insureds. *Christian v. American Home Assurance Co.*, 1977 OK 141, 577 P.2d 899, 904. Necessarily, this duty exists only with parties who have an insurance contract with the insurance company. The record in this case shows that the Gibsons were notified that their policy would not be renewed and that the Gibsons had no insurance contract in effect at the time of the claimed loss."

6. Non-Renewal Of A Policy Is Not A Basis For Bad Faith Where Insurer Objectively Had Reasonable Basis For Denying Claim.

Hamilton v. Northfield Insurance Company, 910 F.3d 1320 (10th Cir. Okla. 2018) (Commercial Property Insurance):

"Finally, although the circumstances surrounding Northfield's decision not to renew Mr. Hamilton's insurance policy appear questionable, they are insufficient to give rise to a cause of action for bad faith denial of the insurance claim given Northfield's objectively reasonable basis for denying it." *Hamilton* @ 1328.

7. Insured Cannot Use Bad Acts Of Insurer Against Adverse Third Party To Support Bad Faith Claim.

Milroy v. Allstate Insurance Company, 2007 OK CIV APP 6, 151 P.3d 922 (Sept. 19, 2006) (cert. denied 1/9/2007) (Automobile Liability Policy):

"¶30. However, even if [the evidentiary materials support an assertion of harassment of the claimant], Allstate's treatment of [the claimant], an adversary, does not support [the insured's] claim of bad faith. The duty of an insurance company to deal fairly and in good faith with its insured does not extend to an injured third party seeking automobile liability insurance proceeds, who has no contractual or statutory relationship with the tortfeasor's insurer and only incidentally benefits from the contract with the named insured. *Allstate Insurance Co. v. Amick*, 1984 OK 15, 680 P.2d 362 (holding that a third party could not maintain an action against the tortfeasor's automobile insurer for bad faith negotiations and for failure to settle claims fairly and in good faith); see also *McWhirter v. Fire Insurance Exchange, Inc.*, 1994 OK 93, 878 P.2d 1056 (dismissing, for failure to state a claim upon which relief could be granted, plaintiff's breach of contract and bad faith action against insurer of minor, who had set a fire that damaged their property)."

8. A Person Who Has A Factual Expectation Of Some Economic Advantage In Property Grants Such Person Standing To Sue For Bad Faith.

Gray & Tarr v. Holman and Republic Underwriters Insurance Co., 1995 OK 118, 909 P.2d 776 (Fire Policy):

"Republic's refusal to settle Gray's claim is actionable if it can be established that, when the insurer's actions are measured by the facts then *known* and *knowable* to it, its failure to recognize Gray's [or Tarr's, if then known as her principal] insurable interest in the covered property was in bad faith.

. . .

[T]he trial judge was duty-bound to ascertain -- from the evidentiary material before him -- that as a matter of law Gray [or Tarr, if her principal] did *not* and could *not* demonstrate she would gain some economic advantage by the insured property's continued existence, or, in the alternative, *that she [or Tarr, if her principal] did not suffer some economic detriment from its loss or destruction*. The law's "factual expectation" standard, adopted in *Snethen*, is today the Oklahoma test for use in ascertaining a person's insurable interest."

a. An Insured Co-Tenant Has A Factual Expectation Of An Insurable Interest And Is Thus Owed The Duty Of Good Faith.

Delk v. Markel American Insurance Company, 2003 OK 88, 81 P.3d 629 (Homeowner's Insurance Policy):

¶11 "In *Snethen v. Oklahoma State Union of the Farmers Educational and Cooperative Union of America,* we adopted the factual expectation theory of insurable interest. Under this theory there is an insurable interest in property if the insured would gain *some economic advantage* by its continued existence or would suffer *some economic detriment* in case of its loss or destruction. . . ."

. . .

¶13 "[W]e regard Oklahoma's factual expectation approach to insurable interest as authorizing under proper circumstances recovery by a cotenant of more than the cotenant's fractional interest in the insured property."

b. An Insurer May Owe The Duty Of Good Faith To A Purchaser Of Real Property On A Contract For Deed Where There Are Facts That Show All The Parties Intended And Acted As Though The Purchaser Was An Insured Or Beneficiary.

Hensley and Douglas v. State Farm Fire and Casualty Company, 2017 OK 57, 398 P.3d 11 (Homeowner's Insurance Policy):

¶1 . . . We hold Douglas's [purchaser's] equitable title to the property arising from the contract for deed is insufficient *by itself* to confer upon him a policy-created right of insurer's duty of good faith created by the insurance contract when Douglas is not expressly named in the policy as a lien holder, insured, loss payee, or third party beneficiary, or when the contract for deed is not expressly referenced in a part of the insurance policy. We also hold Douglas presented facts on the issue whether he was an intended third party beneficiary insured by the policy. Whether, Douglas is a third party beneficiary is based upon a question of fact and summary judgment is reversed and the matter remanded to the District Court for further proceedings.

. . .

¶19 *Trinity Baptist Church* addressed the question who owes the duty to deal fairly and act in good faith, and the question before us today is the other side of this duty/right coin, to whom is the duty owed? Our analysis must start at the same point as *Trinity Baptist Church*, the insurance contract itself and whether plaintiffs' action is based upon an express promise, a promise implied in fact, or a promise implied in law. Again, this is so because the relationship between an insurer and its insured is defined and governed by the insurance policy and its accompanying implied-in-law convenient of good faith and fair dealing.

. . .

¶21 However, when a person possesses a legal right to payment from insurance proceeds such does not mean that an implied-in-law duty of good faith is also present in that relationship. One obvious example occurred when we explained that a third-party *claimant* to the insurance contract is not owed an implied-in-law duty of good faith and fair dealing.

. . .

¶22 A contract made expressly for the benefit of a third-person may be enforced by that person at anytime before the parties thereto rescind it. 15 O.S. 2011 § 29. For example, a named beneficiary in a life insurance contract who is a third party beneficiary is owed the implied-in-law duty of good faith. It is not necessary that a party be specifically named as a beneficiary or third party beneficiary, but only that the contract be made "'expressly for the benefit of a third person' and 'expressly' simply means 'in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.'" When an insurance policy expresses an intent to cover a person's property or make that person a loss payee under the terms under the policy, that person is considered as a co-insured or a third-party beneficiary.

. . .

¶34 Douglas relies on more than a unilateral expectation. He relies upon (1) the insurer treating him and his wife as insured for the purpose of submitting proof of loss for a claim on the policy and in correspondence to them both naming them as an insured, (2) his equitable interest in the property as a person legally entitled to receive the insurance proceeds which was known by the insurer for several years prior to his claim, and (3) the insurance covered the very harm for which the risk was assumed, *i.e.* damage to the mobile

home, and the interest insured by the policy was for the entire property and not just the amount of Hensley's insurable interest. . . .

¶37 In the matter before us, Douglas is invoking the concept that the conduct of the parties may be used to show a latent ambiguity in a written instrument, specifically, that Douglas is an insured/lien holder/loss payee in the policy. A latent ambiguity may arise, not from the face of an instrument, but by the existence of extraneous facts. *Black's Dictionary* states a "latent ambiguity" is "where the language employed is clear and intelligible and suggest but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings."

. . .

¶38. . .When an issue arises concerning the intent of the contracting parties for application of a contract, the issue is decided by the trier of fact. When third party beneficiary status is dependent upon whether contracting parties intended to benefit the third party, that determination of an actual intent is an issue of fact to be determined by the trier of fact.

. . .

¶41. . .Douglas presented facts for the purpose of showing he was treated and considered as an insured by State Farm, and the policy was issued and renewed to cover the entire value of the property and not just the insurable interest of Hensley. Douglas presented facts on the issue whether he was an intended third party beneficiary insured by the policy. Whether Douglas was an intended beneficiary must be decided by the trier of fact and not on summary judgment. Douglas' action for breach of the implied-in-law good faith duty by State Farm is based upon whether Douglas was an insured, and whether Douglas was an insured is based upon an adjudication of the parties' intent which in turn is based upon a trier of fact making the determination based upon Douglas' allegations of fact and facts submitted by the other parties.

9. Condo Owner Lacks Standing To Sue As Being Neither The Named Insured Or Third Party Beneficiary.

May v. Mid-Century Insurance Company, et al., 2006 OK 100, 151 P.3d 132 (Condominium Association Homeowner's Insurance Policy):

"¶23. Association is the sole named insured upon the condominium insurance policy issued by Insurer. . . . The loss payment provisions of endorsement E 3422 give Insurer the

exclusive choice to settle covered losses **directly with** the unit owners **or with** Association 'for the account' of the unit owners.

¶24. The contract's **expressed intent to confer** solely on Insurer the power to regard all contractual obligations due under the policy as extending to the named insured **specifically negates the existence of any enforceable obligation** in favor of unit owners *qua* third-party beneficiary. **No obligation may be imposed upon a promissor in favor of a third party if the contract expressly relieves the promissor of such liability to that third party**. It is crystal-clear by the terms of the policy in suit that the parties to the policy – Insurer and Association – did not intend to confer on any third-party unit owner a legally enforceable right of recovery against Insurer.

¶25. A third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promissor and promissee. One to whom, by the express terms of a contract, no obligation is due from its promissor, cannot qualify for the status of an intended or implied third-party beneficiary. The express contractual negation of the promissor's duty to the third-party status seeker operates to exclude that third party from legal recognition as third-party promissee.

¶26. Evident as it is that under the express terms of the policy in suit **Insurer is not obligated to pay directly to Owner** any part of the indemnity that may be due for the loss she claims to have sustained, it would be indeed utterly pointless to search further for support or abnegation of her third-party beneficiary status. **That status, even if found, would be of no help to her recovery quest. We hence refuse to engage in a vain and useless analytical effort.**

¶27. In sum, the policy in suit expressly withholds from Owner any claim to an enforceable obligation Insurer. The policy's exclusionary provisions specifically bar unit owners from any direct contractual benefit from Insurer. **Owner was hence contractually deprived of any right to assert a bad-faith** tort claim against the Insurer."

10. Insurer Does Not Owe Duty Of Good Faith And Fair Dealing To A Homeowner Under An Unambiguous Lender Protection Policy Which Provides No Right Of Payment To Third-Party Beneficiary Homeowner.

Lumpkins v. Balboa Insurance Company and Meritplan Insurance Company, 812 F.Supp.2d 1280 (N.D. Okla. 2011) (Lender-Placed Insurance Coverage):

"The Court finds the Policy to be unambiguous, rendering consideration of extraneous evidence improper. See *May*, 151 P.3d 1t 140. Based on the Policy terms, the Court finds that the overarching purpose of the policy is to protect GMAC's interest in the property. See *Simpson v. Balboa Insurance Co.,* 2:08CV281, 2009 WL 01291275, at *3

(S.D. Miss. 5/7/09) (describing similar policy as a 'lender protection policy' and describing its purpose as 'to protect the interest of a lender in a property upon which it holds a mortgage interest when there is no other hazard insurance on the covered property'). P. 1284-85.

. . .

Applying the reasoning in *May [v. Mid-Century Insurance Company*, 151 P.3d 132 (Okla. 2006)], the Court concludes that Plaintiffs are not third-party beneficiaries of the Policy. Like the plaintiff in *May*, Plaintiffs are individuals 'to whom, by the express terms of a contract, no obligation is due from [Meritplan].' See *Id.* at 141. This is because the Policy does not obligate Meritplan to pay Plaintiffs insurance proceeds under any circumstances. All obligations to pay proceeds and to engage in good faith and fair dealing are owed directly to GMAC. Unlike the insurer in *May*, Meritplan does not even have the option to directly pay Plaintiffs. If an insurer's 'option' to directly pay the plaintiff was insufficient to confer third-party beneficiary status in *May*, the absence of any contractual option or obligation to directly pay Plaintiffs is fatal to Plaintiffs' argument. Although Plaintiffs have a 'potential right' and 'may' be entitled to ultimate receipt of proceeds paid to GMAC under the language of Policy, Meritplan does not have any contractually conferred decision-making power as to whether GMAC makes such payment. Plaintiffs have not distinguished *May* or explained why *May's* reasoning should not extend to the Policy and the Court finds *May* controlling." P. 1286.

11. A Sole Shareholder Is Not An Insured Under A Corporate Policy So As To Be A Real Party In Interest.

Jadco Management Corporation and Armstrong v. Federal Insurance Company and Chubb & Son, Inc. dba Chubb Group of Insurance Companies, Consolidated Insurance Agency, Inc. and Bill Wilson, 2000 OK CIV APP 68, 9 P.3d 92 (Commercial Business Insurance Policy):

"In the instant case, Armstrong allegedly suffered a loss because of the loss to the corporations in which he held the stock. He was not Federal's insured or a party whom Federal intended to protect when the coverage went into effect. Armstrong's entire relationship with Federal arises only because of the insurance policy between various Jadco corporations and Federal. Federal, therefore, has no direct liability to Armstrong, and the implied covenant to deal fairly and in good faith cannot be extended to him because he pleads an action in tort."

12. Standing In Uninsured Motorist Cases.

Townsend v. State Farm Mutual Automobile Insurance Company, 1993 OK 119, 860 P.2d 236 (Uninsured Motorist Coverage):

"The question on the instant facts becomes whether Townsend, as a class 2 insured passenger covered under Penn's uninsured motorist policy, had a contractual or statutory

relationship with Penn's insurer which granted him standing to bring a bad faith claim. Analysis reveals that Townsend had both a contractual and a statutory relationship with State Farm.

. . .

Penn, the named insured, purchased protection from uninsured motorist for himself, for family members, for permissive users, and for passengers. This gave rise to a legitimate contractual expectation that the insurer would act in good faith and deal fairly with all insureds, whether they were of a class 1 or class 2. Babcock's distinction between class 1 insureds and class 2 insurers did not affect Townsend's standing to bring a bad faith action.

Townsend had standing for another reason. He enjoyed a statutory relationship with State Farm by virtue of section 3636 of title 36 of the Oklahoma statutes. Subsection B of that provision requires insurers to offer uninsured motorist coverage 'for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . ' By this provision, the legislature established a statutory relationship between the insurer and all insureds."

13. Insured may sue for bad faith against a liability carrier before an action against the insured is final.

***Wilbanks Securities, Inc., et. al. v. Scottsdale Insurance Company, Nationwide Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA Defendants*,** 2015 F.Supp. 3d 1196 (W.D. Okla. 2016.) (Financial Services Professional Liability Insurance Policy):

[T]his case most closely resembles the Tenth Circuit decision in *Paul Holt Drilling, Inc., v. Liberty Mutual Insurance Co.*, 664 F. 2d 252(10th Cir. 1981), applying Oklahoma law, wherein the court concluded that a claim for breach of contract premised on breach of the duty to defend accrues at the time the defense is denied by the insurer and continues until the underlying litigation is resolved.

. . .

[M]ost courts have held that the no action clause does not apply to a suit the insured brings for breach of the insurer's obligation to defend.

. . .

We see an important difference between the claims by a third party alleging the insured is responsible for the third party's injuries and claims by the insured asserting the insurer is withholding benefits due under the policy. The purpose of the no action clause are to prevent an injured party or an insured from bringing the insurance company into the underlying litigation with possible resultant prejudice. We think the Oklahoma court would hold the no action clause is intended to apply only to claims by third persons. P.1198-1199

. . .

[T]o give effect to the no action clause would eliminate in its entirety any obligation by Defendant to fulfill its duty to defend until such time as the insured has failed to prevail in the underlying action. p. 1200

. . .

The Tenth Circuit's approach to this issue is not unique. Several courts have held that no action clauses do not bar an insured's claim for declaratory relief against the insurer, at least where coverage is denied by the insurer. (citations omitted)

. . .

This Court is bound to follow the conclusion in *Paul Holt,* which provides that the cause of action regarding the Defendant's duty to defend accrued at the time Defendant refused to provide Plaintiff's with a defense to the arbitration. The insured's cause of action arises as soon as they must incur the expenses of defense as a consequence of an insurer's refusal [to defend].

. . .

As such, the Court can not conclude that the no action provision is a condition precedent with regard to the claim of the insured. Rather, as concluded by the Court in *Paul Holt,* it is a provision that applies the claims of third parties, not the insured, where, as here, the issue is the duty to defend. p. 1200-1201

14. Standing In Third-Party Beneficiary Cases.

a. Life Insurance Beneficiary Is Owed Duty Of Good Faith.

Roach v. Atlas Life Insurance Company, 1989 OK 27, 769 P.2d 158 (Life Insurance):

"A third-party beneficiary contract exists if the proceeds of an insurance policy are payable to third persons. Title 15 O.S. 1981, § 29 provides that a contract, made expressly for the benefit of a third person, may be enforced at any time before the parties thereto rescind it. Before rescission, third party beneficiaries are entitled to enforce any contract made for their benefit. . . .

The failure to afford a cause of action for bad faith to the beneficiary of a life insurance policy would negate a substantial reason for the insured's purchase of the policy -- the peace of mind and security which it provides in the event of loss. An action for the breach of the duty of good faith and fair dealing lies in favor of a policy beneficiary against a life insurance company." P. 161-162.

b. Direct Bad Faith Action Against Liability Carrier Permitted Where Claimant Is A Third-Party Beneficiary Under Policy.

Campbell v. American International Group, Inc. and AIG Europe S.A. and Muller, 1999 OK CIV APP 37, 976 P.2d 1102 (Automobile Liability Insurance):

"Plaintiffs asserted below that, by virtue of German law, they are third-party beneficiary of [third-party tortfeasor's] insurance contract.

"[D]efendant's reliance on *Amick* and the other cited cases is misplaced because in those cases the parties attempting to sue for bad faith were strangers to the insurance contract --they were merely third-party claimants, not third-party beneficiaries... ."

Oklahoma law clearly allows third-party beneficiaries to pursue bad faith claims.

c. Med Pay Provisions Under A Liability Policy Are Not Third-Party Beneficiary Contracts So As To Create Standing Or A Duty Of Good Faith.

(1) ***Rednour v. J. C. & P Partnership and Acceptance Insurance Company***, 2000 OK CIV APP 10, 996 P.2d 487 (Business Owner Liability Medical Pay Policy):

"Unlike the owner of an automobile who would normally have personal, family or social reasons for wishing to provide uninsured motorist protection for passengers in an automobile, the primary purpose behind a business owner's purchase of liability insurance is the protection of assets. Medical expenses provisions in such policies principally serve that goal by reducing the likelihood of further litigation through the prompt payment of medical expenses of parties injured on the premises without the necessity of them suing the business owner and proving negligence.

Considering the policy under which Rednour seeks to impose a duty on Insurer, we must conclude that the primary purpose was to provide protection to the Insured from damage claims, and parties such as Rednour only incidentally benefit from a provision which is primarily designed to avoid more extensive claims by reducing injured party's motivation for bringing a lawsuit. Rednour cannot be considered a third-party beneficiary of the policy for purposes of a bad faith claim."

(2) ***Anderson v. American International Specialty Lines Insurance Company***, 2001 OK CIV APP 141, 38 P.3d 240 (Commercial Property No-Fault Medical Expense Coverage Insurance):

[3] "A common thread throughout . . . court decisions is that to determine who has standing to bring a bad faith claim against an insurer, one must consider the contracting parties' primary intent as reflected in the policy. Even if it is undisputed that a party is entitled to benefits under an insurance policy, the insurer's duty to deal fairly and act in good faith is limited. It does not extend to every party entitled to payment of insurance benefits. There must be either a contractual or statutory relationship between the insurer and the party asserting the bad faith claim before the

duty arises. *Rednour v. JC&P Partnership*, 2000 OK CIV APP 10, 996 P.2d 487 (cert denied), and *Roach v. Atlas Life Insurance Company,* 1989 OK 27, 769 P.2D 158. '[T]he insured's reason for purchasing the insurance policy determines if the required contractual relationship exists, not the entitlement to payment of insurance proceeds.' *Roach, supra*, and *Gianfillippo v. Northland Casualty Company*, 1993 OK 125, 861 P.2d 308."

(3) The Duty of Good Faith and Fair Dealing Does Not Extend to a Third Party Claimant Under the Policy.

Ellis v. Liberty Mutual Insurance Company, 2009 OK CIV APP 29, 208 P.3d 934 (cert. denied 3/11/09) (Homeowner's Med Pay Coverage):

"¶5. [T]he rule maintains that '. . . the insurer's duty to deal fairly and act in good faith is limited. It does not extend to every party entitled to payment from insurance proceeds. There must be either a contractual or statutory relationship between the insurer and the party asserting the bad faith claim before the duty arises.' *Roach v. Atlas Life Insurance Company*, 1989 OK 27, ¶ 8, 769 P.2d 158, 161. The record does not reveal, and Ellis does not assert, a contractual or statutory relationship with Liberty Mutual. Her status was one of third-party claimant under the policy. See *Gianfilippo v. Northland Casualty Company*, 1993 OK 125, 861 P.2d 308."

d. Foster Children Are Not Third-party Beneficiaries for Purposes of Standing to Assert Bad Faith Claim.

Colony Insurance Company v. Burke Special Administrator of the Estate of Aurora Espinal-Cruz and Deanza Jones, 698 F.3d 1222, (10th Cir. Okla.) (10/17/12) (Foster Care Liability Insurance):

"To determine whether a third-party claimant is also a third-party beneficiary with standing to bring a bad faith claim against an insurer, 'one must consider the contracting party's primary intent as reflected in the policy.' *Anderson*, 38 P.3d at 241. Although '[i]t is not necessary that [a third] party be specifically named as a beneficiary' in order to have standing, the contract must be made 'expressly' for the third party's benefit, which 'means in an express manner; indirect or unmistakable [sic] term, explicitly; definitely; directly.' *Keel v. Titan Construction Corp.*, 639 P.2d 1228, 1231 (Okla. 1981) (internal quotation marks omitted); *accord* Okla. Stat. Tit. 15, § 29 ('A contract, made expressly for the benefit of third person, may be enforced by him at any time before the parties thereto rescind it.') . . . *5.

According to the Estate, because coverage is triggered when a foster parent 'fails in her activities as a foster parent' and a foster child is necessarily 'the recipient of the foster parent's activities,' this indicates that 'it is the foster child who is the primary focus of the protection.' *6.

This argument is unavailing. Even if the Estate's characterization of this policy language can be given some credence, this does not constitute the requisite 'direct' or 'unmistakable' designation of foster children as third-party beneficiaries of the policy. See *Keel*, 639 P.2d at 1231. The Estate's interpretation must be 'implied from the terms of the contract,' *Oil Capital Racing Association Inc.*, 628 P.2d at 1179, and foster children would only 'incidentally' benefit from the policy, in those (presumably rare) cases where the foster child has obtained a judgment against her own foster parent. Consequently, there is no third-party benefit that the Estate is entitled to enforce."

e. A Foster Child Has No Statutory Relationship With A Foster Care Liability Insurer.

Colony Insurance Company v. Burke Special Administrator of the Estate of Aurora Espinal-Cruz and Deanza Jones, 698 F.3d 1222, (10th Cir. Okla.) (10/17/12) (Foster Care Liability Insurance):

"Even where an injured third party is not an express contractual third-party beneficiary of an insurance contract, she might nevertheless be able to enforce the contract if there is a sufficient *statutory* relationship between the injured third party and the insurer. . . . *6.

[T]here is no such explicit statutory mandate in this case, nor do any other Oklahoma statutes indicate that the primary purpose of this insurance policy is to provide for first-party coverage for foster children. Thus, there is no statutory relationship between foster children and foster-parent liability insurers as exists in the UM and Workers' Compensation context. *7.

[T]he Estate cites a provision of the OAC stating that '[l]iability insurance is provided for [foster families] for damages incurred by children in OKDHS custody,' Okla. Admin. Code § 340:75-7-65(j), and contends that 'incurred by' in this subsection means 'sustained by.' . . . But that regulation does not indicate that this liability coverage is intended to benefit the foster child. Instead, as liability insurance, it protects the foster family from liability. *8.

Finally, the Estate points out that (1) the OCC mandates insurance coverage, see Okla. Stat. tit. 10, § 7204 (2001) (providing that the DHS, 'in implementing the foster care program within its jurisdictional area, shall . . . [p]rovide for insurance coverage'; (2) another Oklahoma statute indicates that property and casualty insurance, which would include liability coverage, may be provided to cover injuries or damages arising from the foster care relationship and the provision of foster care services, Okla. Stat. tit. 74, § 85.58(j)(A)(2) (2001); and (3) foster care is defined as including 'the care, supervision, guidance and rearing of a foster child by the foster parent,' *id.* tit. 10, § 7203(2) (2001). These statutes, even read together, do not indicate that the provision of liability coverage to the foster parent is intended or required to benefit the foster child. Instead, it would protect the foster parent from liability resulting from the foster care arrangement. This case

cannot be decided by the types of insurance policies DHS was *authorized* to purchase. It must be decided by the type of insurance policy DHS *in fact purchased*, and the type of policy Colony *in fact wrote*." *8.

f. One Who Is A Contracting Party Is Not A Classic Third-Party Beneficiary Of The Contract And Is Directly Owed The Duty Of Good Faith And Fair Dealing.

Embry v. Innovative Aftermarket Systems LP, Twin City Fire Insurance Company and Hartford Fire Insurance Company, 2008 OK CIV APP 92, 198 P.3d 388 (Automobile Debt Relief Waiver Addendum):

"¶21 Based upon the undisputed portion of the record, this Court holds that when Embry parted with his $499.00 for payment to DSC for the DRWA program product, the product he purchased constituted a promise of one or more third parties (IES, Twin City, and Hartford) to pay his debt (deficiency) upon the happening or occurrence of certain conditions (total loss by accident or theft) as evidenced by the DRWA addendum, euphemistically called 'Debt Relief Waiver' (because the debt-deficiency is not waived, but is paid by the third party.) Thus, Embry's legal status is similar to, but different from, that of an intended beneficiary of a contract, as defined in Section 302 of the Restatement (Second) of Contracts. Although Embry benefits from the performance of others not directly a party to his financing contract, he is not a classic third-party beneficiary because he is the contracting party and payor of the funds initiating the contract of coverage. The distinction between Embry and the usual 'intended beneficiary' is that the latter has not parted with the consideration, whereas here Embry paid the consideration that triggered the performance obligations."

g. Employees Have Contractual And Statutory Status As Third Party Beneficiaries To Sue Workers' Compensation Insurer.

Sizemore v. Continental Casualty Company, 2006 OK 36, 142 P.3d 47, rehearing denied 06/26/06 (Workers' Compensation Insurance):

"¶16. Workers in Oklahoma enjoy both a contractual and a statutory status as third party beneficiaries of a Workers' Compensation insurance agreement. 'A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.' Okla. Tit. 15, § 29 (2001). That rule applies specifically to workers in the text of the Workers' Compensation Act:

> 'Every contract of insurance issued by an insurance carrier for the purpose of insuring an employer against liability under the Workers' Compensation Act shall be conclusively presumed to be a contract for the benefit of each and every person upon whom insurance premiums are paid, collected or whose employment is considered or used in determination of the amount of premium collected upon such policy for the payment of benefits

as provided by the Workers' Compensation Act . . . which contract may be enforced by such employee as the beneficiary thereof. Okla. Stat. Tit. 85, § 65.3 (2001). Thus the right to enforce the insurance agreement, and the attendant duty of good faith and fair dealing implied in that contract, belongs to the injured worker. This is true whether the insurer is an insurance company or a self-insured employer who voluntarily assumes insurer status.'"

15. Workers' Compensation Carrier May Be Sued For Bad Faith Under Third-Party Beneficiary Theory.

Goodwin v. Old Republic Insurance Company, 1992 OK 34, 828 P.2d 431 (Workers' Compensation Insurance):

"We assume that a workers' compensation insurance company may be subjected to liability in tort for a willful, malicious and bad faith refusal to pay an employee's workers' compensation award . . . .

The beneficiary of a workers' compensation insurance contract meets the criteria for assertion of the right, because the Legislature specifically provided in 85 O.S. 1981 § 65.3 that workers are third-party beneficiaries of the employer's liability policy with the insurer.

[W]orkers' compensation insurers are not exempted from provisions of the Oklahoma Insurance Code, 36 O.S. Supp. 1983 § 101, et seq. The Unfair Claims Settlement Practices Act, 36 O.S. Supp. 1985 § 1220 provides in § 1222 that no property or casualty insurer shall engage in unfair claims settlement practices . . . .

A bad faith claim is separate and apart from the work relationship, and it arises against an insurer only after there has been an award against the employer.

Workers' compensation insurance is purchased by the employer for the benefit of its employees. Failure of a carrier to pay promptly a claim impacts on the employer-employee relationship. The employer purchases workers' compensation insurance to provide care for its employees. Employers as well as employees rely upon the workers' compensation system for protection for on-the-job injuries. The employer, the injured employee, and other employees in the workplace expect payment in the event of a job-related injury. Otherwise, morale in the workplace suffers, which impacts productivity. The employee, who by a statute is made a third-party beneficiary to the workers' compensation insurance, is in the same class as an insured and may expect prompt payment of his/her claim unless the insurer in good faith asserts a basis for contesting it. Failure to pay promptly may result in workers' compensation insurer's liability for more than the statutorily set recoveries."

a. Workers' Compensation Bad Faith Requires Something More.

Cooper v. National Union Fire Insurance Company of Pittsburg, 1996 OK CIV APP 52, 921 P.2d 1297 (Workers' Compensation Insurance):

"'[I]f an employee is injured by an insurer's bad faith-*intentional* failure to pay benefits under an award, the employee has a common law action in tort.' (Citation omitted.) The opening sentence of the *Goodwin* opinion further reveals that the basis for the liability is something more than simply 'unreasonable' conduct."

. . .

"Even though the bad faith element of a cause of action against a workers' compensation insurer is something more than 'unreasonable' conduct, it is not necessarily conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud, or malice."

b. There Can Be No Bad Faith In Workers' Compensation Until After An Award Is Made.

Anderson v. United States Fidelity & Guaranty Company, 1997 OK 124, 948 P.2d 1216 (Workers' Compensation insurance):

"A review of the cases reveals that the tort liability of a Workers' Compensation insurer 'arises only after there has been an award against the employer.'"

c. No Bad Faith For Overly Aggressive Defense In Workers' Compensation.

Whitson v. Oklahoma Farmers Union Mutual Insurance Company and Phil Spears, 1995 OK 4, 889 P.2d 285 (Workers' Compensation Insurance):

"Unlike the workers' compensation schemes of many other states, our Workers' Compensation Court is not an administrative agency. There is no reason to allow a tort cause of action for a too aggressive defense of a workers' compensation claim -- especially where the claimant is no longer in the defendant's employ. A *successful* plaintiff in a personal injury action certainly has no cause of action against the defendant for the defendant's unsuccessful attempts to defeat the suit. Similarly, Whitson has no cause of action against OFU and Spears for bad faith arising from Spears' activities in defending Whitson's workers' compensation claim."

d. Comp Carrier Still Not Liable For Pre-Award Unfair And Unreasonable Activity.

Hientz v. Trucks For You, Inc. and Risk Management Solutions, Inc., 1999 OK CIV APP 64, 984 P.2d 255 (Workers' Compensation Insurance):

¶5. "The evidentiary materials and admissions in Mr. Heintz's petition and response reveal that there is no substantial controversy that the conduct of Trucks For You, upon which Mr. Heintz relies to show bad faith, predates a final award by the Workers' Compensation Court. In *Anderson v. USF&G*, 1997 OK 124, ¶ 1, 948 P.2d 1216, the Supreme Court gave an unequivocal negative answer to the question:

> 'Does Oklahoma law recognize the tort of bad faith or unjustified denial of workers' compensation . . . or the assertion of a groundless defense, based on . . . conduct that predated the claimant's workers' compensation award?'"

e. Employer Responsible For Duty Of Good Faith In Workers' Compensation.

¶9. "In reviewing this case, we have assumed that an own risk employer is obligated to deal fairly and in good faith when handling its employees' workers' compensation claims and is liable for bad faith under the same circumstances as an insurance carrier." *Id*. at ¶9.

f. State Insurance Fund Is Immune From Its Acts Of Bad Faith In Handling Workers' Compensation Claims.

Fehring v. State Insurance Fund, 2001 OK 11, 19 P.3d 276 (Workers' Compensation Insurance):

"[State Insurance Fund] is a State entity intended to be covered by the GTCA, notwithstanding the fact SIF has certain characteristics of a private insurance carrier. ¶10 ...

[I]t is necessary to decide whether, in order to prevail on the tort theory of liability sued upon here – i.e., breach of the implied duty of good faith and fair dealing in the form of untimely payment of Mr. Fehring's workers' compensation award – appellants would be required, as a matter of law, to show conduct on the part of SIF employees that would mandate a determination the employees were not acting in good faith. We believe appellants would be required to so show." ¶25

g. CompSource Is Not A "Licensed" Insurer For Purposes Of Insurance Code Even Though It Insures Employers Against Liability For Compensation.

Zaloudek Grain Company v. CompSource Oklahoma, 298 P.3d 520, 2012 OK 75 (Sept. 18, 2012, rehearing denied March 25, 2013) (Workers' Compensation Insurance):

¶10 "We find that CompSource is neither an "insurer" for purposes of § 3639(C) nor is it licensed by the Insurance Commissioner. . . .

¶12 [I]n order to have authority to transact insurance in Oklahoma under the Insurance Code an insurer must:

> Be an incorporated stock insurer, an incorporated mutual insurer, a mutual benefit association, a nonprofit hospital service and medical indemnity corporation, a farmer's mutual fire insurance association, a Lloyd's Association or a reciprocal insurer, of the same general type as may be formed as a domestic insurer under this Code . . . .

. . .

¶13 It is a state department created for the purpose of **insuring employers against liability for compensation** pursuant to the Workers' Compensation Code and is required

to be "fairly competitive with other insurance carriers." It is not an incorporated stock insurer, an incorporated mutual insurer, a mutual benefit association, a nonprofit hospital service and medical indemnity corporation, a farmers mutual fire insurance association, a Lloyd's association nor a reciprocal insurer."

h. No Workers' Compensation Bad Faith Against Employer.

Kuykendall v. Gulfstream Aerospace Technologies, 2002 OK 96, 66 P.3d 374 (Workers' Compensation Insurance):

¶9 "Even if this Court were to recognize an insurer's duty to exercise good faith and fair dealing toward a Workers' compensation claimant, that duty would not apply equally to a self-insured employer. The cited cases draw a distinction between workers' compensation insurers and self-insured employers. In *Goodwin*, the Court cited the exclusivity provision, now codified as 85 O.S. 2001 § 12, which provides in pertinent part: 'The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability *of the employer* at common law or otherwise, for such injury, loss of services, or death . . . .' (Emphasis that of the Court.) The Court then contrasted the potential liability of an insurer with the liability of an employer and commented, '*It should be noted that the exclusivity provision of the statute relate to the liability of the employer – not that of the insurer.*' "

i. The Other Shoe Drops – There Is No Workers' Compensation Bad Faith In Oklahoma.

Deanda v. AIU Insurance and AIG Claim Services, Inc., 2004 OK 54, 98 P.3d 1080 (Workers' Compensation Insurance):

¶1 "The United States District Court for the Northern District of Oklahoma certified the following question pursuant to the Uniform Certification of Questions of Law Act, 20 O.S. 2001, § 1601 et seq.: 'Does Oklahoma recognize the tort of bad faith against a Workers' Compensation insurance carrier for post-award conduct?' We answer, consistent with our recent holding in *Kuykendall v. Gulfstream Aerospace Technologies*, 2002 OK 96, 66 P.3d 374, **Oklahoma does not recognize such a tort**. Title 85 O.S. 2001, § 42 provides the sole remedy when an insurance company fails to pay the compensation awarded by the Workers' Compensation Court."

Dissent by Kauger with whom Watt, C.J., Hodges and Edmondson, J.J., join:

¶1 "The majority's failure to honor without overruling jurisprudence clearly signaling to the Legislature and employees that injured workers may reasonably expect fair dealing and putting Workers' Compensation insurers on notice that acting in bad faith may subject the insured to tort damages is disingenuous. One can only assume that the majority's 'general observation' concerning the status of this Court's jurisprudence as

'*obiter dictum'* is itself in the category of language failing to constitute 'a judicial decision or holding'."

j. Yes, Even Workers' Compensation Insurers Owe The Duty Of Good Faith And Fair Dealing.

Sizemore v. Continental Casualty Company, 2006 OK 36, 142 P.3d 47, rehearing denied 06/26/06 (Workers' Compensation Insurance):

¶1 "Does Oklahoma law recognize a tort for bad faith against a Workers' Compensation insurer?

In response, this Court recognizes such a tort for a Workers' Compensation insurer's refusal to pay a Workers' Compensation award and rejects decisions to the contrary. . . . .

¶ 14. [T]he exclusive remedy provision of § 12 applies expressly to the liability in § 11 for accidental personal injury arising out of and in the course of employment. *DeAnda* treated the insurer's bad faith failure to pay an award as an injury arising from the employment relationship. Even if that conclusion were accurate, such conduct cannot be said to have occurred in the course of the injured Workers' employment. '[A] bad faith claim is separate and apart from the work relationship, and it arises against an insurer only after there has been an award against the employer.' *Goodwin*, 1992 OK 34, ¶ 24, 828 P.2d at 434. Thus, the conduct involved in *Kuykendall* and *DeAnda* is outside the scope of the exclusive remedy provision of § 12 of the Workers' Compensation Act. This Court may not expand the exclusive remedy provision of that Act beyond that which the Legislature has provided."

k. The Penalty Provisions Of § 42 Is Not Intended As The Exclusive Remedy.

Sizemore v. Continental Casualty Company, 2006 OK 36, 142 P.3d 47, rehearing denied 06/26/06 (Workers' Compensation Insurance):

¶ 23. " This Court has struggled with the question of whether § 42 provides the sole remedy for an insurer's refusal to pay a Workers' Compensation award.
. . .

¶ 24. Nothing in the text of § 42, in the policies underlying that section, or in the policies underlying the Act generally, provides any support for the theory that § 42 was intended to provide the 'exclusive remedy' for an insurance company's refusal to pay a Workers' Compensation award. The only way that theory can be maintained is by reading the exclusive remedy provision in § 12 far beyond its stated scope of accidental injury arising out of and in the course of employment. Looking at the text and the statutory scheme as a whole, however, a contrary legislative intent is understood.

¶ 25. Section 42(A) addresses late payment of Workers' Compensation benefits. When payment under the terms of a Workers' Compensation award are not made within 10 days, the Workers' Compensation Court may order a certified copy of the award to be filed in the district court clerk's office to be enforced as a judgment of the district court. The award bears interest at the rate of 18 per cent until paid. Thus, the Legislature has provided an incentive for prompt payment of Workers' Compensation awards and a mechanism for enforcement of an unpaid award in district court. An insurer's bad faith in outright refusing to pay an award is beyond the purview of that incentive. The remedy for such conduct is not found in the Workers' Compensation Act but rather in a common law action based on the insurer's bad faith refusal to pay an award. Thus, bad faith conduct by a Workers' Compensation insurer in refusing to pay an award of benefits to an injured worker is judged by the same standard as bad faith conduct by any other insurer. See *Badillo v. Mid Century Insurance Co.*, 2005 OK 48, ¶ 28, 121 P.3d 1080, 1094, ..."

l. Workers' Comp Bad Faith Tort Action Does Not First Require An Award Be Certified For Enforcement.

Sizemore v. Continental Casualty Company, 2006 OK 36, 142 P.3d 47, rehearing denied 06/26/06 (Workers' Compensation insurance):

"The parties' argument that the opinion requires that a bad faith tort action may only be maintained after an order of the Workers' Compensation Court has been certified for enforcement in the district court pursuant to 85 O.S. 2001 § 42(A) is without merit. The opinion clearly provides that it is the refusal of the Workers' Compensation insurer to timely pay an award as finally ordered by the Workers' Compensation Court that gives rise to a common law action for bad faith in tort, and not whether a claimant has sought enforcement in the district court."

m. A Functional Equivalent Of A § 42(a) Certification Is Required As A Prerequisite To Filing A Workers' Compensation Bad Faith Suit.

Summers v. Zurich American Insurance Company, 2009 OK 33, 213 P.3d 565 (rehearing denied June 22, 2009) (Workers' Compensation Insurance):

¶9 In the context of an alleged refusal to pay a final award of *monetary* benefits in *Sizemore*, this Court required that "[a] claimant seeking to enforce an award must first utilize the mechanism provided in § 42(A) of the [Workers' Compensation] Act and have the award certified for enforcement. 2006 OK 36, ¶ 26, 142 P.3d at 54. Although the federal question answered in *Sizemore* dealt with the payment of monetary benefits, the decision encompasses an insurer's bad faith refusal to provide any benefits which (1) have been ordered in a final order of the Workers' Compensation Court and (2) have been certified as having not been provided as ordered."

. . .

¶11 If the insurer's non-compliance with the award is based on its failure to provide *monetary* benefits, the amount of benefits owed will be reduced to a sum certain and any applicable penalty and interest provided by § 42(A) will be assessed. If the unsatisfied award involves *non-monetary* benefits, such as insurer's authorization of Court-ordered

medical treatment, the certification order will identify the unprovided Court-ordered benefits.

¶12 At this point a claimant with a certification order from the Workers' Compensation Court that complies with § 42(A) and Rule 58 which determines that an award of *monetary* benefits remains unpaid without good cause has two options. The claimant may (1) file a certified copy of the certification order, with the award attached, in the District Court as a judgment and proceed to execution pursuant to § 42(A) or (2) the claimant may file a claim in tort for the insurer's bad faith. *Sizemore*, 2006 OK 36, ¶ 26, 142 P.3d at 54. In the latter option, the amount of unpaid benefits listed in the certification order becomes an element of the claimant's damages in the bad faith claim.

¶13 A claimant who has obtained an Order certifying that *non-monetary* benefits have not been provided as ordered does not have the option of enforcing the award as a judgment in the District Court. *See* Okla. Stat. Tit. 85, § 42(A). That claimant's remedy is to proceed with a tort claim for bad faith in District Court.

¶14 The purpose of *Sizemore's* certification requirement is two-fold. First, it is the Legislatively provided incentive for prompt payment of claims for monetary benefits within Workers' Compensation independent of any bad faith claim. Second, the Rule 58 certification hearing by the Workers' Compensation Court provides the insurer the opportunity to show good cause as to why a final award of benefits remains unfulfilled. **When an insurer has failed to provide Court-ordered benefits and cannot demonstrate good cause for doing so, a reasonable inference arises that the reason for the failure to obey the award involves a refusal to comply, not mere negligence. The remedy for such conduct is an action for bad faith**. (Emphasis added.)

¶17 Claimant asserts a bad faith refusal to authorize Court-ordered medical treatment. The question becomes whether the record contains an order which certifies that previously awarded medical benefits have not been provided as ordered, and demonstrates no good cause for Insurer's failure to do so. It does.

. . .

¶18 The October 16, 2007, Order of the Workers' Compensation Court satisfies the § 42(A) and Rule 58 certification requirements by demonstrating that the medical treatment repeatedly ordered by that Court had not been satisfied. The Order directed the employer "to take all reasonable measures to facilitate Claimant's treatment as set out herein within 30 days of the filing date of this Order."

n. A Workers' Compensation Insurer May Be Sued For Bad Faith Where It Does Not Pay The Monetary Award Timely As Ordered And The Workers' Compensation Court Identifies The Previously Ordered Benefits And Finds Insurer Failed To Demonstrate Good Cause For Its Noncompliance.

Meeks v. Guarantee Insurance Company, 2017 OK 17, 392 P.3d 278 (Workers' Compensation Insurance.)

¶1 This appeal was retained to reiterate the proper application of the Court's decision in *Summers v. Zurich Am. Ins. Co.*, 2009 OK 33, 213 P.3d 565, to monetary awards all-though-paid not provided as ordered. Today, this Court reemphasis that an Order of the Workers' Compensation Court (WCC) that clearly identifies previously ordered benefits and finds that insurer failed to demonstrate good cause for its delay in, or noncompliance with, providing Court Ordered benefits satisfies the certification requirements delineated in *Summers*.

. . .

¶7 At the outset, a District Court may only exercise jurisdiction in an employee's bad-faith action against his or her employer/ insurer when that employee has obtained an Order of Workers' Compensation Court certifying "that a final Workers' Compensation award either (1) remains unpaid or (2) benefits have not been provided as ordered" without good cause. *Summers*, 2009 OK 33, ¶10, 213 P.3d @568 (emphasis added by the Court.) …. As delineated in Summers, the certification procedures differ for awards remaining (1) unpaid, and (2) benefits not provided as Ordered.

. . .

(1). The unpaid, Late Payment, or Outright Refusal to Pay a Monetary Award.

¶8 . . . The policy rational behind section 42(A) is to encourage timely payment of Workers' Compensation awards, discourage mere noncompliance, and provide a mechanism for enforcement of the judgment in District Court. *Sizemore,* 2006 OK 36, ¶ 25, 142 P.3d @53-54. But, an insurer's bad faith refusal to pay an award is beyond that incentive. Id. Notably, section 42(A) only contemplates a dollar amount still owing on a monetary award. Consequently, where no amount is owing, by its terms, §42(A) does not apply. See Summers, 2009 OK 33, ¶ 13, 213 P.3d @569; See also Okla. Stat. Tit. 85, § 42(A). (Emphasis added)

¶9 Because the insurer owes a duty to act in good faith and deal fairly toward the injured employee, the insurer bears the burden to demonstrate why benefits were not provided as ordered. *Christian v. Am. Home Assurance Co.*, 1977 OK 141, ¶¶ 25-26, 577 P.2d 899, 904; *Goodwin v. Old Republic Ins. Co.*, 1992 OK 34, 828 P.2d 431; See also *Badillo v. Mid Century Ins. Co.*, 2005 OK 48, 121 P.3d 1080. Thus, the WCC's inquiry surrounds an insurer's conduct and whether that conduct was justified.

. . .

¶11 . . . This Court reemphasizes that where an employee has complied with section 42(A) and rule 58, and obtains a WCC Order finding that an award of monetary benefits remains unpaid without good cause, the employee may:

> (1) file a certified copy of the Certification Order, with the award attached, in the District Court as a judgment and proceed to execution pursuant to section 42(A) or (2) the claimant may file a claim in tort for the insurer's bad faith. Sizemore, 2006 OK 36, ¶ 26, 142 P.3d @54. In the latter option, the amount of unpaid benefits listed in the

> certification order becomes an element of the claimant's damages in the bad faith claim.

Summers, 2009 OK 33 ¶ 12, 213 P.3d @569. It is patently clearly that an employee is not required to first pursue the execution of that Judgment in District Court before commencing a bad faith action. Id, ¶ 14, 213 P.3d @569.

o. A Workers' Compensation Insurer May Be Sued For Bad Faith Where It Does Not Timely Provide Non-Monetary Benefits As Ordered And The Workers' Compensation Court Identifies The Previously Ordered Benefits And Finds Insurer Failed To Demonstrate Good Cause For Non-Compliance.

Meeks v. Guarantee Insurance Company, 2017 OK 17, 392 P.3d 278 (Workers' Compensation Insurance.)

2. Benefits not provided as Ordered.

¶12 The second category for certification/benefits not provided as ordered applies to any benefits award whether non-monetary or monetary. "Benefits" is defined generally to include monetary and non-monetary awards. See *Parret v. ANICCO Service Co.*, 2005 OK 54, ¶20, 127 P.3d 572, 578. It is well settled that an insurer has a statutory duty to promptly provide Workers' Compensation benefits. That statutory duty exists, whether monetary or non-monetary, and includes the provision of benefits pursuant to the terms dictated by the WCC. Failure to do so precipitates the precise economic hardship upon the employee that the employer sought to avoid by purchase of the policy. See *Christian*, 1977 OK 141, 577 P.2d @ 903. In most cases, a failure to comply with court-ordered benefits, whether unpaid, late, or an outright refusal, is inherently subsumed by this second qualifying category for certification**.**

¶13 In *Summers,* this Court held that *Sizemore,* "encompass an insurer's bad faith refusal to provide any benefits which (1) have been ordered in a Final Order in Workers' Compensation Court and (2) have been certified as having not been provided as Ordered." *Summers,* 2009 OK 33, ¶9, 213 P.3d @568. An insurer's bad faith refusal to provide benefits satisfying prongs 1 and 2 articulated in *Summers* will give rise to an independent common-law-tort action in District Court. Id; See also *Martin v. Gray*, 2016 OK 114, ¶9, 385 P.3d 64-67(a bad-faith claim presents an independent tort.) Such reckless conduct, absent good cause, creates a reasonable inference that the reason for the insurer's failure to obey the award involves a refusal to comply. *Summers,* 14, 213 P.3d @ 536. So, just as an outright refusal to pay a monetary award is beyond the purview of section 42(A), a willful or intentional refusal to provide benefits as ordered is beyond the statutory remedy found in the Workers' Compensation Act. Id. Resultantly, an insurer's bad-faith conduct in complying with any benefits awarded to an injured employee lies in tort and will be judged by the same standard applicable to the bad-faith conduct by any other insurer. *Sizemore,* 2006 OK 36, ¶ 25, 142 P.3d @ 54.

¶14 An employee seeking certification under the second category for non-monetary benefits will bypass section 42(A) as there is no unpaid-benefit amount to certify. See Okla. Stat. Tit. 85, §42(A). Rather, that employee should proceed directly to a Rule 58

hearing after providing at least ten (10) days notice to the employer and the insurance carrier pursuant to Rule 58. At that time of hearing, a Certification Order will issue if the insurer fails to demonstrate good cause. That Order must recite the insurer's failure to demonstrate good cause, identify the prior authorized benefits, and state that such benefits were not provided as ordered. This rule is applicable whether an employee seeks judicial relief for a non-monetary award, e.g., medical benefits, or where an employer has failed to comply with, but ultimately satisfies, a WCC award of monetary benefits.

. . .

¶17 The test articulated in *Summers* does not impose the use of magical words in satisfying the certification requirements. Here, the WCC found and expressly held that Insurer was ordered to pay benefits, repeatedly failed to do so as ordered, and did not provide just cause for its failure. Insurer's actions place it squarely within the scope of the second category for certification in *Summers.*

. . .

¶20 Although the Order in this matter did not use the term "certification," as referenced in § 42(A) and Rule 58, it was the functional equivalent of such an order and it satisfied the requirements stated in this opinion for such an order.

p. Unreasonable Delay By Workers' Compensation Insurer In Providing Benefits, Which Causes Death Of Employee Still Requires Jurisdictional Certification Order Before Filing A Bad Faith Claim.

***Gaasch, as Personal Representative of Estate of Troy Gaasch, deceased, v. St. Paul Fire and Marian Insurance Company*,** 2018 OK 12, 412 P.3d 1151. (Workers' Compensation Insurance)

¶28 . . . A Workers' allegation of not receiving a previously awarded benefit is adjudicated by the Workers' Compensation Court, and this adjudication is not limited to employer's denial of a benefit versus a delay by an employer or an insurer in providing a benefit. In *Stewart v. Mercy Health Center Inc*., we stated:

> "Our jurisprudence makes it clear that failure to obtain an order of the Workers' Compensation Court certifying the award as unpaid is a *jurisdictional requirement* to filing a bad faith claim for failure to pay benefits in the District Court." This workers' compensation insurance carrier had its legal duty for providing payment adjudicated by an order of the Workers' Compensation Court. Plaintiff, like any other claimant seeking to enforce an award requiring an insurer to provide a benefit, "Must first utilize the mechanism provided in section 42 (A) of the Act and have the award certified for enforcement." The insurer has a workers' compensation statutory right to defend its conduct in the context of its good-cause burden. We have previously recognized a worker as a third-party beneficiary to the insurer's workers' compensation insurance contract may hold the insurer liable for a delay or failure to pay or provide for coverage as required by its policy utilizing the remedy provided by workers' compensation statutes.

¶29 Plaintiff attempts to go around this procedure we classified as a "jurisdictional requirement" in *Stewart* by characterizing the claim as a breach of contract and an action for

damages resulting from an alleged wrongful death. The clear public policy expressed in the amended version of Art. 23 § 7 requires available workers' compensation remedies for any type of wrongful death claim to be pursued in the Workers' Compensation Court when required by the workers' compensation statutes.

q. A Difference In Workers' Compensation Court Remedies Does Not Make The Remedy Unconstitutional.

Gaasch, as Personal Representative of Estate of Troy Gaasch, deceased, v. St. Paul Fire and Marian Insurance Company**,** 2018 OK 12, 412 P.3d 1151. (Workers Compensation Insurance)

¶30 Plaintiff argues the scope of the remedies for plaintiff's action against an insurer are different in a District Court from those available before the Workers' Compensation Court. A mere difference in a remedy does not demonstrate an unconstitutionally in adequate or insufficient remedy. Plaintiff also refers to Okla. Const. Art. 5 § 46 and alleges workers' compensation insurers receive different treatment than other insurers for the purpose of a wrongful death claim. This allegation fails to recognize that the people expressed their desire in Art. 23 § 7 for Workers' compensation wrongful death related claims to be adjudicated within the Workers' compensation jurisdictional boundaries.

16. Bad Faith Claim Survives Death.

Clements, as Personal Representative of the Estate of H.D. Clements, v. ITT Hartford, and Hartford Underwriters Insurance Company, 1999 OK CIV APP 6, 973 P.2D 902 (Uninsured Motorist Coverage):

"[W]e hold that the legislature intended that a cause of action seeking damages for emotional distress for an insurer's bad faith in failing to timely pay a claim should survive the death of the insured as a cause of action for 'injury to the person.' We further hold that attorney fees and any other loss incurred by an insured to enforce the contract against the insurer's bad faith is 'injury to . . . personal estate' that would survive the insured's death."

17. COCA Holds That An Insured's Bad Faith Claim Is Not Assignable.

United Adjustment Services Inc. v. Professional Insurors Agency, LLC, Chubb Custom Insurance Company and Clifford J. Miller, 307 P.3d 400, 2013 OK CIV APP 67 (released for publication by Order of the Court of Civil Appeals, June 5, 2013) (Commercial Property Policy):

¶19. ". . . When there is clear showing that the insurance company unreasonably and in bad faith withheld payment of the claim of its insured, then tort liability for breach of that duty may be imposed. Citing *Christian v. American Home Assurance Company*, 1977 OK 141 at ¶ 26.

¶20 Section 2017(D) of Title 12 prohibits the assignment of claims not arising from contract. 12 O.S. 2011 § 2017(D). Because a bad faith claim sounds in tort under Oklahoma law, this is such a case. 'We conclude that an action growing out of a tort pure and simple like the one involved in this case . . . is not assignable.' *Kansas City M & O Railway Co. v. Shutt*, 1909 OK 110, ¶5, 104 P. 51, 53.

. . .

Because there is no evidence in the record before us that the bad faith claim has been reduced to judgment, the claim is not assignable under Oklahoma law.

C. PROPER PARTIES TO SUE

1. The Duty Is Non-Delegable.

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

"[W]hen a party owes a legal or contractual duty to another, he may not escape liability for failure to perform that duty by delegating that responsibility to an independent contractor." *Timmons, supra*, at 914.

a. Bank Acts As Agent For Insurer.

Coble v. Bowers First State Bank, and First Life Assurance Company, 1990 OK CIV APP 109, 809 P.2d 69 (Credit Disability Policy):

"[The] bank acted as agent for the insurance company in the solicitation of credit insurance. It was undisputed that bank was [the insured's] only contact for the insurance purchased. Bank's employees solicited the policy, obtained [the insured's] application, and collected the premium by agreeing to finance it as part of the principal loan. Although [insurer] rejected [the insured's] disability application, its agent then purported to accept a counter-offer and make a premium adjustment without [the insured's] authority or without notifying him of the proposed change. This action not only disregarded [the insured's] desires in the matter, but deprived him of the opportunity to take timely and useful corrective measures. Such a course of negotiation raises the inference of unfair dealing between insurer and insured. . ."

b. The Duty Of Good Faith And Fair Dealing May Be Breached By Counsel For An Insurer.

Barnes v. Oklahoma Farm Bureau Mutual Insurance Company, 2000 OK 55, 11 P.3d 162 (Underinsured Motorist Coverage):

"Even if breach of the implied duty of good faith and fair dealing was, in part, due to actions of its counsel, rather than acts or omissions on its part directly, insurer would still be subject to liability. We ruled over seventeen (17) years ago that an insurer could not avoid liability for breach of the duty of good faith and fair dealing by delegating its responsibility to an independent contractor. *Timmons v. Royal Globe Insurance Co.*, 1982 OK 97, 653 P.2d 907, 914. In short, the duty owed to the insured is non-delegable." Note 5.

2. A Controlling Company Is Not A Stranger To The Contract.

Massey v. Farmers Insurance Group, 986 F.2d 1428, 1993 WL 34770 (10th Cir. Okla. 1993) (Homeowner's Fire Policy):

"Defendant argues that Farmers Insurance Group was not a party to the contract and therefore could not be liable for bad faith breach of the contract. . . . Under Defendant's reasoning, evidence of its worth should have been limited to the worth of Truck Insurance Exchange/Truck Underwriters Association, a subordinate entity within the rubric of companies forming Farmers Insurance Group. In light of the evidence in the record showing a significant financial relationship between Farmers Insurance Group and Truck Insurance Exchange/Truck Underwriters Association, Farmers Insurance Group's control over the subordinate entity in the handling of claims in general, and the handling of the claim in this case in particular, we believe that the worth of Farmers Insurance Group is the relevant inquiry . . . ."

and s*ee*: *Delos v. Farmers Insurance Group, Inc*., 155 Cal.Rptr. 843, 93 Cal.App.3d 642 (1979) (Uninsured Motorist Insurance):

"In summary, for legitimate business considerations, the Group was formed to render management services for the Exchange for which it received a percentage of premiums paid by the Exchange's policyholders.

"If we were to accept the Group's argument and adhere to the general rule that 'bad faith' liability may be imposed only against a party to an insurance contract, we would not only permit the insurer to insulate itself from liability by the simple technique of forming a management company but we would also deprive a plaintiff from redress against the party primarily responsible for damages. We conclude the Group is liable for the breach of the implied covenant of good faith and fair dealing." P. 849.

3. Non-Party To An Insurance Contract May Be Liable Through Piercing The Corporate Veil.

Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange, Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96); (Underinsured Motorist Coverage):

"It is true that non-parties to an insurance contract are not subject to the implied covenant of good faith and fair dealing. . . . . However, in a proper case, the court will look beyond the form to the substance of the situation and brush aside the corporate veil in order to hold one corporation responsible for another corporation which, in technical form, appears to be a separate entity. . . . .

The question of whether an allegedly dominant corporation may be held liable for a subservient entity's tort hinges primarily on the issue of control."

4. Piercing The Corporate Veil In Federal Bad Faith Cases Follows The Law Of The State Of Incorporation.

Tomlinson v. Combined Underwriters Life Insurance Company, et al., 684 F.Supp.2d 1296 (N.D. Okla. 2010) (Cancer and Dread Disease Insurance Policy):

"In ruling on the Choice of Law Motion, the Court noted that the choice of law analysis was determined by the laws of Oklahoma, the forum state. The Court additionally observed that Oklahoma courts have not yet directly addressed the question presented in the Choice of Law Motion – namely, whether Plaintiff's veil-piercing claims should be governed by Oklahoma law or by the law of Defendants' states of incorporation . . . .

The Court therefore concluded that because Oklahoma courts have followed the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS in other circumstances, the Oklahoma Supreme Court would likely follow § 307 in holding that the state of incorporation's law applies to issues of piercing the corporate veil. The Court found additional support for its holding in the fact that the vast majority of jurisdictions addressing this question have applied the law of the state of incorporation to veil-piercing claims." *Id.* at 1298.

5. In Federal Court, Piercing The Corporate Veil Of A Holding Company To Show In Personam Jurisdiction Requires Proof Of Pervasive Control.

Harris v. American International Group, Inc. d/b/a American International Companies and Granite State Insurance Companies, 923 F.Supp.2d 1299 (W.D. Okla. 2013) (Uninsured/Underinsured Motorist Coverage):

"The alter ego theory is generally applied to determine if one corporation may be held liable for the conduct of another. Where liability is the issue, that determination involves several factors, including:

(1) Whether the dominant corporation owns or subscribes to all the subservient corporation's stock,
(2) Whether the dominant and subservient corporations have common directors and officers,
(3) Whether the dominant corporation provides financing to the subservient corporation,
(4) Whether the subservient corporation is grossly undercapitalized,
(5) Whether the dominant corporation pays the salaries, expenses or losses of the subservient corporation,
(6) Whether most of the subservient corporation's business is with the dominant corporation or the subservient corporation's assets were conveyed from the dominant corporation,
(7) Whether the dominant corporation refers to the subservient corporation as a division or department,
(8) Whether the subservient corporation's officers or directors follow the dominant corporation's directions, and
(9) Whether the corporations observe the legal formalities for keeping the entities separate.

Gilbert v. Security Finance Corp. of Oklahoma, Inc., 152 P.3d 165, 175 (Okla. 2006) (citations omitted.) Although these factors are examined in determining whether personal jurisdiction may be exercised, the primary consideration is the level of control exercised by the parent over the subsidiary. 'In order to establish jurisdiction under the alter-ego theory, there must be proof of pervasive control by the parent over the subsidiary more than what is ordinarily exercised by a parent corporation.' *Gilbert v. Security Finance Corp. of Oklahoma, Inc.* at 174. . . .

In *Gilbert*, the Court considered whether holding companies could be subject to personal jurisdiction in Oklahoma based on their subsidiaries' admitted contacts here. The Court considered evidence that the holding companies owned the Oklahoma subsidiaries' stock and had some directors in common with the Oklahoma subsidiary; there was also evidence that the holding companies and subsidiaries filed consolidated income tax returns, and the holding companies executed a management agreement. *Id.* These facts were, however, insufficient to constitute the pervasive control required to permit the exercise of personal jurisdiction over the holding companies under an alter-ego theory. *Gilbert*, 152 P.3d at 174. *Harris, supra*, at 1305. . . .

Moreover, as AIG also argues at length, Oklahoma law contains extensive regulations concerning the financial transactions of a domestic insurance company that belongs to an insurance holding company system. Okla. Stat. Title 36, § 1651, *et seq.* The Court finds that the evidence regarding the financial structure of AIG as holding company, and Granite as an Oklahoma insurer, does not support the exercise of jurisdiction over AIG. *Id.* at 1308.

6. An Unincorporated Group Of Insurers May Be Sued For Bad Faith In The Name Of The Association Even Though Not A Legal Entity.

Oliver v. Farmers Insurance Group of Companies and Farmers Group Inc., 1997 OK 71, 941 P.2d 985 (Health Insurance):

"If one corporation is simply the instrumentality of another corporation, the separation between the two may be disregarded and treated as one for the purpose of tort law. [Citations omitted.] The question hinges primarily in control. . . . .

. . .

Two other courts faced with this exact question have dealt with this particular defendant. [Citations omitted.] Both courts held that as the management company and attorney-in-fact for all of its subsidiary and affiliated companies, it could be held liable for bad faith breach of contract. [Citation omitted.] *Delos* specifically rejected the assertion that as the management company it was not involved in the business of insurance. [Citation omitted.]

. . .

Whatever else Farmers Insurance Group of Companies does, it is clearly a name under which a number of Farmers-related companies insure against risks. Under our Section 182 Oliver may properly bring suit against Farmers Insurance Group of Companies."

7. A Non-Party To The Insurance Contract Who Acts Like An Insurer May Be Liable For The Duty Of Good Faith And Fair Dealing.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability):

¶52 "Although normally it is only the actual insurer that owes the duty of good faith and fair dealing to its insured [citation omitted] and a cause for breach of the duty will not lie against a stranger to the insurance contract [citation omitted], these normal rules are not absolutes; there are exceptions. When a non-party to the insurance contract, based on the specific facts and circumstances existent, engages in activities or conduct such that it may be found to be acting sufficiently like an insurer so that a special relationship can be said to exist between the entity and the insured, we have made it clear that imposition upon said entity of the same duty of good faith and fair dealing as that imposed on the actual insurer issuing the insurance policy is appropriate."

8. Plan Administrator Who Acts Like An Insurer Is Liable For The Duty Of Good Faith.

Wolf v. Prudential Insurance Company of America, 50 F.3d 793 (10th Cir. 1995) (Medical Benefits Plan):

"We do not believe that *Timmons* or *Gruenberg* are necessarily dispositive of the issue because the insurer's agents in those cases were not nearly as involved in the insurance process as Prudential was here. We believe that analysis should focus more on the factual question of whether the administrator acts like an insurer such that there is a 'special relationship' between the administrator and insured that could give rise to a duty of good faith.

. . .

In sum, Prudential had primary control over benefit determinations, and assumed some of the risk of these determinations. It thus undertook many of the obligations and risks of an insurer.

We therefore do not see Prudential as a 'stranger' to the insurance contracts in this case. It was contractually obligated to administer the plans, and its contractual obligation directly benefitted plaintiffs as third-party beneficiaries of its agreements with the Annuity Board. The Contractual obligation combines with the fact that Prudential's benefit determinations could at least indirectly affect its profits and losses to create a special relationship between Prudential and plaintiffs. In other words, on the facts as presented by Plaintiffs, Prudential had the power, motive and opportunity to act unscrupulously . . . . We thus hold that as a matter of law, a plan administrator in Prudential's situation could be subject to the duty of good faith."

9. Third Party Plan Administrator Who Performs Some Task Of Insurance Company Claims Handling Which Does Not Share The Risk Of Loss Does Not Owe The Duty Of Good Faith And Fair Dealing.

Wathor v. Mutual Assurance Administrators, Inc., 2004 OK 2, 87 P.3d 559 (Self-Funded Health Insurance Plan):

¶8 "Normally, only the insurer owes the duty of good faith and fair dealing to its insured. Agents of the insurer -- even agents whose acts may have been material to a breach of the duty – do not normally owe the insured a duty of good faith since agents are not parties to the insurance contract."

¶9 In the typical case the insured is adequately protected by the nondelegable duty that the law imposes on the insurer. However, the imposition of a nondelegable duty on the insurer does not necessarily preclude an action by an insured against a plan administrator for breach of an insurer's duty of good faith. In *Wolf v. Prudential Insurance Company of America*, 50 F.3d 793 (10th Cir. 1995), the Tenth Circuit Court of Appeals considered the issue of whether an insured under a self-funded health benefits plan could sue the plan administrator for its own bad faith refusal to pay for treatment. . . . .

. . .

¶11 In determining whether the plan administrator owed the insured a duty of good faith, the Tenth Circuit refused to decide the issue by simply concluding the plan administrator was a stranger to the insurance contract. Rather, the court emphasized that the analysis should focus on the factual question whether the plan administrator acted sufficiently like an insurer such that there was a 'special relationship' between the plan administrator and the insured that would give rise to the duty of good faith. . . . .

¶12 We agree with the analysis of the Tenth Circuit under the facts presented in *Wolf*. In a situation where a plan administrator performs many of the tasks of an insurance company, has a compensation package that is contingent on the approval or denial of claims, and bears some of the financial risk of loss for the claims, the administrator has a duty of good faith and fair dealing to the insured.

¶13 Applying this analysis to the facts of this case, we observe the following. Like the plan administrator in *Wolf*, MAA unquestionably performs some of the tasks of an insurance company in its claims handling process. However, in contrast to the facts in *Wolf*, MAA's compensation package was not tied to the approval or denial of claims but was instead a flat fee based on the number of participants in the Plan. Likewise, MAA did not share the risk of loss with the Plan if losses increased to a certain level, and did not underwrite the entire risk if losses got even higher. In other words, under the facts presented in this case, MAA had neither the power, the motive, nor the opportunity to act unscrupulously."

10. An Independent Adjuster Does Not Owe A Duty Of Good Faith And Fair Dealing If It Is A Stranger To The Insurance Contract And No Special Relationship Exists With Insured.

Trinity Baptist Church v. Brotherhood Mutual Insurance Services and Sooner Claims Services, Inc., 2014 OK 106, 341 P.3d 75 (12/9/14) (Commercial Property Insurance):

¶11 As this jurisdiction has embraced the implied covenant spoken to in *Gruenberg, supra*, **it is clear that the cause will not lie against a stranger to the contract.** *Timmons*, 1982 OK 97, ¶17, 653 P.2d 907 (emphasis in original).

. . .

[T]here are exceptions to the rule.

. . .

¶16 *Wolf, Wathor,* and *Badillo* all stand for the proposition that this Court will only apply the duty of good faith and fair dealing to a third party stranger to the insurance contract when the third party acts so like an insurer that it develops a special relationship with the insured, *Badillo*, 2005 OK 48, ¶5, 121 P.3d 1080, essentially giving the third party the power, motive, and opportunity to act unscrupulously. *Wathor*, 2004 OK 2, ¶13, 87 P.3d 559.

. . .

¶18 Trinity confuses the nature of the "special relationship" standard elucidated in this Court's prior cases. For a non-party to the insurance contract to be subjected to the duty of good faith and fair dealing, a special relationship must arise between it and the **insured**.

. . .

¶19 All of Trinity's allegations and the available record indicate that the scope of Sooner's responsibilities may have been enlarged with respect to what Brotherhood asked Sooner to do for it, not with regard to Sooner's relationship with Trinity.

11. Parent Company Which Handles claims Through A Corporate Division May Be Liable For Bad Faith Of Subsidiary.

Campbell v. American International Group, Inc. and AIG Europe S.A. and Muller, 1999 OK CIV APP 37, 976 P.2d 1102 (Automobile Liability Insurance):

"The record contains evidentiary materials showing that AIU North America, Inc., Personal Lines Claims - - a division of AIG - - was handling plaintiffs' claim through Cyril Bassett, Jr., the Supervisor of Personal Lines at New York Regional Claims. A letter from Bassett to plaintiffs' attorney discussed arranging an independent medical examination and stated: 'We do not have enough information to fully evaluate the case and will not make any offer at this time.' Thus, as to the bad faith claim, we again find that the evidence of record contradicts the assertion that AIG is an entity totally isolated from AIG Europe and this occurrence.

. . .

Here, the record shows that AIG, through the AIU New York facility, not only handled portions of plaintiffs' claim, it generally provided 'high level support' in claim management by 'assisting, supervising and auditing in-country claim offices.'"

12. A Debt Relief Waiver Addendum Which Has The Attributes Of A Policy Of Insurance And Meets The Statutory Definitions Is Insurance Through Which The Legal Duty Of Good Faith And Fair Dealing Exists Even Though The Product Disclaims It Is An Insurance Policy.

Embry v. Innovative Aftermarket Systems LP, Twin City Fire Insurance Company and Hartford Fire Insurance Company, 2008 OK CIV APP 92, 198 P.3d 388 (Automobile Debt Relief Waiver Addendum):

"¶23 The undisputed facts of this case show that Embry purchased and paid for a product that had for its purpose protection to him preventing him from owing a deficiency to the financing entity in the event of a total loss of his vehicle by accident or theft. The obligation to pay the deficiency is conditioned only upon the happening of the event and establishment of the 'loss,' that is, the destruction or unrecovered theft of the vehicle where the vehicle's primary insurance does not pay the balance due on the financing agreement.

¶24 This Court holds that the DRWA program product purchased and paid for by Embry constitutes a contract of insurance. [Citation omitted.] The DRWA Addendum is a contract in which, for consideration, a sum of money is to be paid upon the happening of an event or contingency and this is an insurance contract. . . .

¶25 The workings and purpose of the DRWA program product meet all elements of an insurance product as defined by the accepted definition of insurance, as well as the Oklahoma Insurance Code. [Citations omitted.] The language of the disclaimers in the DRWA addendum do not alter this conclusion, because the references to 'insurance coverage' and 'insurance policy' do not alter the purpose and function of the DRWA program product. . . .

13. A Vehicle Service Contract Is An Insurance Contract Subject To The Duty Of Good Faith And Fair Dealing.

McMullan v. Enterprise Financial Group, Inc., 2011 OK 7, 247 P.3d 1173 (Vehicle Service Contract):

"¶0 ...We hold that a vehicle service contract meets the definition of an insurance contract.

. . .

¶7 The Oklahoma Insurance Code (the Code), 36 O.S. 2001 § 101 *et seq.* defines insurance as 'a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.' Insurers are defined as 'every person engaged in the business of making contracts of insurance or indemnity.' . . .

¶8 'Indemnity' is not defined in the general provisions of the Code, but the Service Warranty Insurance Act, which is located therein, defines indemnity as undertaking repair or replacement of a consumer product. . . . This portion of the Code also redefines insurers as any property or casualty insurer duly authorized to transact business in this state and service warranty associations as any person, other than an insurer, who issues service warranties. Service warranties are contracts between a consumer and a service warranty association in which agreements to indemnify against the cost of repair or a replacement of a consumer product is undertaken. . . .

¶9 Neither the [Service Warranty Insurance] Act nor the [Insurance] Code expressly refers to service warranty agreements as insurance contracts, but the Act requires: 1) the state Insurance Commissioner to regulate both service warranty associations and insurance companies in a similar manner through licensing, collecting fees, etc.; 2) the treatment of service warranty associations as insurers for service of process purposes; and 3) to indemnify themselves of losses by either maintaining a funded reserve account or obtaining liability insurance.

. . .

¶19 Although vehicle service providers may not be subject to the exact same requirements and regulations as insurance providers, vehicle service contracts meet the definition of and are designed to function and perform as 'insurance.' The consumer pays for indemnity and pays to shift the risk for paying for high repair costs to the vehicle service provider in exchange for a pre-paid premium. Because these contracts function like insurance, their providers should be subject to the same covenants of good faith that insurers must meet."

14. Insurance Brokers, Agents And Adjusters Who Are Not Parties To The Contract Have No Liability In Bad Faith.

a. ***Cloud v. Illinois Insurance Exchange***, 701 F.Supp. 197 (W.D. Okla. 1988) (Fire Policy):

"[T]he [defendant's] involvement in the contracting process does not make it a 'risk-bearing entity.'" P. 199.

b. ***Coble v. Bowers First State Bank, and First Life Assurance Company,*** 1990 OK CIV APP 109, 809 P.2d 69; (Credit Disability Policy):

"The implied duty of good faith and fair dealing does not extend to [the bank and loan officer who acted as an insurance broker], a stranger to the insurance contract."

c. ***Brown v. State Farm Fire and Casualty Co. and JJMA Investigations***, 2002 OK CIV APP 107, 58 P.3d 217 (Homeowner's Fire Insurance):

¶9 "While it is well-settled that a non-insurer defendant, such as an adjuster or investigator, who is not a party to the insurance contract is not subject to an implied duty of good faith and fair dealing vis-a-vis the insured, see *Timmons v. Royal Globe Insurance Co.*, 982 OK 97, ¶ 17, 653 P.2d 907, 913, there are no reported decisions in Oklahoma addressing whether independent adjusters or investigators owe a duty of care to insureds, such that they may be held liable directly to insureds in negligence."

15. If An Insured May Not Sue An Agent For Bad Faith, Neither May An Assignee.

United Adjustment Services Inc. v. Professional Insurors Agency, LLC, Chubb Custom Insurance Company and Clifford J. Miller, 307 P.3d 400, 2013 OK CIV APP 67 (released for publication by Order of the Court of Civil Appeals, June 5, 2013) (Commercial Property Policy):

¶ 21 [Plaintiff] purchased the Chubb Insurance coverage through [Professional Insurers Agency LLC and Miller]. Oklahoma law clearly provides that an insured cannot bring a bad faith claim against an insurance agency or its agent because they are not parties to the insurance contract. See *Timmons v. Royal Globe Insurance Co.*, 1982 OK 97, ¶ 17, 653 P.2d 907, 912-13 (rejecting an attempt to hold an agent liable for breach of the duty of good faith and fair dealing who was not a party to the contract between insurer and insured); see also *GuideOne America Insurance Co. Inc. v. Shore Insurance Agency, Inc.*, 2011 OK CIV APP 69, ¶¶ 24, 27, 259 P.3d 864, 870-71 (rejecting an attempt to hold an independent insurance agency liable for a violation of the duty of good faith and fair dealing). If Oklahoma law precludes an insured from bringing such a claim, common sense dictates a purported assignee standing in the shoes of an insured cannot either."

16. Independent Insurance Adjuster Owes Insured A Duty To Conduct A Fair And Reasonable Investigation.

Brown v. State Farm Fire and Casualty Co. and JJMA Investigations, 2002 OK CIV APP 107, 58 P.3d 217 (Homeowner's Fire Insurance):

¶19 "[I]ndependent insurance investigators 'owe a duty to the insured as well as to the insurer to conduct a fair and reasonable investigation of an insurance claim.'"

17. Independent Adjuster Owes No Duty Of Care To Insured For Negligence Regardless Of Foreseeability

Trinity Baptist Church v. Brotherhood Mutual Insurance Services and Sooner Claims Services, Inc., 2014 OK 106, 341 P.3d 75 (12/9/14) (Commercial Property Insurance):

¶24 In [*Brown v. State Farm*, 2002 OK CIV APP 107, 58 P.3d 217 (cert. denied Oct. 15, 2002)] the Court of Civil Appeals adopted the view of a minority of courts in other states that independent insurance investigators owe a duty to the insured as well as the insurer to conduct a fair and reasonable investigation of an insurance claim.

. . .

¶26 Sooner encourages this Court to adopt the view endorsed by the majority of other states that have considered the issue, as well as by some federal district courts in Oklahoma. In the unreported case *Wallace v. Allstate Insurance Co.*, No. CIV-12-0310-HE, 2012 WL 2060664 (W.D. Okla. June 7, 2012), the United States District Court for the Western District of Oklahoma determined that under Oklahoma law an independent insurance adjuster hired by an insurer to investigate a claim does not owe a duty to the insured to conduct a fair and reasonable investigation.

¶27 The court in *Wallace* noted that the decision of this Court relied upon in *Brown* concerned an architect, bond counsel, and accounting firm, all of whom were highly skilled professionals who could reasonably expect third parties to rely upon their work. *Wallace*, 2012 WL 2060664, *1. The *Wallace* court correctly noted that different circumstances apply where insurance adjusters are concerned, stating:

> [i]n the context of an insurance claim, it is "[t]he insurer [that] contractually controls the responsibilities of its adjuster and retains the ultimate power to deny coverage or pay a claim. Subjecting adjusters to potential tort liability from insureds could create conflicting loyalties with respect to the adjuster's contractual obligations, given that insureds and insurers often disagree on the extent of coverage or the amount of damages." *Hamill v. Pawtucket Mutual Insurance Co.* [179 Vt. 250], 892 A.2d 226, 257 [231] (Vt. 2005) (internal citation omitted).
>
> *Wallace*, 2012 WL 2060664, *2.

¶28 While the decisions of this Court relied upon by the Court of Civil Appeals in *Brown* correctly indicate that this Court does not consider lack of contractual privity a bar to the existence of a legal duty for purposes of negligence, the *Wallace* court is correct that public policy and other factors besides foreseeability counsel against imposing a legal duty to the insured with regards to negligence.

. . .

¶30 Even if harm to the insured through an adjuster's negligence might be foreseeable to the adjuster, from a policy standpoint it makes little sense to hold that the adjuster has an independent duty when the insurer itself is subject to liability for the adjuster's mishandling of claims in actions alleging breach of contract and bad faith. The special relationship between the insurer and insured, and the implied duty of good faith and fair dealing on the part of the insurer, represents a unique factual departure from the decisions of this Court relied upon by the Court of Civil Appeals in *Brown*, discussed above. If the insurer mishandles a claim due to the actions of its independent adjuster, the insured may be entitled to recover the compensatory damages for breach of contract, or damages in tort, if the insurer's actions rise to the level of bad faith.

¶31 The existence of a separate legal duty on the part of the adjuster in these circumstances would allow for potential double recovery, permitting the insured to recover in tort both for breach of contract or breach of the duty of good faith and fair dealing by the insurer – caused by an adjuster's negligent conduct – and from the adjuster for the same conduct. In the words of the Supreme Court of Vermont, in *Hamill*: "In most cases, imposing tort liability on independent adjusters would create a redundancy unjustified by the inevitable costs that would eventually be passed on to insureds."

18. An Insurance Company May Sue Its Agent For Statutory Contribution And Indemnity For Negligently Causing Bad Faith To An Insured.

North American Specialty Insurance Company vs. Britt Paulk Insurance Agency, et al., 511 F.Supp.2d 1091 (E.D. Okla.) (09/14/07) (Commercial Property Coverage):

"The Tenth Circuit has held that an insurer can recover in negligence from the agent for amounts that it paid to settle the insured's bad faith claim. In such a case, the insurer must prove the agent was responsible for the insured's bad faith claim. [Citation omitted.] An agent in the discharge of his duties as such must exercise ordinary care, and for negligence in failing to do so he will be liable to his principal." [Citations omitted.] P. 1096.

. . .

"The Court finds that although NAS' allegations against Paulk are based on negligence, not insurance bad faith, Section 832 does not require the party seeking contribution to be liable under the same legal theory as the party from whom they are seeking contribution. According to Section 832, an action for contribution lies '[w]hen two or more persons become jointly or severally liable **in tort** for the same injury to person or property . . . .' (Emphasis added by the Court.) In *In Re Jones*, 804 F.2d 1133, 1142 (10th Cir. 1986), the Court held that Oklahoma's contribution statute does not require that multiple tortfeasors be liable under the same legal theory. . . ." P. 1097.

. . .

"Paulk also emphasizes . . . that Paulk cannot be required to indemnify NAS for bad faith damages because there was no privity of contract, i.e., Paulk was not a party to the contract between NAS and the McDonalds. . . . [P]roof of the agent's 'active fault resulting in the insurer's liability to the plaintiff insured,' may entitle the insurer to indemnity. *In Re Cooper Manufacturing Corp.*, 182 F.3d 931 (10th Cir. 1999). Where, as here, an insured must prove an agent's acts directly caused its liability to its insured, where active fault on the part of the agent is required, an indemnity action may lie." P. 1098.

19. An Underwriting General Agent and its Limited Agent Who Causes a Bad Faith Claim Is Liable to the Insurer in Negligence, Breach of Contract and Contractual Indemnification.

North American Specialty Insurance Company v. Britt Paulk Insurance Agency, 579 F.3d 1106, (C.A. 10th Okla., August 25, 2009) (Commercial Property Coverage):

North American contends that three acts or omissions by Britt Paulk caused settlement of the bad faith claim: (1) Britt Paulk allowed the creation of a coverage opinion regarding the McDonald's property, (2) it allowed that opinion to be communicated to the McDonalds, and (3) it failed to notify North American of the McDonalds' continued efforts to make a claim. P. 1111.

. . .

The terms of Britt Paulk's agreement with North American provide that Britt Paulk must "give [North American] prompt written notice of *any* claim, demand, action, suit or proceeding raised, brought, threatened, made, or commenced against [North American]." (Emphasis that of the Court.) Based on that language Britt Paulk was required to notify North American of *any* demand made by the McDonalds, not just "new" ones. North American presented a bounty of evidence to support the jury's finding Britt Paulk's acts and omissions caused North American to settle the McDonalds' lawsuit. P. 1111.

20. An Insurer Has No Right Of Contribution Against An Independent Soliciting Agent On Any Breach Of Contract Or Bad Faith Theory.

GuideOne America Insurance Company, Inc., et al. v. Shore Insurance Agency, Inc., 2011 OK CIV APP 69, 259 P.3d 864 (released for publication 02/10/11, cert. denied 05/23/11) (Underinsured Motorist Coverage):

"¶23 GuideOne's counsel seems to assert that Agency's complain-of conduct sounds in negligence, not in bad faith. To the extent GuideOne is arguing Agency's conduct toward Roberts violated the duty of good faith and fair dealing, we agree with Agency that there can be no right to contribution based on Agency's purported violation of this duty.

¶24 "'The special relationship [between insurer and its insured] creates a nondelegable duty of good faith and fair dealing on the part of the insurer.' [Citation omitted.] This duty is nondelegable so that insurers cannot escape liability by delegating tasks to third parties. *Barnes v. Oklahoma Farm Bureau Mut. Ins. Co.*, 2000 OK 55, Note 5, 11 P.3d 162 (holding that an insurer cannot 'avoid l]iability for breach of the duty of good faith and fair dealing by delegating its responsibility to an independent contractor'); see also *Timmons v. Royal Globe Insurance Co.* 1982 OK 97, ¶ 17, 653 P.2d 907, 912-13 (rejecting an attempt to hold an agent liable for breach of the duty of good faith and fair dealing who was not a party to the contract between insurer and insured)."

"¶27 Agency has no liability to [insured] on any breach of contract or bad faith theory; only GuideOne can be liable to [insured] on these theories. Joint tortfeasor contribution does not lie for joint breach of contract liability, and Agency was not a party to the contract of insurance on which [insured] based her federal claims."

21. Insurance Agent Cannot Be Liable To The Insurer For Contribution For Bad Faith Based On Negligence Of The Agent.

GuideOne America Insurance Company, Inc., et al. v. Shore Insurance Agency, Inc., 2011 OK CIV APP 69, 259 P.3d 864 (released for publication 02/10/11, cert. denied 05/23/11) (Underinsured Motorist Coverage):

"¶28 We reject GuideOne's argument that a claim of simple negligence under these circumstances gives rise to a right of contribution. Clearly, GuideOne could not be liable to its insured for bad faith based only on negligent conduct in its handling of an insured's claim. [Citing *Badillo v. Mid Century Insurance Company*, 2005 OK 48, ¶ 28, 121 P.3d 1080, 1094.]

¶ 29 To hold that Agency, on the basis of alleged negligence only, could be subject to liability for a portion of [insured's] breach of contract/bad faith damages paid by GuideOne is to hold Agency to a higher standard than that required by Oklahoma law to impose liability on GuideOne. On the record before us, we cannot conclude that Agency and GuideOne have become or could become 'jointly or severally liable in tort for the same injury' to [insured], thus giving rise to a right of contribution against Agency in favor of GuideOne pursuant to 12 O.S. 2001 § 832(A)."

22. An Insurer Has No Contractual Or Implied Indemnity Right Where There Is No Contract Provision Setting Up The Right And Insurer's Acts Caused The Loss.

GuideOne America Insurance Company, Inc., et al. v. Shore Insurance Agency, Inc., 2011 OK CIV APP 69, 259 P.3d 864 (released for publication 02/10/11, cert. denied 05/23/11) (Underinsured Motorist Coverage):

"¶10 This [contractual indemnity] provision clearly states that GuideOne has agreed to indemnify and hold Agency harmless against liability for damage arising out of any act or omission committed by GuideOne, unless the Agent caused the error. There is no reverse provision by which Agency agreed to indemnify GuideOne. This is GuideOne's independent agent contract, and GuideOne did not include language imposing a duty on Agency to indemnify it under circumstances such as the ones in question here. As a result, under a plain reading of the contract, GuideOne is not entitled to recover from Agency based on a contractual indemnity theory.

. . .

¶12 No right of indemnity exists between joint tortfeasors, however. . . . 'The right exists when one who is only constructively liable to the injured party and is in no manner responsible for the harm is compelled to pay damages for the tortious act of another.' (Emphasis added.)

. . .

¶ 17 We find the undisputed evidence establishes that [insured's] injuries or damages in her federal lawsuit were caused by GuideOne's own acts or omissions in handling [insured's] claim, conduct separate and apart from any alleged acts or omissions of Agency. It is not disputed that GuideOne was at fault, and no recovery under an implied indemnity theory will therefore lie in GuideOne's favor."

23. Selling Agent Has Duty Of Good Faith.

Swickey v. Silvey Companies and Insurance Resource Agency, Inc.: 1999 OK CIV APP 48, ¶ 13, 979 P.2d 266 (Uninsured Motorist Coverage):

"An agent has the duty to act in good faith and use reasonable care, skill and diligence in the procurement of insurance and an agent is liable to the insured if, by the agent's fault, insurance is not procured as promised and the insured suffers a loss."

24. Though Insurance Agent Owes Duty To Act In Good Faith In Procuring Coverage, Insured Must Disclose Needs.

Rotan v. Farmers Insurance Group of Companies, 2004 OK CIV APP 11, 83 P.3d 894 (Automobile Insurance Policy):

"¶3 To discharge their duty to act in good faith and use reasonable care, skill, and diligence in the procurement of insurance, including the use of their specialized knowledge about the terms and conditions of insurance policies, insurance agents *need only offer coverage mandated by law and coverage for needs that are disclosed by the insureds*, and this duty is not expanded by general requests for 'full coverage' or 'adequate protection'. In the instant case, the insureds did not know, and hence did not disclose, that the fair market value of the insured vehicle was less than the amount owed on the vehicle. Without being provided such information, the scope of the agent's duty to use reasonable care and skill, or diligence in the procurement of insurance did not extend to providing residual debt coverage."

25. Insurer Owes No Duty To Explain A Policy Or Advise An Insured With Respect To Insurance Needs.

Vickers v. Progressive Northern Insurance Company, 353 F. Supp. 3rd 1153 (N.D. Okla. 2018) (Uninsured/Underinsured Motorist Coverage):

"Similarly, to demonstrate constructive fraud, a plaintiff must show a breach of a legal duty or equitable duty to the detriment of another, which does not necessarily involve any moral guilt, intent to deceive or actual dishonesty of purpose." *Id.* However, an insurer owes no duty to explain a policy to an insured; rather an insured is chargeable with the knowledge of the terms and legal effect of his insurance policy. *National Fire Insurance Co. v. McCoy*, 1951 OK 379, 205 Okla. 511, 239 P.2d. 428, 430. Additionally, insurance companies and their agents have no duty to advise an insured with respect to his insurance needs. *Rotan v. Farmers Ins. Group of Cos., Inc.*, 2004 OK CIV APP 11, 83 P.3d. 894, 895, quoting *Mueggenborg v. Ellis*, 2002 OK CIV APP 88, 55 P.3d. 452, 453.

… However, Plaintiff has put forward neither undisputed facts nor evidence to support these allegations. Accordingly, Plaintiff cannot show that Defendant had a duty to describe Plaintiff's coverage under the policy, to advise Plaintiff's father as to which policy he should purchase, or to assist Plaintiff to process a claim for benefits, and none of Plaintiff's allegations are sufficient for Defendant's conduct to be reasonably perceived as tortious. P. 1164

26. Where There Are Separate Verdicts Against The Insurer And The Selling Agent For Separate Amounts, The Acts Of A Selling Agent May Not Make The Insurer Vicariously Liable For Punitive Damages.

Cox, et al., v. Kansas City Life Insurance Company, et al., 1997 OK 122, 957 P.2d 1181 (Life Insurance Policy):

"Oklahoma law allows a plaintiff to obtain separate judgments against a principal and agent, although the principal's liability is based solely on the agent's acts. Liability, therefore, may not be imposed against the principle, on a judgment against the agent alone. . . .

Here . . ., the jury returned a verdict for separate amounts against Kansas City Life and Stearman. The verdict imposed individual, not joint, liability. There were two verdicts, one against Kansas City Life, and the other against Stearman. It is this critical distinction that defeats the Pelter's claim that Kansas City Life should be held liable on the Stearman judgment. . . .

The result is not changed by the fact that Kansas City Life's liability was based on respondeat superior."

27. No Garnishment Action Against A Liability Carrier For Common Law Bad Faith.

Fidelity & Casualty Company of New York v. Southall, 1967 OK 235, 435 P.2d 119 (Automobile Liability Policy), the Court quotes 7 Am.Jur.2d, "Automobile Insurance," Section 159, as follows:

"[I]t has been held . . . that a garnishment proceeding by judgment creditors of the insured will not lie against the insurer on the ground that it was negligent or acted in bad faith in failing to settle the claims against the insured for the reasons that the insured's cause of action sounds in tort and is therefore an unliquidated tort claim and that it is not a chose in action subject to garnishment." P. 122.

28. For a Garnishment of an Excess Verdict There must First Be Some Established Liability of the Insurer for the Excess Judgment.

Colony Insurance Company v. Burke Special Administrator of the Estate of Aurora Espinal-Cruz and Deanza Jones, 698 F.3d 1222, (10th Cir. Okla.) (10/17/12) (Foster Care Liability Insurance):

"In a garnishment proceeding 'the judgment creditor stands in the shoes of the judgment debtor to enforce a *liability owed to the latter by a third party. Culie v. Arnett*, 765 P.2d 1203, 1205 (Okla. 1988) (emphasis added). The judgment creditor 'may claim no greater rights against the garnishee than the [judgment debtor] himself possesses.' *Id*. In other words, a garnishee must have some established liability to the judgment debtor before the judgment creditor can enforce that liability.

But Colony was never liable to Jones for more than the policy limits. Although an insurance contract by its terms limits the insurer's liability to the stated policy limits, 'an insurer that breaches its duty to consider settlement offers in good faith may be held liable for the entire judgment obtained against the insured, regardless of policy limitations.' *Magnum Foods, Inc. v. Continental Casualty Co.*, 36 F.3d 1491, 1504 (10th Cir. 1994) (citing *American Fidelity and Casualty Co. v. L. C. Jones Trucking*, 321 P.2d 685, 687 (Okla. 1957), overruled on other grounds by *Badillo v. MidCentury Insurance Co.*, 121 P.3d 1080, 1093-94, 1094 and n. 7 (Okla. 2005)). Under this rule, however, an insurer's liability for a judgment in excess of the policy limits is premised on a finding of bad faith. *11.

. . .

Here, there was never any such finding of bad faith, nor does the record support any such conclusion. Although Jones asserted a bad-faith counterclaim against Colony, no Court or jury ever found Colony had acted in bad faith, and indeed Jones dismissed the bad-faith claim, with prejudice, as part of her settlement with Colony. Thus, notwithstanding the fact that Colony ultimately settled with Jones for an amount far in excess of the policy limits, Colony was never *legally liable* to pay Jones any more than the policy limits. The policy limits, therefore, were the only liability the Estate was entitled to enforce against Colony through garnishment. See *Culie*, 765 P.2d at 1205. The Estate received the policy limits and more. The Estate has no more remaining garnishment claim. *12

29. No Standing To Sue Third-Party Liability Insurance Carrier Who Breaches Settlement Agreement.

McWhirter v. Fire Insurance Exchange, Inc. d/b/a Farmers Insurance Group of Companies, 1995 OK 93, 878 P.2d 1056 (Homeowner's Liability Policy):

"In the instant case, the McWhirters' theories of tortious breach of contract, misrepresentation, negligence and intentional infliction of emotional distress are claims emanating from a claim of bad faith dealings that would not have arisen *but for the existence of the insurance contract with the Defendants*. The McWhirters, however, attempt to create a contractual or tort basis out of the facts of the settlement negotiations on which to support their claims. This argument has no merit."

30. No Private Right Of Action Under The Claims Acts.

a. ***Walker v. Chouteau Lime Company and Shelter Insurance Company,*** 1993 OK 35, 849 P.2d 1085 (Automobile Liability Policy):

"Based on this foregoing analysis [of *Holbert v. Echeverria*], we find no private right of action exists under the Act.

The Act does not serve to benefit any special class, indeed from its face, it appears to benefit the public at large. Considering the plain meaning of the statutory language, we find it neither specifically nor otherwise gives any indication the legislature intended to allow a private remedy.

Lastly, we do not find a private remedy consistent with the general scheme of the Act. The purpose of the Act is to prevent unfair business practices. To accomplish this, the legislature gave the insurance commissioner the power to regular through its 'cease and desist' orders and power to revoke or suspend an insurance industry's license to do business.

If the legislature intended to provide for a private right of action, we have no doubt that the legislature knew how to do so. And to create such a right is up to the legislature, not this court."

Failure to Comply with the Unfair Claims Settlement Practice Act Advance Notice of the Statute of Limitations Does Not Apply to Bad Faith Claims.

b. ***Trinity Baptist Church v. GuideOne Elite Insurance Company***, 654 F.Supp.2d. 1316 (August 28, 2009, W.D. Okla.) (Commercial Property Coverage):

"A: Timeliness Issues
2. Statutory Notice

"[T]he provisions of the [Unfair Claims Settlement Practices] Act apply to "claims arising under an insurance policy or insurance contract issued by an insurer." *Id.* at § 1250.3. The Court finds no indication in the Act that it was intended to apply to tort claims or rights of recovery that may exist outside the insurance policy or contract.

Therefore, because the statute does not apply to Plaintiff's bad faith claim, Defendant's failure to give a notice otherwise required by the statute provides no basis for tolling the limitations period or precluding Defendant from asserting a limitations defense to a bad faith claim." P. 1322.

31. Though There Is No Private Right Of Action Under The Unfair Claims Settlement Practice Act, Conduct Which Violates The Act Can Be Considered Bad Faith.

Beers v. Hillory and Northland Insurance Company, 2010 OK CIV APP 99, 241 P.3d 285 (Underinsured Motorist Coverage):

"¶ 29 [I]t is well settled, however, that the UCSPA does not provide the insured with a private right of action against the insurer. *McWhirter v. Fire Ins. Exch., Inc.*, 1994 OK 93, ¶5, 78 P.2d 1056, 1057; *Walker v. Chouteau Lime Co.*, 1993 OK 35, ¶7, 849 P.2d 1085, 1087. Nonetheless:

> The bad-faith action may also be based upon an insurer's failure to perform an act that is derivative or secondary in nature; that is, an insurer's duty that owes its existence to a pre-existing implied contractual, or statutory, or

> status-based duty arising from the insurer-insured relationship. For example, a duty to timely and properly investigate an insurance claim is intrinsic to an insurer's contractual duty to timely pay a valid claim. Similarly, bad-faith actions have been based upon an insurer's failure to follow judicial construction of insurance contracts or available applicable law, as well as upon duties that are necessary for an insurer's timely determination of a claim.

Brown v. Patel, 2007 OK 16, ¶ 11, 157 P.3d 117, 122 (footnotes omitted).

Therefore, the USPCA can provide the district court with guidance in determining whether particular conduct on the part of an insurer is unreasonable and sufficient to constitute a basis for a bad faith claim."

32. The Unfair Claims Settlement Practice Act Does Not Establish Standards of Conduct For Insurer.

Aduddell Lincoln Plaza Hotel d/b/a Renaissance Center LLC v. Certain Underwriters at Lloyd's of London, 2015 OK CIV APP 34, 348 P.3d 216 (10/6/14, rehearing denied 11/25/14, cert. dismissed 4/1/15, mandate issued 4/15/15) (Commercial Property Insurance):

¶24 Jury Instruction No. 14, entitled "Unfair Claims Settlement Practices Act – Standard of Care" is contrary to law and prejudicial. The Unfair Claims Settlement Practices Act (Act), 36 O.S. 2011 §§ 1250.1-1250.17, does not establish standards of care or standards of conduct for measuring whether an insurer has violated its duty of good faith and fair dealing.

. . .

¶25 In order to be an unfair practice, the breach must be committed (1) flagrantly and in conscious disregard of the Act, or (2) with such frequency as to constitute a business practice. § 1250.5 and § 1250.3. This statutory condition was not included in Instruction No. 14.

. . .

¶26 Hotel argues that Instruction No. 14 permissibly advised the jury that it could consider the prescribed violations, together with all other facts and circumstances in evidence, in determining bad faith, Hotel relies on *Beers v. Hillory*, 2010 OK CIV APP 99, 241 P.3d 285. . . . The Unfair Claims Settlement Practices Act may provide guidance to a Court in determining whether to grant summary judgment, but it does not function as an appropriate guide for a jury to determine bad faith. (¶26.)

33. Where Insured Knowingly Allows Policy To Expire, The Duty Of Good Faith And Fair Dealing Also Expires.

Farmers Insurance Company, Inc. v. Smith, 1998 OK CIV APP 28, 957 P.2d 125 (Fire Policy):

"In the present case, the insurance contract included the standard loss payable

clause, and the Smiths' insurance coverage indisputably expired prior to the fire due to the Smiths' non-payment of the premium, ending the relationship between the Smiths and Farmers.

. . .

The record reflects notices sent by Farmers advising the Smiths in November that the premium was due December 26, 1990, and further notices of expiration sent to the Smiths in January, 1991, prior to the fire. However, the record reflects the Smiths failed to adduce *facts* that they were unaware that the premium was due or that they timely paid such premium; that is, facts sufficient to justify trial on the issue of whether the insurance policy was in effect at the time of the fire."

34. An Injured Member Of The Public Has No Standing To Sue A Public Liability Insurer In Bad Faith.

Hoar v. Aetna Casualty And Surety Company, 1998 OK 95, 968 P.2d 1219 (Public Liability Policy):

"An injured member of the public is not a statutory third-party beneficiary to a public liability insurance contract under the Oklahoma Competitive Bidding Act.

. . .

We affirm once more that absent a statutory or contractual relationship an injured party may not maintain a bad faith action against a public liability insurer."

35. A Performance Bond Surety Owes The Duty Of Good Faith And Fair Dealing To The Third Party Beneficiary.

Worldlogics Corporation v. Chatham Reinsurance Corporation, 2005 OK Civ App 16, 108 P.3d 5 (Performance Surety Bond):

¶9 "Worldlogics was a party to the performance bond, for which it paid, and the bond's express purpose was to protect it as the identified obligee. Thus, Worldlogics and [surety] had a contractual relationship that gave rise to a duty of good faith and fair dealing on [surety's] part."

. . .

¶12 Oklahoma law, however, has consistently held that the obligations of a surety should be construed under the laws applicable to other policies of insurance. *Durant v. Changing, Inc.*, 1995 OK CIV APP 20, ¶12, 891 P2d 628, 631. Indeed, Oklahoma's Insurance Code includes a suretyship in its definition of 'insurance policy or insurance contract'. 36 O.S. Supp. 2003 § 1250.2(5); see also 36 O.S. 2001 § 6103.2(C). The Code also provides that it is an unfair claims settlement practice for a surety to fail to promptly investigate a claim or not attempt 'in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear.' 36 O.S. 2001 § 1250.5(3)-(4)."

36. A Self-Insurance Group of Governmental Entities Is Immune From Suit for Bad Faith.

Board of County Commissioners v. Association of County Commissioners of Oklahoma Self-Insurance Group, 2014 OK 87, 339 P.3d 866 (General Liability Insurance):

6. [A] governmental's entity's cooperative insurance plan, which pools self-insured reserves, claims and losses of its member municipalities or counties, shares little in common with commercial enterprises that sell insurance for a profit to their shareholders. The relationship between these governmental entities is contractual in nature. The contracting parties have substantially more freedom to contract than an individual consumer dealing with the a commercial for profit insurance enterprise. All the contracting parties in a governmental cooperative insurance plan have equal interest in enforcing the contracts protecting the pooling of their resources.

7. The fact that OMAG was created to operate pursuant to 51 O.S. 2011, § 167(C), and ACCO-SIG operates pursuant to 51 O.S. 2011, § 169(C), makes no substantial difference because both statutes contain this sentence: "The pooling of self-insured reserves, claims or losses among governments as authorized in this act shall not be construed to be transacting insurance nor otherwise subject to the provisions of the laws of this state regulating insurance or insurance companies."

. . .

9. We hold that ACCO-SIG, like OMAG, is not an insurer for all purposes. Although it clearly insures, ACCO-SIG is not subject to the general rules of liability imposed on all insurers.

. . .

12. The facts as revealed to this Court support a legal conclusion that the insurance contracts from ACCO-SIG are executed in the interest of and for the benefit of the member counties, not for private citizens, not for private companies operating for profit, but solely for member counties. ACCO-SIG's sole reason for existence is to provide property and liability plans for its member counties. ACCO-SIG fits the definition of "agency" under the GTCA and therefore falls within its sovereign immunity protection.

. . .

15. Therefore, ACCO-SIG is immune from liability for the tort of bad faith conduct in payment of claims because its employees are not acting within the scope of their employment if they are acting in bad faith. Scope of employment means: "performance by an employee acting in good faith within the duties of the employee's office", 51 O.S. Supp. 2014, § 152(12). See *Fehring v. State Insurance Fund*, 2001 OK 11, 19 P.3d 276. Accordingly, the trial court erred in denying ACCO-SIG's motion to dismiss Delaware County's bad faith claim.

37. No Affirmative Duty On Title Insurer.

OPY I, L.L.C. v. First American Title Insurance Company Inc. v. Yavuz and 61MM, Ltd., 2015 OK CIV APP 49, 350 P.3d 163 (released for publication by Order of the Court of Civil Appeals 12/19/14, cert. denied 4/27/15) (Title Insurance Policy):

¶7 Title insurance is "ordinarily considered a contract of indemnity." Steven Plitt, *et al.*, 11 COUCH ON INSURANCE, § 159:8 (3d. 2013). "The importance of the contract not being one of guaranty is primarily that the insurer's liability to pay monetary

compensation under the policy does not arise immediately upon the existence of a covered defect being proved." *Id.* at § 159:9. Rather, the insurer has a "range of options by which it may fulfill its obligations under the policy" including "paying the amount of the insured's loss, paying the face amount of the policy . . ., successfully defending the insured against an adverse claim, instituting affirmative litigation to clear the title" or settling with adverse title claimants. *Id.* The unique nature of title insurance makes it somewhat different from other breach of contract disputes.

. . .

¶12 Here, the terms of the policy are not ambiguous and clearly establish Defendant has the right, but not the duty, to take whatever affirmative action it may deem necessary to establish Plaintiff's title.

. . .

¶14 Defendant here had not refused to take any action while also denying it was liable under the policy. Rather, Defendant, while recognizing its option to pursue affirmative action, chose to wait until the conclusion of the Yavuz litigation. This course of action was permitted by the policy, which stated, in the event of litigation, Defendant's liability under the policy did not arise until "there ha[d] been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title as insured." This course of action was also supported by the fact title insurance is a policy of indemnity, not guaranty, which gives the insurer options other than to pay upon the showing of an adverse claim insured by the policy. . . .

¶15 We hold, therefore, under the particular facts and circumstances presented by this case, the uniform ALTA policy language, specifically paragraph 4(b), does not impose a duty on the insurer to take affirmative action to confirm the title of an insured. . . . Even if the expungement failed to eliminate any cloud on the title created by the Yavuz litigation, the insurer still was not under a duty to take affirmative action and would not have been required to perform under the policy, if at all, until the conclusion of the Yavuz litigation.

D. FEDERAL PREEMPTION

1. No State Law Claims Of Bad Faith On ERISA Qualified Plans.

Wallace v. Transport Life Insurance Company and Oklahoma Farmers Union Mutual Insurance Company, 1992 OK CIV APP 20, 841 P.2d 613 (Group Disability Policy):

"The state courts have been granted concurrent jurisdiction with federal courts to determine and enforce rights under an insurance plan covered by ERISA. See 29 U.S.C. § 1132(a)(1)(b). . . .

Rule 72 [of the Minimum Standards and Benefits for Accident and Health Insurance of the State Insurance Commissioner] is not a State law as contemplated by the exemption in [29 U.S.C.] § 1003(b)(3). It is inapplicable to the Plan. By its own terms, it applies only to an individual policy. . . . The Plan is a group disability policy.

The trial court correctly held: (1) the Plan was within the scope of ERISA; (2)

Oklahoma has no applicable regulatory requirements or statutes pertaining to the Plan other than those dealing with recovery of benefits, enforcing rights and clarifying future benefits; and, (3) State laws to the contrary must yield to the federal."

2. ERISA Can Kill And Leave You Without A Remedy.

Cannon v. Group Health Service of Oklahoma Inc., 77 F.3d 1270 (10th Cir. Okla. 1996) (Health Insurance Policy):

"Although moved by the tragic circumstances of this case and the seemingly needless loss of life that resulted, we conclude the law gives us no choice but to affirm. . . .

[The trial court] carefully considered plaintiff's argument but stands unpersuaded that he can sue . . . to recover anything other than payment for medical expenses actually incurred, when that is the benefit provided by the plan. Plaintiff cites no legal authority for the proposition that a person may sue to recover the value of a service that would have been a benefit of the plan if the plan's terms had been satisfied."

3. No Preemption Of A Health Claim Under Federal Employees Health Benefit Act (FEHB).

Kincade v. Group Health Services of Oklahoma, Inc. dba Blue Cross and Blue Shield of Oklahoma, 1997 OK 88, 945 P.2d 485 (Health Insurance Benefits):

"[S]tate remedies may co-exist with a scheme of federal remedies. Accordingly, we determine that an action for damages caused by a bad faith breach of contract is not clearly preempted by the provisions of the FEHB and the action may be maintained in the state district court against a FEHB insurance carrier."

4. A Government Plan Is Not Preempted By ERISA.

McGraw v. The Prudential Insurance Company of America, 137 F.3d 1253 (10th Cir. Okla. 1998) (Medical Insurance Benefits):

"[C]ongress did not include public or governmental benefit plans within its reach believing, in part, state and local governments' ability to tax, would enable them to operate employee benefit systems that would 'avoid the pitfalls of under funding.'

[E]MSA did not establish the plan or directly employ Mr. McGraw. . . .

Thus, we hold Ms. McGraw's Plan is not a governmental plan. ERISA then preempts the application of state law and provides 'a panoply of remedial devices . . . .'"

5. To Qualify For ERISA "Governmental Plan" Exemption The Plan Must Either Be Established Or Maintained By A Governmental Entity.

Graham v. Hartford Life and Accident Insurance Company, 589 F.3d 1345 (10th Cir., 2009) (Long-Term Disability Policy):

"Title I of ERISA defines a 'governmental plan' as 'a plan established or maintained for its employees by the Government of the United States by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.' [Citation omitted.] ERISA's definition of a 'governmental plan' 'focuses on the public entity . . . that 'established or maintained' the plan. ERISA deems these *publicly-spawned* plans to be exempt.' *McGraw v. Prudential Insurance Co. of America*, 137 F.3d 1253, 1257 (10th Cir. 1998) (emphasis added). The definition of a 'governmental plan' also creates a disjunctive standard: 'a plan need only be established *or* maintained by a governmental entity in order to constitute a governmental plan.' [Citation omitted.] . . . .

"It is apparent that the USPS did not 'establish' the NRLCA disability benefits plan. The plan was also not the product of collective bargaining; instead, the NRLCA contracted separately with Hartford to provide disability benefits." *Id.* at 1353. . . . Conceding that the USPS did not 'establish' the plan, Graham instead argues that the USPS 'maintains' the plan because it plays an integral part of the [p]lan's operation." *Id.* at 1354.

"Upon review of the plan documentation, we find no support for the view that USPS 'maintains' the plan. While the certificate of insurance designated the NRLCA as the policyholder and Hartford as the insurer, it only named the USPS as the employer. The explanatory brochure accompanying the NRLCA invitation letter indicated that the plan was '[a]rranged and [a]dministered by the 'NRLCA's Group Insurance Department.' In fact, the USPS's only involvement with the administration of the disability benefits plan is to make payroll deductions and to release to Hartford any information necessary for enrollment in and administration of the plan. This involvement is minor, almost clerical, and it is insufficient to support the conclusion that the USPS 'maintains' the plan." *Id.* at 1354.

6. A State Employee May Maintain A Cause Of Action For Bad Faith Against A Health Maintenance Organization Where Paid On The Claim.

Walker v. Group Health Services Inc. and GHS Health Maintenance Organization, Inc., 2001 OK 2, 37 P.3d 749 (Health and HMO Insurance):

"Consistent with *Cannon v. Lane*, 1993 OK 40, ¶ 14, 867 P.2d 1235, we hold that a state employee may sue a health maintenance organization for bad faith breach of the insurance contract. Therefore, claims for bad faith are not subject to administrative exhaustion requirements. Although matters involving the allowance and payment of claims, eligibility for coverage and provision of services are within the initial consideration of the Grievance Panel pursuant to 74 O.S. Supp. 1999 § 1303(6) and OAC 360:1-5-1 (1997), its province does not extend to issues concerning bad faith breach of an insurance contract. Under the facts presented, where the insured has received payment for contested medical services, we determine that the exhaustion requirements of 74 O.S. Supp. 1999 § 1306(6) do not apply to an action for breach of good faith. ¶ 1.

. . .

Our determination that exhaustion is excused in the instant case should not be read to undermine the primary authority of the Grievance Panel to address causes when payment for medical expenses remain at issue. In such situations, the holding of *Lincoln Income Life Insurance Co. v. Wood,* 1976 OK 140, ¶6, 556 P.2d 602, applies – state employees with outstanding medical claims must exhaust the applicable administrative remedies before proceeding in district court. Nevertheless, exhaustion of administrative procedures is inapplicable here because: 1) the authorized administrative remedy is inadequate to vindicate a bad faith claim for breach of the insurance contract; 2) exhaustion of administrative remedies is a remedial rather than a jurisdictional concept; and 3) resort to the administrative remedy was rendered useless by the voluntary payment of insurance proceeds settling the amount in controversy." ¶42.

7. A State Employee Who Is Not Informed Of Review Or Appeal Rights Does Not Have To Exhaust Administrative Remedies And May File A Bad Faith Action Even Though He Is Unpaid.

Davis v. GHS Health Maintenance Organization, Inc. d/b/a BlueLincs, Inc., 2001 OK 3, 22 P.3d 1204 (Health and HMO Insurance):

"Title 74 O.S. Supp. 1992 § 1372 and OAC 87:1-5-10 (1994) require HMO's denying claims to advise insureds of the right of appeal and the name of the entity from whom review may be requested. Because the HMO did not inform the insured of review or appeal rights in its denial letter, we hold that, under the unique facts of this case, an insured who has not pursued administrative remedies, may file a bad faith action in district court. ¶ 1.

. . .

However, neither the statute nor the rule authorized the Benefits Council to address bad faith claims or to award damages appropriate to tort actions. Therefore, we hold that bad faith claims do not fall within the province of the administrative review process encompassed by the Oklahoma State Employees Benefits Act (Benefits Act), 74 O.S. Supp. 1992 § 1362, et seq. Further, under the unique facts of this case – where the insurer has failed to advise its insureds of the right of appeal and the name of the entity from whom review may be requested – , we determine that failure to exhaust administrative remedies does not bar an insured from filing a bad faith action in district court. ¶ 28.

Our determination that exhaustion is excused in the instant cause is not intended to undermine the primary authority of the Benefits Council to address issues involving payment for medical expenses. Rather, it is limited to the facts presented." ¶ 29.

8. Oklahoma's Bad Faith Law Does Not Regulate Insurance Within The Meaning Of ERISA.

Gaylor v. John Hancock Mutual Life Insurance Company, 112 F.3d 460 (10th Cir. 1997) (Long Term Disability):

"Oklahoma's bad faith law does not regulate the spreading of policyholder risk . . .

A law which defines the manner in which insurance claims should be processed 'declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain [consequential and] punitive damages.' *Pilot Life*, 481 U.S. at 51. Such a law thus does not effect a change in the risk borne by insurers and the insured, because it does not affect the substantive terms of the insurance contract. On the other hand, a law mandating that a certain disease be covered under health insurance contracts would effect a spread of risk, both from insureds to insurers, and among the insureds themselves."

9. Bad Faith Law Regulates Insurance So As To Avoid ERISA Preemption.

Lewis v. Aetna U.S. Health Care, Inc., 78 F.Supp. 2d 1202 (N.D. Okla. 1999) (Life Insurance):

"The United States Supreme Court recently articulated the analytical framework to be applied by this Court in resolving whether a state law 'regulates insurance' within the meaning of the saving clause. . . . First, the Court asks whether, from a 'common-sense view of the matter,' the contested prescription regulates insurance. . . . Second, the Court considers three factors employed to determine whether the regulation fits within the 'business of insurance' as that phrase is used in the McCarran-Ferguson Act. (15 U.S.C. § 1011-1015): 'First, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.' . . .

In conclusion, the Court finds that the *Christian* cause of action is based on Oklahoma's statutory policy concerns specific to the insurance industry. The Court further finds that the *Christian* tort does not exist outside the context of insurance contracts. Because under *Unum, Christian* satisfies the requirements of the McCarran-Ferguson Act for a state law that regulates the business of insurance, the Court concludes that the cause of action is a state law that regulates insurance and therefore avoids preemption pursuant to ERISA's saving clause."

10. There Is A Conflict Whether ERISA Still Preempts A Bad Faith Theory Of Recovery.

Conover v. Aetna U.S. Healthcare Inc. and Aetna Life Insurance Company, 167 F.Supp.2d 1317 (U.S.D.C. N.D. Okla. 2001) (Long-Term Disability Insurance Plan):

"While the Tenth Circuit in *Gaylor* applied a less 'supple' test in its analysis of Oklahoma's bad faith rule than that applied in *UNUM [v. Ward]* to California's notice-prejudice rule, the Court is not persuaded the *Gaylor* test is enough at odds with *UNUM* to free the Court from *Gaylor's* dictates.

. . .

Thus, from the Court's reading of *Gaylor*, Oklahoma's bad faith rule does not meet the first and second McCarron-Ferguson factors and the third is undermined by the rule's 'origins' in general principles of tort and contract law. . . . [T]he Court is not convinced a

post-*UNUM* decision by the Tenth Circuit would invalidate *Gaylor*. Regardless of whether the Court agrees with the analysis in *Lewis*, the Court is bound to follow *Gaylor*, until the issue is revisited by the Tenth Circuit or the United States Supreme Court."

a. If A State's Bad Faith Law Regulates Insurance, It Is Probably Exempt From ERISA's Preemption Regardless Of Conflict With ERISA Remedies

Conover v. Aetna U.S. Healthcare Inc. and Aetna Life Insurance Company, 167 F.Supp.2d 1317 (U.S.D.C. N.D. Okla. 2001) (Long-Term Disability Insurance Plan):

N6 "The Court questions the relevance of a conflict with the civil enforcement provisions of ERISA in a state-law exemption analysis. Under ERISA, a state law which regulates insurance is expressly exempted from pre-emption. ERISA does not dictate a state law which regulates insurance is exempt *unless* it provides a state law cause of action or remedy." *Id.* at 1320-1321.

b. No Federal Common Law Remedy For Extracontractual Damages Under ERISA.

Conover v. Aetna U.S. Healthcare Inc. and Aetna Life Insurance Company, 167 F.Supp.2d 1317 (U.S.D.C. N.D. Okla. 2001) (Long-Term Disability Insurance Plan):

"The Tenth Circuit has also foreclosed a federal common law remedy of extracontractual damages for a denial of benefits under an ERISA plan. (Citations omitted.) . . . .

Based on Tenth Circuit precedent, therefore, the Court is precluded from creating a federal common law remedy for extracontractual damages under ERISA." Id. at 1321-1322.

11. ERISA Still Preempts Oklahoma's Bad Faith Law.

Conover v. Aetna U.S. Healthcare Inc., 320 F.3d 1076 (10th Cir. 2/20/03) (Disability Policy):

"It is undisputed Oklahoma's bad faith law falls within the Employee Retirement Income Security Act's language preempting state laws related to 'any employee benefit plan.' 29 U.S.C. § 1144(a). . . . Ms. Conover argues Oklahoma's bad faith law is saved from preemption under the Act because it 'regulates insurance.' See 29 U.S.C. § 1144(b)(2)(A). We disagree. This court addressed this issue in *Gaylor v. John Hancock Mutual Life Insurance Co.*, 112 F.3d 460, 466 (10th Cir. 1997), holding 'Oklahoma's bad faith law does not sufficiently regulate insurance such that it falls within [the Act]'s savings clause.' We are bound by this decision." 320 F.3d at 1079.

[E]ven though Oklahoma's Supreme Court has associated its bad faith law with the

insurance industry, 'its origins are from general principles of tort and contract law.' *Gaylor*, 122 F.3d at 466. Oklahoma's Supreme Court also recognized '[t]here is an implied covenant of good faith and fair dealing in every contract.' *Christian*, 577 P.2d at 904. . . . Breach of any contract, and not just an insurance contract, may lead to liability in tort under Oklahoma law. See e.g., *Beshara v. Southern National Bank,* 928 P.2d 280, 291 (Okla. 1996)." 320 F.3d at 1079.

a. Oklahoma's Bad Faith Law Providing Consequential And Punitive Damages Are Remedies Rejected In ERISA And Thus Preempted.

"Furthermore, the Court in *Gaylor* concluded Oklahoma's bad faith law provided a cause of action excluded from the Employee Retirement Income Security Act's civil enforcement scheme and would therefore 'pose an obstacle to the purposes and objectives of Congress.' *Gaylor*, 112 F.3d at 466. Oklahoma's law allows plan participants to obtain 'consequential and, in a proper case, punitive damages' for breach of good faith and fair dealing by an insurer. *Christian*, 577 P.2d at 904. Nowhere does the Employee Retirement Income Security Act allow consequential or punitive damages. Damages are limited to the recovery of 'benefits due . . . under the terms of the plan.' See 29 U.S.C. § 1132(a)(1)(B). Oklahoma's bad faith law therefore 'allows plan participants to obtain remedies . . . that Congress rejected in the Act.' *Rush Prudential,* 122 S.Ct. At 2165." *Conover v. Aetna, supra,* 320 F.3d at 1080.

12. Though Insurance Companies Pool The Risk Of Bad Faith Damages Among Its Policyholders, ERISA Preempts Oklahoma Bad Faith Law As It Does Not Substantially Affect The Risk Pooling Arrangement Between Insurer And Insured.

Hollaway v. UNUM Life Insurance Company of America, 2003 OK 90, 89 P.3d 1022 (Group Long-Term Disability Policy):

¶ 24 "The tort of bad faith breach of an insurance contract is not a risk identified within insurance policies as a risk of loss the insurer agrees to bear on behalf of the insured. The fact that the existence of the tort may compel insurance companies to investigate an insured's claims more thoroughly does not result in increased costs which may automatically be passed on to the insured. There is no indication that the law of bad faith was intended to result in the sharing of risk as to any form of medical care. Although the tort of bad faith may well have affected insurance rates to the extent that it has placed an additional burden on insurers to act in good faith to avoid increased awards, the insured has not demonstrated that it is a 'risk of loss' included in risk pooling formulas used by insurers to determine premiums for losses insured against.

. . .

¶27 The result here may seem harsh. However, it is a consequence of a federal statute which contains one of the broadest preemption clauses ever enacted by Congress.... The breadth of ERISA's preemption clause often results in plan beneficiaries or participants being left without a meaningful remedy."

13. Under The Latest Standard, ERISA Still Preempts Oklahoma Bad Faith Law.

Allison v. Unum Life Insurance Company of America, 381 F.3d 1015 (10th Cir. Okla. 2004) (Long Term Disability Benefits Under Employer's Group Disability Plan):

"The question is whether an Oklahoma state law bad faith claim against an employment disability insurance provider is preempted by ERISA. . . . . We hold that the district court correctly granted summary judgment to UNUM on this issue because Ms. Allison's bad faith claim (1) conflicts with ERISA's remedial scheme and, in the alternative, (2) is directly preempted under the test announced in *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. 329, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003)." *Allison v. UNUM Life* at 1025.

14. ERISA Still Preempts State Bad Faith Claims.

Weber v. GE Group Life Assurance Co., 541 F.3d 1002 (10th Cir. Okla.) (09/12/08) (Life Insurance Policy):

"GE promptly removed the case to federal court, asserting that Mr. Weber's state causes of action – for breach of contract, promissory estoppel, bad faith breach of contract, and breach of fiduciary duty – sought recovery under an employee welfare benefit plan and, therefore, were preempted by the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461." P. 1006-1007.

15. An ERISA plan is not subject to state law claims of bad faith.

Johnston v. Health Care Service Corporation, d/b/a, Blue Cross and Blue Shield of Oklahoma, 262 F.Supp. 3d 1260 (2017) (Health Insurance Benefits)

"To the extent that Plaintiff may still be attempting to pursue some state law claims, they are completely preempted by ERISA See *Salzer v. SSM HealthCare of Oklahoma Inc*., 762 F.3d 1130, 1134-35 (10th Cir. 2014.)"

16. For Removal of a Bad Faith Claim of a "Church Plan" the Plan Must Show an Affirmative Election to be Governed by ERISA.

Medellin v. Community Care HMO, Inc., 787 F.Supp.2d 1259, (N.D. Okla. 2011) (Health Insurance Policy):

"[T]he ERISA church plan exception is limited to a church plan 'with respect to which *no election* has been made under section 410(d) of [the Internal Revenue Code].' . . P. 1264

[W]hether the Court applies the precise requirements of the election regulations or merely looks for a 'reasonable form and manner' of election, there must be some sort of affirmative election, which is notably missing in this case. . . . Therefore, based on the absence of any affirmative election in the record, the Court is unwilling to find that the Plan is governed by ERISA because of an election pursuant to Section 410(d)." P. 1265-66.

17. Whether a Plan Is A Multiple Employer Plan Where Not All Employers Are Tax Exempt Or Whether The Plan Is Controlled By Or Associated With A Church Is Fact Intensive Requiring Discovery Before Ruling.

Medellin v. Community Care HMO, Inc., 787 F.Supp.2d 1259, (N.D. Okla. 2011) (Health Insurance Policy):

"The nature of the Plan and the precise contours of the relationship between St. John Health System and the Sisters of the Sorrowful Mother are fact intensive inquiries. The Court finds that Plaintiff's request for discovery is well founded as the current record before the Court is somewhat incomplete regarding these issues. For example, regarding the nature of the Plan, although the Anderson Affidavit states that all SJHS employers buy into the Plan, certain documents attached to the Anderson Affidavit indicate that the Plan is a 'single employer plan,' and/or list the employer as St. John Medical Center, which is only one of the SJHS employers. . . ." P. 1266.

[U]nderstanding the precise governing powers of Marian and SSM over SJHS and the SJHS employers is key to determining whether Marian and SSM sufficiently 'control' or are 'associated' with SJHS and the SJHS employers so as to render the plan a church plan." P. 1267.

E. CLASS ACTION REQUIREMENTS

1. Class Action Available For Bad Faith Cases Where Insurer Has A Common Practice Of Underpaying Damage Claims Against Policyholders.

Melot v. Oklahoma Farm Bureau Mutual Insurance Company, 2004 OK CIV APP 25, 87 P.3d 644 (Homeowner's Insurance):

¶15 "In the instant case, while the alleged omissions of information may not have been written, they were standardized in that Plaintiffs have asserted that Insurer made the same omissions to all members of the class. Under this analysis, the commonality requirement has been met.

¶16 The trial court concluded this requirement was met because all the class members' claims were based on the same alleged conduct by Insurer through its failure to include the 20 percent charge in paying claims to its homeowners for property damage. The typicality requirement is satisfied '[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . irrespective of varying fact patterns which underlie individual claims.' [Citations omitted.] Clearly, Plaintiffs' legal theories of recovery arise from allegations of a common course of deceptive conduct equally affecting themselves and the putative class members. This requirement is therefore met.

. . .

¶19 As a prerequisite to a class action, the predominance factor requires the trial

court to examine whether individual questions preclude the common questions of law or fact from being predominant. [Citation omitted.] In rendering its decision, the trial court found that Plaintiffs sought to remedy a common legal grievance. The alleged breaches of contract and/or fraud are the same or similar acts or omissions for each Class Member and common questions predominate, even though damage amounts may vary."

2. Insurer's Systematic Failure To Pay Insureds Amounts Due And Withholding Information As To Entitlement Predominates As A Common Question Of Law Or Fact Subject To Class Action.

Burgess v. Farmers Insurance Co., Inc., Farmers Insurance Exchange, Farmers Insurance Group of Companies and Farmers Group, Inc., 2006 OK 66, 151 P.3d 92 (Homeowner's Insurance):

¶13 " The trial court ultimately agreed with Insureds and determined that questions of law or fact common to members of the class predominated over questions affecting only individual members, noting that 'the group requesting class certification seeks to remedy a common legal grievance' and that although damage amounts may vary, 'the breach of contract, fraud and bad faith claims arise from the same or similar acts or omissions for each Class Member.'"

. . .

¶17 [H]ere, the acts or omissions of Insurer which constitute the alleged breaches of contract, bad faith and/or fraud (specifically, Insurer's alleged systematic failure to pay general contractor's O & P at the time of ACV settlement when due and failure to disclose information to Insureds concerning O & P) are the same or similar acts or omissions for each class member. Even though damages amounts may vary, common questions predominate where the acts or omissions are the same."

3. Class Action Is Superior To Remedy Bad Faith In Far Reaching And Systematic Underpayment And Failure To Disclose Information.

Burgess v. Farmers Insurance Co., Inc., Farmers Insurance Exchange, Farmers Insurance Group of Companies and Farmers Group, Inc., 2006 OK 66, 151 P.3d 92 (Sept. 19, 2006) (Homeowner's Insurance):

¶20 "We agree with the trial court's finding that a class action is superior to other available methods, because without 'class treatment, any widespread underpayment for O & P will continue to go uncompensated or result in hundreds or thousands of individual cases.' Certification Order at 17. The record includes evidence reflecting that the number of Coverage (i.e., dwelling and attached structures used principally as a private residence) claims in Oklahoma for a 5-year period ending on January 1, 2001, was 84,715. If required to sue individually, Insureds would be forced to seek compensation for O & P and in each case would require the same proof regarding the existence and validity of the 'three trade rule.' Class action lawsuits are designed to enable plaintiffs such as Insureds here to 'vindicate the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.'

Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 338, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980)."

4. Federal Class Action Fairness Act Will Generally Allow Removal Of Oklahoma Bad Faith Cases.

Plummer v. Farmers Group, Inc., Farmers Insurance Company, Inc. and Farmers Insurance Exchange, 388 F.Supp.2d 1310 (E.D. Okla. 2005) (Automobile Material Damage Coverage):

"Nevertheless, the Court finds that the face of Plaintiff's Amended Petition and the face of Defendants' Notice of Removal have shown, at the very least, by a preponderance of the evidence that the amount in controversy exceeds $5,000,000.00. ...[D]efendants' note in the Notice of Removal that Plaintiff claims that each of the 'thousands' of class members were damaged by Defendants' bad faith, which could result in additional damages of $100,000.00 or more under 23 O.S. §9.1 for each proven individual claim. After making the reasonable inference that all class members are pursuing similar damages and after making some effortless mathematical calculations, the Court concludes that the face of the Amended Petition and the Notice of Removal show by at least a preponderance of the evidence that the amount in controversy far exceeds the five million dollar requirement. The Court also notes that Plaintiff has no where stipulated that the ultimate amount sought is less than $5,000,000.00." *Id* at pages 6-7.

III. LEGITIMATE DISPUTE

A. CORNERSTONE CASES

1. The Reasonableness Of The Insurer's Conduct (Including Evaluations) Always Goes To The Jury.

***McCorkle v. Great Atlantic Ins. Co.*,** 1981 OK 128, 637 P.2d 583 (Fire Policy):

"[T]he essence of the intentional tort of bad faith with regard to the insurance industry is the insurer's unreasonable, bad faith conduct, including the unjustified withholding of payment due under a policy, and if there is conflicting evidence from which different inferences may be drawn regarding the reasonableness of insurer's conduct, then what is reasonable is always a question to be determined by the trier of fact by a consideration of the circumstances in each case." P. 587. (Emphasis added.)

. . .

We trust that the trier of fact will award [punitive damages] only in a proper case, with the focus always on the unreasonableness of the insurer's conduct." P. 588.

2. Purchase Peace Of Mind.

***McCorkle v. Great Atlantic Insurance Co.*,** 1981 OK 128, 637 P.2d 583 at 588:

"We believe that the purchaser of insurance does not contract to obtain a commercial advantage but to protect himself/herself against the risks of the accidental losses and the mental stress which could result from such losses. Therefore, we think one of the primary

reasons a consumer purchases any type of insurance (and the insurance industry knows this) is the peace of mind and security that it provides in the event of loss." P. 588.

3. Legitimate Dispute As To The Facts - - Two Similar Cases With Conflicting Rulings.

Manis v. Hartford Fire Insurance Company, 1984 OK 25, 681 P.2d 760 (standard fire policy):

"The defense of arson is provable by circumstantial evidence. . . . Defendant's evidence, if believed by the jury, could have supported an arson defense.

. . .

In *Christian*, this Court stated that 'the essence of the cause of action is bad faith.' Defendant's evidence, if believed, would have supported an arson defense. It cannot be said as it was in *Christian* that it was apparent that defendants never had a valid defense to plaintiff's claim. The fact that plaintiff prevailed does not make defendant's actions bad faith per se. The defendant's actions were reasonable and legitimate. The facts were in dispute as to the cause of the fire. The insurers had a right to have this dispute settled in a judicial forum. A *Christian* cause of action will not lie where there is a legitimate dispute.

. . .

To hold otherwise would subject insurance companies to the risk of punitive damages whenever litigation arises from insurance claims. Insurance companies have the right to dispute a claim in good faith." P. 762. (Emphasis added.)

McCoy v. Oklahoma Farm Bureau Mutual Insurance Company, 841 P.2d 568, 1992 OK 43 (Home Fire Policy):

"This court will indulge in the presumption that the jury's verdict is correct, and if there is any competent evidence reasonably tending to support the verdict of the jury, this court will not disturb the verdict and judgment based thereon.

The jury's verdict is conclusive as to all disputed facts and all conflicting statements, including the credibility of witnesses and the effect and weight to be given to conflicting or inconsistent expert testimony. Inasmuch as these are questions of fact to be determined by the trier of facts, whether court or jury, the same will not be disturbed on appeal since such are not questions of law.

In the instant case, the jury, in awarding Homeowner damages under the insurance policy must have believed that Homeowner did not set his house on fire, or procure his residence to be burned. We are of the opinion that there is competent evidence to support the jury's conclusion that the fire was not of an incendiary origin, that Insurer unreasonably withheld payment of Homeowner's claim, and that Insurer's handling of an investigation in response to Homeowner's loss was conducted in bad faith.

Conflicting evidence was presented to the jury concerning whether Insurer 'had a good faith belief, at the time its performance was requested, that it had a justifiable reason for withholding payment under the policy.' By its verdict, the jury answered in the negative.

With regard to homeowner's bad faith claim, we have reviewed the record and find competent evidence which supports the jury' conclusion that Insurer did not have a reasonable good faith belief for withholding payment of homeowner's claim. The jury evaluated conflicting evidence and determined that homeowner was treated unfairly and unreasonably and that Insurer had no legitimate reason to deny homeowner's claim. This we will not disturb."

a. The Legal Gatekeeper.

City National Bank and Trust Company v. Jackson National Life Insurance, 1990 OK CIV APP 89, 804 P.2d 463 (Life Policy):

"We therefore hold that before the issue of insurer's alleged bad faith may be submitted to the jury, the Trial Court must first determine, under the facts of the particular case and as a matter of law whether insurer's conduct may be reasonably perceived as tortious. If the Trial Court so determines, the legal gate to submission to the jury of the issue of insurer's alleged bad faith conduct is open. However, until the facts, when construed most favorably against the insurer, have established what might be reasonably perceived as tortious conduct on the part of the insurer, the legal gate to submission of the issue to the jury remains closed. . . . It is for the court to determine whether on the evidence [insurer's tortious conduct] can be found; it is for the jury to determine whether, on the evidence, it has in fact existed. Restatement of Law, Second, Torts, §§ 46(h), (j)."

b. Conflicting Evidence As To Reasonableness Of Insurer's Conduct Is Jury Question.

Alsobrook v. National Travelers Life Insurance Company, 1992 OK CIV APP 168, 852 P.2d 768 (Health Insurance Policy):

"[The company] asserts the trial court erred in submitting the issues of bad faith and punitive damages to the jury . . . .

The unreasonableness of the insurer's actions is the essence of the tort of bad faith. (Citations omitted.) Conflicting evidence as to reasonableness of conduct of the insurer is a jury question. (Citation omitted.) 'The action of the company must be assessed in light of all facts known or knowable concerning the claim at the time Plaintiff requested the company to perform its contractual obligation.' " (Citation omitted.) (Emphasis in original.)

4. Insurer's Decisions Are To Be Made With Knowledge Of Applicable Law.

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

"The insurance company's decision not to defend plaintiff was made on a determination that coverage did not extend to this accident, and was presumably made in the face of the knowledge of applicable Oklahoma law. The reasonableness of that decision must be judged in the light of the applicable law . . . ." *Timmons, supra*, at 913-914.

5. Insurer Is To Reasonably Handle Claims In Light Of Applicable Law And Unreasonable Reliance Upon Advice Of Counsel Is Bad Faith.

Barnes v. Oklahoma Farm Bureau Mutual Insurance Company, 2000 OK 55, 11 P.3d 162 (Underinsured Motorist Coverage):

"In our view, the evidence at trial, in light of the law readily available to insurer and its counsel when handling Barnes' claim, plainly warranted findings no legitimate dispute or reasonable justification existed for the manner insurer dealt with Barnes and that insurer did not have a reasonable belief in its counsel's advice. ¶21. . . .

Eighteen (18) months before Barnes' accident this Court expressed the meaning of § 3636(C) in the following language: 'An insured must be allowed to look to [her UIM] insurer when the liability limits of the negligent motorist prevent the insured from recovering fully [for] the injury suffered.' Citation omitted. The advice of its counsel directly conflicted with this Court's prior expression of the meaning of § 3636(C)." ¶23

. . .

Although reliance on the advice of counsel can be a defense to a bad faith suit, the reliance on counsel's advice must be reasonable. . . .

> 'It is simply not enough for the carrier to say it relied on advice of counsel, however unfounded, and then expect that valid claims for coverage can be denied with impunity pursuant to such advice. The advice of counsel is but one factor to be considered in deciding whether the carrier's reason for denying a claim was arguably reasonable. We believe that where, through verbal sleight of hand, the advising attorney concocts an imagined loophole in a policy whose plain language extends coverage, such advice is heeded at the carrier's risk. Citation omitted.'

Further, even when there has been no judicial interpretation of a relevant statutory provision, the reasonableness of reliance on advice of counsel will normally be a fact question where counsel misreads the plain language of a statute." ¶31.

a. No Bad Faith If There Is A Legitimate Basis To Seek Legal Advice Even After A Decision To Pay Benefits Has Been Made.

Beers v. Hillory and Northland Insurance Company, 2010 OK CIV APP 99, 241 P.3d 285 (Underinsured motorist coverage):

"¶25 The evidentiary materials of record establish that the delay between NIC's decision to extend the UM policy limit to Beers and notifying his attorney Green of that decision resulted from adjuster Adamson's decision to seek advice from NIC's counsel. Adamson testified that, because of her 'history of dealing' with Green's office, and the absence of a signed medical authorization from Beers, she was concerned about there being unpaid medical providers after NIC paid the $50,000 UM to Beers and Green. Therefore, she sought advice of legal counsel in Oklahoma before issuing the settlement check, in order to protect NIC from potential exposure to double payments."

"¶26 The extensive correspondence between Adamson and attorney Green demonstrates factual and legal reasons for NIC's conduct, that Adamson's concerns were legitimate, and that NIC did not act in bad faith in seeking legal advice before offering the UM policy limit. Beers did not produce any contradictory evidence or any evidence suggesting NIC intentionally delayed payment during this period for an improper purpose. The record shows that NIC's decision to consult with Oklahoma counsel before offering Beers the UM policy limit was reasonable. Where an insurer has demonstrated a reasonable basis for its actions, bad faith cannot exist as a matter of law."

b. An Insurer's Reliance Upon Advice From Counsel May Be A Defense To Bad Faith But Only If Reasonable.

Beers v. Hillory and Northland Insurance Company, 2010 OK CIV APP 99, 241 P.3d 285 (Underinsured Motorist Coverage):

"¶37 If the advice an insurer receives from its counsel regarding the handling of a UM claim is contrary to the dictates of Section 3636, existing case authority, or in direct conflict with an express provision of the insurance contract, then it is unreasonable for the insurer to rely on that advice. *Barnes*, 2000 OK 55 at ¶¶ 17-18, 11 P.3d at 169-70. Nonetheless, reliance on the advice of counsel can be a defense to a bad faith claim, but the insurer's reliance on that advice must, itself, be reasonable. See *Barnes*, 2000 OK 55 at ¶¶ 31-32, 11 P.3d at 174.

¶38 Assuming that the requirements of the release were drafted pursuant to the recommendation of NIC's counsel, the current record demonstrates neither the reasonableness of that advice, nor NIC's reliance thereon. Therefore, the district court's judgment cannot be sustained on the basis that NIC relied on the advice of counsel in its actions."

c. Where Legal Advice Is Reasonable, The Motive In Seeking The Advice May Not Necessarily Be Bad Faith.

Flores v. Monumental Life Insurance Company, 620 F.3d 1248 (10th Cir. 2010) (Accidental Death Insurance Certificate):

"Finally, Plaintiff argues that his bad-faith claim is supported by evidence that the claims adjuster who handled his claim asked the legal department whether a denial of coverage was 'defensible,' as well as evidence that the legal department replied they could probably meet their 'burden to prove sickness or its treatment contributed to death.' We are not persuaded, however, that this language is sufficient to demonstrate bad faith in a case involving a legitimate dispute." *Id.* at 1256.

d. An Insurance Company Need Not Seek A Legal Opinion When Its Position Is Correct On The Law.

Oldenkamp v. United American Insurance Company, 619 F.3d 1243 (10th Cir. 9/28/10) (Limited Benefit Hospital and Surgical Expense Policy):

"We are also unpersuaded by the Oldenkamp's reliance on United's failure to obtain a legal opinion regarding the question. That fact might have probative value if the question were whether an erroneous denial of coverage was reasonable or not, but it cannot support a finding of unreasonableness when the position taken without advice of counsel was reasonable." *Id.* at 1249-50.

e. An Insurance Company May Have A Legitimate Dispute If It Reasonably Relies Upon Reasonable Advice Of An Attorney.

Vickers v. Progressive Northern Insurance Company, 353 F. Supp. 3rd 1153 (N.D. Okla. 2018) (Uninsured/Underinsured Motorist Coverage):

"Further, though defendant may not rely on patent legal mistakes made by an attorney, defendant may rely on reasonable advice of counsel in denying coverage. *See Barnes v. Oklahoma Farm Bureau Mutual Insurance Co.*, 11 P.3d. 162, 174 (Okla. 2000) In this case, Defendant behaved in accordance with the guidelines for the application of Exclusion 1(b) that it developed based on the advice of its counsel when it offered Plaintiff $25,000.00, the statutory mandatary minimum of UM coverage. …the guidelines which Defendant used to determine coverage in the instant case demonstrate a reasonable and accurate understanding of *Morris*, and its construction of § 3636 (E) to apply not to all motor vehicle insurance polic[ies]," but rather UM coverage. Further, the guidelines demonstrate a reliance on a reasonable understanding of *Conner*, which upheld an exclusion similar to Exclusion 1(b) under similar but not identical circumstances, and which was apparently adopted by *Morris*. … Though the Court has ultimately determined, after detailed analysis that the holding of *Conner* does not require the same outcome in the instant case, it cannot be said that Defendants contention that *Conner* is binding is unreasonable or based on a patent legal mistake. Accordingly, Defendant's argument in the absence of conclusive, precedential legal authority requiring coverage, was reasonable. Construing the facts most favorably for Plaintiff, Defendant's conduct may not reasonably be perceived as tortuous, and summary judgment is appropriate. P. 1163-1164

6. An Unreasonable Interpretation Of The Law As Applied To The Facts Is Bad Faith.

Willis v. Midland Risk Insurance Company, 42 F.3d 607 (10th Cir. 1994) (General Business Liability Policy):

"Oklahoma statutory law provides that a binder 'shall be deemed to include all the usual terms of the policy . . . together with such applicable endorsements as are designated in the binder . . . .' 36 O.S. § 3622(A). Here the binder did not designate any endorsement.

The insurer is held to knowledge of the applicable Oklahoma law, and the reasonableness of its decision must be judged in light of that law. [Citations omitted.] As the Oklahoma law cited shows, Midland's denial of the claim was not based on a reasonable understanding of Oklahoma law governing binders."

7. Whether Insurer Had Reasonably Applied Law To Insurance Contract Provision Is For The Jury.

Kelly v. Farmers Insurance Company, Inc., 281 F.Supp.2d 1290 (W.D. Okla. 2003) (Homeowner's Insurance):

"Kellys' position is premised on the doctrine of efficient proximate causation. . . '[W]here a covered peril is the efficient proximate cause of the loss, there is coverage.'

. . .

When the 'insured [cause] sets [one or more excluded] causes in motion in an unbroken sequence between the insured risk and the ultimate loss . . . the insured risk is regarded as the proximate cause of the entire loss, even if the last step in the chain of causation was an excepted risk.'" *Id.* at 1296.

. . .

[T]he factual predicate for application of the efficient proximate cause doctrine exists in this case and no exception to the application of the doctrine has been identified. Because the determination as to the efficient proximate cause of a loss presents a question of fact for the jury [citations omitted], the Court finds that a question of fact remains regarding the proximate cause of the loss to the Kelly's home. The Court finds, as a matter of law, that this question of fact is material to the present dispute, and that it compels the conclusion that Farmers' conduct may be 'reasonably perceived as tortious.' [Citation omitted.] Thus, the Court finds that the Kellys have satisfied their burden of demonstrating a genuine issue of material fact and that summary judgment is, therefore, inappropriate as to the Kellys' bad faith claim." *Id.* at 1300.

8. It Is For The Jury To Determine Whether Defendant's Acts Of Using A Medical Reviewer To Determine Reasonableness And Necessity Of Medical Bills In A UM Claim Is Bad Faith.

Falcone v. Liberty Mutual Insurance Company, 2017 OK 11, 391 P.3d 105 (Uninsured Motorist Coverage):

¶10 . . . In this case, whether withholding payment for the cost of the trauma center as "compensatory damages" was unreasonable and in bad faith is a fact question for a jury. See *Newport v. USAA*, 2000 OK 59, 11 P.3d 190; *McCorkle v. Great Atlantic Insurance Company*, 1981 OK 128, 637 P.2d 583. We have held that medical expenses can constitute "compensatory damages." *Southwestern Greyhound Lines, Inc. v. Rodgers*, 1954 OK 40, 267 P.2d 572; *Denco Bus Line, Inc. v. Hargis*, 1951 OK 11, 204 Okla. 339, 229 P.2d 560. The amount of the bill Plaintiff received for the treatment at the L2 trauma center was completely beyond her control, as was the decision of the ER doctor to send her there in the first place.

Where There Is Neither Policy Language Nor Statutory Authority To Review Whether Medical Services Were Reasonable And Necessary, The Insurer Is In Bad Faith As A Matter Of Law.

Falcone v. Liberty Mutual Insurance Company, 2017 OK 11, 391 P.3d 105 (Uninsured Motorist Coverage):

Concurring opinion.

¶11 The med-pay provision might arguably allow Liberty Mutual to do what it did in this case and send the claim to a reviewer to determine what medical services/expenses were "reasonable" and "necessary." ***But no such language exists in the UM provision.*** The UM provision requires that Liberty Mutual pay the compensatory damages the insured is legally entitled to recover from the uninsured driver. ***The language of the UM provision does not allow Liberty Mutual to question the reasonableness or necessity of the medical services or expenses. Nor is there any statutory authority to allow an insurance company to withhold payment.***

. . .

¶12 "Liberty Mutual argues the emergency room staff ordered *too many* tests and were too cautious in treating Ms. Falcone as L2 trauma. Oklahoma law is clear and well settled on this issue. The OU Medical Center emergency room bill is part of Ms. Falcone's compensatory damages. Liberty Mutual ignored the plan language of their policy and disregarded well settled law regarding compensatory damages."

Using Medical Reviewers To Determine Reasonableness And Necessity Of UM Is Bad Faith.

Falcone v. Liberty Mutual Insurance Company, 2017 OK 11, 391 P.3d 105 (Uninsured Motorist Coverage)**:**

¶12 ". . . The very act of using the utilization reviewers as a pretext to deny payment of the Emergency Room bill in this case is bad faith. Footnote 5.

Fotonote 5: The Tenth Circuit, relying on this Court's case law, has held that evidence that an insurance company ignored the provisions of its own policy and ignored Oklahoma law

in disputing or denying certain coverage can constitute bad faith. *Haberman v. The Hartford Insurance Group*, 443F.3d 1257, 1271 (10th Cir. 2006.)

9. Insurer May Be In Bad Faith Where They Do Not Apply Law Known To Be In Force Even Though There Is No Specific Oklahoma Case On Point.

Kelly v. Farmers Insurance Company, Inc., 281 F.Supp.2d 1290 (W.D. Okla. 2003) (Homeowner's Insurance):

"Farmers' alternative basis for summary judgment is founded on the fact that no Oklahoma Court has had occasion to address either the factual scenario or the exclusion provision at issue here. Farmers argues that because there is no controlling authority on point, it cannot, as a matter of law, be liable for the tort of bad faith for disputing the Kellys' claim. See *Davis v. Mid-Century Insurance Company*, 311 F.3d 1250, 1252 (10th Cir. 2002) ('For bad faith liability to attach, the law at the time of the alleged bad faith must be settled.') Farmers' argument is inapposite. As discussed above, the efficient proximate cause doctrine has been in force in Oklahoma for over half a century. Therefore, Farmers' reliance on the purported dearth of controlling case law is misplaced. Farmers was not justified in disputing the Kellys' claim as a matter of law, and the Court denies Farmers' alternative ground for summary judgment." *Id.* at 1300-1301.

10. Where Insurer May Have Misunderstood Its Duty To Defend In Oklahoma And Therefore Does Not Conduct A Proper Investigation, It May Not Have A Reasonable Basis For Delaying Payments.

Automax Hyundai South LLC v. Zurich American Insurance Company and Universal Underwriters Insurance Company, 720 F.3d 798 (10th Cir. 2013) (E & O Coverage and Garage Operations Coverage):

"Zurich insists that even if it breached its duty to defend and indemnify Automax, the bad faith claim must fail because there was a reasonable dispute over coverage. . . .

The elements of a bad faith claim against an insurer are: (1) the insured was entitled to coverage under the policy; (2) the insurer had no reasonable basis for delaying payment; (3) the insurer did not deal fairly and in good faith with the insured; and (4) the insurer's violation of the duty of good faith was the direct cause of the insured's injury. (Citations omitted.)

The District Court granted Zurich's motion for summary judgment on the bad faith claim because it concluded that Automax could not meet the first element of the claim – that Automax was entitled to coverage. . . . Yet the record suggest – though, at the moment, does not conclusively show – that Zurich may have misunderstood the duty in Oklahoma to defend an insured if the *facts* of the lawsuit reveal a mere possibility that a claim is covered, as well as the duty that, once an insured requests a defense, the insurer has to inquire into the underlying facts. (Citation omitted.) It is possible that Zurich did not conduct the requisite

investigation before denying Automax's claim. Such a scenario would suggest that Zurich did not have a reasonable basis for delaying payment. *Automax, supra*, at 810-811.

11. As A Matter Of First Impression, The Breach Of The Duty Of Good Faith And Fair Dealing Was Actionable In Tort.

Worldlogics Corporation v. Chatham Reinsurance Corporation, 2005 OK Civ App 16, 108 P.3d 5 (Performance Surety Bond):

¶13 "Although Oklahoma's Courts have not yet dealt with this precise issue, we are persuaded by the reasoning of the Courts of other states which have applied the tort of bad faith to surety companies in similar context. ...The two factors most important to its conclusion were: '(1) Whether the Plaintiff contracted for security or protection rather than for profit or commercial advantage, and (2) whether permitting tort damages will 'provide a substantial deterrence against breached by the parties who derive a commercial benefit from the relationship.'

. . .

¶14 [T]he possibility of damages in tort will provide a significant deterrence to surety companies in the future who might be inclined to wait as long as possible to pay on a performance bond. In this instance, for example, a possible claim for breach of contract gave [surety] no incentive to act in a timely fashion on [Plaintiff's] demand since its contractual liability would be the same regardless of the time frame. The possibility of damages in tort, however, provides just the necessary incentive to respond in a timely fashion to the obligee.

. . .

¶¶14-15 [B]ecause [surety] had complete control over when it would honor the bond, however, [Plaintiff] was at a distinct disadvantage and lost all of the benefit it sought to gain by requiring the performance bond. A duty of good faith and fair dealing, reinforced by possible tort liability, levels the playing field."

12. Where There Is A Question Of First Impression As To The Conscionability Of A Policy Term, There May Be A Legitimate Dispute.

Coblentz v. Oklahoma Farm Bureau Mutual Insurance Company, 1995 OK CIV APP 126, 915 P.2d 938 (Homeowner's Policy):

"Given that the issue on appeal presented a question of first impression, we conclude that Insurer's withholding of full replacement value under the policy did not amount to unreasonable bad faith conduct that would justify a finding of liability under the tort of bad faith."

Cf. ***Buzzard v. Farmers, supra; Timmons, supra; Christian, supra***.

13. No Bad Faith Where Insurer Has A Legitimate Dispute Over The Law Applicable To The Coverage.

Nichols v. Nationwide Mutual Insurance Company, 948 F.Supp. 988 (W.D. Okla. 1996) (Uninsured Motorist Coverage):

"Because this Court has found that Plaintiff's uninsured motorist policy did not cover the damages to their vehicle, the Court finds that Defendant's refusal to pay on that policy was not in bad faith. The Court has also noted that the authoritative decisions on uninsured motorist coverage contain conflicting standards. Therefore, as much of this dispute arises out of the uncertainty in the law, the Court also finds that it was not unreasonable for Defendant to dispute the claims."

Narvaez v. State Farm Mutual Automobile Insurance Company, 1999 OK CIV APP 92, 989 P.2d 1051 (Uninsured Motorist Coverage):

"The sole issue before us is whether or not Narvaez is entitled to recover UM benefits from his policy when Narvaez was injured during an assault, at the conclusion of which his car was stolen by the assailant. ¶6.

. . .

We agree the trial court correctly granted judgment to State Farm on Narvaez's claim of bad faith. State Farm had a reasonable defense to the claim, based on the facts thereof.."

Ballinger v. Security Connecticut Life Insurance Company, 1993 OK 69, 862 P.2d 68 (Life Insurance Policy):

"Here, defendant insurance company did not refuse to pay according to the policy. Plaintiff sought reformation of the contract and a guardian ad litem was appointed for the named beneficiary, a minor. Defendant tendered the policy amount into court for directions as to payment of the claim. . . . The fact that defendant defended the reformation action is not per se evidence of bad faith. Plaintiff named her minor son as a defendant in the lawsuit, recognizing that his interests needed to be adjudicated as well. . . . Plaintiff's basic complaint appears to be that defendant did not simply roll over and play dead, based on the affidavit of the insurance agent. . . . We cannot find that defendant's actions in the matter were unreasonable or constituted a bad faith refusal to deal fairly with the plaintiff."

14. Legitimate Dispute As To The State Of The Law.

Duckett v. Allstate Insurance Company, 606 F.Supp. 728 (1984) (Automobile Medical Pay Provisions):

"The Court is satisfied that the only permissible inference which can be drawn from the facts of this case is that Allstate's denial of Duckett's demand to stack was reasonable in light of existing Oklahoma law. There is not now nor has there ever been definitive, controlling authority on the enforceability of policy provisions prohibiting the stacking of med pay coverage. . . . There is a 'legitimate dispute' as to the applicability of the mechanism of stacking to multiple med pay provisions, and Allstate 'had a right to have this dispute settled in a judicial forum'. (Citations omitted.) The Court therefore concludes that, on the facts of this case, there is no permissible inference that Allstate acted unreasonably and in bad faith.

. . .

Likewise, the mere fact that Allstate did not correctly predict this Court's decision on stacking does not mean that *ipso facto* the reasonableness of Allstate's conduct becomes

a question for the jury. A jury question arises only where the relevant facts are in dispute or where the undisputed facts permit differing inferences as to the reasonableness of the insurer's conduct." P. 731.

15. For Bad Faith The Law On The Issue Must Be Settled.

Davis v. Mid Century Insurance Company, 311 F.3d 1250, 1252-53 (10th Cir. 11/20/02) (Homeowner's Insurance):

"For bad faith liability to attach, the law at the time of the alleged bad faith must be settled. See *Skinner v. John Deere Insurance Company*, 998 P.2d 1219, at 1224 (Okla. 2000). 311 F.3d at 1252.

The law was not settled at the time of Mid-Century's actions. 'There was no conclusive precedential legal authority on the issue' of whether the costs associated with the removal of damaged shingles or the labor costs incurred in installing new shingles were properly subject to depreciation under the actual cash value provision of a dwelling policy. See Id. at 1223. Furthermore, the Oklahoma Supreme Court ultimately found Mid-Century's position regarding the issues to be partially correct. (Cost of labor to install new shingles is depreciable, cost to remove damage shingles is not). As a matter of law, Appellants' litigation of this legitimate coverage dispute cannot constitute bad faith because Appellants' position in the litigation was reasonable. See *Thompson v. Shelter Mutual Insurance*, 875 F.2d 1460, 1462 (10th Cir. 1989)." 311 F.3d at 1252.

16. Unsettled First Impression Legal Issue Does Not Permit Bad Faith.

Graham v. Travelers Insurance Company, 2002 OK 95, 61 P.3d 225 (Commercial Underinsured Motorist Policy):

¶7 "The court also held that the $10,000 statutory minimum did not apply, and Travelers' refusal to compensate Graham did not constitute bad faith because the issue is one of first impression."

17. Oklahoma Court Of Appeals Allows A One Bite Rule Even Though Contract Is Ambiguous As Matter of Law.

Andres v. Oklahoma Farm Bureau Mutual Insurance Company, 2009 OK CIV APP 97, 227 P.3d 1102, Release for Publication Nov. 23, 2009 (Homeowner's Insurance Policy):

"¶17. In the present case, we have already determined that OFB was required under its insurance policy to pay Plaintiff's claim. However, the second element of a claim for breach of an insurer's duty of dealing fairly and in good faith requires proof that the insurer's refusal was unreasonable. The Oklahoma Supreme Court has held that an insurer's refusal to pay is not unreasonable or in bad faith when there is a legitimate dispute concerning coverage or when there is no conclusive precedent on the issue presented. *Christian v. American Insurance Co.*, 1977 OK 141, 577 P.2d 899; *Claborn v. Washington National Insurance Co.*, 1996 OK 8, ¶14, 910 P.2d 1046, 1051; *Skinner v. John Deere Insurance*

Company, 2000 OK 18, ¶17, 998 P.2d 12 19, 1223; *Duensing v. State Farm Fire and Casualty Co.*, 2006 OK CIV APP 15, ¶40, 131 P.3d 127, 138.

"¶18. Here, OFB denied the claim on the grounds that the claim was not covered by the policy; it relied upon decision from nine other jurisdictions which supported its theory; its legal theory was plausible; and there was no Oklahoma precedent. Nothing in the appellate record suggests that OFB lacked a good-faith basis for refusing to pay Plaintiffs' claim. Thus, we conclude as a matter of law that OFB had a reasonable legal basis for refusing to pay the claim, and it is not liable for breach of the duty of good faith and fair dealing."

18. An Insurer's Failure To Follow COCA Opinion That Does Not Constitute The Law At The Time Action Was Requested Is Not Bad Faith.

Porter v. Oklahoma Farm Bureau Mutual Insurance Company, 330 P.3d 511, 2014 OK 50 (Homeowner's Insurance Policy):

¶ 23 The decisive question is whether the insurer "had a good faith belief, *at the time its performance was requested*, that it had a justifiable reason for withholding payment under the policy." *Buzzard v. McDanel*, 1987 OK 28, ¶10, 736 P.2d 157, 159. It is not bad faith to withhold payment when there is a legitimate dispute concerning coverage or **no conclusive precedential legal authority** requiring coverage. *Skinner v. John Deere Insurance Co.*, 2000 OK 18, ¶17, 998 P.2d 1219, 1223. In *Skinner*, we reasoned that a COCA opinion not ordered for publication by this Court is persuasive only and has no precedential effect, it cannot constitute the law at the time of an insurer's alleged bad faith actions. *Id.* ¶19, 998 P.2d at 1223-24.

¶ 24 Here, Plaintiffs argue that Defendant committed bad faith by refusing to follow *Andres v. Oklahoma Farm Bureau Mutual Insurance Co.*, 2009 OK CIV APP 97, 227 P.3d 1102 *cert. denied* (Nov. 23, 2009). We disagree. *Andres* was not ordered for publication by this Court and constitutes persuasive authority only. Rule 1.200(c), Oklahoma Supreme Court Rules, 12 O.S. 2001, ch. 15, app. 1. Failure to follow a COCA opinion that did not constitute the law at the time of an insurer's resistance to payment does not constitute an act of bad faith. *Skinner*, 2000 OK 18, ¶ 19, 998 P.2d at 1223-24. Thus, the district court correctly dismissed Plaintiff's claim that Defendant committed bad faith by refusing to follow *Andres.*

19. Where There Is No Conclusive Precedential Legal Authority A Legitimate Dispute May Exist As To Coverage.

Duensing v. State Farm Fire and Casualty Company, 2006 OK CIV APP 15, 131 P.3d 127 (Nov. 14, 2005) (Homeowner's Policy):

¶40 "An insurer's withholding of payment is not unreasonable or bad faith when there is a legitimate dispute concerning coverage and when there is no conclusive precedential legal authority on that issue. *Skinner v. John Deere Insurance Company*, 2000 OK 18, 998 P.2d 1219.

20. Where There Is No Controlling Oklahoma Law On An Issue May An Insurer Be In Bad Faith – Stay Tuned.

Ball v. Wilshire Insurance Company, 498 F.3d 1084 (10th Cir. Okla.) (Motor Vehicle Liability Insurance Policy):

"There are several reasons for certification. The questions presented are state-law issues apparently of first impression in Oklahoma. There are no material disputed fact issues so all that is presented are pure questions of state law. Resolution of the questions should be dispositive of this case, and the answers to these questions concerning Oklahoma's law would assist the federal courts in resolving cases presenting claims similar to those presented in this appeal. The courts of other states have split on whether an invalid exclusion negates an insurance company's duty to defend, with two state courts finding no duty to defend, [citations omitted] and six state courts finding a duty to defend, [citations omitted]."

21. The Oklahoma Supreme Court Does Not Render Advisory Opinions On Certified Questions.

Ball v. Wilshire Insurance Company, 2007 OK 80, 184 P.3d 463 (Motor Vehicle Liability Insurance Policy):

"¶ 8 Here, the certification puts us in the position of answering questions which may not be determinative of any issue in the cause. Just as we are under a duty to inquire into our own jurisdiction, the Tenth Circuit must determine its jurisdiction to exercise its adjudicatory power. If the Tenth Circuit determines that it will not hear the appeal, the answers proffered would be given in the abstract. The certification statute does not extend to the exercise of such judicial authority. Furthermore, to render answers to questions which may never be subject to review in the federal cause would result in our issuing a prohibited advisory opinion concerning nothing more than a hypothetical situation. This we will not do."

22. In The Absence Of Controlling Legal Authority Making A Loaned Vehicle Exclusion Unenforceable As To UM Coverage, An Insurer Who Relies On The Exclusion Does Not Act In Bad Faith.

Ball v. Wilshire Insurance Company, 2009 OK 38, 221 P.3d 717 (Okla. June 16, 2009, rehearing denied September 14, 2009) (Commercial Auto Liability Insurance Policy and Uninsured Motorist Coverage):

¶20 [T]he Tenth Circuit has asked whether Oklahoma law is settled regarding an insurer's obligation to provide UM benefits to a person in Ball's position. We agree with the federal district court that Oklahoma law at this time does not provide a conclusive answer to this question.

. . .

¶25 [I]f the Compulsory Liability Insurance Law does not make a person an insured under the policy for purposes of the very coverage to which the Compulsory Liability Insurance Law is directed, it is not unreasonable to question whether it has the power to confer that status for a completely separate coverage. Today we have declared that the

Compulsory Liability Insurance Law does not confer insured status on a contractually-excluded person for purposes of an insurer-provided defense. We conclude that there is room for questioning whether the legislature intended that those on whose behalf minimal liability coverage must be paid thereby become persons insured thereunder as that phrase is used in § 3636.

¶26 [T]he Wilshire policy's UM endorsement defines as an insured the named insured and any person occupying a covered auto. Ball would come within the definition of an insured in the policy's UM insurance provisions as an occupant of a covered auto but for the Loaned Vehicle Exclusion.

. . .

¶28 A salient feature of our UM legislation, distinguishing it from compulsory liability insurance, is the latitude given to the policyholder or applicant to accept or reject UM coverage.

. . .

¶36 In short, a review of our extant UM jurisprudence reveals (1) a public policy that is protective of UM coverage for Class One insureds and (2) a willingness to uphold UM exclusions which by their express terms are limited to individuals who own a vehicle and who have thus had an opportunity to purchase their own UM coverage. We have not yet addressed whether the public policy expressed in § 3636 is offended by an exclusion that applies to Class Two insureds regardless of vehicle ownership. Inasmuch as the insurer has made payment to the claimant and the law had not been settled by requiring payment under this fact pattern, a bad-faith claim will not lie against the insurer.

¶37 [I]n answer to the fourth certified question, we declare that there has been no controlling legal authority in Oklahoma holding that the Loaned Vehicle Exclusion cannot eliminate UM coverage for a person in Ball's position and tort liability for withholding or delaying payment of UM benefits in reliance on the Exclusion will not lie in this case.

23. A Legitimate Dispute May Exist Regarding Coverage Where There Is No Controlling Legal Authority.

Flores v. Monumental Life Insurance Company, 620 F.3d 1248 (10th Cir. 2010) (Accidental Death Insurance Certificate):

"However, although we conclude in this opinion that Plaintiff may be entitled to coverage, we are not persuaded this resolution was so obvious and inevitable that Defendant acted unreasonably in denying Plaintiff's claims. 'Where the [bad faith] tort claim is factually based on a coverage dispute as to which no controlling legal authority provides an indisputable resolution, a determination of the coverage dispute is unnecessary because the elements of unreasonableness and bad faith are not present as a matter of law.' *Ball v. Wilshire Ins. Co.*, 221 P.3d 717, 724, note 40 (Okla. 2009)." *Id.* at 1256.

24. Where There Is No Conclusive Precedential Legal Authority Requiring Coverage, Insurance Company Has A Legitimate Dispute As To The Law.

Vickers v. Progressive Northern Insurance Company, 353 F. Supp. 3rd 1153 (U.S.D.C., N.D.O.K., November 19, 2018) (Uninsured/Underinsured Motorist Coverage):

The critical question determining if an insurer acted in bad faith is whether the insurer had "a good faith belief, at the time its performance was requested, that it had a justifiable reason for withholding or delaying payment under the policy." *see Ball [v. Wilshire Ins. Co.,* 2009 OK 38] 221 P.3d at 725 (internal citations omitted). If there is a legitimate dispute concerning coverage or no conclusive precedential legal authority requiring coverage, withholding or delaying payment is not unreasonable or in bad faith period. *Id.*…

There is no conclusive, precedential legal authority requiring coverage in the present factual circumstances. As noted *supra,* IV, § 3636 (E) has been interpreted twice by Oklahoma courts in the two cases relied upon by the parties, *Conner* and *Morris.* However, both *Conner* and *Morris* address fact patterns where the resident insureds also owned the vehicle that they were driving when they were in an accident with an uninsured or underinsured motorist. Both of those plaintiffs had therefore insured the vehicle they were driving for liability coverage, and had been offered the opportunity to purchase UM coverage, which they both rejected. Accordingly, though both cases interpret § 3636 (E), neither case required the outcome reached by those courts.

Further, though this Court has ultimately determined that both *Conner* and *Morris* supported the finding that the Exclusion 1(b) violates public policy as applied to Plaintiff in this case, Defendant presented a reasonable argument supporting its claim that, under *Conner*, § 3636 (E) does not require UM coverage in this case. Defendant argued that Exclusion 1(b) did not violate Oklahoma public policy under § 3636 (E) interpreted by the Oklahoma Supreme Court in *Morris*, and the Court of Civil Appeals of Oklahoma's holding in *Conner*, upholding an exclusion similar to Exclusion 1(b). Though the Court ultimately held to the contrary under the facts of this case, the Court can not find that Defendant's reliance on this argument to deny coverage, or to sell a policy containing Exclusion 1(b) is conduct that rises above simple negligence, or that Defendant's conduct may be reasonably perceived as tortuous. P. 1163

25. The Carrier Cannot Manufacture A "Dispute" Of The Law Where Either The Common Law Or Statutes Provide The Answer.

Everaard v. Hartford Accident and Indemnity Co., 842 F.2d 1186 (10th Cir. Okla. 1988) (Uninsured Motorist Coverage):

"At the core of Hartford's appeal is its contention that UM coverage is excess and thus recoverable only after all available liability insurance has been depleted." P. 1188.

. . .

We are somewhat hesitant to adopt Hartford's characterization of the pivotal issue of this appeal as one of first impression. While we are called upon to determine the proper sequencing of payment obligations between the insurer and its insured under an UM policy, we are satisfied that Oklahoma law furnishes the necessary guidelines." P. 1189.

. . .

[I]n Oklahoma, contrary to the position asserted by Hartford, UM insurance is primary coverage from the insurer to its policyholder. . . . The Oklahoma Supreme Court has stated in ***Uptegraft***, 662 P.2d at 683-84, 'The purpose of an uninsured motorist provision in an insurance contract is to protect the insured from the effects of personal injury resulting

from an accident with another motorist who carries no insurance or is underinsured.'" P. 1190 (Emphasis that of the Court.)

. . .

Section 3636 does not require the adjudication of tort claims against the uninsured motorist as a prerequisite to recovery. In our case, no language in § 3636 or ***Keel*** implies that the presence of other insured or underinsured tortfeasors alters this sequence." P. 1190. (Emphasis added.)

. . .

Contrary to Hartford's theory, Oklahoma did not 'opt[] for an excess-type of statute' but adopted primary UM coverage which also provides for underinsured coverage." Footnote 9, P. 1190.

Buzzard v. Farmers Insurance Company, Inc., 1991 OK 127, 824 P.2d 1105 (Underinsured Motorist Insurance):

"Section 3636(C) contemplates that underinsured motorist coverage will be available for that amount of injury or damage which exceeds the underlying liability limits of the tortfeasor. Thus, Farmers' assertion that underinsurance is 'excess' insurance is correct only in the sense that it becomes available only when the claim exceeds the amount of liability coverage. However, it is not 'excess' as defined by *Equity Mutual*, because exhaustion of limits is not required as a condition precedent to recovery. Our statute is clear; underinsurance is available when 'the liability limits . . . are less than the amount of the claim . . . .' See 36 O.S. 1981 § 3636(C). . . .

[T]he underinsurer is directly and primarily responsible to the insured for the amount of the claim which exceeds the liability limits of the tortfeasor's insurance. The insured may proceed against the underinsurer without first adjudicating the liability issues against the tortfeasor.

[W]here, as here, the claim greatly exceeds the available liability coverage, we find no reason to require that payment be delayed while awaiting payment by the liability carrier. To do so would frustrate the very purpose of underinsured motorist coverage -- protection of the insured from loss incurred at the hands of an underinsured motorist. (Citation omitted.)

We thus hold that requiring exhaustion of liability coverage was not a reasonable defense to the payment of the underinsured motorist benefits. Settlement by the City was not a prerequisite to settlement by Farmers. Requiring exhaustion of liability limits would completely dodge the intent of the legislature by allowing the insurer to delay its obligations until such a time as it could not be avoided. Our ruling furthers the purpose of underinsurance by providing quick payment for an insured's losses while also protecting the statutory rights of the insurer to be responsible only for that amount above the limits of liability. Regardless of whether the insured ever recovers from the tortfeasor, the insured may claim the benefits of underinsurance." (P. 1112.)

26. To Claim A Legitimate Dispute An Insurer Cannot Maintain A Blind Eye Toward The Applicable Oklahoma Law.

Crews v. Shelter General Insurance Company, 393 F.Supp.2d 1170 (W.D. Okla. 2005) (Homeowner's Fire Policy):

"The Insurer is held to knowledge of the applicable Oklahoma law, and the reasonableness of its decision must be judged in light of that law. *Crews* at 1178.

. . .

Shelter is charged with knowledge of applicable Oklahoma law at the time it made its decision to void Plaintiff's policy, *Willis*, 42 F3d at 612, and is thus charged with knowledge that under Oklahoma law an insurer may not void an insurance policy on the basis of an alleged misrepresentation unless the misrepresentation was made with intent to deceive. *Hays*, 105 F3d at 588-89." *Crews* at 1178.

27. Reliance On a Change in the Law Which Defines Terms in a Renewed Policy Is Not Bad Faith.

Stangl v. Occidental Life Insurance Company of North Carolina and Philadelphia American Life Insurance Company, 804 F.Supp.2d 1224 (W.D. Okla. 2011) (Supplemental Limited Benefit Cancer Insurance Policy with a Radiation and Chemotherapy Rider):

"'Actions taken in reasonable reliance on existing law cannot constitute bad faith because such conduct is not unreasonable.' *Anderson v. State Farm Mutual Automobile Insurance Co.*, 416 F.3d 1143, 1148 (10th Cir. 2005). Section 3651(B) expressly applies the definition of 'actual charge' and 'actual fee' to existing cancer policies, like Plaintiffs, that do not contain definitions of those terms and which are renewed after the effective date of Section 3651. . . . Defendant Philadelphia American's reliance on Section 3651 to alter or clarify its interpretation of the undefined term 'actual expenses' and begin paying only the amount that the medical providers of cancer treatments accepted rather than the billed amount, was reasonable as a matter of law. The Court finds that no genuine issue of material fact exists but that Defendant Philadelphia American had a 'good faith belief, at the time its performance was required, that it had a justifiable reason for withholding payment [of the billed amount when it was more than the medical provider accepted as full payment] under the policy." *Buzzard v. Farmers Insurance Co.*, 825 P.2d 1105, 1109 (Okla. 1991) (quoting *Buzzard v. McDanel*, 736 P.2d 157, 159 (Okla. 1987)). P. 1238.

28. "Intent To Deceive" Is A Long-Standing Requirement To Void A Policy.

Scottsdale Insurance Company v. Tolliver, 2005 OK 93, 127 P.3d 611 (Property Insurance):

¶11 "We have three times followed *Massachusetts Mutual's* requirement of a finding of an 'intent to deceive' the insurer before a policy may be avoided by reason of the insured's false statement or omission in the application. In *Whitlatch v. John Hancock Mutual Life Insurance Co.*, 1968 OK 6, 441 P.2d 956, 959, the Court . . . had applied the rule that questions as to the falsity of statements in an application and applicant's intent in making the statement are questions for determination by the jury, not questions of law for the Court.

¶12 In *Brunson v. Mid-Western Life Insurance Co.*, 1976 OK 32, 547 P.2d 970, [w]e noted that an insurer relying on the defense of misrepresentations by the insured in his application bears the burden of pleading and proving the facts necessary to sustain the defense, and that the '[q]uestion of falsity of statements . . . and intent of applicant in making them is for jury.

¶13 In *Claborn v. Washington National Insurance Co.*, 1996 OK 8, 910 P.2d 1046, . . . the *Claborn* Court stated that '[w]here evidence is conflicting, as to either insured's state of health at the time of the application, or the falsity of the insured's statements in the application process, or the intent of the insured, the issues are properly tendered to the jury for resolution.

. . .

¶15 In *Hays v. Jackson National Life Insurance Co.*, 105 F.3d 583 (10th Cir. 1997), cited in our certifying question, *Massachusetts Mutual, Brunson and Claborn* were followed in holding that Oklahoma law requires proof of an intent to deceive before an insurer can avoid a policy under § 3609. . . . See also *Vining v. Enterprise Financial Group, Inc.*, 148 F.3d 1206 (10th Cir. 1998) (citing *Hays, supra*, 105 F.3d at 588, and recognizing Oklahoma law requires a finding of intent to deceive to avoid a policy).

¶16 [W]e respectfully decline to answer the question.*"*

29. "Intent To Deceive" Post Claim Is For The Jury To Decide.

Benson v. Leader Life Insurance Company, 2012 OK 111 (Life Insurance Policy):

¶8 "We have four times followed *Massachusetts Mutual's* requirement of a finding of an 'intent to deceive' the insurer before a policy may be avoided by reason of the insured's false statement or omission in the application. In *Whitlash v. John Hancock Mutual Life Insurance Co.*, 1968 OK 6, ¶11, 441 P.2d 956, 959, the Court, reversing judgment in favor of the insurer on its motion for directed verdict, stated that *Massachusetts Mutual* had 'defined the terms, enumerated in [section 3609], which are made grounds for avoidance of a policy,' and had applied the rule that questions as to the falsity of statements in an application and applicant's intent in making the statement are questions for determination by the jury, not questions of law for the Court."

. . .

¶10 In *Brunson v. Mid-Western Life Insurance Co.*, 1976 OK 32, 547 P.2d 970, we quoted and approved the definition of 'misrepresentation' from *Massachusetts Mutual* expressly requiring the intent to deceive insurer and . . . that the '[q]uestion of falsity of statements . . . and intent of applicant in making them is for the jury.' . . .

¶ 11 Citing *Brunson*, the *Claborn* [*v. Washington National Insurance Co.*, 1996 OK 8, 910 P.2d 1046] Court stated that '[w]here evidence is conflicting, as to either insured's state of health at the time of application, or the falsity of insured's statements in the application process, or the intent of the insured, the issues are properly tendered to the jury for resolution.'

¶12 . . . This Court directed the Federal Court [in *Scottsdale Insurance Company v. Tolliver*, 2005 OK 93, 127 P.3d 611] to this Court's previous holdings recognizing a finding

of intent to deceive to avoid a policy as well as a jury determination as to the intent to deceive. . . .

¶13 . . . This matter must be given to the jury for determination and when properly submitted is not an issue to be determined by this Court.

30. Even Though Intent To Deceive Is A Critical Fact, Federal Trial Court Finds Intent To Deceive Unnecessary In Bad Faith Cases.

Scottsdale Insurance Company v. Tolliver, 440 F.Supp.2d 1247 (Homeowner's Fire Policy):

"The relevant inquiry for the Tollivers' bad faith claim is whether 'the [insurer's] agents who denied [the Tollivers'] claim actually knew or should have known that [the Tollivers'] application for insurance did not contain intentional misrepresentations.'"

. . .

The omissions on the application created an inference of fraud and misrepresentation, which created a legitimate basis for Scottsdale to conclude it may be able to rescind the policy. . . . The case law is clear that concealment of previous losses, whether or not intentional, presents a basis for a legitimate coverage dispute. *Vining v. Enterprise Financial Group, Inc.*, 148 F.3d 1206, 1213 (10th Cir. 1998); *Oulds*, 6 F.3d at 1437-39; *Claborn v. Washington National Insurance Co.*, 910 P.2d 1046, 1051 (Okla. 1996); *Hobbs v. Prudential Property and Casualty Co.*, 853 P.2d 252, 254 (Okla. Civ. App. 1993). Although the Tollivers repeatedly assert that they did not intentionally deceive Scottsdale by omitting their prior claims history, this is not relevant to their claim that Scottsdale acted in bad faith." *Scottsdale* at 1253.

31. Insurer In Bad Faith Where Its Investigation Seeks Only Information Inconsistent With The Application And Does Not Investigate "Intent To Deceive".

Benson v. Leader Life Insurance Company, 2012 OK 111 (Life Insurance Policy):

¶12 . . . In the present matter, the Insurer presented much evidence at trial that they would never had issued this policy had they known of Mr. Benson's alcohol use. The underwriter went to great lengths to state this fact. However, the jury considered that Insurer admitted that the policy was ambiguous, that it had examined only a portion of Mr. Benson's medical records and that Insurer's investigation sought only medical information inconsistent with the application and they did not even investigate the question of whether or not Mr. Benson intended to deceive them to obtain his insurance policy.

. . .

¶14 In plain language, we are not allowed to substitute our judgment for that of the jury merely because we would have decided or viewed disputed material fact questions differently than the jury. Where competent evidence was presented at trial to support

reasonable findings as to those material fact questions relating to the claim in suit and no reversible error is otherwise shown, an appellate court must affirm a judgment based on a jury verdict, not second-guess such judgment or the jury verdict upon which it is based. These general principles guide our review here."

32. No Bad Faith For Legitimate Dispute Where Insurer Actively Attempts To Resolve The Question Of Its Exposure For UM Coverage.

Skinner v. John Deere Insurance Company, 2000 OK 18, 998 P.2d 1219 (Uninsured Motorist Coverage):

"There was a legitimate dispute concerning the amount of UM coverage imputed to the policy and the amount to which each claimant was entitled. The record shows that during the relevant time period, Deere was actively attempting to resolve the question of its exposure for UM coverage. There was no conclusive precedential legal authority on the issue of the amount of UM coverage imputed to the policy under these factual circumstances. Deere negotiated with the claimants and investigated on its own to determine its actual UM exposure. It sought an attorney's opinion, with which Deere disagreed. Deere's position that it was responsible for only $20,000.00 was justified by this Court's decision in *May* [*v. National Mutual Insurance Company*, 1996 OK 52, 918 P.2d 43]."

33. An Insurer May Pay One Claim And Deny A Similar Claim And Still Be In Good Faith.

Bailey v. Farmers Insurance Company, Inc., 2006 OK CIV APP 85, 137 P.3d 1260 (Homeowner's Policy):

¶18 "An insurer's failure to dispute a claim when it has the opportunity to do so, does not usually foreclose its right to dispute a later, similar claim, nor does such conduct constitute a breach of its duty of good faith. Insurers are free to make legitimate business decisions (and mistakes) regarding payment, as long as they act reasonably and deal fairly and in good faith with their insureds.

¶19 Moreover, it [Farmers] has presented extensive correspondence between its attorney and Plaintiff's attorney discussing the factual and legal reasons for withholding payment. The record presents a clear and compelling demonstration of how to deal fairly and in good faith with an insured."

34. Where Insurer Has Legitimate Dispute, It Is Not Bad Faith To Compel Insured To Employ Legal Counsel.

Vickers v. Progressive Northern Insurance Company, 353 F. Supp. 3rd 1153 (N.D. Okla. 2018) (Uninsured/Underinsured Motorist Coverage):

Finally, Plaintiff claims that Defendant breached its duty of good faith and fair dealing "by compelling their insured to employ legal counsel in order to obtain benefits." However, it is not bad faith for an insurer to seek judicial resolution to a legitimate dispute. *See Barnes v. Oklahoma Farm Bureau Mut. Ins. Co.,* 2000 OK 55, 11 P.3d., 162, 171 (Okla.

2000). Accordingly, the simple fact that Plaintiff was required to employ counsel in this case does not demonstrate bad faith. In this case, the parties had a reasonable dispute about whether Exclusion 1(b) violated public policy, and as such, whether Plaintiff was entitled to coverage under the Progressive policy. Accordingly, Plaintiff's decision to initiate this lawsuit does not demonstrate that Defendant acted in bad faith. P. 1165

35. Unless Unreasonable, An Insurance Company Is Entitled To Appeal An Adverse Summary Judgment.

Price v. Mid-Continent Casualty Company, 2002 OK CIV APP 16, 41 P.3d 1019 (Uninsured Motorist Coverage):

[12] "Absent a showing that Mid-Continent's request for judicial interpretation of the contract was frivolous or dilatory or otherwise motivated by bad intent, the exercise of such right cannot form the basis of unreasonableness or bad faith.

N3 [W]ithout evidence to the contrary, the right to submit an insurance dispute to a judicial forum certainly includes the right of appeal and to complete the judicial process to a final judgment."

36. Legitimacy Of Dispute Requires An Appropriate Factual Investigation.

***Buzzard v. Farmers Insurance Company, Inc.*,** 1991 OK 127, 824 P.2d 1105 (Underinsured Motorist Coverage):

"An insurer clearly has the right to resist payment and litigate any claim to which the insurer has a reasonable defense. . . .

However, a claim must be paid promptly unless the insurer has a reasonable belief that the claim is legally or factually insufficient. The decisive question is whether the insurer had a 'good faith belief, at the time its performance was requested, that it had justifiable reason for withholding payment under the policy.' (Citation omitted.) To determine the validity of the claim, the insurer must conduct an investigation reasonably appropriate under the circumstances. The knowledge and belief of the insurer during the time period the claim is being reviewed is the focus of a bad faith claim." P. 1109. (Emphasis that of the court.)

. . .

If the claim exceeds the amount available under the liability policy, the underinsurer must take prompt action to determine what payment is due and may not delay the payment of benefits until exhaustion of liability limits. The underinsurer may not safely await settlement between the liability insurer and the insured. Instead, the insurer must go about the business of investigating and evaluating the claim. An insurer is readily equipped to make such a determination, and to assign a dollar value to the claim. Once this is

accomplished, if the insurer determines that the claim does not exceed liability limits, and such valuation is supported by reasonable evidence, the underinsurer may delay payment. However, if the underinsurer does not conduct an investigation, or after investigation, determines that the likely worth of the claim exceeds the liability limits, prompt payment must be offered."

Capstick v. Allstate Insurance Company, 998 F.2d 810 (10th Cir. Okla. 1993) (Automobile Policy):

"Allstate contends that there was 'undisputed scientific evidence' of arson present in this case and that it had legitimately disputed coverage, the trial court in overruling the motion for directed verdict specifically found, under the evidence described above, that the company had simply picked an 'expert' who was not given any information concerning the true circumstances of the fire and that Allstate had denied coverage without making any other bonafide investigation of plaintiff's claim. . . . In making its argument, Allstate erroneously contends that its arson evidence was based upon 'undisputed scientific evidence,' thereby overlooking all other evidence tending to prove that it failed entirely to conduct any legitimate investigation of plaintiff's claim."

Oulds v. Principal Mutual Life Insurance, 6 F.3d 1431 (10th Cir. 1993) (Health Insurer):

"No showing was made in this case that Principal overlooked material facts due to an inadequate investigation or that a more thorough investigation would have resolved the discrepancy in statements between plaintiff and [the insurance agent]. . . .

The investigation of a claim may in some circumstances permit one to reasonably conclude that the insurer has acted in bad faith. This is particularly true <u>if the manner</u> of an investigation suggests that the insurer has constructed a sham defense to the claim or has intentionally disregarded undisputed facts concerning the insured's claim. None of these circumstances are present in the case before us."

37. The Decisive Question In A Bad Faith Case Is Whether The Insurer's Denial Was Based On A Good-Faith Reason At The Time Of Denial Under A Reasonably Appropriate Investigation.

Bannister v. State Farm Mutual Automobile Insurance Company, 692 F.3d 1117 (10th Cir. Okla. 9/5/12) (Uninsured Motorist Coverage):

"The law of bad faith was properly encapsulated by Jury Instruction No. 10 in this case. The instruction on the elements of Bannister's bad faith claim (i.e., breach of the duty of good faith and fair dealing) was that [*Bannister*] *must prove each* of the following elements by the greater weight of the evidence":

> FIRST: That State Farm was required under the insurance policies to pay Mr. Bannister's uninsured motorist claim;

SECOND: That *State Farm's refusal to pay the claim was unreasonable under the circumstances because*

1) State Farm *did not perform a proper investigation,*
2) State Farm *did not evaluate the results of the investigation properly, or*
3) State Farm *had no reasonable basis for the refusal.*

THIRD: That State Farm did not deal fairly and in good faith with Mr. Bannister; and,

FOURTH: That the violation by State Farm of its duty of good faith and fair dealing was the direct cause of the damages sustained by Mr. Bannister and sought to be recovered in this action. . . .

The instruction went on to state:

> In determining whether the insurer had a good faith belief in some justifiable reason for denying payment at the time it made its decision on the insurance claim, you [the jury] may only consider evidence which the insurer had at the time it decided to deny the claim. In this action there is a factual dispute about when that decision was made. *An insurer's refusal to pay a claim is not bad faith when there is a legitimate dispute concerning coverage. However, merely because there is a reasonable basis that an insurance company could invoke to deny a claim does not necessarily immunize the insurer from a bad faith claim if, in fact, it did not actually rely on that asserted reasonable basis and instead took action in bad faith.* The insurer is not required to show that its good faith belief was correct." P. 1126-27.

"The Court correctly acknowledged that the decisive questions are whether State Farm's denial of coverage was based on a good-faith reason at the time it decided to deny coverage, and also whether State Farm conducted an investigation reasonably appropriate under the circumstances to determine the validity of Bannister's claim. See *Buzzard v. Farmers Insurance Co., Inc.*, 824 P.2d 1105, 1109 (Okla. 1991)." P. 1127.

38. Insurer's Failure to Determine Fault Apportionment Before Closing File Creates Issue of Fact of Bad Faith.

Watson vs. Farmers Insurance Company, Inc., 23 F.Supp.3d 1342, (N.D. Okla. 2014) (Automobile Medical Pay and Uninsured/Underinsured Motorist Coverage):

Farmers next argues that it is entitled to judgment as a matter of law because Ms. Tabler testified that she did not apportion any fault percentage to the plaintiff and that she would not have assessed 50% fault (which was at one time assessed against plaintiff by the third party adjusters) without plaintiff actually admitting he was 50% at fault. However, construing the evidence in plaintiff's favor, there is a genuine dispute of fact as to Tabler's

actions regarding findings of comparative fault. The computer prompted Tabler to enter a fault percentage, and Tabler admits that she could not fully adjust a UM claim without a fault assessment, yet she deactivated or closed the UM claim without assessing fault or recording any percentage of fault, and she only assessed 100% fault to Mr. Rase after the filing of this lawsuit. To wholly accept her testimony as to what she would have done or what was in her mind, without considering her other testimony and the evidence in the claim file, would require the Court to improperly weigh all of the evidence in Farmers' favor and ignore the evidence that favors plaintiff's position. See *Tolan*, 134 S.Ct. at ___, 2014 WL 1757856 at (*5)

39. There Is No Legitimate Dispute Where The Insurer Fails To Investigate An Essential Element For Denial.

Crews v. Shelter General Insurance Company, 393 F.Supp.2d 1170 (W.D. OK 2005) (Homeowner's Fire Policy):

"It is undisputed that Shelter voided Plaintiff's insurance policy on the basis of Mr. Crews's acknowledged misrepresentation without having investigated or even considered whether Mr. Crews may have made the misrepresentation *without* an intent to deceive." ... "The Court relatedly finds that, given the dispute as to the reasonableness of Shelter's investigation, the factual record permits differing inferences as to the reasonableness of Shelter's belief that it was authorized to void Plaintiff's policy under Oklahoma law and by necessity as to the legitimacy of the coverage dispute giving rise to this litigation. Accordingly, the Court finds that Shelter is not entitled to summary judgment on Plaintiff's bad faith claim." *Crews* at 1178.

40. Failure To Properly Investigate A Material Fact May Give Rise To Bad Faith.

Matlock v. Texas Life Insurance Company, 404 F.Supp.2d 1307 (W.D. OK 2005) (Life Insurance Policy):

"Defendant can act in bad faith if it failed to undertake a reasonable investigation into the nature of Mr. Matlock's visits to Via Christi. Oklahoma law imposes on defendant an obligation to undertake an investigation reasonable under the circumstances before it denies plaintiff's claim." *Matlock* at 1314.

41. An Insurer Cannot Claim A Legitimate Dispute As To Value Where It Does Not Conduct An Adequate Investigation.

Watson vs. Farmers Insurance Company, Inc., 23 F.Supp.3d 1342, (N.D. Okla. 2014) (Automobile Medical Pay and Uninsured/Underinsured Motorist Coverage):

The evidence reveals a genuine issue of fact as to whether [the UM claims adjuster] conducted an adequate investigation before determining that plaintiff's damages would not exceed [third party tortfeasor's] liability limits. Farmers contends that it was plaintiff's delay in providing medical records and bills which led to [the UM adjuster's] concluding that plaintiff's damages would be covered within [third party tortfeasor's] $50,000 liability

limits. However, the facts construed in plaintiff's favor reveal a genuine dispute of material fact as to whether Farmers' actions were based upon a legitimate dispute. [The UM adjuster] deactivated the UM claim and determined that plaintiff's damages would be covered by [the third party tortfeasor's] liability limits even though she knew that plaintiff was still being treated, and she had not asked for any medical bills or records, evaluated plaintiff's pain and suffering, or asked about any lost wages. She also inaccurately informed plaintiff that he must first exhaust the liability limits of [the third party tortfeasor's] liability policy or file a lawsuit against Farmers before the UM claim would be reactivated.

. . .

In *Burch* there is no exception to the general rule (that UM coverage is primary, first dollar coverage, in cases where one insurance company provides the liability insurance for the tortfeasor and the UM coverage for the injured claimant.) (*6)

42. Insurer In Bad Faith Where Its Investigation Seeks Only Information Inconsistent With The Application And Does Not Investigate "Intent To Deceive".

Benson v. Leader Life Insurance Company, 2012 OK 111 (Life Insurance Policy):

¶12. . . . In the present matter, the Insurer presented much evidence at trial that they would never had issued this policy had they known of Mr. Benson's alcohol use. The underwriter went to great lengths to state this fact. However, the jury considered that Insurer admitted that the policy was ambiguous, that it had examined only a portion of Mr. Benson's medical records and that Insurer's investigation sought only medical information inconsistent with the application and they did not even investigate the question of whether or not Mr. Benson intended to deceive them to obtain his insurance policy.

. . .

¶14. In plain language, we are not allowed to substitute our judgment for that of the jury merely because we would have decided or viewed disputed material fact questions differently than the jury. Where competent evidence was presented at trial to support reasonable findings as to those material fact questions relating to the claim in suit and no reversible error is otherwise shown, an appellate court must affirm a judgment based on a jury verdict, not second-guess such judgment or the jury verdict upon which it is based. These general principles guide our review here."

43. Where Insurer May Have Misunderstood Its Duty To Defend In Oklahoma And Therefore Does Not Conduct A Proper Investigation, It May Not Have A Reasonable Basis For Delaying Payments.

Automax Hyundai South LLC v. Zurich American Insurance Company and Universal Underwriters Insurance Company, 720 F.3d 798 (10th Cir. 6/26/13) (E & O Coverage and Garage Operations Coverage):

"Zurich insists that even if it breached its duty to defend and indemnify Automax, the bad faith claim must fail because there was a reasonable dispute over coverage. . . .

The elements of a bad faith claim against an insurer are: (1) the insured was entitled to coverage under the policy; (2) the insurer had no reasonable basis for delaying payment;

(3) the insurer did not deal fairly and in good faith with the insured; and (4) the insurer's violation of the duty of good faith was the direct cause of the insured's injury. (Citations omitted.)

The District Court granted Zurich's motion for summary judgment on the bad faith claim because it concluded that Automax could not meet the first element of the claim – that Automax was entitled to coverage. . . . Yet the record suggest – though, at the moment, does not conclusively show – that Zurich may have misunderstood the duty in Oklahoma to defend an insured if the *facts* of the lawsuit reveal a mere possibility that a claim is covered, as well as the duty that, once an insured requests a defense, the insurer has to inquire into the underlying facts. (Citation omitted.) It is possible that Zurich did not conduct the requisite investigation before denying Automax's claim. Such a scenario would suggest that Zurich did not have a reasonable basis for delaying payment. *Automax, supra*, at 810-811.

44. After An Appropriate Factual Investigation, A Legitimate Dispute Requires A Competent, Unbiased Factual Evaluation.

Massey v. Farmers Insurance Group, 986 F.2d 1428, 1993 WL 34770 (10th Cir. Okla. 1993) (Homeowner's Fire Policy):

"[E]ach party is required to appoint a 'competent and disinterested appraiser' once either party has made a written demand for an appraisal. . . . Substantial evidence was presented that the first appraiser appointed by Defendant was not competent, and that neither of the two appraisers appointed by Defendant were disinterested. Defendant's first appraiser, Wilburn, was an attorney who did substantial work on Defendant's behalf, and indeed had been retained by Defendant to represent it in its dealings with Plaintiffs. The second appraiser, Murlowski, relied on insurance work, a substantial portion of which was from the Defendant, for his livelihood, and he had earlier provided an estimate for repairing the house. Moreover, there was direct evidence in the form of a letter by one of Defendant's attorney who happened to be an associate of Wilburn, that Defendant attempted to improperly influence the second appraiser by conveying his expectation that the appraiser would stand by his estimate to rebuild the house."

but see London v. The Trinity Companies, 1994 OK CIV APP 59, 877 P.2d 620 (Fire Insurance):

"In the present case, the policy provisions require the [insureds] to document any additional living expense as the evidence showed Trinity explained in detail to [the insureds' professional adjuster]. . . .

Practices of the insurance industry are no doubt baffling and frustrating to many people as it likely was to the [Londons]. This does not mean that the insurer must pay whatever the insured requests or demands or risk paying punitive damages through a bad faith claim. . . .

Trinity's request to its appraiser to pay special attention to Trinity's in-house adjuster's estimate is advisory only, not mandatory. Moreover, the law imposes no

obligation on Trinity to send its designated Section 4803 appraiser any estimates, much less low ones. Finally, the Londons' appraiser did sign the appraisal, for which a neutral third party chosen by each party's disinterested appraiser acted as umpire and also signed the appraisal."

45. A Continuum Of Reasonableness.

Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange, Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96); (Underinsured Motorist Coverage):

"[I]t is clear Farmers' conduct falls somewhere between *Christian* (where the insured never had a valid defense and fraudulently concealed this fact) and *Manis* (where the insured produced strong evidence for denying the claim)."

46. Legitimate Dispute Must Be Based Upon A Reasonable Investigation.

Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange, Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96); (Underinsured Motorist Coverage):

"Farmers' investigation began reasonably but was admittedly less than thorough. . . . .

An insurance company cannot rely on an inadequate investigation, even one made without evil intent."

47. Insurer May Not Put Burden Of Investigating On Claimant's Lawyer.

Brashier v. Farmers Insurance Company, Inc. and Farmers Insurance Exchange, Court of Appeals, Division 4, State of Oklahoma, Case No. 82,512, (3/15/95, cert. granted only as to attorney fees, mandate issued 10/25/96); (Underinsured Motorist Coverage):
Here, the trial court denied Farmers' demurrer, stating:

"[The claims adjuster] tries to excuse his failure to do any investigating by putting the burden on [the claimant's lawyer] to do his investigating for him. . . . . [F]rom what I heard he really didn't do a thing to investigate this claim other than say, send me more stuff. Under the circumstances, Farmers' reliance upon the demand letter is wholly misplaced and does not relieve Farmers of its obligation to conduct an investigation reasonably appropriate under the circumstances."

48. Insurer May Be In Bad Faith Even Though It Has Defenses.

Massey v. Farmers Insurance Group, 986 F.2d 1428, 1993 WL 34770 (10th Cir. Okla. 1993) (Homeowner's Fire Policy):

"Defendant argues that unless Plaintiffs were entitled to a directed verdict on the breach of contract claim, the bad faith claim should not have been submitted to the jury. .

. *Christian* does not suggest that an insurer's absence of a defense to a breach of contract claim is a necessary predicate to a bad faith cause of action. Indeed, in *Timmons*, also relied on by Defendant, the court affirmed a bad faith judgment based on the insurer's actions in investigating the claim, despite the fact that the insurer had several defenses to the contract action. . . .

More recently, the Oklahoma Supreme Court recognized that whether or not an insured is legally entitled to recover under the policy is not the 'controlling issue' in a bad faith action based on a denial of coverage; rather, the bad faith issue, in such a case, turns on 'whether [the insurer] at the time [the insureds] made their claim, was in possession of information to establish that its refusal to pay was in good faith." . . . (Citation omitted.) Similarly, in *McCoy v. Oklahoma Farm Bureau* (citation omitted), the court held that the issue of bad faith was properly submitted to the jury despite the existence of a triable issue as to whether the insured had burned down his own house."

49. A Legitimate Dispute Does Not Exist Where An Insurer Does Not First Investigate Or Evaluate Whether It Had Such A Legitimate Dispute.

Vining v. Enterprise Financial Group Inc., 148 F.3d 1206 (10th Cir.1998) (Credit Life Policy):

"Enterprise could contest liability on the basis of a misrepresentation if it had a good faith belief that the misrepresentation was intentional. (Citations omitted.) . . . Here, Enterprise reasonably could have determined that by signing the disclaimer, [plaintiff's decedent] materially misrepresented the condition of his health. In addition, Enterprise might have been able to defend against a bad faith claim based upon the conduct of its [selling agent] . . . in selling or issuing the policy because the tort of bad faith 'must be based upon an insurer's wrongful denial of a claim; it cannot be based upon the conduct of the insurer in selling and issuing the policy.'

However, even a 'legitimate dispute as to coverage will not act as an impenetrable shield against a valid claim of bad faith' where the insured presents 'sufficient evidence reasonably tending to show bad faith' or unreasonable conduct. (Citations omitted.) That is, a plaintiff may bring a bad faith cause of action even though a legitimate defense to a breach of contract claim exists if the defendant did not actually rely on that defense to deny payment under the policy. . . .

Vining presented evidence that Enterprise engaged in a systematic, bad faith scheme of canceling policies without determining whether it had good cause to do so. Such conduct constitutes bad faith regardless of whether Enterprise legitimately might have been able to contest Vining's claim based on [plaintiff's decedent's] heart condition, because the evidence showed that Enterprise, in fact, did not dispute coverage in good faith based on [plaintiff's decedent's] heart condition."

50. Where There Is A Legitimate Possible Basis For Dispute, The Insured Must Present Evidence That The Insurer Did Not Have A Reasonable Good Faith Belief Or Actually Rely On The Legitimate Basis For Denying The Claim.

Bannister v. State Farm Mutual Automobile Insurance Company, 692 F.3d 1117 (10th Cir. Okla. 9/5/12) (Uninsured Motorist Coverage):

"[A] jury may decide the issue of bad faith, even when the evidence reveals a legitimate possible basis for a dispute, if the claimant submitted evidence that the insurer did not *actually* rely on that legitimate basis but rather denied the claim for an illegitimate reason, such as a 'systematic, bad faith scheme of cancelling policies without . . . good cause,' *Vining v. Enterprise Financial Group, Inc.*, 148 F.3d 1206, 1214; see also *Capstick v. Allstate Insurance Co.*, 998 F.2d 810, 814-15 (10th Cir. 1993) (affirming denial of JMOL where 'from the very beginning without any investigation, [the insurer] treated the claim as a 'suspicious loss'' and 'denied coverage without making any other bonafide investigation').

51. Relying On The Insured's Statement Where More Investigation Would Not Reveal Different Facts Is Not Bad Faith.

Timberlake Construction Co. v. U.S. Fidelity and Guaranty Co., 71 F.3d 335 (10th Cir. 1995) (Builder's Risk Insurance):

"It appears that Fidelity did not contact anyone from Wal-Mart to determine if they regarded the project as accepted or occupied until after coverage was denied. . . . However, we note the side of the story Fidelity had immediately gotten in detail was that of its own insured, on whose statements it was entitled to rely.

. . .

[W]hen a bad faith claim is premised on inadequate investigation, the insured must make a showing that material facts were overlooked or that a more thorough investigation would have produced relevant information. *Id.* at 345.

. . .

Consequently, given all the information Fidelity's investigation did uncover, as well as the fact that further investigation would have produced nothing of consequence, we are compelled to conclude that any alleged 'failure' to further investigate cannot, in this case, support Timberlake's bad faith claim." *Id.* at 347.

52. Where Insurer Had A Reasonable, Actually Relied Upon Basis For Denial, Bad Faith Investigation Still For Jury If Material Fact Overlooked Or More Thorough Investigation Would Produce Relevant Information.

Bannister v. State Farm Mutual Automobile Insurance Company, 692 F.3d 1117 (10th Cir. Okla. 9/5/12) (Uninsured Motorist Coverage):

Another instance in which the jury may decide the issue is if there is evidence that insurer 'failed to adequately investigate [the] claim.' *Timberlake*, 71 F.3d at 345. Crucially, however, 'when a bad faith claim is premised on inadequate investigation, the [claimant] must make a showing that material facts were overlooked or that a more thorough

investigation would have produced relevant information' that would have delegitimized the insurer's dispute of the claim. *Id.* That is, evidence of inadequate investigation must 'suggest a sham defense or an intentional disregard of uncontrovertable facts' in order to put to a jury. *Id.* To illustrate, where an insurer had interviewed a claimant, but had failed to question key individuals and therefore 'had not completed an investigation [but rather] had only gotten one side of the story,' JMOL was still warranted when such questioning 'would not have changed the underlying *facts* already known to [the insurer], facts from which [the insurer] was entitled to form a reasonable belief' regarding its justification for denying the claim. *Id.*" P. 1128.

. . .

"Even though State Farm had a reasonable, actually-relied upon basis for denying Bannister's claim, the bad faith issue could still be sent to the jury to the extent that Bannister's theory is 'premised on inadequate investigation.' *Timberlake*, 71 F.3d at 345. However, to resist JMOL based on a theory of inadequate investigation, Bannister 'must [have] ma[d]e a showing that material facts were overlooked or that a more thorough investigation would have produced relevant information." *Id.* P. 1131.

53. An Insurer May Confirm Legitimacy Of Plaintiffs' Claim by Various Means.

Walker v. Progressive Direct Insurance Company, 720 F.Supp.2d 1259 (N.D. OK 2010) (Automobile Comprehensive Coverage):

"Although Plaintiffs take issue with the manner in which Progressive handled the third key and the Branson photographs, the Court does not find the specific allegations asserted by Plaintiffs to rise to the level of bad faith. For example, although Progressive did not immediately call Dixie Stampede to confirm the legitimacy of the Branson photographs, as Plaintiffs contend should have occurred, Progressive determined the validity of the pictures by other means." (P. 1274.)

54. To Avoid Bad Faith Insurance Company's Investigation Need Not Follow Every Lead But Must Be Reasonable.

Hamilton v. Northfield Insurance Company, 910 F.3d 1320 (10th Cir. Okla. 2018) (Commercial Property Insurance):

Mr. Hamilton rests his bad faith claim primarily on the assertion that Northfield's investigation was inadequate because the insurance company "intentionally chose not to consider undisputed facts favorable to a finding of coverage." *Hamilton* @ 1326.

… [I]n *Sims v. Great American Life Insurance Co.*, another case upon which Mr. Hamilton relies, we acknowledged that Oklahoma law provides that the question of reasonableness must be submitted to the jury when different inferences could be drawn regarding whether the insurer's actions were reasonable. (citation omitted) Nevertheless, in *Sims*, we also concluded that there was a legitimate dispute as to coverage given evidence

indicating the insureds death was a suicide rather than an accident. (citation omitted) Moreover, we rejected the Plaintiff's argument that the insurance company's investigation was inadequate because it had not further questioned family members regarding the insured's motive to commit suicide given that "the missing person's report, the death certificate, the medical examiner's report, and the accident report" all indicated suicide was the insured's cause of death.(citation omitted) Because the insurer "reasonably relied on such evidence when making its preliminary decision to dispute coverage," we held that the district court erred in submitting the question of reasonableness to the jury: In light of the legitimate dispute as to coverage and the adequacy of the insurer's investigation the Plaintiff had not presented sufficient evidence of bad faith to survive a motion for judgement as a matter of law.

Viewing the evidence in the light most favorable to Mr. Hamilton, Northfield still had an objectively reasonable basis to deny coverage.... *Hamilton* @ 1327.

…As in *Sims*, there may have been additional actions Northfield could have taken, but Mr. Hamilton's criticisms do not rise to the level of indicating Northfield "conducted a superficial investigation." (citation omitted) Northfield sent the field adjuster and the Rimkus Engineer to Mr. Hamilton's property to inspect the roof, and both investigations resulted in the conclusions that the fifteen-year-old roof had not been well-maintained. "[A]n insurance company need not follow up on every possible lead or piece of evidence in a claim investigation to avoid liability for bad faith." (citation omitted) The record simply does not support an inference that Northfield "had no objectively reasonable basis for denying [Mr. Hamilton]'s claim and that it acted in willful or reckless disregard of [Mr. Hamilton]'s rights."(citation omitted) *Hamilton* @ 1327-1328.

55. An Insurer Can Rely On Its Agent's Denial Of Knowledge Of Facts As Creating A Legitimate Dispute To Coverage.

Scottsdale Insurance Company v. Tolliver, 440 F.Supp.2d 1247 (Homeowner's Fire Policy):

"The Tenth Circuit [in *Oulds v. Principal Mutual*, 6 F.3d 1431 (10th Cir. 1993)] held that the insurer could rely on its agent's denial as a legitimate basis to dispute coverage and that even if the Court assumed Oulds had provided the agent all the information she claimed, this would not preclude summary judgment." *Scottsdale* at 1252.

56. False Swearing By Insured During Investigation May Create Legitimate Dispute.

Thompson v. State Farm Fire and Casualty Co., 34 F.3d 932 (10th Cir. Okla. 1994) (Fire Insurance Policy):

"[T]he relevancy of the statements to State Farm's investigation was in showing that Thompsons owned assets that had sufficient value and had a sufficient prospect of early

realization to negate the inference that they had a financial incentive to burn their own building. And as such, the statements were material to the extent that they reflected or did not reflect present facts, not Thompson's future intentions. . . .

If the jury so decided, Thompsons' assertion of the purportedly imminent sale was surely an overt misrepresentation as to present facts. . . ."

57. The Reasonableness Of Insurer's Evaluation Of An Unliquidated Claim Is A Factual Issue For The Jury.

Truesdell v. State Farm Fire & Casualty Company, 960 F.Supp. 1511 (N.D. OK. 1997) (Homeowner's Policy):

"Plaintiffs claim that the estimates considered by State Farm were inadequate, were based on estimates made by an [sic] disreputable and incompetent contractor, and did not take into account repair of wood trim in the living room, *safe* repair to the electrical system, and replacement of redwood siding. . . .

Questions of reasonableness are generally factual issues, and the Court cannot hold as a matter of law that State Farm acted in an[sic] reasonable manner by rejecting the highest of the three estimates it received in light of Plaintiffs' explanation as to why the bids differed to such a large extent." *Id*. at 1521.

58. Good Faith Duty Remains Even Where There Is A Claim For Uninsurable Punitive Damages.

Magnum Foods Inc. v. Continental Casualty Company, 36 F.3d 1491 (10th Cir. Okla. 1994) (Commercial General Liability Policy):

"When an insurer owes or undertakes the duty to defend its insured in a suit seeking both insured and uninsurable damages, it has the duty to conduct settlement negotiations in good faith as part of that defense.

[T]he presence of the punitive claim did not absolve CNA from its obligation of good faith in handling the entire case. . . . CNA's duty of good faith included working cooperatively with [the insured] throughout in both defending and attempting to settle the entire case, with fair consideration given to [the insured's] concerns because of its exposure to the uninsured punitive claim. The good faith duty of CNA thus required cooperative efforts by CNA with Magnum throughout to handle and settle the entire case."

59. Where There Is A Substantial Risk Of Adverse Verdict, Even An Honest Belief In A Defense Does Not Provide A Legitimate Dispute.

Magnum Foods Inc. v. Continental Casualty Company, 36 F.3d 1491 (10th Cir. Okla. 1994) (Commercial General Liability Policy):

"We believe that where, as here, there is a substantial risk of a large verdict for which the insured will be held liable, an insurer may not refuse to cooperate with its insured in settling the claims merely because the insurer has an honest belief in its ability to defend the insured. . . . The insurer must exercise 'diligence, intelligence, good faith, honest and conscientious fidelity to the common interest of the parties.' . . . If an insurer fails to act cooperatively to reach a settlement -- for example, by refusing to make a reasonable offer to settle at least the insured portion of the claim -- then the insurer's conduct may be reasonably perceived as tortious."

60. A Liability Insurer Who Asserts False Defenses Which Forces Its Insured To Be Dragged Through The Legal System Unnecessarily Is Not In Bad Faith If It Has A Legitimate Dispute As To The Alleged Value Of The Claim.

Milroy v. Allstate Insurance Company, 2007 OK CIV APP 6, 151 P.3d 922 (Sept. 19, 2006) (cert. denied 1/9/07) (Automobile Liability Policy):

"¶25 [Plaintiff] Milroy's claim against Allstate is based in part on her accusation of litigation misconduct against [Allstate's attorney]. She claims that he prepared an untruthful answer to one of [the claimant's] discovery requests, . . . and that he misled both claimant's counsel and the Trial Court in the personal injury action regarding why she was not present when the case was set for trial on February 14, 2001. . . .

¶26 The record reveals that Allstate legitimately disputed the alleged value of the [claimant's] claim. At trial, the jury returned a verdict for approximately half of the amount sought by [claimant] at the time she filed her action in Small Claims Court. [Allstate's attorney] effectively represented [Plaintiff] within the bounds permitted by law. We conclude that the litigation conduct provides no basis for a bad faith action under *Badillo*."

61. Ambiguity In A Policy Cannot As A Matter Of Law Create A Valid Defense To A Bad Faith Claim.

Wolf v. Prudential Insurance Company of America, 50 F.3d 793 (10th Cir. 1995) (Medical Benefits Plan):

"The fact that courts differ on the meaning of 'experimental' may well mean that the term is ambiguous, but it does not necessarily mean that the coverage question in a given case is 'fairly debatable.' And assuming 'experimental' is ambiguous, Prudential's argument fails on consideration of the rules governing insurance policy interpretation . . . .

Insurers are obviously well aware of [the insurance policy construction] 'familiar rule', but Prudential's argument would allow them to ignore it with impunity. Under Prudential's argument, an insurer could intentionally insert an ambiguous term into a policy and continually deny coverage based on that term, despite contrary court decisions or its own

doubts about the meaning of the term. The insurer could lose coverage cases (though many insureds would not litigate and would accept the insurer's denial of coverage), but would never face a bad faith claim because its ambiguous term would create a 'legitimate dispute'. Such actions by an insurer would not be in good faith and could not be countenanced. Thus, mere ambiguity cannot, as a matter of law, create a valid defense to a bad faith claim."

62. An Insurer May Be In Bad Faith Even When A Policy Is Ambiguous If There Is A Reasonable Expectation Of Coverage.

Tomlinson v. Combined Underwriters Life Insurance Company, et al., 708 F.Supp.2d 1284, (N.D. Okla. 2010) (Cancer and Dread Disease Policy):

"[T]he Policy creates a reasonable expectation in the insured that coverage exists for Arimidex . . . .

Defendants argue the Arimidex is not covered because Plaintiff self-administered it. . . . ." *Id.* at 1292.

"The Court will not construe the policy so narrowly as to prohibit coverage when a pill is prescribed for – and not handed to – a patient. In this instance, the insurer has created a reasonable expectation in the insured that coverage exists." *Id.* at 1293.

"The Court has found that the Defendants' interpretation of the Policy with regard to the Arimidex was too narrow; the trier of fact could find that it was unreasonably so." *Id.* at 1296.

63. Insurer Cannot Rely Upon Exclusions Which Violate Public Policy.

Alternative Medicine of Tulsa, Inc. v. Cates v. Progressive Preferred Insurance Company, 2006 OK CIV APP 65, 136 P.3d 716 (Uninsured Motorist Coverage):

¶4 "Appellant urges the named-driver exclusion is void as contrary to public policy because it excludes UM benefits for innocent passengers. Appellant's contentions have merit. . . . Even in the absence of a violation of a law's express provision, an exclusion may nonetheless be invalid for nonconformity to the *policy of the law*. . . .

¶5 Oklahoma jurisprudence teaches that clauses in insurance policies which leave an innocent third-party victim of the insured's negligence without any insurance protection are void as contrary to statutorily articulated public policy. [Citation omitted.] Because the named-driver exclusion under the facts of this case resulted in the denial of UM coverage to innocent third-party passengers, we find the exclusion is void and contrary to public policy."

64. Bad Faith Claim May Exist Where Insurer Denies Claim On Provision Which Violates Public Policy.

Morris v. America First Insurance Company, 240 P.3d 661, 2010 OK 35 (Underinsured

Motorist Coverage):

"¶6 None of Mr. Morris's vehicles were listed as 'covered autos' under [his mother's] policy, and he paid no part of the premium. But he was an 'insured' under the policy as a resident of the household. The policy excluded UM coverage for an 'insured' who was a family member and was injured while occupying a vehicle that he owned that was not insured for UM coverage at the time of the accident."

. . .

"¶20 The clause before this Court that excludes UM coverage for bodily injury sustained by a resident family member, who is otherwise insured by such policy, violates the public policy expressed in *Cothren* and *Wendt*. That clause is void insofar as it requires separate UM coverage on a specific vehicle even though the owner is otherwise covered by the UM provisions of a liability policy he purchased on another vehicle."

65. Plaintiff's Recovery Under Multiple Health Policies Is Neither Against Public Policy Nor A Defense To A Bad Faith Claim.

Tomlinson v. Combined Underwriters Life Insurance Company, et al., 708 F.Supp.2d 1284, (N.D. Okla. 2010) (Cancer and Dread Disease Policy):

"Defendants' argument in this case conflicts with regulations in Oklahoma regarding the coordination of benefits, i.e., where an insurance company reduces benefits otherwise payable under a policy because of the availability of other insurance coverage. See Okla. Admin. Code § 365:10-11-2(I). . . . Oklahoma forbids the coordination of benefits unless an insurer includes a written disclosure in the policy informing the policyholder that benefits may be reduced to the extent of other applicable coverage. *Id.* at 365:10-5-2(B). It is undisputed that the Policy contained no such disclosure. 'Where two or more insurance policies cover the same hazard and do not provide for coordination of benefits, each policy is primary, and each insurer must pay "all medical expenses that qualify for payment under the policy or plan"'." (Citations omitted.) *Id.* at 1297-98.

66. An Insurer Can Create A Legitimate Dispute If It Redefines Coverage Even If It Violates Public Policy.

Ameen v. Prudential Property and Casualty Insurance Company, 2005 OK Civ App 23, 110 P.3d 86 (Uninsured Motorist and Medical Pay Coverage):

¶14 "In the instant case, Insurer crafted the policy so as to redefine who was insured under the policy within each subdivision of coverage. Insurer argued Ameen was not an insured under the terms of the policy for the purposes of UM coverage if he was not in a car or on foot at the time of the accident. However, such provisions violate §3636. . . . Insurer may not dilute the legislatively mandated UM coverage by restricting coverage based upon the particular vehicle the insured is occupying at the time of injury. The policy provisions purporting to do so violate the public policy of §3636."

. . .

¶17 We hold the parties had a legitimate dispute as to the interpretation of the

contract language in light of Oklahoma's UM statute. Therefore, Insurer is entitled to summary judgment on Ameen's bad faith claim as a matter of law."

67. Insured May Pursue Bad Faith Claim Even Where Insurer Has A Legitimate Defense To Coverage.

Timberlake Construction Co. v. U.S. Fidelity and Guaranty Co., 71 F.3d 335 (10th Cir. 1995) (Builder's Risk Insurance):

"[A] legitimate dispute as to coverage will not act as an impenetrable shield against a valid claim of bad faith. An insured may pursue a claim of bad faith even where the insurer has a legitimate defense to coverage." (P. 343.)
See also footnote 13 wherein it is stated "See *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1984) (affirming a bad faith judgment despite insurer having several defenses to coverage); *Massey v. Farmers Ins. Group*, 1993 WL 34770 (10th Cir.) *cert. denied* _ U.S. _, 113 S.Ct. 2345, 124 L.Ed. 2d 255 (1993). ("*Christian* does not suggest that an insurer's absence of a defense to a breach of contract claim is a necessary predicate to a bad faith cause of action)."

68. Where The Court Finds Contract Term Unambiguous And No Breach Of Contract For Depreciating Labor, May Not Be Bad Faith.

Branch v. Farmers Insurance Company, Inc. and Farmers Group, Inc., 123 F.Supp.2d 590 (W.D. OK 2000) (Homeowner's Insurance Policy):

The policy does not define the term 'replacement cost'. . . .

The Court finds the term 'replacement cost' is unambiguous and subject to only one reasonable interpretation. Further, the Court finds the plain and ordinary meaning of 'replacement cost' is the sum of those costs and insured is reasonably likely to incur in replacing his covered loss. The Court finds the cost of labor to install a new roof is a cost an insured is reasonably likely to incur in replacing his roof, and, accordingly the cost of labor is included within the meaning of 'replacement cost.'

Accordingly, since the cost of labor to install a new roof is included within the meaning of 'replacement cost', the Court finds that when determining a roof's 'actual cash value' it is proper to depreciate the cost of labor. Thus, the Court finds FICI did not breach its insurance contract by depreciating the labor required to replace plaintiff's roof and FICI is entitled to summary judgment on this claim. . . .

Since the Court found FICI was entitled to summary judgment on Plaintiff's breach of contract claim, Plaintiff's bad faith claim fails as a matter of law."

See also ***Branch v. Farmers Insurance Company, Inc. and Farmers Group, Inc.***, 2002 OK 16, 55 P.3d 1023 (Homeowner's Insurance Policy):

[13] "[A]ctual cash value is determined by the broad evidence rule. The *Davis* Court determined that under the broad evidence rule, 'replacement cost less depreciation' was the proper measure of the loss of the roof under the facts before that court. The *Branch* policy contained an endorsement providing for 'replacement cost less depreciation' to settle covered losses to roof surfacing. Therefore, in both cases, the losses of the two roofs were measured in the same manner. . . . We answer the first question certified to us by the Tenth Circuit that labor costs may be depreciated when using the replacement costs less depreciation method."

. . .

[18] If a roof has been damaged by wind or hail to the degree that it must be replaced, then the damaged portion is rubble or wreckage. If the whole roof must then be torn off to repair or replace the damaged portion, then those materials also must be considered wreckage. [Citations omitted.] Replacement costs within the cost of the labor to install the new materials forming the new roof. Removing damaged materials, and materials that have to be removed as a result of storm damage to the roof in order to install the new roof, must all be treated as rubble, or in the contract language, debris. If the insurer intended to exclude debris removal of damaged roofing products, it could have done so. To answer the question of the 10th Circuit, labor costs to tear off an old roof are not included as a necessary part of the replacement costs of installing a new roof."

69. Where There Is No Breach Of Contract For Depreciating Labor, Insurer Entitled To Summary Judgment.

Redcorn v. State Farm Fire and Casualty Company and State Farm General Insurance Company, 2002 OK 15, 55 P.3d 1017 (Homeowner's Insurance Policy):

"The United States District Court for the Western District of the State of Oklahoma has certified the following question: 'In determining actual cash value using the replacement costs less depreciation method, may labor costs be depreciated?' We answer that a roof is a single product consisting of both materials and labor, and that pursuant to the 'broad evidence rule,' which allows a fact-finder to consider the age and condition of the roof, depreciation of the whole product is appropriate. Because labor is a part of the whole product, is it included in the depreciation of the roof."

Dissent:

[6] "A roof, unlike a pre-assembled consumer good, is not an integrated product. Redcorn cannot go to the lumberyard or the retail store and buy a roof. A roof does not exist until the shingles are transported to the cite and installed on top of the house. A roof is not a unified product, but a combination of a product (shingles) and a service (labor to install the shingles).

[7] The shingles are of course logically depreciable.

[8] Labor, on the other hand, is not logically depreciable. Does labor lose value

due to wear and tear? Does labor lose value over time? What is the typical depreciable life of labor? Is there a statistical table that delineates how labor loses value over time? I think the logical answers are no, no, it is not depreciable, and no. The very idea of depreciating the value of labor is illogical. The image that comes to me is that of a very old roofer with debilitating arthritis who can barely climb a ladder or hammer a nail. The value of his labor, I suppose, has depreciated over time."

70. Misrepresenting Available Coverage, Fraudulently Concealing Available Policy Provisions, And Failing To Assist An Insured Support A Claim of Bad Faith.

Vickers v. Progressive Northern Insurance Company, 353 F. Supp. 3rd 1153 (N.D. Okla. 2018) (Uninsured/Underinsured Motorist Coverage):

Plaintiff further alleges that Defendant acted in bad faith by "misrepresenting available coverage to an insured, fraudulently concealing available policy provisions, [and] failing to assist an insured process a claim for benefits." If these allegations proved accurate, it is possible they could support a claim that Defendant acted in bad faith. *See Garnett* 186 P.3d. at 945 (discussing conduct that qualified as bad faith conduct by an insurer who insures both parties, including both misrepresentations and fraudulent misrepresentations). However, to successfully prove actual fraud, Plaintiff must show "an intentional misrepresentation or concealment of a material fact, with an intent to deceive, which substantially affects another person." *Horton v. Hamilton*, 2015 OK 6, 345 P.3d. 357, 363 (Okla. 2015). Plaintiff has not presented evidence or undisputed facts that represent any intentional misrepresentation or concealment of material fact, and the Court can find none. Page 1164

71. Insurer Has The Duty To Inform Of Potential Coverage And Produce Potentially Applicable Policies.

Phillips v. New Hampshire Insurance Company, 263 F.3d 1215 (W.D. OK 2001) (Commercial Business Underinsured Motorist Coverage):

"The UM/UIM insurer must take prompt action to determine what payment is due if the insured's damages exceed the liability coverage available under the tort-feasor's policy. See *Buzzard,* 824 P.2d at 1112. Thus, in commercial/business policies that cover employees, the UM/UIM insurer may also have a concomitant duty to inform an injured employee – insured who may be ignorant of potential coverage and contract terms of its right to contractual or statutory subrogation if the insurer wishes to later elect to exercise that right. See *Uptegraft,* 662 P.2d at 687, n. 11 (citing New Jersey case holding that if an insurance contract has a cooperation agreement, 'the initial responsibility to act to protect subrogated rights rests upon the insurer. . . . When an insurer sits on these rights, it cannot be heard to complain.'); *Sexton*, 816 P.2d at 1138 (noting the insurer's duty to 'aid its insured in the preservation of its subrogation rights.') (Quotation omitted.) At the very least, the insurer has a duty to promptly produce a policy on request to an injured employee with a colorable claim under the policy so that the employee may ascertain whether he is covered and what responsibilities he has under the contract."

72. No Legitimate Dispute For Denying A Claim Based On A *Porter* Defense Where Carrier Denied The Claim Based On Defense Of No Coverage.

Phillips v. New Hampshire Insurance Company, 263 F.3d 1215 (10th Cir. 2001) (Commercial Business Underinsured Motorist Coverage):

"In the current case, the district court distinguished *Robertson* because the insured there executed the release with an impression that none of his insurance policies included UM coverage, while Ms. Phillips executed the release before even obtaining NHIC's identity or a copy of the policy. This seems to be a distinction without a difference. Neither insured in either case knew at the time the release was signed that he/she was impairing any prospective subrogation rights of his/her insurer. Thus, neither insured 'voluntarily and knowingly' interfered with the insurer's contract rights as the insured in *Porter* had done.

. . .

Because the district court's grant of summary judgment on Ms. Phillips' bad-faith claim was predicated on its holdings that any entitlement to UIM proceeds was extinguished under *Porter*; that NHIC should not be precluded from raising the *Porter* defense; and that NHIC therefore had a justifiable reason for denying her claim, we accordingly also reverse summary judgment in favor of NHIC on this claim."

73. No Bad Faith Where There Is Legitimate Dispute As To Coverage.

VBF, Inc. v. Chubb Group of Insurance Companies; Great Northern Insurance Company; Federal Insurance Company; Chubb and Son, Inc., 263 F.3d 1226 (10th Cir. N.D. Okla. 2001) (Commercial General Liability Policy):

"There is no bad faith when the insurer's denial of a claim is based on a legitimate dispute between the insurer and the insured (citation omitted) as the policies did not cover VBF's claim Defendants' denial of the claims was clearly legitimate. Thus, VBF has no bad faith claim against Defendants.

. . .

VBF argues that the reasonable expectations doctrine applies in this case to preclude a grant of summary judgment for Defendants. Because the policy provisions necessary to resolve this case are unambiguous and do not contain 'unexpected exclusions arising from technical or obscure language or which are hidden in policy provisions,' the reasonable expectations doctrine does not apply. *Max True Plastering*, 912 P.2d at 869."

74. An Insurer May Be In Bad Faith Even When A Policy Is Ambiguous If There Is A Reasonable Expectation Of Coverage.

Tomlinson v. Combined Underwriters Life Insurance Company, et al., 708 F.Supp.2d 1284, (N.D. Okla. 2010) (Cancer and Dread Disease Policy):

"[T]he Policy creates a reasonable expectation in the insured that coverage exists for Arimidex . . . .

Defendants argue the Arimidex is not covered because Plaintiff self-administered it. . . . ." *Id.* at 1292.

"The Court will not construe the policy so narrowly as to prohibit coverage when a pill is prescribed for – and not handed to – a patient. In this instance, the insurer has created a reasonable expectation in the insured that coverage exists." *Id.* at 1293.

"The Court has found that the Defendants' interpretation of the Policy with regard to the Arimidex was too narrow; the trier of fact could find that it was unreasonably so." *Id.* at 1296.

75. No Coverage, No Bad Faith.

Behar v. Certain Underwriters At Lloyds, London and International Special Events And Recreation Association, Inc., 554 F.Supp. 2d 1262 (W.D. OK 2008) (Commercial Liability Insurance):

"FN 5. Because the Court determines that plaintiffs were not covered, it does not address arguments related to the bad faith claim." P. 1267.

76. The Duty of Good Faith and Fair Dealing Does Not Arise Where There Is No Coverage.

Mansur v. PFL Life Insurance Company, 589 F.3d 1315 (10th Cir. Dec. 29, 2009) (Long-Term Care Policy):

"PFL's offer may have been lower than what the Mansurs had hoped for, but it was certainly not unfair in light of PFL's having had no obligation to pay benefits. . . . An insurer does not act in bad faith by refusing to provide benefits that it has no obligation to provide." *Id.* at 1321.

77. Where There Is A Legitimate Dispute As To The Causal Connection Between The Injury And The Policy Language Regarding Coverage There May Not Be Bad Faith.

Pearson v. St. Paul Fire and Marine Insurance Company, 393 F.Supp.2d 1238 (W.D. OK 2005) (Uninsured/Underinsured Motorist Coverage):

"Because the policy language parallels that of §3636, the Court's prior determination that no causal connection exists between Plaintiff's injuries and the transportation mode of the bucket truck applies equally to Plaintiff's claim under the policy. See *E.G. Mayer v. State Farm Mutual Auto Insurance Co.*, 944 P.2d 288, 291 (Okla. 1997) (construing similar contract language as requiring a causal connection between the injury and the vehicle's 'transportation mode')." *Id* at p. 1.

. . .

In this case, based on the state of the law in Oklahoma, it is clear that a legitimate dispute existed as to coverage. As a result, the Defendant did not act unreasonably in denying coverage or seeking a Judicial determination for Plaintiff's claim of loss. Accordingly, summary judgment is granted in favor of Defendant on Plaintiff's bad faith claim."

78. Where There Is A Reasonable Basis For Denying Coverage An Insurer Is Not In Bad Faith.

Southern Hospitality, Inc. v. Zurich American Insurance Company, 393 F3d 1137 (10th Cir Okla. 2004) (Business Property Insurance Policy):

"If there is a legitimate dispute about coverage, an insurer's decision to refuse to pay a claim or to litigate a dispute is not a breach of the duty of good faith where the insurer's position is 'reasonable and legitimate.' *Oulds v. Principal Mutual Life Insurance Co.*, 6 F3d 1431, 1436 (10th Cir 1993) (quotation omitted) (applying Oklahoma law). Given our determination that the insurance policy does not provide coverage to Southern Hospitality, we conclude that Zurich had a reasonable basis for denying coverage and cannot reasonably be seen as acting in bad faith. " *Id* at 1142.

79. Where a Breach Of Contract In The Sale Of A Home Is Neither A Covered Claim Nor An Occurrence For Which There Is Coverage There Is A Legitimate Dispute Over Coverage And No Bad Faith.

Boggs v. Great Northern Insurance Company and Federal Insurance Company, 659 F.Supp.2d 1199 (N.D. Okla. 2009) (Homeowner's and Excess Coverage):

"The Boggses did not request summary judgment on this issue, and have made no response to the Insurance companies' motion on this subject.

[In] this case, the Insurance Companies' refusal to indemnify or defend the Boggses was based on a 'legitimate dispute' over coverage, and therefore was not in bad faith. Further, since the Underlying Claims were not covered, any withholding of payment cannot be unjustified. Accordingly, the Insurance Companies are entitled the summary judgment on the Boggses claims of breach of the duty of good faith and fair dealing." (P. 1216.)

80. Where There Is A Question Of Fact As To Coverage, There Is A Question Of Fact As To Bad Faith.

Fossil Creek Energy Corporation v. Cook's Oilfield Services v. Admiral Insurance Company, 2010 OK CIV APP 123, 242 P.3d 537 (cert. denied 10/25/10) (Commercial Lines

Policy):

"¶22 The trial court granted summary judgment in favor of Admiral on the issue of bad faith. The trial court stated that '[b]ecause there was no potential coverage under the Policy for any of the claims asserted by [Fossil] against [Cook's], Admiral was not obligated to provide a defense to [Cook's] in this action,' and '[b]ecause Admiral owed no duty to defend [Cook's] and has no duty to indemnify [Cook's] against any loss in this action, Admiral has not violated its duty of good faith and fair dealing.' However, as stated in the preceding section of this Opinion, whether Admiral was required under the policy to pay Cook's claim is a genuine issue of material fact. Therefore, a determination as to whether Admiral acted in bad faith is premature, and we must find that the trial court erred in granting summary judgment on this issue." (Emphasis added.)

81. Where There Is A Legitimate Dispute As To Coverage There Is No Bad Faith.

Brown v. Oklahoma Farm Bureau Mutual Insurance Company and AG Security Insurance Company, 2011 OK CIV APP 99, 261 P.3d 622 (CGL Policy):

"¶13 [T]he lawsuit against Brown made claims for property damage which he did not discover or report in performing a home inspection as part of a real estate purchase. The policy excludes coverage for property damage *caused by* an occurrence. It also excludes coverage for expected or intended injury and for property damage for which an insured may be liable because of rendering professional services in the performance of an inspection. Because of these exclusions, it was reasonable for insurers to dispute Brown's claim for coverage. As a result, insurers were entitled to judgment as a matter of law on the bad faith claim.

82. A Legitimate Dispute Exists Precluding Bad Faith Where There Is No Coverage By A Valid Exclusion.

Conner v. American Commerce Insurance, 2009 OK CIV APP 61, 216 P.3d 850 (Okla. Civ. App. Div. 3) (mandate issued 7/10/09) (Underinsured Motorist Coverage)

¶7 Oklahoma public policy is that all vehicles carry liability insurance for the protection of the public. Consistent with this public policy, § 3636(E) does not allow a resident relative to avoid the protection of the public by not obtaining liability coverage on his vehicle while, at the same time, enjoying insurance protection through UM coverage on another vehicle.

. . .

¶9 The trial court did not err in determining that Defendant may preclude UM coverage from

extending to Plaintiff's motorcycle, which it does not insure and which is not otherwise covered for UM by any other insurer. As a result, it did not err in further determining that because there is no coverage under the policy, there is no breach of contract, and Plaintiff's claims must fail as a matter of law.

83. An Insurer Is Not In Bad Faith Where Policy Which Contains An Invalid Exclusion Does Not Require An Insurer-provided Defense For The Person Driving The Insured Vehicle.

Ball v. Wilshire Insurance Company, 2009 OK 38, 221 P.3d 717, (Okla. June 16, 2009, rehearing denied September 14, 2009) (Commercial Auto Liability Insurance Policy and Uninsured Motorist Coverage):

¶16 Ordinarily the duty to defend accompanies the duty to indemnify, but the parties may provide otherwise.

. . .

¶18 Our Compulsory Liability Insurance Law mandates that *vehicles* be secured against liability to innocent victims where harm occurs from a vehicle's negligent operation. It does not mandate an insurer-provided defense of persons driving vehicles that are secured by operation of the Compulsory Liability Insurance Law. . . .

¶19 [T]oday's pronouncement, recognizing that the duty to defend is not a part of the Law's mandate, should not be taken by the insurance industry as a license to place or leave in place unenforceable exclusions in policies in a manner that misleads insureds as to the insurer's other, dependent contractual obligations. Should flagrant and persistent abuses arise, the court might find itself impelled to reconsider the point addressed by today's decision. It would be advantageous for all concerned if insurers would draft their policies to take into account today's pronouncement.

84. Legitimate Dispute As To Meaning Of Policy Language.

Harris v. Farmers Insurance Company Inc., 607 F.Supp. 92 (W.D. Okla. 1985) (Automobile Med Pay Provisions):

"[T]he defendant cannot be deemed to have acted in bad faith by litigating the meaning of the phrase 'alighting from', as the Court has found it ambiguous. The parties herein had a legitimate dispute as to the construction of that phrase, and the defendant 'had a right to have this dispute settled in a judicial forum.'" P. 96.

Dodson v. St. Paul Insurance Company, 1991 OK 24, 812 P.2d 372 (Comprehensive General Liability Insurance Coverage):

"The interpretation of the insurance contract and whether it is ambiguous is a matter of law for the Court to determine and resolve accordingly. . . . If the insurance policy language is doubtful and susceptible to two constructions, without resort to and following application of the rules of construction, then a genuine ambiguity exists, and the contract will be interpreted consistent with the parties' intentions, most favorably to the insured and against the insurance carrier." (Emphasis that of the Court.)

Branch v. Farmers Insurance Company, Inc. and Farmers Group, Inc., 311 F.3d 1241, (10th Cir. 2002) (Homeowner's Insurance Policy):

> "Because Farmers' interpretation of the actual cash value provision was a reasonable position taken in litigation of a legitimate coverage dispute, we affirm the district court's grant of summary judgment against Appellant's fraud and bad faith claims. See *Thompson v. Shelter Mutual Insurance*, 875 F.2d 1460, 1462 (10th Cir. 1989) (holding no breach of good faith duty occurs when insurer litigates a legitimate coverage dispute based on a reasonable interpretation of an insurance policy provision)." 311 F.3d at 1243.

85. Reliance on Superceded Policy Language Which Is Similar to Amendments Is Not Unreasonable.

Pitts v. West American Insurance Company, 2009 OK CIV APP 64, 212 P.3d 1237 (Automobile Collision Coverage):

¶16 [T]he pertinent language remains the same: both provisions still limit liability for loss to the lesser of actual cash value or cost of "repair or replacement of the property with other property of like kind and quality." Plaintiff has not shown how Defendant's reliance on the superceded provision caused any difference in result or was prejudicial to him.

86. No Bad Faith Where Insurer Alters Its Interpretation of a Term to Which There Is No Contractual Definition.

Stangl v. Occidental Life Insurance Company of North Carolina and Philadelphia American Life Insurance Company, 804 F.Supp.2d 1224 (W.D. Okla. 2011) (Supplemental Limited Benefit Cancer Insurance Policy with a Radiation and Chemotherapy Rider):

"[I]nasmuch as 'actual expenses' is not defined in Plaintiffs' policy and Plaintiffs had no *agreement* with either Defendant Occidental or with Defendant Philadelphia American as to the meaning of 'actual expenses' or how payments therefor would be determined, Defendant Philadelphia American could alter its interpretation of 'actual expenses' to represent the amount the insured was actually obligated to pay his or her medical provider for a cancer treatment (through primary insurance or otherwise) when that amount was less than the billed amount without incurring bad faith liability. This is so because the Plaintiffs had no contractual right to a definition or interpretation of 'actual expenses' as 'billed amounts' or to payment on that basis." P. 1239-1240.

87. Regardless Of Unreasonableness Of Investigation And Evaluation, No Bad Faith For Interpretation Of Policy Terms Where Insurer Agrees To Be Bound By Verdict.

Price v. Mid-Continent Casualty Company, 2002 OK CIV APP 16, 41 P.3d 1019 (Uninsured Motorist Coverage):

[8] "In the case at bar, Mid-Continent agreed to be bound by the verdict in the wrongful death action and when the Prices were granted judgment, tendered payment. The dispute arose because of the different interpretations of the insurance contract.

[9] Price's claim that Mid-Continent did not properly investigate and evaluate the case does not apply to the facts of this case. Mid-Continent disagreed with Price's interpretation of the contract which is a legal, not a factual, question.

. . .

[10] Because Mid-Continent agreed to be bound by the verdict in the wrongful death action, investigation and evaluation were not pertinent to its liability for payment of the uninsured motorist portion."

88. An Insurer Cannot Delay Responding To Insured Even Where There Is A Legitimate Dispute Of Law Or Policy Language.

Gary v. American Casualty Company of Reading, 753 F.Supp. 1547 (W.D. Okla. 1990) (Directors and Officers Liability Insurance Policy):

"Prior to this Order, there was no controlling authority on the enforceability of an endorsement not filed . . . under Oklahoma law nor was there any definitive controlling authority in this jurisdiction on the applicability or enforceability of the exclusions addressed . . . . There was a legitimate dispute as to the enforceability of the exclusions.

. . .

[T]he original Plaintiffs also have submitted evidence that the Defendant ACCO ignored Plaintiffs' counsel's requests that ACCO pay for the costs of defending the FDIC action, pay for any loss which the directors might become obligated to pay and state its position concerning coverage and ignored Plaintiffs' counsel's demand that ACCO settle the FDIC's claims against his clients. Reasonable jurors could find from this evidence that Defendant ACCO breached its duty to deal fairly with its insureds."

89. The Carrier Cannot Manufacture A "Dispute" Of The Facts.

Buzzard v. Farmers Insurance Company, Inc., 1991 OK 127, 824 P.2d 1105 (Underinsured Motorist Insurance):

"At trial Farmers advanced the defense that the claim was denied because Farmers believed Troy was primarily at fault. . . .

However, as the Buzzards point out, nowhere in Farmers' file was there any statement that the claim was denied because of the excessive speed, or that the claim was delayed until further investigation could be conducted to determine the primary cause of the accident. In fact, one letter written by the claims adjuster stated that the primary cause of the accident was the [opposing vehicle]. . . . The only reason ever documented for denial or delay of the claim was Farmers' intention to wait until the liability carrier . . . settled with the insureds.

[H]owever, there was evidence that during the relevant time period, this defense [of comparative fault] was neither internally noted by Farmers nor communicated to Plaintiffs as a reason for delay or denial of the claim. Accordingly, we find the jury's verdict to be supported in this respect." Pp. 1109-1110.

90. For A Legitimate Dispute To Exist Insurer Must Use The Same Basis For Denial As That Used At Trial.

Haberman v. The Hartford Insurance Group, 443 F.3d 1257 (10th Cir. Okla. 2006) (Uninsured/Underinsured Business Automobile Policy):

"[A] plaintiff may bring a bad faith cause of action even though a legitimate defense to a breach of contract claim exists if the defendant did not actually rely on that defense to deny payment under the policy. The record shows that the dispute identified by the Hartford in its motion for summary judgment (i.e., whether Plaintiff was an insured under the policy for purposes of the UM/UIM coverage) was not the reason or justification the Hartford provided to Haberman for denying her request for UM/UIM benefits. The Hartford denied Haberman's claim on the ground that she was not riding in a 'covered vehicle' at the timeof the accident. Because the 'legitimate' reason for denying Haberman's claim is different from the reason Haberman was given, we conclude that the district court correctly denied the Hartford's motion for summary judgment on the bad faith claim. *Haberman* at 1270-1271.

91. Dispute Over Extent Of Insurer's Obligation under Policy Does Not Prevent Bad Faith Lawsuit.

Burch v. Allstate Insurance Company, 1998 OK 129, 977 P.2d 1057 (Underinsured Motorist Coverage):

¶3 "*Except where the insured affirmatively destroys the insurer's subrogation rights, a UM carrier is directly and primarily liable to its insured for the <u>entire</u> loss to be indemnified; it must seek recovery of paid indemnity through an exercise of its right to subrogation*."

92. Carrier Must Pay Undisputed Portion Of Claim.

***Thompson v. Shelter*,** 875 F.2d 1460 (10th Cir. 1989) (Fire Insurance):

"An unresolved dispute as to other policy claims does not as a matter of law excuse the failure of the insurer to pay living expense benefits, when the liability for such benefits is undisputed." P. 1462.

93. Where Insurer Has A Legitimate Dispute Over The Value Of The Claim, It Is Not Bad Faith.

Garnett v. Government Employees Insurance Co., 2008 OK 43, 186 P.3d 935 (Underinsured Motorist Coverage):

"¶20 The insurer contends that the amount in question was not 'undisputed' and that because there was a legitimate dispute over the value of UIM claim, its refusal to pay the amount did not constitute bad faith.

. . .

¶23 . . . Because a legitimate dispute existed between the parties as to the value of the UIM claim, the trial court did not err by granting summary judgment to the insurer on the issue of whether the insurer's failure to tender the 'undisputed amount' constituted bad faith."

94. No Bad Faith Where There Is A Legitimate Dispute As To Value.

Andres v. Oklahoma Farm Bureau Mutual Insurance Company, 2012 OK CIV APP 93, 290 P.3d 15 (released for publication 06/12/12; cert. denied 09/17/12) (Homeowner's Insurance Policy):

"¶3 The essence of Plaintiff's claim here, as described in her trial court briefings, is that after remand, 'OFB did absolutely nothing to independently investigate and evaluate Plaintiff's claim so that it could pay her on it.' Rather, Plaintiff complains that OFB 'simply sat back and waited for Plaintiff to 'prove'' her claim's value without ever proffering its own evaluation."

. . .

"¶15 Neither party suggests that the value of Plaintiff's claim, or the amount of her damages, was undisputed."

95. It Is Not Bad Faith In An <u>Underinsured</u> Motorist Claim As Opposed To Uninsured Motorist Claim Not To Advance Pay Disputed General Damages When:

(1) All Economic Damages Have Been Paid By The Tortfeasor;
(2) The Tortfeasor's Limits Have Been Exhausted And The UIM Insurer Promptly Investigates And Places A Value On The Claim;
(3) There Is A <u>Legitimate</u> Dispute Regarding The Noneconomic General Damages; And,
(4) The Benefits Due And Payable Have Not Been Firmly Established By An Agreement Or Judgment.

Government Employees Insurance Company v. Quine, 2011 OK 88, 264 P.3d 1245 (Underinsured Motorist Coverage):

"¶15 Whether or not an insurer has breached its duty to act in good faith and deal fairly is dependent upon the particular facts and circumstances in each case.

. . .

¶19 In the present case, as in *Garnett*, Watkins received compensation from the tortfeasor's insurer in excess of her economic/special damages. GEICO, through its evaluation, determined that Watkins was entitled to some amount of UIM benefits under the GEICO policy for the noneconomic/general damage element of her claim. The distinction between these two damage elements is especially germane under the facts of this case. The parties could not agree on an appropriate value for Watkins' general damage claim; thus, a legitimate dispute arose. GEICO's refusal to issue an advance payment on Watkins' UIM claim presents a scenario far different than one involving a request for partial payment needed to satisfy unpaid medical expenses, lost wages, or other economic/special damages – cases where the impact of the loss is direct, immediate and measurable with reasonable certainty. . . . (Emphasis added.)

¶20 Adhering to the rule of law announced in *Garnett v. GEICO*, and utilizing the guiding principle of stare decisis, we conclude that an insurer's refusal to unconditionally tender a partial payment of UIM benefits does not amount to a breach of the obligation to act in good faith and fair dealing when: (1) the insured's economic/special damages have been fully recovered through payment from the tortfeasor's liability insurance; (2) after receiving notice that the tortfeasor's liability coverage has been exhausted due to multiple claims, the UIM insurer promptly investigates and places a value on the claim; (3) there is a legitimate dispute regarding the amount of noneconomic/general damages suffered by the insured; and (4) the benefits due and payable have not been firmly established by either an agreement of the parties or an entry of a judgment substantiating the insured's damages." (Emphasis added.)

96. Whether The Value Of A Warranty Constitutes Part Of "Covered Auto" Or "Equipment" Is A Legitimate Dispute And Thus Not Bad Faith.

Pitts v. West American Insurance Company, 2009 OK CIV APP 64, 212 P.3d 1237 (Automobile Collision Coverage):

¶13 [D]efendant, according to Plaintiff, failed to pay him to replace the covered vehicle with a vehicle of like kind and quality because the value offered excluded the value of the lost power train warranty.

¶14 Defendant, on the other hand, argues that the loss of the warranty was not covered under the "plain language of the policy's collision coverage" and that it has found no case law from Oklahoma or any other state deeming loss of such a warranty to be covered under an automobile policy's collision coverage. . . .

¶15 Based on our examination of the record submitted, the conduct cited by Plaintiff cannot be viewed as unreasonable and in bad faith. Defendant has a legitimate dispute with Plaintiff over what is covered in this claim under this policy, entitling Defendant to resort to a judicial forum for resolution. . . . Defendant's conduct in disputing coverage for the power

train warranty did not amount to bad faith or a breach of duty to act in good faith and deal fairly with Plaintiff.

97. Carrier's Unreasonable Tactics Can Estop The Carrier From Asserting Its Rights.

Buzzard v. Farmers Insurance Company, Inc., 1991 OK 127, 824 P.2d 1105 (Underinsured Motorist Insurance):

"[I]n certain instances, an insurer is estopped from insisting on the forfeiture of benefits. (Citation omitted.) If the insurer's conduct leads an insured to believe that benefits will not be forfeited will estop the insurer from later denying benefits even though forfeiture 'might be claimed under the express letter of the [insurance] contract.' . . .

[A]cquiescence in Farmers' tactics would allow an insurer to avoid payments on any claim in which their was a possibility of settlement by a third party. Such a result would undermine the purpose behind underinsured motorist coverage by allowing insurers to deprive policyholders of the benefits for which premiums are paid. Under these circumstances, the holdings of *Porter* and *Frey* do not serve as a defense to payment on the policy."

98. Delayed Payment Of A Claim Is Not A Defense To Bad Faith.

Barnes v. Oklahoma Farm Bureau Mutual Insurance Company, 2000 OK 55, 11 P.3d 162 (Underinsured Motorist Coverage):

"We also note that insurer's attempt - - which was refused by the trial court - - to pay into court $15,000.00 after Barnes had already requested the trial court to allow her to supplement her petition to sue for bad faith, was not required to be deemed by the jury a viable defense to the bad faith claim. Otherwise, every insurer, after being sued for bad faith withholding of payment, could merely pay the money into court and be protected from a bad faith claim, no matter how egregious, unfounded or unreasonable its earlier conduct of withholding payment." Note 6.

99. Payment by Insurer of Contract Claim Eliminates Those Contract Damages.

Watson vs. Farmers Insurance Company, Inc., 23 F.Supp.3d 1342, (N.D. Okla. 2014) (Automobile Medical Pay and Uninsured/Underinsured Motorist Coverage):

The defendant's payment of policy limits renders plaintiff's breach of contract claim moot, because plaintiff cannot show that he has contract damages, and he is protected by his tort claim for bad faith. The defendant's motion for summary judgment on plaintiff's contract claim is thus *granted*. (*8)

100. Whether Insurer Properly Investigated And Evaluated Non-Availability Of Insurance Policy For Intentional Acts Is For The Jury.

Floyd v. Ricks, 1998 OK 9, 954 P.2d 131 (Uninsured Motorist Coverage):

"The response to the motion for summary judgment demonstrated the existence of

a substantial controversy as to several material facts, such as whether the other driver's insurance was available to pay plaintiff's claim under the circumstances, and whether Geico's refusal to pay plaintiff's claim was in bad faith. *McCoy v. Oklahoma Farm Bureau Mutual Insurance Co.*, 1992 OK 43, 841 P.2d 568. Thus, respondent judge erred in granting summary judgment at this stage of the litigation."

101. No Bad Faith Where Insurer Relied Upon Policy Provision Which Insured Read And Understood.

Bratcher v. State Farm Fire and Casualty, 1998 OK 63, 961 P.2d 828 (Renter's Insurance Policy):

"We have not adopted the equitable concept of unconscionability as an aid to interpret insurance contracts, although we have held that upon proof of mistake in the contracting, an insurance policy may be reformed to accomplish the bargained-for coverage.

In addressing the issue presented, the *Coblentz* opinion did not utilize the established rules of construction of insurance contracts. Although Bratcher presents a similar issue, we decline to embrace the equitable concept of unconscionability as an aid in interpreting the provisions of the involved homeowner's insurance contract. Therefore, *Coblentz v. Oklahoma Farm Bureau Mutual Insurance Company*, 1995 OK CIV APP 126, 915 P.2d 938, is not to be considered as a correct exposition of the law and, insofar as it is modified by this opinion, is hereby overruled."

102. Whether A Claim Comes Within Policy Language Is For The Jury To Determine.

Wynn v. Avemco Insurance Company, 1998 OK 75, 963 P.2d 572 (Aircraft Policy):

"Even though the policy clearly excludes 'in flight' damage to the aircraft, there is genuine issue as to whether the damage was caused 'in flight' as defined by the policy. . . .

Because a genuine issue of material fact remains, summary judgment is improper."

103. Carrier Can Deny Claim For Misrepresentations In An Application For Insurance.

Dennis v. William Penn Life Assurance Company of America, 714 F.Supp. 1580 (W.D. Okla. 1989) (Life Insurance Policy):

"Under Oklahoma law, an insurer has a right to rescind a life insurance policy procured with an application containing a single material misrepresentation knowingly made." P. 1584 ". . . ***Christian*** imposes a duty of good faith on an insurer only in the handling of a

valid claim." P. 1584. (Emphasis that of the Court.)

Firstier Mortgage Co. v. Investors Mortgage Insurance Co., 708 F.Supp. 1224 (W.D. Okla. 1989), affirmed on appeal, 930 F.2d 1508 (10th Cir. 1991) (Mortgage Insurance Policy):

"Section 3609 furnishes three separate grounds for an insurance company to deny coverage on an insurance policy. Specifically, § 3609 provides:

'All statements and descriptions in any application for an insurance policy or in negotiations therefor, by or in behalf of the insured, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy unless:

1. Fraudulent; or
2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
3. The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been known to the insurer as required either by the application for the policy or otherwise.'" Pp. 1228-1229.

. . .

[T]he borrowers' fraud prevents Firstier from recovering under the policies and renders the policies void as a matter of law. P. 1230.

It is unquestionable that Firstier submitted the insurance applications in bad faith and that such conduct constitutes fraud sufficient to void the policies . . . ." P. 1230.

105. Carrier Under No Duty To Discover Misrepresentations At The Time Of Application For Insurance.

Marshall v. Universal Life Insurance Company, 1991 OK CIV APP 115, 831 P.2d 651 (Life Insurance Policy):

"[The insurance company] was under no duty at [the] time [the claimant made application for insurance] to discover whether or not the 'no' answer was a misrepresentation. It did, however, have the contractual and statutory right to investigate the claim when it was made." At 3.

106. Negligence In Application And Policy Issuance May Not Be Basis For Bad Faith Claims Handling.

Peters v. American Income Life Insurance Company, 2003 OK CIV APP 62, 77 P.3d 1090 (Life Insurance Policy and Accidental Death Benefit Policy):

¶36 "*In short, AIL's failure to pay the claim had nothing to do with the claim itself, the cause or event (Deason's death by accident) giving rise to the claim, insurable interest, amount of the claim, or breach of policy conditions. Moreover, no evidence was presented tending to show that AIL delayed payment, tried to extort some unfair advantage or result by*

withholding payment, or even just ignored the claim. The problem with Peters' position is simply that AIL's internal negligence in the management of its affairs was not directed in an intentional, malicious, or even reckless manner against Deason, as the insured, or Peters, as the beneficiary.

. . .

¶38 This Court holds that the evidence here of AIL's internal negligence is not probative of the issue of bad faith. Bad faith and negligence are not synonymous."

107. Statutory And Policy Appraisals Do Not Preclude Bad Faith Suit.

Massey v. Farmers Insurance Group, 1992 OK 80, 837 P.2d 880 (Fire Policy):

"We hold that the umpire's damage appraisal award made pursuant to policy provision mandated by 36 O.S. 1981, § 803, has no preclusive effect upon issues raised and litigated by the party who did not make demand to enter into the appraisal process. . . .

[W]here a statute requires mandatory compliance with the appraisal provision, the appraisal award is not binding upon the party who did not demand the appraisal because such binding nature of the appraisal award would violate the non-demanding party's constitutional right to trial by jury."

108. No Bad Faith Where One Of Joint Insureds Intentionally Set Fire.

United Services Automobile Association v. McCants, 1997 OK 73, 944 P.2d 298 (Homeowner's Fire Policy):

"Husband and Wife were both insureds under the policy, Husband as the insured named on the declarations page and Wife as a spouse residing in the household. This determination is consistent with the fact that Wife had an insurable interest in the property by virtue of being a spouse who resided there.

. . .

Speaking only to joint coverage, this Court reasoned that '[t]o allow recovery on an insurance contract where the arsonist has been proven to be a joint insured would allow funds to be acquired by the entity of which the arsonist is a member and is flatly against public policy.'"

109. No Bad Faith Where Insured Fraudulently Procures Automobile Policy With Knowledge Of A Collision For Which He Makes Claim.

Poff v. Oklahoma Farmers Union Mutual Insurance Company, 2006 OK CIV APP 3, 127 P.3d 646 (December 13, 2005) (Automobile Policy):

¶19 "Where one applies for insurance knowing that a loss has already occurred, conceals this fact, and procures a policy to be antedated to cover the period when the loss occurred, the policy is void because of such fraud or concealment, and no recovery can be had.

110. Where a Corporate Employer Fraudulently Submits Health Claims, the Insurer Legitimately Has a Dispute.

Ag Equipment Company v. AIG Life Insurance Company, 636 F.Supp.2d 1210 (N.D. Okla. 2009) (Stop Loss Insurance For Medical Expenses):

Based on the jury's verdict, it would also be improper to reinstate Plaintiff's bad faith claim, because the jury determined that Kurtz was not eligible for coverage. Thus, Defendant could not have denied AG's claim for reimbursement of Kurtz's medical expenses in bad faith, because AIG had no obligation to pay the claim. P. 13.

111. The Insured's Delay In Making A Claim Provides The Insurer With The Defense Of Untimely Notice To Bad Faith Claim.

Reeder v. American Economy Insurance Company, 88 F.3d 92 (10th Cir. Okla. 1996) (Underinsured Motorist Coverage):

"The [insurer] had the right to timely litigate the issue of untimely notice of the insured (approximately four years after the subject accident) as it impacted [the insurer's] contractual right of subrogation against the tortfeasor.

. . .

The fact that the [investigation and] the evaluation was completed twenty-one months after Reeder's claim was initially filed is irrelevant because AEIC's liability was in serious disputed until [the court order regarding coverage as a result of the untimely notice]. Thus, AEIC's 'delay' was hardly a delay and certainly not in bad faith."

112. Facts Determining Sufficiency Of Notice Is A Jury Question.

First Bank of Turley v. Fidelity and Deposit Insurance Company of Maryland, 1996 OK 105, 928 P.2d 298 (Directors and Officers Liability Insurance):

"It is the insured's sole duty to give its insurer *timely and adequate notice* of a third-party claim to aid the insurer in the discovery of facts bearing on coverage.

. . .

As part of its notice-giving obligation, the insured must provide the insurer with facts material to its ascertainment of the duty to defend. A breach of the insured's obligation to give notice of *critical post-denial developments* may *modify, excuse or defeat* the insurer's performance under the contract. . . . None of these issues, if contested, can be resolved as a matter of law. *Each is to be treated as a disputed fact for the trier.*"

113. Late Notice Which Prejudices The Insurer Is A Legitimate Basis For Disputing The Claim For Coverage.

Hayes v. State Farm Fire and Casualty Company, 855 F.Supp.2d 1291 (W.D. Okla. 2012) (Homeowner's Insurance Policy):

"It is undisputed that the claim was submitted months after the loss. Plaintiff failed to mention it to State Farm even though he was in contact with defendant in conjunction with his first claim at the time the dock sank. Because of plaintiff's failure to comply with the policy's requirement that he give State Farm 'immediate notice' of a loss, State Farm had a

legitimate basis for disputing his claim for coverage. P. 1305.

Plaintiff overlooks the fact that there was little investigation that could be done because of his failure to report the loss in a timely manner. P. 1305.

114. No Bad Faith Where Plaintiff Accepts Policy Limits.

Widmann v. Acceptance Insurance Company, 2002 OK CIV APP 118, 63 P.3d 23 (Fleet Uninsured Motorist Coverage):

¶18 "[B]ecause we hold Plaintiffs accepted a settlement from Defendants for the maximum amount to which he was entitled under the UM/UIM provisions of the policy, we need not address this argument."

115. Reasonableness Of Conduct Is Still The Hallmark For A Legitimate Dispute Even If Insurer Found Wrong On The Facts By The Jury.

Peters v. American Income Life Insurance Company, 2003 OK CIV APP 62, 77 P.3d 1090 (Life Insurance Policy and Accidental Death Benefit Policy):

¶40 "The decisive question is whether the insurer had a 'good faith belief, at the time its performance was requested, that it had justifiable reason for withholding payment under the policy." *Buzzard*, 1991 OK 127 at ¶ 14, 824 P.2d at 1109.

. . .

¶44 However, the question of whether the premium was paid is only the beginning point in the bad faith cause of action. There, the inquiry also looks to the reasonableness of the conduct of the insurer in the matter of handling the claim. Here, Peters' evidence shows that AIL promptly investigated the claim and denied it for nonpayment of premiums. Whether the original premiums were in fact paid was a matter in dispute. The dispute was resolved against AIL by the jury after it had presented its defense in good faith for its asserted nonpayment which it had an unqualified right to do."

116. The Insurer Had A Legitimate Dispute From Not Only Admissible Evidence But From Inadmissible Evidence Upon Which It Relied.

Sims v. Great American Life Insurance Co., 469 F.3d 870 (10th Cir. Okla. Nov. 7, 2006) (Life Insurance Policy):

"Great American presented ample evidence to suggest [Sims committed suicide].

Foremost, the jury reviewed Mrs. Sims's sworn statement to the police, where she stated that here husband 'mention[ed] driving off a cliff' and had become 'angrier and angrier'. The police officer who took this statement interpreted it to imply that Sims was not only enraged but suicidal. Indeed, Sims's apparent conduct lends credence to this interpretation. No skid marks or other evidence at the scene indicated any intent to avoid the accident. Nor did Sims take his routine precaution to avoid injury – he failed to fasten his seatbelt. Finally, although he did not drive off a cliff *per se*, within moments of leaving his home, Sims did launch his vehicle off an incline that propelled him some 115 feet across a river bed.

Aside from this evidence, every official report listed suicide as the cause of death: the accident report, the medical examiner's report, and the death certificate. Even the official missing persons report indicated that Sims might be suicidal. While it may be true that these reports were primarily based on Mrs. Sims's sworn statement to the police, a statement she later recanted, this fact does not negate the conclusion reached in these reports for the purpose of determining whether a legitimate dispute existed. Notably, these conclusions in these reports were not made at the behest of Great American – the medical examiner and investigating officer had no connection with Great American. An insurer can reasonably rely on such evidence when making its preliminary decision to dispute coverage.

Given the evidence before Great American at the time a decision on payment was required, the evidence clearly demonstrates a legitimate dispute concerning coverage. Therefore, Mrs. Sims had to present additional evidence of bad faith to survive a motion for judgment as a matter of law." P. 891-892.

117. A Liability Insurer Who Asserts False Defenses Which Forces Its Insured To Be Dragged Through The Legal System Unnecessarily Is Not In Bad Faith If It Has A Legitimate Dispute As To The Alleged Value Of The Claim.

Milroy v. Allstate Insurance Company, 2007 OK CIV APP 6, 151 P.3d 922 (Sept. 19, 2006) (cert. denied 1/9/07) (Automobile Liability Policy):

"¶ 25 [Plaintiff] Milroy's claim against Allstate is based in part on her accusation of litigation misconduct against [Allstate's attorney]. She claims that he prepared an untruthful answer to one of [the claimant's] discovery requests, . . . and that he misled both claimant's counsel and the Trial Court in the personal injury action regarding why she was not present when the case was set for trial on February 14, 2001. . . .

¶26 The record reveals that Allstate legitimately disputed the alleged value of the [claimant's] claim. At trial, the jury returned a verdict for approximately half of the amount sought by [claimant] at the time she filed her action in Small Claims Court. [Allstate's attorney] effectively represented [Plaintiff] within the bounds permitted by law. We conclude that the litigation conduct provides no basis for a bad faith action under Badillo."

118. Though An Insurer Has A Right To Contest The Legitimacy Of A Claim, An Insurer May Engage In Litigation Conduct That Violates Its Duty Of Good Faith And Fair Dealing Subjecting It To A Bad Faith Claim.

Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company, 2007 OK 16, 157 P.3d 117 (Uninsured Motorist Coverage):

"¶32 A UM insurer possesses a right to contest the 'insured's side' and doing so, *by itself*, is not per se unreasonable. This is so because of the insurer's right to contest an insured's claim. [Citations omitted.] Thus, intervention by a UM insurer is not by itself a violation of its duty to act in good faith towards its insured. On the other hand, the fact that an insurer was granted leave to intervene does not insulate that activity from bad-faith action. An insurer may engage in certain litigation conduct pursuant to a procedural right and yet by that act violate its duty to an insured. *Badillo v. Mid Century Co.*, 2005 OK 48, 121 P.3d 1080.

¶33 In the controversy before us, the essence of Brown's bad faith claim is not merely that OneBeacon filed its petition to intervene without sufficient legal reasons for doing so; but that maintaining mutually inconsistent subrogation claims and adopting Patel's defenses, OneBeacon was continuing to maintain a fence-sitting position two years after the claimed injury, neither denying or approving a UM claim; in sum, that OneBeacon abrogated a duty to timely investigate and either to pay Brown and seek subrogation or to deny the claim."

119. Where An Insurer Pays Full Policy UM Benefits It May Not Be Bad Faith To Ask For A Release Of The Contract Claim.

Beers v. Hillory and Northland Insurance Company, 2010 OK CIV APP 99, 241 P.3d 285 (Underinsured Motorist Coverage):

"¶28 There is no Oklahoma case law establishing a general prohibition against an insurer requesting its insured to execute a release on payment of the maximum amount insured by the policy. . . . It was not unreasonable for NIC to condition payment of UM proceeds on a release of any future claims against that contract."

120. An Insurer Who Requests A Release That Goes Beyond The Law Or Circumstances Of The Case May Be In Bad Faith.

Beers v. Hillory and Northland Insurance Company, 2010 OK CIV APP 99, 241 P.3d 285 (Underinsured Motorist Coverage):

"¶32 Although it was not bad faith for NIC to ask Beers to sign a release, the reasonableness of NIC's action in demanding that Beers and attorney Green execute a release with defend, indemnify and hold harmless provisions, in addition to a release of contract claims, must be 'judged in light of the applicable law.' *Timmons v. Royal Globe Ins. Co.,* 1982

OK 97, ¶ 20, 653 P.2d 907, 914. . . . Based on our de novo review, this Court finds that reasonable persons could conclude that NIC requested more than it was entitled to request from its insured Beers."

121. Insurer Including Terms In A Release That Were Not Discussed Including Releasing A Bad Faith Claim Supports An Inference That The Insurer Acted In Bad Faith.

***Trotter v. American Modern Select Insurance Company*,** 220 F.Supp.3d 1266 (W.D. Okla. 2016) (Commercial Insurance Policy):

*7 "At the settlement conference the parties did not reach an agreement that Trotter Doors would release its indemnity claim against American Modern. So far as appears from the parties' current submissions, the issue was not discussed. Ms. Woods [the adjuster] simply assumed Mr. Trotter agreed to her release but admitted she "did not tell him he had to sign a policy release." The settlement agreement does not mention a release of any type. Nonetheless, American Modern subsequently indicated it would withhold payment of its portion of the settlement payment unless the agreement included language in which Mr. Trotter and Trotter Doors released <u>any</u> claims including a bad faith claim, they might have against American Modern under policy #Q61020359 or related to the TOD lawsuit. This evidence supports an inference that, motivated at least partially by the "bad faith implication letter from Plaintiff sent …by insured's counsel," 17 the insurer threatened to upend a hard wrought settlement.

. . .

"The Court concludes American Modern's conduct in conjunction with its attempt to obtain a release creates a fact question precluding summary judgment on Plaintiff's bad faith claim."

Footnote 17

"Under Oklahoma's Unfair Settlement Act, it is an unfair claims settlement practice to "[r]equest [] a claimant to sign a release that extends beyond the subject matter that gave rise to the claim payment." 36 Okla. Stat. § 1250.5 (8).

122. Insurer including terms in a release that were not discussed including releasing a bad faith claim supports an inference that the insurer acted in bad faith.

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123. Insureds Failure To Cooperate In Providing Required Information May Create A Legitimate Dispute.

Dixson Produce, LLC v. National Fire Insurance Company of Hartford, 2004 OK Civ App 79, 99 P.3d 725 (Commercial General Liability Policy):

¶19 "The single uncontested material fact that is dispositive of the summary judgment in favor of insurance companies is the fact that the owner of the insured business is the one who breached the parties' insurance contract by failing to provide essential information about the claimed losses that owner alone possessed *after both oral and written requests from the insurance company, and an urging by the Oklahoma Insurance Commissioner, and a reasonable opportunity to do so.*"

. . .

¶21 In addition, the belated claim and failure to provide the proof of loss as required and requested also formed the basis of a legitimate dispute between insured business and insurance company over expense of coverage, cause of loss, amount of loss, and breach of policy conditions. It is well settled that a bad faith cause of action will not lie where there is a legitimate dispute over such matters."

124. An Insured Must Cooperate In Producing Documents If The Insured Claims The Insurance Company Delayed Its Investigation.

Vickers v. Progressive Northern Insurance Company, 353 F. Supp. 3rd 1153 (N.D Okla.) (Uninsured/Underinsured Motorist Coverage):

…, Plaintiff has failed to produce evidence that Defendant conducted an unreasonably lengthy or duplicitous investigation. After Defendant first received notice of Plaintiff's claim, Plaintiff's counsel and Defendant exchanged productive, professional letters approximately once a month. … Indeed, it appears that except for Defendant's initial request for documents, virtually Defendant's only request for evidence was the repeated request for any policy of insurance in force for the Sierra at the time of the accident-the Hanover policy. …Plaintiff did not produce the Hanover policy, however, until April 4, 2016, approximately one month after Defendant conditionally denied coverage because its investigation found no insurance policy in effect on the Sierra at the time of the accident. Defendant also informed Plaintiff that it denied that coverage existed under the Progressive policy but had made the business decision to afford $25,000.00 of UM coverage on May 5, 2016, only a month after Plaintiff produced the Hanover policy. Plaintiff accepted this offer on May 17, 2016, and Defendant tendered the $25,000.00 on July 1, 2016, approximately six weeks later. Moreover, there are no undisputed facts or evidence that suggests that Defendant's investigation was unreasonable. … [A]ll documentary evidence indicates that the case and scope of Defendant's investigation was reasonable. P. 1165

125. Delay Caused by Insured's Refusal to Cooperate in Completing EUO's Is Not Bad Faith.

Barre v. State Farm Fire and Casualty Company, 982 F.Supp.2d 1267 (N.D. Okla. 2013) (Automobile Theft Policy):

Anthony Barre was the person who allegedly discovered the vehicle missing on the day of the theft, and it would be a substantial indicator of fraud if he did not actually reside with his wife at that time. [The SIU investigator] attempted to follow up on this information with Etta Barre, and she "started screaming and stated to ask her husband everything" instead of working with [the SIU investigator] to clarify a possible misunderstanding, Etta Barre immediately became uncooperative and State Farm could reasonably have considered this as a factor lending some weight to the appearance of fraud. . . State Farm had a justifiable reason to ask its insureds to submit to EUO's and much of the delay in obtaining the EUO's was the result of the insureds' refusal to cooperate and the Court finds no evidence of bad faith for any delay in the investigation caused by a delay in completing the EUO's of the insureds. (P. 1276)

126. Referring a Theft Claim for Fraud Investigation Is Not Evidence of Bad Faith.

Barre v. State Farm Fire and Casualty Company, 982 F.Supp.2d 1267 (N.D. Okla. 2013) (Automobile Theft Policy):

The mere fact that State Farm initiated a fraud investigation is not evidence of bad

faith because the [SIU claims representative] testified in her deposition that all theft claims were reviewed by SIU for indicators for fraud. . . . This initial stage of the investigation lasted approximately six weeks, and this is a reasonable amount of time to conduct an investigation when indications of fraud are present. (P. 1275)

127. Six Months' Delay of Payment Once Decision to Pay Was Made Is Not Bad Faith Where Insured or Insured's Attorney Was the Primary Cause of Any Delay.

Barre v. State Farm Fire and Casualty Company, 982 F.Supp.2d 1267 (N.D. Okla. 2013) (Automobile Theft Policy):

The final stage of the claims handling process concerns the delay following State Farm's decision to settle with its insured after completion of the EUO's. Plaintiff argues that payment should have been issued immediately after Morris recommended that the death claim be paid and any delay after March 19, 2010, was unjustified. However, plaintiff overlooks the evidence in the record clearly showing that State Farm was willing to settle the claim and the insureds' failure to communicate with State Farm was the cause of any delay in payment. . . . State Farm has offered a reasonable explanation for the delay following its decision to settle with its insured on March 19, 2010, and the evidence shows that the insureds' refusal to communicate with State Farm was the primary cause on any delay during this final period of the claims settlement process. (P. 1276-1277)

IV. REVERSE AND COMPARATIVE BAD FAITH

1. There Is No "Comparative Bad-Faith" Defense Or Reverse Bad Faith Tort In Oklahoma.

First Bank of Turley v. Fidelity and Deposit Insurance Company of Maryland, 1996 OK 105, 928 P.2d 298 (Directors and Officers Liability Insurance):

"California permits the defense of *comparative bad faith* but does not appear to have adopted the so-called *reverse bad-faith tort*. The former concept establishes an affirmative defense, premised upon principles of comparative fault, which allocates fault and apportions damages according to harm inflicted by both the insurer's and insured's bad-faith conduct. The latter doctrine creates an independent tort that allows an insurer to seek affirmative relief for an insured's breach of the duty of good faith and fair dealing. . . .

[W]e *reject the notion* that the insured's responsibility to provide its insurer adequate notice of facts relating to insurance coverage can be translated into an actionable tort or into a contributory-fault defense concept for comparison with the fault of the insurer. *We hence hold that an insured's misperformance of its contractual duty is neither a 'freestanding' ex contract breach nor a civil harm actionable in tort* as an incident of the insurer/insured status."

2. Failure To Keep Insurer Informed Of Critical Developments Provides Insurer With A Defense In Whole Or Part.

First Bank of Turley v. Fidelity and Deposit Insurance Company of Maryland, 1996 OK 105, 928 P.2d 298 (Directors and Officers Liability Insurance):

"If failure timely to provide critical information adversely affected the *entire loss* that was insured, it would avail as an absolute defense against liability (i.e., as *in toto defense*). That defense should show that the insured's failure to give adequate notice -- not available from other sources -- made it entirely impossible for the insurer to discharge its duty. On the other hand, if the defense were to be shown as having affected only an element (or portion) of the claimed loss, the defense could be invoked to defeat (*pro tanto*) that part of the total loss which was due to the insured's misperformance of its notice-giving duty."

V. BIFURCATION

1. Bifurcation To Determine Underlying Claims Viability Not Permitted Where Sole Issue Is Bad Faith.

Buzzard v. The Honorable Mike McDanel, 1987 OK 28, 736 P.2d 157 (Uninsured Motorist Automobile Policy):

"In the present case Petitioners' action brings into question Farmers' handling of Petitioners' claim for benefits under the insurance policy. Farmers' actions, in this regard, must be assessed in light of all the facts known and knowable concerning the claim at the time Petitioners requested Farmers to perform its contractual obligations. Thus, the issue of whether, in fact, Petitioners had a legal right to recover from the City of Norman is not separable from the question of whether Farmers had a good faith belief, at the time its performance was requested, that it had a justifiable reason for withholding payment under the policy.

Respondent trial judge had no authority under 12 O.S. Supp. 1984 § 2018(D), or any other provision, to require Petitioners to submit to a separate trial as to the comparative fault of the City of Norman." P. 159.

In making this observation, in footnote 3, the Court stated:

"Our a discussion in ***McCorkle, supra***, makes clear that it is not the question of whether [the Buzzard family] would be legally entitled to recover which is the controlling issue in this action on bad faith refusal, but whether Farmers, at the time [the Buzzard family] made their claim, was in possession of information to establish that its refusal to pay was in good faith. As Farmers attempts to frame the issue, the question would be whether it had credible information which it felt, in good faith, would defeat [the Buzzard family's] recovery. ***McCorkle*** clearly made the action for bad faith applicable in the present case as it held that the action applied to all types of insurance companies." P. 159.

Justice Opala, in his concurring opinion, states:

"The gravamen of a claim against the insurer for withholding of a loss mala fide is unreasonable, bad-faith conduct. The insurer's decision to seek to resort to a judicial forum is not per se bad faith or unfair dealing regardless of the outcome of the suit. (Citations omitted.) Conversely, a jury determination that the alleged UM/UIM tortfeasor was not at fault is not per se indicative of the insurer's good faith in handling the insured's demand for payment of the loss." Pp. 160-161. (Emphasis added.)

a. If Federal Court Bifurcates Contract Claims, It May Dismiss Bad Faith Claim If Legitimate Dispute Shown.

Oulds v. Principal Mutual Life Insurance, 6 F.3d 1431 (10th Cir. Okla. 1993) (Health Insurer):

"This case began when Ms. Oulds brought suit against Principal, her health insurance carrier, alleging breach of contract and breach of the duty of good faith and fair dealing in its denial of her claim for medical benefits.

[B]ecause evidence at trial had established a legitimate factual and legal dispute regarding Principal's liability for benefits, Plaintiff could not meet her burden of showing that Principal had 'unreasonably, and in bad faith, with[eld] payment of the claim of its insured.'

While [*Buzzard v. McDaniel*] would be persuasive in an Oklahoma state court, we note that bifurcation of trials is permissible in federal court even when such procedure is contrary to state law."

b. Trial Court Has Discretion To Deny Late Filed Application To Amend For Bad Faith And Then Permit Bifurcation Of UM Case.

Phillips v. Oklahoma Farmers Union Mutual Insurance Company, 1993 OK CIV APP 199, 867 P.2d 1361 (Uninsured Motorist Coverage):

"Considering that the Phillips' application to amend came over four months after the Trial Court's terminal date for amendment set out in the pretrial scheduling order, we find no such abuse in the present case. Second, allowance of amendment and bifurcation of trials also fall within the discretionary powers of the Trial Court, and we find no abuse of discretion by the Trial Court in these matters. . . .

(ftn 9) "We distinguish the apparent proscription of bifurcation of claims against the tortfeasor from bad faith claims against the plaintiff's UM carrier announced in *Buzzard v. McDanel* as applicable only where a bad faith claim stands pending. In the present case, the Trial Court denied the Phillips permission to add a bad faith claim."

2. Bifurcation Not Permitted Regardless of Whether Underlying Tortfeasor Is a Party.

Newport v. USAA, 2000 OK 59, 11 P.3d 190 (Uninsured Motorist Coverage):

"An insurer may not defeat the application of the *Buzzard* holding simply by adding the uninsured motorist to the litigation. The holding is not limited to the situation in which the uninsured or underinsured motorist is not present in the suit."

3. Court May Not *Sua Sponte* Bifurcate A Theory Of Breach Of Contract From A Bad Faith Theory Of Recovery.

Cales v. Le Mars Mutual Insurance Company, 2003 OK CIV APP 41, 69 P.3d 1206 (Commercial Property Insurance):

¶5 "We further note that the trial court incorrectly describes Cales' suit as 'two causes of action'. Cales has but one cause of action: for damages arising out of Insurer's failure to pay Cales' claim. In support of that cause of action, Cales has two interrelated theories of recovery. The first, sounding in contract, is for damages arising out of Insurer's failure to pay the claim in breach of the insurance contract. The second theory of recovery sounds in tort, based on Cales' allegation that Insurer acted in bad faith by ignoring relevant information in its investigation of the claim, leading to its decision not to pay. These theories are connected and, as set out below, should not be bifurcated.

. . .

¶8 Further, 'the issue of whether [Cales] had a legal right to recover from [Insurer] was not separable from the question of whether the Insurer had a good faith belief that it had a justifiable reason for withholding payment under the policy.' [Citation omitted.] The trial court's decision to bifurcate Cales' theories of recovery was erroneous."

VI. PUNITIVE DAMAGES

1. No Punitive Damages Without Tort Claim And Actual Damages.

Norman's Heritage Real Estate Company v. Aetna Casualty & Surety Co., 727 F.2d 911 (10th Cir. Okla. 1984) (Business Fire Policy):

"[P]roof of the fact of a breach of contract, standing alone, cannot support an award of punitive damages. Punitive damages cannot stand without at least a nominal compensatory award under a tort cause of action." P. 916.

2. No Punitive Damages Where No Bad Faith.

Davis v. Mid Century Insurance Company, 311 F.3d 1250 (10th Cir. 11/20/02) at 1253 (Homeowner's Insurance Policy):

"Because Mid-Century did not act in bad faith as a matter of law, we also reverse the

jury's award of punitive damages against Mid-Century."

3. Without A Finding Of Bad Faith, There Can Be No Punitive Damages Or Prejudgment Interest Of A Bad Faith Award.

Duensing v. State Farm Fire and Casualty Company, 2006 OK CIV APP 15, 131 P.3d 127 (Nov. 14, 2005) (Homeowner's Insurance Policy):

¶42 "There can be no punitive damage award where there is no bad faith award. [Citation omitted.] Similarly, our resolution of insured's bad faith claim eliminates any need to address insurer's allegation that the trial court erred in awarding prejudgment interest on the jury's bad faith award.

4. No Actual Damages Means No Punitive Damages.

Gillogly v. General Electric Capital Assurance Company, 430 F.3d 1284 (10th Cir. Okla. 2005) (Long-Term Care Nursing Home Indemnity Insurance Policy):

"Because Gillogly did not and could not prove that GECA is liable for acting in bad faith, Gillogly cannot show actual damages resulting from GECA's conduct. Therefore, Gillogly is not entitled to punitive damages, ... " *Gillogly* at 1294.

5. Where There Is No Bad Faith You Cannot Get Punitive Damages.

Oldenkamp v. United American Insurance Company, 619 F.3d 1243 (10th Cir. 9/28/10) (Limited Benefit Hospital and Surgical Expense Policy):

"The district court correctly held that the Oldenkamps could not seek punitive damages because their bad faith claim had failed. See *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 893 (10th Cir. 2006)." *Id.* at 1250.

6. Although Bad Faith May Be Found, Punitive Damages Do Not Necessarily Follow.

Willis v. Midland Risk Insurance Company, 42 F.3d 607 (10th Cir. 1994) (General Business Liability Policy):

"[Plaintiff] has not presented any evidence of acts which were intentionally wrongful such as the deception and dishonesty in *Timmons*. In the absence of a showing of 'oppression, fraud or malice, actual or presumed' (23 O.S. § 9(A)), it would be improper to submit the issue of punitive damages to the jury."

7. Punitive Damages Not Automatic.

Hall v. Globe Life and Accident Insurance Company, 1998 OK CIV APP 161, 968 P.2d 1263

(Life Insurance Policy):

"The Oklahoma Supreme Court has said that the 'availability of a punitive damage award in a bad faith case is not automatic, but rather is governed by the standard applicable in other tort cases.' The plaintiff must show that the defendant acted with oppression, malice, fraud or gross negligence or wantonness. *Buzzard v. Farmers Insurance Company, Inc.*, 1991 OK, 824 P.2d 1105, 1114. We have alluded to our assessment that Globe Life believed it had an arguably legitimate reason to deny Hall's claim. When there is no evidence to show that the 'actions were tainted by oppression, fraud, malice or gross negligence, there was no basis for the submission of the punitive damage issue to the jury."

8. Punitive Damages Are Not Automatic And Are Governed By Same Standard As Other Tort Cases.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability):

¶66. "Although the current punitive damage statute contains language specifically referencing insurers when they are sued for breach of the duty of good faith and fair dealing, our recognition in *Buzzard* that such an award is not automatic and is governed by the standard applicable in other tort cases still stands and nothing in §9.1 has altered this principle. ...Whether that showing has been made remains an issue of law for the trial Court in its role as gatekeeper to determine, upon a Defendant's challenge to the sufficiency of the evidence via a motion for directed verdict, whether there is competent evidence upon which a reasonable jury could find reckless disregard, from which malice and evil intent may be inferred."

9. Standard Of Proof For Punitive Damages.

McLaughlin v. National Benefit Life Insurance Company, 1988 OK 41, 772 P.2d 383 (Life Insurance Policy):

"Clearly, punitive damages do not *ipso facto* follow from every breach of [the implied duty to deal fairly and to act in good faith] or in every case a jury may render a verdict for the wronged party. P. 385.

. . .

[T]he question of proof necessary to sustain a claim for punitive damages in a bad faith dealing case involving an insurance carrier is the same standard necessary to sustain such a claim in any case where punitive damages are sought under 23 O.S. 1981, § 9." P. 387.

Alsobrook v. National Travelers Life Insurance Company, 1992 OK CIV APP 168, 852 P.2d 768 (Health Insurance Policy):

"[T]he trial court must make a determination of the 'prima facie sufficiency of plaintiff's evidence of fraud, malice or the like, before an award of punitive damages in excess of actual damages may be allowed.' Company contends the Court, in the instant case, failed to make such a showing. We disagree with Company's assessment of the trial court's statement. Malice may be shown by 'an indifference to or conscious disregard' of the rights of another, justifying an award of punitive damages."

Capstick v. Allstate, 998 F.2d 810 (10th Cir. Okla. 1993) (Automobile Policy):

"In all respects the Capstick jury was given specific guidelines to follow in

determining whether or not punitive damages were appropriate in the circumstances of this case. It was not allowed to 'run wild,' and its discretion to impose punitive damages was confined to deterrence and retribution, the specific policies to be advanced under the State statute. The procedures followed by the trial court in removing the punitive damage cap are identical to that approved by this Circuit . . . and in full accord with the guidelines provided by the Supreme Court in *Haslip*. . . ."

10. Regardless Of The Viability Of The Bad Faith Claim, There Was Insufficient Evidence To Support Punitive Damages.

Sims v. Great American Life Insurance Co., 469 F.3d 870 (10th Cir. Okla. 2006) (Life Insurance):

"[B]ecause we find the evidence insufficient to support bad faith, we reverse the punitive damages verdict.

We note that even were we to have left the bad faith verdict intact, punitive damages still would have been inappropriate. . . . . [A]n insurer must 'recklessly disregard' or 'intentionally and with malice breach its duty to deal fairly and act in good faith with its insured.' OKLA. STAT. TIT. 23, § 9.1(B), (D) (2005); . . . . The evidence in this case plainly does not support this conclusion." P. 893-894.

11. Questions Of Fact Allow Punitive Damages To Go To The Jury.

Matlock v. Texas Life Insurance Company, 404 F.Supp.2d 1307 (W.D. Okla. 2005) (Life Insurance Policy):

"[Q]uestions of fact remain on Plaintiff's bad faith claim. Thus, it cannot be said that plaintiff cannot establish that Defendant recklessly disregarded its duty to deal fairly and act in good faith. Thus, Defendant's claim will be denied on this [punitive damage] issue. *Matlock* at 1315.

12. Constitutionality Of Burden Of Persuasion.

Harrell v. Old American Insurance Company**,** 1991 OK CIV APP 91, 829 P.2d 75 (Hospitalization Policy):

"Finally, we hold that Old American's contention -- that the punitive damages award violates its constitutional right to due process under the Fourteenth Amendment of the United States Constitution and Article II, Section 7 of the Oklahoma Constitution -- is without merit.

The argument is that bad faith insurance claims should be judged by a clear-and-convincing-evidence standard rather than by a mere preponderance of the evidence.

The law, however, has been established otherwise in this state. The high court has expressly held that the burden of persuasion does not deviate in bad faith and fair dealing cases from the usual standard in civil cases, i.e., a preponderance of the evidence." P. 80.

13. Insurer's Conformance To Industry Practice Of Delay Warrants Punitive Damages.

Cooper v. National Union Fire Insurance Company of Pittsburg, 1996 OK CIV APP 52, 921 P.2d 1297 (Workers' Compensation Insurance):

"The 'bad faith' must be accompanied by *some* 'aggravating circumstance' to warrant submission of punitive damages to the jury under *McLaughlin*, ...

. . .

[D]efendant's explanation that its failure [to not make court ordered weekly payments for three weeks] does not deviate from a widespread industry practice of not making weekly payments, in spite of court orders to do so, furnishes a sufficient 'aggravating circumstance' of blatant, indifferent disobedience to a court order, as well as plaintiff's rights, to warrant submission of the issue of punitive damages to the jury."

14. Failing To Investigate A Known Critical Element Is Basis For Submitting Punitive Damages.

Crews v. Shelter General Insurance Company, 393 F.Supp.2d 1170 (W.D. Okla. 2005) (Homeowners Fire Policy):

"The Court finds that the undisputed facts in this action, if established through evidence at trial, could reasonably support a jury's finding by clear and convincing evidence, that Shelter recklessly breached its duty to deal fairly and in good faith with Plaintiffs. The factual record before the Court demonstrates that Shelter voided Plaintiffs' insurance policy *after* Plaintiffs' home was completely destroyed by fire and without making any effort to determine whether Mr. Crews's misrepresentation regarding his criminal history- the sole basis for Shelter's decision to void the policy- was made with an intent to deceive, a critical element necessary to justify Shelter's decision under Oklahoma law. Based on this record, the Court finds that Plaintiffs' request for punitive damages should not be stricken." *Crews* at 1179.

15. Ignoring An Insured's Rights Or Failing To Investigate The Law Allow Punitive Damages.

Haberman v. The Hartford Insurance Group, 443 F.3d 1257 (10th Cir. Okla. 2006) (Uninsured/Underinsured Business Automobile Policy):

"Haberman presented evidence suggesting that the Hartford ignored the provisions of its own policy and ignored Oklahoma law. Haberman argued that although the Hartford knew its insured suffered a serious injury and would have a substantial lost wages claim, The Hartford denied the claim. The Hartford delayed payment of Haberman's medical payments coverage until just weeks before trial. And Haberman asserted that the Hartford did not check to see if Oklahoma law would permit tying the policy's uninsured motorist coverage for an individually named insured to specific vehicles. These facts could give rise to an inference of malice – that the Hartford was 'indifferent to', or 'consciously disregarded,' Haberman's rights. It was, therefore, proper for the district court to submit the issue [of punitive damages] to the jury." *Haberman* at 1271.

16. Three Million Dollar Punitive Damage Verdict Not Excessive As A Matter Of Law.

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

"[T]he punitive damage award must stand. . . . [W]e find punitive damages justified for falsifying a sworn statement, surreptitiously obtaining government records, actual deceit by misrepresentation of identity, and a successful attempt to gain advantage over an insured by discouraging legal representation in a legal controversy. These items alone justify

substantial punitive damages. Measured by the wealth of the Defendant, the amount awarded cannot be said to be legally erroneous considering the economic resources of the defendant, and the premise that a punitive damage verdict is peculiarly within the province of the jury and will not be casually interfered with on the grounds of passion or prejudice." *Timmons, supra*, at 919.

17. $1.5 Million Punitive Damages Is Not Excessive.

Newport v. USAA, 2000 OK 59, 11 P.3d 190 (Uninsured Motorist Coverage):

"The amount of punitive damages, which are today limited to the amount of $1.5 million by the award of $1.5 million in actual damages for bad faith, is not grossly excessive, nor does it appear to be the result of passion, prejudice or improper sympathy."

18. If You're Going To Be Bad, Be Real Bad.

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

It is the solemn and considered judgment of this Court that the $3,000,000.00 awarded as punitive damages is partially the result of the combined impact of the several wrongful and willful acts of the defendant and that the combined effect of these items of evidence influenced the jury so as to create an improper sympathetic response of a damage award larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated." *Timmons, supra*, at 919.

19. Relationship Of Actual Damages To Punitive Damages.

a. Oppression Over Nominal Amounts Of Actual Damages Is Basis For Remittitur Of Large Punitive Damage Award.

Buzzard v. Farmers, 1991 OK 127, 824 P.2d 1105 (Underinsured Motorist Insurance):

"Because such damages are awarded to punish the wrongdoer for the wrong committed upon society, Oklahoma does not require the amount of punitive damages to be in a particular ratio to the amount of actual damages. (Citation omitted.) Instead, the focus is the harm caused to society by defendant's wrongful actions. (Citation omitted.) *Basden* does, however, allow the court to consider as a factor in determining the correctness of a punitive award the amount in actual controversy. . . . .

We must view the circumstances within the context of the controversy between the Buzzards and Farmers. (Citation omitted.) Farmers' financial responsibility under its UM coverage amounted to only a slight part of the bereaved parents' monetary claim for the loss of their son. In the absence of bad faith this was a $10,000.00 obligation, nothing more. With bad faith having been found by the jury, the jury then proceeded to award the Buzzards actual damages for their emotional distress as allowed by *Christian*, in the sum of $200,000.00. That is not an insignificant sum for the distress occasioned by delay in withholding a $10,000.00 insurance payment over 7-1/2 months. . . . [W]e believe that the large award of punitive damages was likely a result of 'an improper sympathetic response . . . larger than reason dictates to be necessary to deter such conduct in this defendant and other similarly situated.' (Citations omitted.) We thus order that a remittitur by Buzzard of $1,600,000.00 be filed as

a condition to the affirmance of this judgment for punitive damages."

b. Though Contract Claim May Be Small, Outrage May Be Significant.

Capstick v. Allstate, 998 F.2d 810 (10th Cir. Okla. 1993) (Automobile Policy):

"It is significant that Allstate specifically and repeatedly labelled Capstick as an arsonist and one who intended to pursue an insurance fraud. These are significant factors which support the punitive award in this case. . . .

In many cases involving bad faith conduct by insurance companies or others, the actual amount in controversy may be relatively insignificant, as was Capstick's contract claim for $1,500.00, the consequential damages may be only nominal, but the outrage may be significant. . . .

A further factor which we consider significant in finding that the amount of the punitive award was reasonable in this case is the evidence that several Allstate representatives who testified at trial believed that their handling of Capstick's claim was consistent with company's directions and policies, that no suggestion of error had ever been sent to them by the company, and that they would continue to handle claims in the same manner in the future. . . . . With this type of evidence, it is fair and reasonable to believe that anything short of the award given here would fail to have any desired deterrent effect upon Defendant's future conduct in handling the claims of Oklahoma policyholders."

20. $1.5 Million Punitive Damage Verdict Not Unreasonable On Claim Of Policy Benefits Of $15,000.00.

Barnes v. Oklahoma Farm Bureau Mutual Insurance Company, 2000 OK 55, 11 P.3d 162 (Underinsured Motorist Coverage):

"The evidence sufficiently showed any reasonable insurer would have understood that Barnes was entitled to both the $15,000.00 in UIM coverage and the $10,000.00 from Donaldson's liability coverage [or its substituted equivalent from insurer under § 3636(E)] yet, insurer unreasonably deprived Barnes of these benefits for an extended period of time and it forced her to litigate her entitlement to the full $25,000.00 based on an untenable argument insurer had some valid claim to Donaldson's liability coverage. . . . ¶42

. . .

In light of the evidence presented in this record, we simply cannot say a $1.5 million punitive damage award is somehow grossly excessive or the result of passion, prejudice or improper sympathy. To rule otherwise would merely be an improper replacement of our verdict for that given by the jury, something we are not willing or warranted in doing. Accordingly, we uphold the punitive damage award and determine insurer's claim of excessiveness is without merit." ¶44.

21. Evidence Of Insurer's Net Worth To Be Considered For Punitive Damages.

Capstick v. Allstate, 998 F.2d 810 (10th Cir. Okla. 1993) (Automobile Policy):

"Under Oklahoma law, the net worth of a defendant may be considered in assessing punitive damages. . . . .

[A $4.5 billion net worth] is a significant factor which justifies the amount of the verdict in this case, since under Oklahoma law the purpose of a punitive award is to punish and deter a wrongdoer. In order to have a deterrent effect, the damage award must be sufficient to attract the attention of the defendant in order to assure that oppressive practices do not continue."

22. Constitutionality.

a. ***Buzzard v. Farmers,*** 1991 OK 127, 824 P.2d 1105 (Underinsured Motorist Insurance):

"Farmers next asserts that the award of punitive damages violates Federal Constitutional provisions: the Eighth Amendment, the Contracts Clause, and the Due Process Clause. As for the Eighth Amendment, the United States Supreme Court has recently held that the Excessive Fines Clause does not apply to punitive damage awards in cases between private parties. *Browning-Ferris Industries v. Kelco Disposal Inc*., 492 U.S. 257, 109 S.Ct. 2909, 2914, 106 L.Ed.2d 219 (1989).

The Contracts Clause and Due Process questions raised by Farmers center on the 'lack of notice as to the appropriate standard of behavior.' Farmers argues that an award of punitive damages is constitutionally defective because as an insurer, it was unable to plan ahead and calculate its premiums to allow for such an award under Oklahoma law. We disagree. Not only was the applicable law of punitive damages well known, Farmers was on notice that it had a duty to act in good faith toward its insureds."

b. ***Harrell v. Old American,*** 1991 OK CIV APP 91, 829 P.2d 75 (Hospitalization Policy):

"Finally, Old American asserts that the jury received no instructional guidance concerning the issue of punitive damages and that the trial court failed to conduct a post-verdict scrutiny of the reasonableness of the award sufficient to satisfy due process.

It points to the recent United States Supreme Court decision in *Pacific Mutual Life Insurance Company v. Haslip* (citation omitted) to support this Constitutional challenge.

. . .

The Supreme Court found adequate jury instructions which included these elements: (1) Describe the purpose of punitive damages; (2) confine juror discretion to deterrence and retribution; (3) advise the jury that the imposition of punitive damages is not compulsory; and (4) admonish the jury to consider the character and degree of the wrong and the necessity of preventing a similar wrong. *Id*. at 1044.

Here the instructions given to the jury were substantially similar to those deemed adequate in *Pacific Mutual*.

. . .

We find that the application of the law of this state in the court below 'impose[d] a sufficient definitely and meaningful constraint on the discretion of [the jury] in awarding punitive damages.' *Id*. at 1045." Pp. 80-81.

c. A $145 Million Punitive Damage Award Violates The Due Process Clause Of The Fourteenth Amendment.

State Farm Mutual Automobile Insurance v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (4/7/03) (Automobile Liability Insurance):

"While states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. [Citations omitted.] The Due Process Clause of the Fourteenth Amendment prohibit the imposition of grossly excessive or arbitrary punishments on a tortfeasor. [Citations omitted.] The reason is that '[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose.' [Citation omitted.] To the extent an award is grossly excessive, it furthers no legitimate purpose and

constitutes an arbitrary deprivation of property. 123 S.Ct. at 1519-20.

. . .

Under the principles outlined in *BMW of North America, Inc. v. Gore*, this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award." 123 S.Ct. at 1521.

(1) In Awarding Punitive Damages The Degree Of Reprehensibility Of The Defendant's Conduct Is The Most Important Consideration.

"'[T]he most important indicium of the reasonableness of a punitive damages award is the degree or reprehensibility of the defendant's conduct.' *Gore, supra*, at 575, 116 S.Ct. 1589. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery or deceit, or mere accident." 123 S.Ct. at 1521.

(2) There Are No Rigid Benchmarks Of A Punitive Damage Ratio To Compensatory Award.

"Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages awarded. *Gore, supra*, at 582, 116 S.Ct. 1589 ('[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award']; *TXO, supra*, at 458, 113 S.Ct. 2711. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." . . . 123 S.Ct. 1524.

Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' *Ibid;* see also *ibid*. (positing that a higher ratio *might* be necessary where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine'). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

"In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 123 S.Ct. 1524.

(3) The Punitive Damage Award Should Relate To Other Penalties Authorized Or Imposed In Comparable Cases.

"The third guidepost in *Gore* is the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.' [Citation omitted.] We note that, in the past, we have also looked to criminal penalties that could be imposed." 123 S.Ct. 1526.

d. A Ratio Of Nine To One Does Not Offend Constitutional Due Process Concerns.

State Farm Mutual Automobile Insurance Company v. Campbell, 543 U.S. 874, 125 S.Ct. 114 (Mem), 160 L.Ed.2d 123 (10/4/04) (Automobile Liability Coverage):

Petition for Writ of Certiorari to the Supreme Court of Utah denied.

23. A Twenty To One Punitive Damage Ratio Is Constitutionally Permissible.

Haberman v. The Hartford Insurance Group, 443 F.3d 1257 (10th Cir. Okla. 2006) (Uninsured/Underinsured Business Automobile Policy):

"[T]he Court also recognized that there are no rigid benchmarks that a punitive damages award may not surpass and that ratios greater than those previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. *Id.* at 423, 123 S.Ct. 1513; see also *BMW* at 582, 116 S.Ct. 1589. Courts have consistently rejected the notion that the constitutional line determining excess in an award of punitive damages is marked by a simple mathematical formula, even one that compares actual with potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine." *Haberman* at 1272.

24. Punitive Damages In A Bad Faith Claim Are Taxable Notwithstanding A Settlement Agreement Which Is Silent As To The Allegation Of The Amounts To Any Type Of Damage.

Lane v. United States of America, 902 F.Supp. 1439 (W.D. Okla. 1995) (UM Coverage):

"[T]he amounts of the settlement which the Court has determined are allocable and allocated to contract damages and compensatory damages for the tort of bad faith are excludable from income . . ., and the only remaining question is whether the amount of the settlement proceeds allocable and allocated to punitive damages is excludable from income.
. . .
[P]unitive damages are not 'received on account of personal injury or sickness' and are therefore not excludable from gross income . . . .
. . .
There are two independent requirements that a taxpayer must meet before a recovery may be excluded under Sec. 104(a)(2). First the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is based upon tort or tort type rights; and second, the taxpayer must show that the damages were received on account of personal injuries or sickness."

25. Where There Are Separate Verdicts Against The Insurer And The Selling Agent For Separate Amounts, The Acts Of A Selling Agent May Not Make The Insurer Vicariously Liable For Punitive Damages.

Cox, et al., v. Kansas City Life Insurance Company, et al., 1997 OK 122, 957 P.2d 1181 (Life Insurance Policy):

"Oklahoma law allows a plaintiff to obtain separate judgments against a principal and agent, although the principal's liability is based solely on the agent's acts. Liability, therefore, may not be imposed against the principle, on a judgment against the agent alone.
. . .

Here . . ., the jury returned a verdict for separate amounts against Kansas City Life and Stearman. The verdict imposed individual, not joint, liability. There were two verdicts, one against Kansas City Life, and the other against Stearman. It is this critical distinction that defeats the Pelter's claim that Kansas City Life should be held liable on the Stearman judgment. . . .

The result is not changed by the fact that Kansas City Life's liability was based on respondeat superior."

26. The Trial Court Can Correct As A Matter Of Law The Jury Verdict Regarding Punitive Damages.

Newport v. USAA, 2000 OK 59, 11 P.3d 190 (Uninsured Motorist Policy):

"The verdict for actual damages on the claim for bad faith should also have been corrected as a matter of law. The punitive damages instruction stated that 'in no event should the punitive damages exceed the amount of actual damages awarded.' The instruction did not distinguish between actual damages on the claim for policy benefits and actual damages on the bad-faith claim. The jury could not be reasonably expected to cure the legal insufficiency in the instructions it was given. . . .

On remand, the trial court shall enter judgment in the amount of policy limits, $1.5 million, on Mrs. Newport's contract claim for UM benefits against USAA, $1.5 million, the jury's initial determination, on her bad-faith claim, and $1.5 million in punitive damages."

VII. DISCOVERY

1. Attorney Ordinary Work Product Consisting Of Factual Information Is Discoverable.

Hall v. Goodwin, 1989 OK 88, 775 P.2d 291 (Fire Policy):

"The allegation of bad faith is sufficient to sustain a good cause showing for substantial need of the statement taken by Farmers' attorney. In fact, there is no other method to precisely determine the facts upon which Farmers based its decision to deny the claim. We find that the facts stated and the allegation in the petition are sufficient showing of substantial need. . . ." P. 296.

a. Claims Files Prepared In Anticipation Of Litigation Are Discoverable.

See: Brown v. Superior Court in and for Maricopa County, 670 P.2d 725 (Ariz. 1983) (Fire Policy):

"No matter how the test is defined, bad faith is a question of reasonableness under the circumstances. [citation omitted] The portions of the claims file which explained how the company processed and considered Brown's claim and why it rejected the claim are certainly relevant to these issues.

Further, bad faith actions against an insurer, like actions by client against attorney,

patient against doctor, can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims file is a unique, contemporaneously-prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming. [citation omitted] The 'substantial equivalent' of this material cannot be obtained through other means of discovery. The claims file 'diary' is not only likely to lead to evidence, but to be very important evidence on the issue of whether Continental acted reasonably." P. 734.

See also: Silva v. Fire Insurance Exchange, 112 F.R.D. 699 (D. Mont. 1986) (Fire Policy):

"This court has recently ruled that a plaintiff in a first-party bad faith action is entitled to discover the entire claims file kept by the insurer. [citation omitted] Under ordinary circumstances, a first-party bad faith claim can be proved only by showing the manner in which the claim was processed, and the claims file contains the sole source of much of the needed information. [citation omitted]

"The time-worn claims of work product and attorney-client privilege cannot be invoked to the insurance company's benefit where the only issue in the case is whether the company breached its duty of good faith in processing the insured's claim. . . .the general rule in cases of this nature should be that the plaintiff is absolutely entitled to discovery of the claims file."

b. Mental Impressions Of Attorney Are Discoverable.

See: Brown v. Superior Court in and for Maricopa County, 670 P.2d 725 (Ariz. 1983) (Fire Policy):

"[T]he reasons the insurance company denied the claim or the manner in which it dealt with it are central issues to Brown's claim of bad faith. Thus, the strategy, theories, mental impressions and opinions of Continental's agents concerning the loss of earnings claim are directly at issue. When mental impressions and the like are directly at issue in a case, courts have permitted an exception to the strict protection of Rule 26(b)(3) and allowed discovery. P. 735.

In the case at bench it is possible, for example, that the insurer denied payment of the claim because of a legal theory (that there was no coverage), a mental impression (that the insured had exaggerated the claim), an opinion (that the fire was attributable to arson), etc. If the file shows such a reason for denial of the claim, this information would go to the very heart of the question of whether the company acted in good or bad faith and must be admissible, and thus discoverable, in a subsequent bad-faith case. Similar considerations would exist in a variety of other actions such as legal malpractice, malicious prosecution, abuse of process and all other cases in which the issue is the motives or reasons for, or the propriety or impropriety of a party's actions in handling a prior legal matter or proceeding. Thus, the absolute immunity accorded for the essence of work product -- mental impressions, conclusions, opinions or legal theories of the attorney or other representative -- would apply only to the case being litigated (here, the bad-faith case) and not to such material prepared for some prior case which is the subject of the instant litigation. Of course, the 'true work product,' like all other trial preparation material, will continue to enjoy the qualified immunity even though prepared in another case." Ftnt. 8, P. 735-736.

2. Full Discovery Required Even In Alleged Slow Impact Frivolous Claim.

Floyd v. Ricks, 1998 OK 9, 954 P.2d 131 (Uninsured Motorist Coverage):

"Geico contends the lawsuit is frivolous because the alleged tortfeasor has insurance available in the amount of $500,000.00, and plaintiff's damages are significantly less than that

. . .

There is nothing in the discovery code which permits a defendant to refuse all discovery requests on the ground that the lawsuit is 'frivolous.' The district judge abused her discretion in denying discovery to the plaintiff."

3. Claims Files And Manuals Are Discoverable.

Darzenkiewicz v. The Honorable Niles Jackson, 1994 OK 151, 904 P.2d 66 (Underinsured Motorist Coverage):

"Let mandamus issue . . . to permit discovery of the defendant insurer's claim file and claims manual . . . ."

Justice Opala concurring opinion:

"I concur in today's order because the insured is entitled to discover **the facts known or knowable** to the insurer at the time the insured's claim was met with denial of UM liability. *Buzzard v. McDanel*, 736 P.2d 157, 159, 161 (Okla. 1987)."

3(a). If You Want The Claim File Or The Policy, File A Motion To Compel, Not A Motion In Limine.

David Edens and Rhonda Edens, Individually and as next of kin of Zachery Edens, deceased; Edens Structural Solutions, LLC v. The Netherlands Insurance Company, 834 F.3d 1116 (10th Cir. Okla. 2016) (Business Auto Policy Uninsured/Underinsured Motorist Coverage):

Of course, the District Court was well within its discretion to terminate any aspect of the First Motion in Limine that was purely trial related because the district court had dismissed the case on Summary Judgment. P. 1130

…

But Plaintiffs' First Motion in Limine didn't solely address trial issues. Plaintiffs also requested that the district court "order [Netherlands] to provide Plaintiffs with an un-redacted copy of its claim file," arguing that Netherlands had waived its claimed privilege in the file.… This is essentially a Motion to Compel trapped within the four corners of a misnamed First Motion Limine. … Had Plaintiffs filed a Motion to Compel Production of an un-redacted claim file in the District Court, arguing that Netherlands had waived its claimed privilege, we would have something to review. But all we have to review is the district court's termination of the First Motion in Limine. Without addressing the merits of Plaintiffs' claim that Netherlands violated Rule 26, then, we conclude that the District Court didn't abuse its considerable discretion in terminating an irrelevant Motion in Limine after it granted Netherland's Summary Judgment Motion. P. 1130-31

…

Much like the privilege issue, Plaintiffs brought the [Defendant's refusal to provide a] certified--policy to be issued to the District Court's attention only in another Motion in Limine, this time their Second Motion in Limine. Plaintiffs filed their Second Motion in Limine on the same day that Netherlands filed its Motion for Summary Judgment. Again, the District Court simply terminated the Second Motion in Limine after granting Netherland's Summary Judgment Motion. And, again, the nature of this issue on appeal is much harder to discern then it should be because Plaintiffs filed a misnamed Second Motion in Limine addressing a discovery dispute that should have been addressed in Plaintiff's response to

Netherlands's Summary-Judgment Motion. P. 1131

…

If this was Plaintiffs' attempt to bring a Summary-Judgment issue to the district court's attention it was packaged incorrectly as a Motion in Limine. While Rule 37 (c)'s preclusion sanction may be self-executing, any discovery failure must be brought to the district court's attention so that it can address whether the failure was "substantially justified or … harmless." Fed. R. Civ. P.37 (c) (1). … Thus, like the privilege issue, we have nothing to review except for the district court's termination of the Second Motion in Limine. And, just like the privilege issue, we decline to address the merits of the Rule 26 (a) and 37(c) discovery dispute. P. 11332

4. Third-Party Administrator Contract And Claims Handling Guidelines Or Manuals Are Discoverable In Bad Faith Claim.

Cudd Pressure Control, Inc. v. New Hampshire Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, 297 F.R.D. 495 (W.D. Okla. 2014) (Employer's Liability Policy and Umbrella Policy):

The Court finds that Defendant's relevancy objection is not well taken because the handling of the *Phillips* claim – whether by Defendants directly or through their claims adjusters – is relevant to Plaintiff's bad faith claim in this case. Plaintiff is entitled to know the nature of Defendant's contractual relationship with and directions to the third-party administrator for the *Phillips* claim. . . . The Court orders the production of any contract or written agreement the Defendants had with [third-party administrator] between 2007 and 2012 to provide claim services under employer's liability policies covering Oklahoma employers, and any claims-handling guidelines or manuals applicable to [third-party administrator's] services during this same time period for claims against Oklahoma employers. (P. 502)

5. There Is A Rebuttable Presumption An Insurer's Investigatory File Is Not Privileged And Thus Discoverable.

Lindley v. Life Investors Insurance Company of America, 267 F.R.D. 382 (N.D. Okla. 2010) (Cancer Only Supplemental Policy):

"As the Court has observed in its general discussion above, there are often no clear answers to privilege issues due to the fact-dependent case by case analysis that is required. This is particularly true in the context of insurance bad faith claims. [Citation omitted.] . . . Most courts have adopted a rebuttable presumption that neither attorney work product nor attorney-client privilege protects an insurer's investigatory file on an insured's claim from discovery before a final decision is made. . . . ." *Id.* at 398-399.

6. Insurers Must Provide Complaint Information With The Oklahoma Insurance Department And Bad Faith Lawsuits Filed Against It.

Cudd Pressure Control, Inc. v. New Hampshire Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, 297 F.R.D. 495 (W.D. Okla. 2014) (Employer's Liability Policy and Umbrella Policy):

Defendants have refused to provide any information or documents regarding 1) complaints filed against them with the insurance commissioner (or other regulatory agency) related to similar insurance policies, 2) regulatory investigations made of their companies, and 3) other lawsuits asserting bad faith claims regarding employers liability coverage . . . . Again, the Court finds that Defendants' relevance objection is not well taken and that unsworn statements of counsel are insufficient answers to Plaintiff's interrogatories. The Court agrees, however, that the interrogatories are unreasonably broad or inartfully phrased. The Court orders Defendants to answer Interrogatory Nos. 12-15 limited to identifying information regarding complaints lodged against Defendants with the Oklahoma Insurance Department related to workers' compensation or employers liability policies, regulatory investigations or audits of Defendants in Oklahoma within the past 5 years related to such policies, and lawsuits filed against Defendants in Oklahoma within the past 5 years alleging bad faith conduct with regard to workers' compensation or employers liability policies. (P. 503)

7. There Is No Self-Critical Analysis Privilege.

Lindley v. Life Investors Insurance Company of America, 267 F.R.D. 382 (N.D. Okla. 2010) (Cancer Only Supplemental Policy):

"The Court gives short-shrift to Life Investors' assertion of the self-critical analysis privilege. This privilege 'allows individuals or businesses to candidly assess their compliance with regulatory and legal requirements without creating evidence that may be used against them by their opponents in future litigation.' [Citation omitted.] Life Investors has offered no Oklahoma or Tenth Circuit authority recognizing this privilege and the Court declines to do so." *Id.* at 387.

8. Whether A Document Is Protected By Attorney-Client Privilege Or Attorney Work Product Depends On Its Primary Or Predominant Purpose.

Lindley v. Life Investors Insurance Company of America, 267 F.R.D. 382 (N.D. Okla. 2010) (Cancer Only Supplemental Policy):

"Whether attorney-client privilege or attorney work product protects certain information from discovery often turns on the same set of facts and, consequently, courts frequently merge their analysis. This occurs when the pertinent inquiry is whether the confidential advice that is sought or given is primarily or predominantly 'business' rather than 'legal' in nature, which generally occurs when the 'primary motivation' for creating a document is for a 'business' rather than 'litigation' purpose." *Id.* at 395.

9. Insured Not Entitled to Confidential Communications and Work Product Between Insurer and its Counsel.

Cudd Pressure Control, Inc. v. New Hampshire Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, 297 F.R.D. 495 (W.D. Okla. 2014) (Employer's Liability Policy and Umbrella Policy):

The Court agrees with Defendants that Plaintiff had no right to share in confidential attorney-client communications or receive work product of attorneys who were separately retained by Defendants to advise them regarding their rights and obligations under the insurance policies. See *Roesler v. TIG Ins. Co.,* 251 Fed.Appx. 489, 500 (10th Cir. 2007) ("An insurance company, just as any other individual or entity, has the right to seek confidential

legal advice.") (citing Oklahoma Statute Title 12, § 2502(A)(2)). (P. 498-499)

10. "At Issue" or Implied Waiver of Attorney-client Privilege Require Insurer Take Affirmative Steps in the Litigation to Make Attorney's Advice Relevant and Discoverable.

Cudd Pressure Control, Inc. v. New Hampshire Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, 297 F.R.D. 495 (W.D. Okla. 2014) (Employer's Liability Policy and Umbrella Policy):

[P]laintiff seems to argue that these documents are "at issue" in the case because they are relevant to its bad faith claim. . . .

The Court is not persuaded by Plaintiff's implicit waiver argument. Defendants have not taken any affirmative steps in this litigation that would make the substance of its attorney's previous advice relevant in the case, as required by the waiver doctrine on which Plaintiff relies. See *Gilson v. State*, 8 P.3d 883, 909 (Okla. Crim. App. 2000); see also *Roesler*, 251 Fed.Appx. at 500 ("It is only when [legal] advice becomes at issue in a *legal proceeding* that the client may be required to disclose the advice of counsel under a theory of implied waiver.") (Emphasis in original.) Also, Plaintiff has improperly utilized documents subject to a claim of privilege to craft its waiver arguments. Rule 26(b)(5) clearly prohibits the use or disclosure of inadvertently produced document that is subject to a claim of privilege or work product protection "until the claim of privilege is resolved." See Fed.R.Civ.P. 26(b)(5)(B). Thus, Plaintiff cannot rely on the substance of the coverage opinion or other privileged documents to argue that Defendants have waived production of them. Moreover, Plaintiff's counsel improperly discusses the contents of the documents in publicly-filed briefs while seeking resolution of the claim of privilege. This conduct violates both the letter and spirit of Rule 26(b)(5)(B). (P. 499)

11. An Insurer Waives Attorney/Client Privilege IF Both Relevant To The Issues Raised And Either Vital Or Necessary To The Opposing Party's Case.

Seneca Insurance Company, Inc. v. Western Claims, Inc., et al., 774 F.3d 1272 (10th Cir. 12/22/14) (Commercial Property Policy):

[T]he **second** set of generalized approaches [to determine whether a litigant has waived the attorney/client privilege] provides that the privilege is waived only when the materials to be discovered is both relevant to the issues raised in the case and either vital or necessary to the opposing party's defense of the case. See *Black Panther Party v. Smith*, 661 F.2d 1243, 1266-68 (D.C. Cir. 1981) (balancing need for discovery with importance of privilege), vacated without opinion, 458 U.S. 1118, 102 S.Ct. 3505, 73 L.Ed.2d 1381 (1982); *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (setting forth three-factor test, which includes relevance and vitality prongs).

. . .

The Oklahoma Supreme Court has not definitively adopted any of these three approaches, but the parties agree Oklahoma courts would apply some version of the second approach, i.e., the *Hearn* test. . . . see also *Gilson v. State*, 8 P.3d 883, 908-09 (Okla. Crim. App. 2000) (applying version of *Hearn* test); see also *Lindley v. Life Investors Insurance Company of America*, 267 F.R.D. 382, 392-393 (N.D. Okla. 2010), affirmed in part as modified, 08-CV-0379-CVE-PJC, 2010 WL 1741407 (N.D. Okla. 4/28/10) (applying *Hearn* test).

Under the *Hearn* test, "at issue" waiver requires –

(1) assertion of the privilege was the result of some affirmative act, such as filing

suit, by the asserting party;

(2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; *and*

(3) application of the privilege would have denied the opposing party access to information vital to [its] defense.

Frontier, 136 F.3d at 701 (quoting *Hearn*, 68 F.R.D. at 581). 1275-1276.

. . .

Here, Seneca affirmatively put at issue its attorney's advice by invoking "advice of counsel" to support its claims in this litigation. Thus, the first two prongs of the *Hearn* test were met in this case. 1277.

Focusing on the third *Hearn* prong, Seneca contends its assertion of attorney-client privilege would not have denied Western Claims access to information "vital" to its defense because the information in the Isbell and Abowitz correspondence was available through other sources.

. . .

Here, Seneca not only sued Western Claims, it expressly relied on "advice of counsel" as a reason – if not the primary reason – for settling the Route 66 lawsuit for $1 million. 1278.

12. Insurer May Not Use Attorney-Client Privilege Or Work Product Doctrine As Both A Sword And Shield.

Seneca Insurance Company, Inc. v. Western Claims, Inc., et al., 774 F.3d 1272 (10th Cir. 12/22/14) (Commercial Property Policy):

[A]llowing Seneca to rely on "advice of counsel" to establish the reasonableness of the Route 66 settlement while excluding the contents of that advice would violate the well-established principle that "attorney-client communications cannot be used both as a sword and a shield." See *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1552 (10th Cir. 1995); see also *Frontier*, 136 F.3d at 700 (bringing indemnity suit does not impliedly waive attorney-client privilege unless plaintiff asserts reliance on advice of counsel to prove reasonableness of underlying settlement; EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES, § 6.12.4 (2014) (noting thrust of "in issue" doctrine is that party's privilege cannot be used as both shield and sword). 1277-1278.

. . .

Like the attorney-client privilege, "a litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invok[e] the privilege to prevent an opponent from challenging the assertion." *Frontier*, 136 F.3d at 704. 1278.

13. An Insurer Claiming Inadvertent Disclosure Of Privileged Documents Has The Burden Of Showing It Took Reasonable Steps To Prevent Disclosure.

Cudd Pressure Control, Inc. v. New Hampshire Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, 297 F.R.D. 495 (W.D. Okla. 2014) (Employer's

Liability Policy and Umbrella Policy):

The party claiming that its disclosure was inadvertent bears the burden of proving that each of the three elements of Rule 502(b) has been met . . . [including] that it took reasonable steps to prevent disclosure in the first place. [Citations omitted.] In this case, Defendants have failed to carry this burden. They do not explain their record keeping or review procedures with respect to privileged materials placed in general claim files, nor do they identify who was responsible for conducting the review, how much time was devoted to the task, or what criteria or methodology was used. With the exception of the coverage opinion, none of the inadvertently produced documents bears any mark that would signal a claim of privilege. The coverage opinion itself does not bear a "confidential" or "privileged" stamp, but merely states in bold print in the "Re" clause of counsel's letter: "LEGAL - COVERAGE COUNSEL." Here, as in *Golden Valley Microwave Foods*, *Inc. v. Weaver Popcorn Co.*, 132 F.R.D. 204, 209 (N.D. Ind. 1990), "the Court is left to speculate what specific precautions were taken" to prevent the disclosure of communications for which a claim of privilege is now made. Further, as in *Williams*, Defendants provide only conclusory statements of counsel in their briefs that are "patently insufficient to establish that a party has discharged its duty of taking 'reasonable steps' to guard against the disclosure of privileged documents." *Williams,* 806 F.Supp.2d at 49-50. (P. 500)

14. Inadvertent Waiver Of Privilege Through Inadvertent Production Of Documents Does Not Extend To Other Documents On The Same Subject Matter.

Cudd Pressure Control, Inc. v. New Hampshire Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, 297 F.R.D. 495 (W.D. Okla. 2014) (Employer's Liability Policy and Umbrella Policy):

This finding of waiver extends only to documents actually produced and not to any other documents on the same subject matter which were withheld from production under a claim of privilege. See *Silverstein*, 2009 WL 4949959 at *9 (observing that Rule 502 "abrogates previous Tenth Circuit law concerning subject matter waivers on disclosed documents otherwise protected by attorney-client privilege and work-product protection") (citing *In Re Qwest Communications Int'l, Inc.*, 450 F.3d 1179, 1195 (10th Cir. 2006)). (P. 500-501)

15. Pretrial Discovery Of Defendant's Financial Records Permitted.

YWCA of Oklahoma City v. Honorable Gordon R. Melson, 1997 OK 81, 944 P.2d 304 (Worker's Compensation Insurance):

"*Pretrial* discovery of a defendant's financial condition serves to protect the uninterrupted continuity of the trial process and a smooth transition into the punitive-damages stage.

. . .

In camera inspection with a protective order should be sought if discovery material is to be withheld in whole or in part or be merely shielded from public view.

The provisions of 12 O.S. 1991 § 3226(C) -- which allow for protective orders -- can easily be harmonized with those of the current 23 O.S. Supp. 1995 § 9.1. The latter *expressly authorizes* the financial condition of a defendant to be inquired into for assessment of the award that is sought at the punitive-damages stage."

16. Discovering And Using Information Relating To Non-Party Insureds For Purposes Of Determining The Increased Financial Benefit Derived By An Insurer For The Same Or Similar Conduct In Determining Punitive Damages

Is Proper.

Metzger v. American Fidelity Assurance Company, 245 F.R.D. 727 (W.D. Okla. 2007) (Limited Benefit Specified Disease Cancer Insurance):

"[T]he *Phillip Morris* Supreme Court decision may not sweep so broadly as to disallow punitive damage awards based on non-parties. . . .

"Pursuant to § 9.1 the Oklahoma punitive damage statute (until addressed in light of recent Supreme Court authority) allows punitive damage award based on the same conduct against in-state non-parties, but not out-of-state parties." P. 729.

17. Insurer Must Answer Interrogatories Or Produce Documents Reflecting the Method Or System By Which Bonuses Or Incentive Payments Are Made For Claims Handlers.

Cudd Pressure Control, Inc. v. New Hampshire Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, 297 F.R.D. 495 (W.D. Okla. 2014) (Employer's Liability Policy and Umbrella Policy):

Defendants have refused to answer interrogatories or produce documents reflecting the method or system by which bonuses or incentive payments are determined for individuals who handle insured claims. The Court rejects Defendants' relevance argument. . . . They cite the deposition of one employee, Tara Barlin, where Plaintiff's counsel inquired into this area. Defense counsel repeatedly objected to these questions and, improperly, instructed the witness not to answer. [Citation omitted.] When allowed to answer the question, "Is your bonus or incentive pay linked to money paid out by your department?" The transcript reflects that the witness paused and then stated, "I don't know specifically what goes into determining . . . ." [Citations omitted.] Thus, the Court finds the Defendants' position that Plaintiff has received an adequate answer to its discovery request is unsupported.

The Court also finds, however, that the wording of Plaintiff's discovery request is overbroad. The Court orders Defendants to answer Interrogatory No. 9 and Interrogatory No. 11 and produce responsive documents to Request for Production No. 6, limited to the type and amounts of bonuses paid for the time period between 2007 and 2012 and the methods used to calculate such bonuses for any individual involved in handling the *Phillips* claim. (P. 502)

18. Insurers Must Provide Complaint Information With The Oklahoma Insurance Department And Bad Faith Lawsuits Filed Against It.

Cudd Pressure Control, Inc. v. New Hampshire Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, 297 F.R.D. 495 (W.D. Okla. 2014) (Employer's Liability Policy and Umbrella Policy):

Defendants have refused to provide any information or documents regarding 1) complaints filed against them with the insurance commissioner (or other regulatory agency) related to similar insurance policies, 2) regulatory investigations made of their companies, and 3) other lawsuits asserting bad faith claims regarding employers liability coverage . . . Again, the Court finds that Defendants' relevance objection is not well taken and that unsworn statements of counsel are insufficient answers to Plaintiff's interrogatories. The Court agrees, however, that the interrogatories are unreasonably broad or inartfully phrased. The Court orders Defendants to answer Interrogatory Nos. 12-15 limited to identifying information regarding complaints lodged against Defendants with the Oklahoma Insurance Department related to workers' compensation or employers liability policies, regulatory investigations or audits of Defendants in Oklahoma within the past 5 years related to such policies, and lawsuits

filed against Defendants in Oklahoma within the past 5 years alleging bad faith conduct with regard to workers' compensation or employers liability policies. (P. 503)

19. Insurer's Claims Handling Of Other Similar Claims Are Relevant And Discoverable In Bad Faith Claims.

Cudd Pressure Control, Inc. v. New Hampshire Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, 297 F.R.D. 495 (W.D. Okla. 2014) (Employer's Liability Policy and Umbrella Policy):

The Court finds that information regarding Defendants' handling of other insured employers' claims for coverage of *Parret* lawsuits is relevant to Plaintiff's claim of bad faith in Defendants' denial of indemnity for the *Phillips* case. Further, Defendants' arguments that it would be an undue burden to identify claims files of other insureds involving *Parret* issues is not persuasive when the parameters of inquiry are limited to Oklahoma employers insured by Defendants under employers liability policies that have faced *Parret* claims within the past 5 years. By their nature, *Parret* claims must be asserted in a lawsuit filed outside of Workers' Compensation Court. The scope of document production should also be limited to Court filings and records rather than Defendants' claim files, thus obviating the need to review for private and privileged material. (P. 503)

20. Depositions Of Senior Corporate Insurance Company Officers Who Have No Unique Knowledge May Not Be Taken.

Evans v. Allstate Insurance Company, 216 F.R.D. 515 (N.D. Okla. 2003) (Homeowner's Policy):

"The *Baine* Court held that Rule 26(b) gives the court power to regulate harassing or burdensome depositions, and that unless a high level executive has unique personal knowledge about the controversy, the court should regulate the discovery process to avoid oppression, inconvenience, and burden to the corporation and to the executive . . .
. . .
Moreover, the oral deposition of a high level corporate executive should not be freely granted when the subject of the deposition will be only remotely relevant to the issues of the case."

21. Actor Viewer Deponents Are Not Entitled To More Than Ten Dollars Witness Fee Even Though An Expert.

Heffron v. The District Court of Oklahoma County, The Honorable Noma D. Gurich, 2003 OK 75, 77 P.3d 1069 (Commercial Fire Policy):

¶19 "[T]he preeminent trigger for entitlement to payment of a reasonable expert fee for individuals such as Mr. Lee and Mr. Bulla is 1) that the facts known and opinions held by the expert be 'acquired or developed in anticipation of litigation or for trial', in the case of an expert witness expected to be called at trial by the other party (i.e., Mr. Lee) or 2) in the case of an expert not expected to be called at trial (i.e., Mr. Bulla), that said expert must be 'retained or specially employed by another party in anticipation of litigation or preparation for trial.' . . . [T]he facts and opinions known and held by them seem to have been uncovered and formed, at least initially, prior to denial of the claim while they were assisting Emcasco in adjusting and investigating the claim in the ordinary course of business.

. . .

¶23 [T]he mere fact an individual is an expert is not alone sufficient to bring into play the reasonable expert fee provision, as opposed to treating the individual as a witness entitled only to the statutory ordinary witness fee.

. . .

¶29 "The question involving Mr. Dallas is controlled by § 2004.1(C)(3)(b)(2), rather than § 3226, because he was not and has not been retained by either party in anticipation of litigation or for trial preparation. . . .

. . .

¶32 As we view the matter, because the underlying nature of the suit involves litigation to recover on an insurance policy and Emcasco's alleged bad faith in handling Mr. Heffron's claim, Mr. Dallas' role in investigating the cause of the conflagration in his capacity as an OKCFD fire investigator and in imparting information, if any, to Emcasco (or its agents) prior to a denial of the insurance claim, makes Mr. Dallas a participant to specific events and occurrences particularly relevant to the lawsuit. Mr. Heffron is entitled to inquire of him as to said specific events and occurrences without payment of an expert witness fee."

VIII. EVIDENTIARY ISSUES

1. Burden Of Persuasion.

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

"Had this court contemplated a digression from the usual standard [of persuasion] in a civil case, the ***Christian*** opinion would have clearly delineated such a change. Good faith and fair dealing are the measure of the insurer's obligation both in the instance of the claim of an insured and that of the third parties. . . . [T]his Court has not stated that the burden of persuasion deviates in this type of action from the usual preponderance of the evidence standard. This Court now expressly declines to so hold." *Timmons* at 913.

2. Entire Course Of Conduct Is Relevant.

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

"Appellant contends the only conduct relevant to such an inquiry is that which revolves around the formulation of the reason ultimately given by the insurance company for non-coverage of the policy. . . . Appellants would have the Court to consider relevant only evidence relating to the formulation of those grounds for non-coverage. The cause of action sued upon is not this narrow, however. The essence of the cause before the Court is failure to deal fairly and in good faith with an insured and as such, the jury may be shown the entire course of conduct between the parties to arrive at a determination of whether that standard had been breached or not." *Timmons* at 917.

3. No "Evil Intent" Or "Bad" Faith Required.

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

"The gravamen of a *Christian*-type tort is failure to deal fairly and in good faith. Failure to abide by the implied duty imposes liability. The trial court did not err in refusing the requested instruction because to limit recovery or *Christian*-type actions to "an actual existing evil intent to mislead or deceive" limits recovery substantially beyond that required proof of failure to deal fairly and in good faith." *Timmons* at 914.

4. Mental Suffering Need Not Be "Severe" Or "Outrageous".

Timmons v. Royal Globe Insurance Company, 1982 OK 97, 653 P.2d 907 (Pilot's Liability Policy):

"[W]here mental suffering is alleged to be one of the items of damage resulting from an otherwise actionable transgression, recovery of damages for that aggravation does not require either "severe" mental distress or "outrageous" conduct to be actionable . . . . [T]he damages sought for mental suffering are but one element of damage sought for failure to deal fairly and in good faith." *Timmons* at 916.

5. No Proof Of Emotional Distress Necessary To Recover.

Gary v. American Casualty Company of Reading, 753 F.Supp. 1547 (W.D. Okla. 1990) (Directors and Officers Liability Insurance Policy):

"[P]laintiffs allege that they have suffered emotional distress as a result of Defendant ACCO's refusal to respond to Plaintiffs' request . . . . Defendant ACCO's challenge to Plaintiffs' allegation of or ability to allege any actual damages does not require that Plaintiffs submit any proof of emotional distress damages, which are recoverable in a tort claim for an insurer's bad faith."

6. Where There Is No Evidence Of Damage, A Bad Faith Claim Fails.

Walker v. Progressive Direct Insurance Company, 720 F.Supp.2d 1259 (N.D. Okla. 2010) (Automobile Comprehensive Coverage):

"In assessing Plaintiffs' allegations in light of the elements of a bad faith claim, the Court finds Plaintiffs' claim cannot withstand summary judgment. First, Plaintiffs offer no explanation as to how they were damaged by the alleged unreasonable actions of Progressive, which is a required element of the bad faith claim. See *Badillo*, 121 P.3d at 1093." (P. 1274.)

7. The Testimony Of Plaintiff Alone Is Sufficient Evidence To Sustain $400,000.00 Verdict For Mental Pain And Suffering.

Vining v. Enterprise Financial Group Inc., 148 F.3d 1206 (10th Cir. 1998) (Credit Life Policy):

"Given the special nature of an insurer's relation to its insureds, recovery for mental suffering in a bad faith insurance claim does not require either severe mental distress or outrageous conduct. See *Timmons v. Royal Globe Insurance Co.*, 653 P.2d 907, 916 (Okla. 1982). Vining testified at trial regarding the distress she experienced as a result of Enterprise's conduct towards her during the three years she spent fighting the insurance company over the

claim. Such evidence is sufficient in a bad faith claim to support an award for emotional distress.

In addition, $400,000.00 for mental pain and suffering, financial losses, embarrassment, and loss of reputation in the context of bad faith insurance claims is not excessive on this record. See, e.g. *Buzzard*, 824 P.2d at 1116 (noting that the district court awarded $200,000.00 for mental distress caused by delay in withholding a $10,000.00 insurance payment over seven and one-half months)."

8. The Insured Need Not Testify At Trial As To Causation Or Otherwise.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability):

¶ 37. "As to their challenge relating to causation, insurers argue in effect, no causation could be found unless Smith herself testified she could and would have settled her claim or that she authorized someone else who would have done so, said authorization being made at a time Smith unequivocally had the capacity to so authorize.

. . .

¶ 38. Insurers' argument(s) as to causation, capacity and authorization seek to take advantage of Smith's purported incapacity (as a result of her injuries from the accident and treatment received) from the date of the accident to, at the latest, April 17, 2000, where suit was filed against insured by Young on Smith's behalf.

. . .

¶ 40. Very simply, in our view, the absence of testimony from Smith did not mandate a directed verdict in favor of insurers because of a lack of proof on the causation element."

9. Insurers Branch Claims Manager Can Be Called By The Plaintiff To Testify That Insurers Acted Unfairly.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability):

¶ 61. "Plainly, in view of his position and his long experience in the claim handling field, [Farmers Branch Claims Manager] was a competent witness as to the procedures and practices concerning good claims handling. Although he may not have been active in the day-to-day handling of the claim prior to April 17, 2000, his review of the Smith claims file coupled with his experience and his position at the local office handling the claim, would seem to have afforded him sufficient knowledge to opine and comment on the handling of the claim."

10. Refusing To Investigate Gives Rise To An Inference Of Bad Faith.

Willis v. Midland Risk Insurance Company, 42 F.3d 607 (10th Cir. 1994) (General Business Liability Policy):

"There was evidence that Roundtree did not investigate why the location of the accident was different than that listed in the policy.

Rather than investigate the matter, it appears that Roundtree decided simply to maintain the position that there was no coverage for the loss because it occurred at a location other than the one designated in the policy. This evidence could also give rise to an inference of bad faith. See *State Farm Fire & Casualty Co. v. Barton*, 897 F.2d 729, 731-32 (4th Cir. 1990) (evidence that insurer used investigation to support denial of claim, rather than

attempting to learn the truth of fire's origin, supported jury verdict of bad faith . . . .)"

11. For There To Be Bad Faith Failure To Investigate, Plaintiff Must Show Insurer Overlooked Material Facts Or More Thorough Investigation Would Have Resolved the Discrepancy.

Hayes v. State Farm Fire and Casualty Company, 855 F.Supp.2d 1291 (W.D. Okla. 2012) (Homeowner's Insurance Policy):

"When a plaintiff bases a bad faith claim on an inadequate investigation theory, 'the insured must make a showing that material facts were overlooked or that a more thorough investigation would have produced relevant information.'" *Sellman v. AMEX Assur. Co.*, 274 Fed.Appx. 655, 658 (10th Cir. 2008) (unpublished) (quoting *Timberlake Construction Co. v. U.S. Fidelity and Guar. Co.*, 71 F.3d 335, 345 (10th Cir. 1995)). . . .

Plaintiff contends State Farm should have interviewed Perry Kurth or his neighbors, yet he does not show what information they would have offered that would have helped resolve the conflict. Similarly, plaintiff criticizes State Farm for not taking 'a recorded statement of Gerald with Affordable Dock to fully set forth the repairs he made and why they were necessary,' Doc. #55, p. 18, but he does not offer any evidence of what Gerald would have said. The record reflects that State Farm had invoices prepared by Affordable Dock and spoke with Gerald several times. More is required to show that an investigation is unreasonable than merely to list people who could have been interviewed. Plaintiff must offer some evidence of the information the individuals could have provided which was material or pertinent to resolution of the claim." . . . . P. 1303

The crux of plaintiff's claim is that he disagrees with State Farm's analysis of the evidence before it. As he has not shown what other evidence the insurer should have found and considered in making its coverage determination, plaintiff has not demonstrated the existence of a material fact dispute as to the reasonableness of defendant's investigation." P. 1303.

12. Manufactured Evidence After Denial Is Not Admissible.

Buzzard v. Farmers, 1991 OK 127, 824 P.2d 1105 (Underinsured Motorist Coverage):

"The information relevant at trial was that upon which Farmers relied in refusing payment. The reconstructionist was not asked to evaluate the accident until after the denial of the claim. Thus, Farmers could not have relied on his opinion in denying the claim." (Emphasis that of the Court.) P. 1114.

13. The Date Of The Act Of Bad Faith Precludes Evidence Of Insurer's Later Acts.

Truesdell v. State Farm Fire & Casualty Company, 960 F.Supp. 1511 (N.D. Okla. 1997) (Homeowner's Insurance Policy):

"Although State Farm did not deny Plaintiff's claims, on February 29, 1996, State Farm did submit an offer by which it indicated what it had determined to be actual cash value for the property as well as the cost of repair. Plaintiffs insist that any actions taken by State Farm after that date, such as seeking other estimates, are irrelevant to the bad faith claim as the bad faith claim is now limited to the issue of whether or not State Farm acted unreasonably in calculating the actual cash value of the Truesdell's residence. The Court agrees, and hold that the bad faith claims against State Farm will be litigated based solely on the reasonableness of State Farm's actions prior to February 29, 1996." Id. at 1519.

14. To Evaluate The Reasonableness Of Insurer's Denial, One Must Identify The Date Of Denial To Determine The Evidence The Insurer Knew Or Should Have Known.

Bannister v. State Farm Mutual Automobile Insurance Company, 692 F.3d 1117 (10th Cir. Okla. 9/5/12) (Uninsured Motorist Coverage):

"First, to evaluate both the reasonableness of State Farm's denial of Bannister's claim in light of State Farm's knowledge at the time, it is necessary to identify the date of that denial. See *Timberlake*, 71 F.3d at 344 (evaluating reasonableness 'in light of the facts known or knowable to [the insurer] at the time it denied [the insured's] claim' (citing *Buzzard v. McDanel*, 736 P.2d 157, 159 (Okla. 1987)))." P. 1129-30.

15. Neither A Defense Nor Evidence Which Is Not The Basis For Denial Is Proper.

Newport v. USAA, 2000 OK 59, 11 P.3d 190 (Uninsured Motorist Coverage)**:**

"The issue of unavoidable accident was not relevant to the knowledge and belief of USAA at the time the Newport claim was being evaluated. It was not until its fourth offer of settlement on August 3, 1994, well into settle negotiations and long after it evaluated the claim on May 16, 1994, that USAA intimated its intention to assert the defense. The absence of any mention of the defense prior to that time gives rise to an inference that its mention in the fourth offer was intended to coerce a settlement. The trial court did not err in refusing to give an unavoidable accident instruction.

. . .

The trial court did not abuse its discretion in excluding the deposition [of plaintiff's treating physician]. It was not relative to the issue of USAA's belief at the time it evaluated the Newport claim. In fact, nothing in it was an issue in this matter until shortly before trial. . . . During negotiations, USAA never disputed that the collision had caused Mr. Newport's injuries and death."

16. Facts Not Used As Basis To Excuse Conduct Of Insurer Is Not Admissible.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability):

¶ 45. "The Trial Court's exclusion of evidence concerning Smith's capacity is plainly consistent with *Buzzard v. Farmers Insurance Co. Inc.*, 1991 OK 127, 824 P.2d 1105, 1109 and *Newport v. USAA*, 2000 OK 59 ¶¶ 34-37, 11 P.3d 190, 199-200, to the extent evidence of capacity or lack of authorization on the part of the Young-hired attorneys to act on Smith's behalf, would tend to excuse any unreasonable conduct on insurers' part or any breach by insurers of their duty of good faith and fair dealing toward insured. . . . Nothing indicates insurers considered Smith's purported lack of capacity to execute a power of attorney or to agree to a settlement at the time the matter was being reviewed by them. Nor was any alleged lack of capacity or authorization raised by insurers as some type of obstacle in settlement negotiations/discussions with the attorney's that were acting on her behalf, nor as somehow sustaining the reasonableness of insurers' handling of the statement request for the ultimate decision not to produce insured for a statement without consulting him on the matter."

17. Low Balling And Then Offering Policy Limits After A Bad Faith Lawsuit Is Filed May Be Evidence Of Defendant's Negotiation Bad Faith.

Falcone v. Liberty Mutual Insurance Company, 2017 OK 11, 391 P.3d 105 (Uninsured

Motorist Coverage)

¶11 A jury's determination of the facts is necessary to determine whether a lack of good faith is shown by Defendant's offers to Plaintiff over the course of 1 year, which ultimately led to Plaintiff's lawsuit and the offer by Defendant of the policy's UM limits of $100,000. We hold the significance of the undisputed facts, and whether Defendant's actions over the course of their negotiations constituted bad faith, are questions for the trier of fact.

18. Inadmissible Evidence To Be Considered By The Court But Not The Jury.

Conti v. Republic Underwriter's Insurance Company, 1989 OK 128, 782 P.2d 1357 (Fire Policy):

"This Court does not attempt to weigh the evidence, but examines the record only to determine whether the evidence and permissible inferences drawn therefrom reasonably sustain the jury's verdict." P. 1361.

[T]he crucial consideration in that case was the relative merit in the evidence supporting the defense of arson." P. 1361. (Emphasis added.)

. . .

[W]e also hold that a trial court may, when ruling on a motion for directed verdict, summary judgment, or motion to dismiss, in a cause of action for bad faith insurance settlement which is defended on the grounds of arson, consider the results of a voluntary polygraph examination as an element tending to show the reasonableness of the insurer's conduct. We remain committed, however, to the rule that it is error to allow the jury to hear such evidence. Polygraph results are relevant only as a factor tending to show an insurer's good faith." P. 1363.

19. An Offer To Settle Is Inadmissible.

Reeder v. American Economy Insurance Company, 88 F.3d 92 (10th Cir. Okla. 1996) (Underinsured Motorist Policy):

"*Buzzard* imposes a duty upon an underinsurer to investigate and evaluate claims and offer payment if the claim so warrants. *Id*. at 1108-09. In this case, AEIC lived up to its duties as an underinsurer by evaluating Reeder's claim and offering payment of $1 million. Reeder attempts to claim that the $1 million offer was not a settlement offer but an 'evaluation' and thus admissible as such, citing *Massey v. Farmers Insurance Group* [citation omitted]. . . . In *Massey*, an evaluation was admitted into evidence because it was only an evaluation and nothing more, and the court specifically noted that the insurance company had 'never furnished, offered or promised to furnish [the evaluation amount] to settle plaintiff's claim.' [Citation omitted.] In this case, the evaluation was also the offer and clearly noted as such; . . . .

Although AEIC's settlement offer may also qualify as an evaluation made in light of Oklahoma public policy, the offer falls squarely within the confines of Rule 408, and thus the district court properly ruled evidence of the offer inadmissible."

20. Evidence Of Insurer's Litigation Bad Faith Should Rarely Be Admitted.

Timberlake Construction Co. v. U.S. Fidelity and Guaranty Co., 71 F.3d 335 (10th Cir. 1995) (Builder's Risk Insurance):

"Where improper litigation conduct is at issue, generally the Federal Rules of Civil Procedure provide adequate means of redress, such as motions to strike, compel discovery, secure protective orders, or impose sanctions.

"In light of existing case law and the public policy concerns identified above, we hold that while evidence of an insurer's litigation conduct may, in some rare instances, be admissible on the issue of bad faith, such evidence will generally be inadmissible, as it lacks probative value and carries a high risk of prejudice." *Id.* at 341.

21. Litigation Conduct Of An Insurer By Asserting A Subrogation Right Without Making Payment Under A UM Claim May Be Bad Faith.

Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company, 2007 OK 16, 157 P.3d 117 (Uninsured Motorist Coverage):

"¶11 The bad-faith action may also be based upon an insurer's failure to perform an act that is derivative or secondary in nature; that is, an insurer's duty that owes its existence to a pre-existing implied contractual, or statutory, or status-based duty arising from the insurer-insured relationship. . . .

¶12 In our case today, this latter category of derivative or secondary duties is raised by Brown, in that he asserts bad faith is shown by OneBeacon's litigation efforts to both press a subrogation claim while denying that such a claim exists, all without either granting or denying a UM claim. Specifically, Brown asserts that OneBeacon acted in bad faith by intervening in Brown's action against Patel and asserting a subrogation claim against Patel and adopting Plaintiff's allegations, and secondly, that OneBeacon acted in bad faith by asserting a subrogation interest 'as a ruse to actually harm' Brown by OneBeacon's litigation conduct in defending Patel.

. . .

¶20 Conventional (or contractual) subrogation is created by an agreement or contract between parties granting the right to pursue reimbursement from a third party in exchange for payment of a loss. [Citation omitted.] Equitable subrogation allows a party who has paid to stand in the shoes of the party to whom the amount was owed and proceed against the third party primarily responsible for the amount paid. [Citation omitted.] In both circumstances the subrogation is based upon payment.

¶21 An insurer's *payment* on a policy of insurance clearly creates a subrogation interest for the purpose of intervention. If OneBeacon, as a UM carrier, desired to litigate a subrogation interest against Patel in Brown's action against Patel and intervene as a matter of right pursuant to 12 O.S. § 2024(A)(2), then OneBeacon was required to make payment to Brown prior to its intervention. We agree with Brown that a *potential* subrogation interest against an insured's alleged tortfeasor, by itself, is too remote to justify an insurer's right to intervene as a matter of right."

22. A Jury Verdict For The Tortfeasor Does Not Foreclose A Bad Faith Claim. Evidence Of The Verdict Is Not Relevant Or Admissible.

Brown v. Patel and Commercial Union Insurance Company, OneBeacon Insurance Group and Employers Fire Insurance Company, 2007 OK 16, 157 P.3d 117 (Uninsured Motorist Coverage):

"¶35 OneBeacon asserts that it has a right to litigate contested claims, a right to intervene, and that the jury's verdict for Patel forecloses, as a matter of law, any bad-faith

claim. It argues that an insurer's methods in investigating and litigating a UM claim may be conclusively justified if a court subsequently determines that no UM payment is owed. In other words, it seeks for a "means justified by ends" rule of law for an UM insurer's handling of UM claims. A related complaint is made by Brown concerning OneBeacon's use of information that OneBeacon did not possess until after OneBeacon's intervention. Evidence relating to facts that OneBeacon did not have or rely on until after the time period in question, that is, from the time of OneBeacon's notice of the collision until the intervention, is not relevant to an adjudication of a bad-faith claim concerning the intervention. *Newport v. USAA*, 2000 OK 59, ¶ 10, ¶¶ 36-37, 11 P.3d 190, 195, 200 (an insurer's good faith belief is measured by facts known, or relied on, by the insurer at the time of the conduct challenged as showing bad faith on the part of the insurer)."

23. An Insurer's Provision Of A Non-Waiver Agreement And Payments Thereunder Are Evidence Of The Insurer's Good Faith.

Timberlake Construction Co. v. U.S. Fidelity and Guaranty Co., 71 F.3d 335 (10th Cir. 1995) (Builder's Risk Insurance):

"Fidelity's entry into the [non-waiver] agreement never shielded it from possible liability for the full amount. As its name indicates, the non-waiver agreement preserved the right of each insurer to sue the other to recover any and all monies paid. Thus, Fidelity entered into the agreement knowing that it might eventually be liable for the full amount of the rebuilding cost. In addition, common sense dictates that entry into the non-waiver agreement cannot be construed as bad faith where Fidelity started immediately advancing to Timberlake payments totaling $1,147,000.00 in lieu of exercising its option to go to court and seek a declaratory judgment of no coverage." *Id.* at 347.

24. Evidence Of Collateral Source Benefits May Be Relevant In A Bad Faith Case.

Rucker v. Mid Century Insurance Company, 1997 OK CIV APP 47, 945 P.2d 507 (Uninsured Motorist):

"[P]laintiff Geraldine Rucker testified on direct examination that Defendant's failure to pay the bills led to considerable family stress and aggravation and, along with the accident, almost caused the couple to divorce. On cross-examination, in an answer that was not responsive to the question asked, she also suggested that the family was getting calls from bill collectors during meals. Because Plaintiff introduced affirmative evidence on how Defendant's failure to pay the medical bills exacerbated family stress, the trial judge allowed Defendant a limited inquiry on cross-examination to show that these bills had, in fact, been paid from other sources."

25. Selling Agent's Training Manuals Are Admissible.

Vining v. Enterprise Financial Group Inc., 148 F.3d 1206 (10th Cir. 1998) (Credit Life Policy):

"Enterprise's training manual for its agents [the 'Manual'] emphasizes that applicants only need to be between the ages of 18 and 65 to purchase insurance. The Manual does not discuss the health disclaimer or in any way suggest that the agent is supposed to ask the customer about his health or that health is relevant in issuing the policy. The Manual also encourages agents to maximize profit by overstating the actual monthly premium that should be charged and by secretly increasing the actual amount of monthly payments the customer agrees to pay, for example, raising a payment from $78.22 to $78.99 because customers look more closely at dollars than cents. The Manual informs agents that the life insurance policies they sell are guaranteed issue policies, which means that the coverage is in force immediately as compared to ordinary life insurance applicants who first must be approved by the insurer before coverage takes effect. . . .

[The insurer's representative] testified that he did not know what the terms used in the health disclaimer statement meant and that he did not know how Enterprise processed claims. [The insurer's representative] also testified that he does not train agents to ask about doctor visits or medication. . . .

. . .

Enterprise argues that the Manual should not have been admitted because [the plaintiff] did not show that [the selling agent] ever read or even saw a copy of the Manual.

[Plaintiff's] case of bad faith was based on demonstrating a pervasive, consistent pattern of abuse by Enterprise. Clearly, the Manual . . . [was] relevant to that exercise."

26. Insurance Commissioner's Report Is Admissible.

Vining v. Enterprise Financial Group Inc., 148 F.3d 1206 (10th Cir.1998) (Credit Life Policy):

"The Oklahoma Insurance Department conducted an investigation of Enterprise's business practices. The Report criticized Enterprise for requiring applicants to sign a disclaimer stating that they had never had any health problems. The Report sharply criticized Enterprise's loss ratios, the ratio of benefits paid to premiums received, as being unreasonably below accepted levels due to a large number of policy rescissions. . . . The Report also noted that in numerous cases Enterprise used unlicenced agents to sell insurance policies. . . .

Enterprise claims the Report was not relevant because the evidence it revealed regarding Enterprise's general conduct was not specific to this case. Enterprise also argues that the Report unfairly prejudiced the jury against it. . . . Vining sought to prove that Enterprise engaged in a pervasive, consistent pattern of abusive rescissions. Such evidence is clearly relevant to the question of how Enterprise acted in this case under Federal Rule of Evidence 406 (habit)."

27. Evidence Of Other Similar Acts Of Bad Faith Are Admissible.

a. ***Vining v. Enterprise Financial Group Inc.***, 148 F.3d 1206 (10th Cir.1998) (Credit Life Policy):

"Enterprises challenges the introduction of . . . the testimony of other Enterprise credit life insurance claimants . . . . The other claimants testified about their purchase of life insurance policies and the subsequent rescission of those policies by Enterprise despite their disclosures to Enterprise agents concerning prior health problems. . . .

The only impact such evidence might have had on the jury was to convince them that Enterprise habitually denied claims in bad faith, precisely the point Vining wished to prove."

b. Evidence Of Other Similar Acts Of Bad Faith Are Admissible.

Barnes v. Oklahoma Farm Bureau Mutual Insurance Company, 2000 OK 55, 11 P.3d 162 (Underinsured Motorist Coverage):

"Further, evidence was submitted sufficient to support a finding no attorneys that represented insurer in UM/UIM matters other than the counsel that represented it in the Barnes case gave the same advice to it concerning the 'interpretation' of § 3636 it adopted in the Barnes' case and, in fact, all other lawyers representing insurer in UM/UIM matters disagreed with the 'interpretation' so adopted. ¶17.

. . .

However, evidence was submitted sufficient to show that insurer's treatment of Barnes was not an isolated incident, but that insurer, by and through its counsel, had used the same or similar unreasonable tactic with other UIM insureds repeatedly, i.e. relying on an unfounded claim to the tortfeasor's liability coverage in an attempt to settle disputes with its UIM insureds for less than they were rightfully owed under their UIM coverage. ¶19.

. . .

The jury was also entitled to find that insurer's treatment of Barnes was not an isolated incident, but that the insurer, by and through its counsel, had used the same or similar unreasonable tactic with other UIM insureds repeatedly, i.e. relying on an unfounded claim to the tortfeasor's liability coverage in an attempt to settle disputes with its UIM insureds for less than they were rightfully owed under their UIM coverage." ¶43.

c. Evidence Of Dissimilar Wrongful Conduct Is Inadmissible And Conversely Evidence Of Other Similar Incidences Is Admissible On The Issue Of Punitive Damages.

State Farm Mutual Automobile Insurance v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (4/7/03) (Automobile Liability Insurance):

"A State cannot punish a defendant for conduct that may have been lawful where it occurred. 123 S.Ct. 1522.

. . .

Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortuous, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. 123 S.Ct. 1522.

. . .

A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. 123 S.Ct. 1523.

. . .

Although '[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance,' *Gore, supra* at 577, 116 S.Ct. 1589, in the context of civil actions, courts must ensure the conduct in question replicates the prior transgressions. *TXO*, 509 U.S., at 462, n. 28, 113 S.Ct. 2711 (noting that courts should look to 'the existence and frequency of similar past conduct') (quoting *Haslip*, 499 U.S., at 21-22, 111 S.Ct. 1032), 123 S.Ct. 1523.

. . .

Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here because evidence pertaining to schemes that had nothing to do with a third-party lawsuit was introduced at length. . . . In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis." 123 S.Ct. 1524.

28. An Expert May Testify On Issues A Jury Is Capable Of Assessing.

Vining v. Enterprise Financial Group Inc., 148 F.3d 1206 (10th Cir.1998) (Credit Life Policy):

"[I]t is plainly within the trial court's discretion to determine whether expert testimony is admissible when the expert offers to testify on an issue that a jury is capable of assessing for itself."

29. Expert Testimony Regarding Statutory Standards Discretionary With Federal Court.

a. ***Thompson v. State Farm Fire and Casualty Co.,*** 34 F.3d 932 (10th Cir. Okla. 1994) (Fire Insurance Policy):

"What we have already said as to the Acts not creating a private right of action casts a cloud on the relevance (and hence the admissibility) of any testimony (expert or otherwise) in that respect under Federal Rules of Evidence 402 and what we have already said as to the jury's competence to deal with bad faith issue on its own confirms the discretionary power of the magistrate judge to bar testimony by the asserted expert."

In a Negligence Indemnity Action Of An Underlying Bad Faith Case, It Is Discretionary With Court To Exclude Expert.

b. ***North American Specialty Insurance Company v. Britt Paulk Insurance Agency***, 579 F.3d 1106, (C.A. 10th Okla. 2009) (commercial property coverage):

"Relying on what we have called the 'touchstone of admissibility' under *Daubert*, *Thompson v. State Farm Fire and Casualty Co.*, 34 F.3d 932, 941 (10th Cir. 1994 (quotation omitted), the district court invoked the second prong of this test to exclude Luther, concluding that the jury was perfectly capable of resolving the issues in this case without expert testimony. Notably, it also applied this conclusion evenhandedly to North American's proposed expert witness, Atkinson. P. 1112.

Britt Paulk contends that the jury should have been permitted to hear testimony regarding standard insurance industry practice. Such evidence, it claims, would help Britt Paulk establish that North American mishandled the McDonalds' claim, causing it to settle the bad faith lawsuit. Britt Paulk relies on *Ford v. Allied Mutual Insurance Co.*, 72 F.3d 836 (Wyoming 10th Cir. 1996), for the proposition that insurance experts may testify regarding

industry standards. . . . Britt Paulk's reliance is misplaced. First, the issue in *Ford* is not analogous to the present case. Second, that the district court in *Ford* did not abuse its discretion by allowing expert testimony by an insurance industry expert does not lend measurable support to the contrary position that the district court in this case abused its discretion by refusing to permit similar testimony. . . . P. 1112.

30. Expert's Testimony Admissible On "Adequacy Of Investigation".

Hall v. Globe Life and Accident Insurance Company, 1998 OK CIV APP 161, 968 P.2d 1263 (Life Insurance Policy):

"[I]n this case, [the expert's] testimony was arguably helpful to the jury. The central issue concerning the bad faith claim pivoted on the adequacy of the investigation. The expert's testimony was relevant to the matter and potentially helpful to the jury."

31. Evidence of an Expert's Opinion Prepared in the Course of Litigation Is Inapplicable to a Bad Faith Claim.

Walker v. Progressive Direct Insurance Company, 720 F.Supp.2d 1259 (N.D. Okla. 2010) (Automobile Comprehensive Coverage):

"Moreover, Plaintiffs' reliance on Zalma's use of the third key in his expert report is misplaced, as this report was prepared in the course of this litigation and was not part of Progressive's investigation, making it inapplicable to Plaintiffs' bad faith claim. Although it might have been preferable for Progressive to determine the origin of the third key prior to the Gilliart deposition, 'an insurer's investigation need only be reasonable, not perfect.' *Roberts v. State Farm Mutual Auto Insurance Co.*, 61 Fed. Appx. 587, 592 (10th Cir. 2003) (applying Oklahoma law) (citing *Buzzard*, 824 P.2d at 1109).

32. A Trial Court Should Consider An Expert Opinion On Summary Judgment Which Controverts Insurer's Evidence of No Wrongdoing And Explains The Ways Defendant Violated Industry Standards and Reflected Bad Faith.

Embry v. Innovative Aftermarket Systems LP*, *LP, Twin City Fire Insurance Company and Hartford Fire Insurance Company, 2010 OK 82, 247 P.3d 1158 (11/23/10, rehearing denied 02/28/11) (Gap Protection Contract):

"¶12 The trial court also ignored evidentiary material that controverted defendants' evidentiary material to show the reasonableness of their belief, actions, and decisions. Plaintiff offered an expert witness concerning the type of gap protection at issue. This expert explained in detail the ways in which the actions, omissions and decisions of the defendants violated industry standards and reflected bad faith. In general, when a party opposing a summary judgment offers an expert opinion to controvert the defendant's evidentiary material showing no wrongdoing on the part of the defendant, summary judgment is not proper."

33. Only Post-Award Conduct Of Insurer Admissible In Workers' Compensation Bad Faith Claim.

Cooper v. National Union Fire Insurance Company of Pittsburg, 1996 OK CIV APP 52, 921 P.2d 1297 (Workers' Compensation Insurance):

"Review of cases dealing with the liability of a workers' compensation carrier reveals that tort liability of the workers' compensation carrier *'arises against the insurer only after there has been an award against the employer'*.

. . .

[W]e hold that the trial court did not err in (1) limiting evidence on the issue of defendant's bad faith to its post-award conduct . . . ."

34. Court Erred In Excluding Evidence Gained Investigating A Claim Beyond The 90 Days Of § 3629 Where From Outset Insurer Had Clear Indications Of Arson And Motive.

Hale v. A.G. Insurance Company, 2006 OK CIV APP 80, 138 P.3d 567 (cert. denied 7/12/06) (Commercial Property Insurance Policy):

¶7 "We have found no case limiting admissible evidence to that obtained within the arbitrary period of 90 days. Indeed we have found no bad faith case even addressing the issue of excluding evidence gained in investigating a claim beyond 90 days; the analysis in bad faith cases indicates the cutoff for relevant evidence is the date of payment or denial of the claim. The duty of good faith and fair dealing exists during the time the claim is being reviewed. See *Newport v. USAA*, 2000 OK 59, 11 P.3d 190, and *Skinner v. John Deere Insurance Co.*, 2000 OK 18, 998 P.2d 1219.

¶8 "We find no authority for an arbitrary cutoff for admitting relevant evidence, obtained before denial of the claim, based solely on a prevailing party attorney fees statute. To be sure, unreasonable delay in settling or denying a claim is a factor in proving bad faith, but nothing supports a finding that delay beyond 90 days is patently unreasonable. This is particularly so in a case such as this where Insurer had clear indications, from the time of the fire, that the fire was intentionally set and that the Hales or Chance Hale had a financial motive. . . . This exclusion was prejudicial because the jury could have found that Insurer had a good faith basis for denial based on the evidence that the store burned four days before the insurance lapsed, the owners had a financial motive for burning the store which was losing money, and there was evidence of arson."

35. Insurer Does Not Have To Prove Evidence Sufficient For Criminal Arson But Must Only Have A Good Faith Belief That Insureds Committed Arson For A Legitimate Dispute To Exist.

Hale v. A.G. Insurance Company, 2006 OK CIV APP 80, 138 P.3d 567 (cert. denied 7/12/06) (Commercial Property Insurance Policy):

"¶10 The central question in a claim for bad faith failure to settle or investigate an insurance claim is 'what did the insurance company know, or what should it have known at the time the insured requested payment under the applicable policy, i.e., whether the insurer had a justifiable, reasonable basis to withhold payment when the insured requested the carrier to perform its contractual obligation.' *Newport, supra*, 11 P.3d at 195; *Conti v. Republic Underwriters Insurance Co.*, 1989 OK 128, 782 P.2d 1357, 1362; *Buzzard v. McDanel*, 1987 OK 28, 736 P.2d 157, 159.

. . .

¶20 At the conclusion of insurer's case, it again asked for a directed verdict. The trial court responded:

Well, what the Court has heard at this time there is no doubt in the Court's mind that – well, there is some doubt in my mind as to whether this was an arson, based on the conflicting testimony of two witnesses. But there is nothing in the record which can

substantiate or even lie claim to a criminal charge of arson against Lillian and Raymond Hale. There is nothing in there. So I would have to have that before I could go with a motion for directed verdict. . . .

This is a misstatement of the proof required in a bad faith case. Insurer was required to prove only that it had a legitimate dispute to coverage. Only in a breach of contract case, which this was not, would Insurer be required to prove the facts of arson and the Hales' participation. The undisputed evidence showed Insurer had a good faith belief, at the time it was reviewing the case, that the claimed loss was due to arson and that the insureds, either the Hales or Chance Hale, had a motive. The Hales' asserted Insurer acted in bad faith only in not paying their claim within 90 days and in investigating their claim instead of paying it. In these circumstances, an action for bad faith will not lie. See *Oulds v. Principal Mutual Life Insurance Co.*, 6 F.3d 1431 (10th Cir. Okla. 1993)."

36. Evidence Of Non-Use Of A Seatbelt Is Admissible To Show State Of Mind For A Suicide Defense In Bad Faith Cases.

Sims v. Great American Life Insurance Co., 469 F.3d 870 (10th Cir. Okla. Nov. 7, 2006) (Life Insurance Policy):

"Great American frankly is unconcerned whether Sims could have avoided his injuries had he been wearing his seatbelt. Great American is only concerned with how his failure to wear a seatbelt reflects on his mental state. In this sense, the evidence does not speak to the conduct of the driver but instead to the driver's state of mind.

Because Great American introduced this evidence for purposes of showing Sims's state of mind, not to insinuate fault, we hold that Oklahoma's Mandatory Seat Belt Act is inapplicable to the present case, and the district court should have admitted this evidence at trial." P. 886.

37. Expert Opinions In Medical Examiner's Report And Death Certificate As To Cause Of Death By Suicide Are Not Admissible.

Sims v. Great American Life Insurance Co., 469 F.3d 870 (10th Cir. Okla. Nov. 7, 2006) (Life Insurance Policy):

"Under Rule 702, reports from experts, such as a medical examiner, are admissible only if necessary to aid in the interpretation of scientific, technical, or other specialized facts. Although any witness may offer an opinion as to an ultimate issue to be decided by a jury, this opinion should not unduly invade the province of the jury when the assistance of the witness is unnecessary. . . .

Here, the jury was fully capable of assessing the facts to determine causation. The experts did not offer any opinion that was based on scientific or technical facts outside the juror's common knowledge or experience. To the contrary, this is the very type of fact determination a jury is equipped to make."

38. A Police Investigating Officer's Conclusion As To Cause Of Death Is Inadmissible.

Sims v. Great American Life Insurance Co., 469 F.3d 870 (10th Cir. Okla. Nov. 7, 2006) (Life Insurance Policy):

"The district court also limited the investigating officer's accident report as well as

his testimony relating to Sims's cause of death. . . .

[The evidence] concerned facts that could be readily appreciated by any person who drives an automobile or crosses streets. No special skill or knowledge was needed to understand these facts and draw a conclusion from them. In such a case as this, where the normal experiences and qualifications of laymen jurors permit them to draw proper conclusions from the facts and circumstances, expert conclusions or opinions are inadmissible. P. 889. . . .

The investigating officer's opinion on this matter was no more than speculation based on the same facts that the jury had before it. We therefore find that had the district court properly applied the Federal Rules, it would have excluded the officer's testimony concerning causation." P. 890.

39. In A Double Insured Or "Dual Representation" Matter, The Evidence Must Show More Than The Mere Potential For A Conflict Of Interest To Be Bad Faith.

Garnett v. Government Employees Insurance Co., 2008 OK 43, 186 P.3d 935 (Underinsured Motorist Coverage):

"¶25 We have consistently held that in order to establish a bad faith claim, a party must show that the insurer engaged in unreasonable, bad faith conduct. This principle may be seen underlying examples of bad faith conduct by insurers who insure both parties to an accident found in other decisions of other courts. These include: 1) using delay in settling one claim to force unfair settlement of the other; 2) making known misrepresentations to force an insured to accept an unfair settlement; 3) failing to disclose the nature of its relationship to each party; 4) using conflicting defenses against each party; and 5) using a single adjuster for both claims, who makes fraudulent misrepresentations to both parties. . . . .

¶26. . . [T]he existence of a mere potential for conflict does not suffice to meet the burden of proof (for bad faith). It was incumbent upon (the plaintiffs) to prove that (the insurance company) did in fact act improperly in handling their claims. The potential for mischief must be shown to have ripened into the reality of tortious conduct.

¶27 Here . . ., the passenger has shown nothing more than the potential for a conflict of interest created by the coincidence that the insurer happened to insure both Fain and the driver."

40. In Double Insured Liability And UM cases, Evidence Of Liability Adjuster's Actions May Be Relevant To Show Insurer's Bad Faith In Handling UM Claim.

Watson vs. Farmers Insurance Company, Inc., 23 F.Supp.3d 1342, (N.D. Okla. 2014) (Automobile Medical Pay and Uninsured/Underinsured Motorist Coverage):

While the underlying facts upon which plaintiff relies are intertwined with facts relating to the third party coverage, the gravamen of his claim for bad faith is based upon actions by the UM adjuster, which plaintiff alleges constituted a bad faith breach of Farmers' obligations under established Oklahoma UM law and which caused an unwarranted delay in his receipt of compensation for his injuries. Accordingly, the Court rejects Farmers' argument that summary judgment must be entered merely because the plaintiff's bad faith arguments refer to facts relating to the handling of his third party claims against Rase's liability coverage. Those facts may be relevant, not to show that the third party adjuster's acted in bad faith, but to the issue of whether Farmers acted reasonably when it deactivated the UM claim while third

party insurance payments were unavailable to him. (*5)

IX. ATTORNEY FEES

1. Entitlement To Attorney's Fee In Bad Faith Cases.

Christian v. American Home Assurance Company, 1977 OK 141, 577 P.2d 899 (Disability Policy):

"Ordinarily, attorney fees may not be recovered in the absence of an agreement or statutory authority. [Citations omitted.] One exception to this rule is that where a litigant has acted in bad faith, wantonly or for an oppressive reason, the trial court, in exercise of its equitable power, may award attorney's fees." P. 906.

Halliburton Oil Producing Company v. Aetna Insurance Company, 491 F.Supp. 595 (W.D. Okla. 1978) (commercial liability policy):

"As Plaintiff's cause of action in the instant case is based on Defendant's alleged failure to act in good faith in dealing with Plaintiff's claim under an insurance policy issued by Defendant, it appears that Plaintiff may be entitled to attorney fees under the 'bad faith' exception to the 'American Rule'."

2. Procedure And Factors Considered In Awarding Fees.

Oliver's Sports Center, Inc. v. National Standard Insurance Company, 1980 OK 120, 615 P.2d 291 (Fire Insurance Policy):

"[T]he proper procedure to be followed by trial courts in establishing a reasonable attorney fee is to determine the hourly compensation on an hourly rate basis and to add an additional amount based on the following guidelines:

(1) Time and labor required.
(2) The novelty and difficulty of the questions.
(3) The skill requisite to perform the legal service properly.
(4) The preclusion of other employment by the attorney due to acceptance of the case.
(5) The customary fee.
(6) Whether the fee is fixed or contingent.
(7) Time limitations imposed by the client or the circumstances.
(8) The amount involved and the results obtained.
(9) The experience, reputation and ability of the attorneys.
(10) The "undesirability" of the case [i.e., risk of non-recovery].
(11) The nature and length of the professional relationship with the client.
(12) Awards in similar cases." Pp. 294-295.

It is provided by 36 O.S. Supp. 1977 § 3629(B):

"It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer

of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party. For purposes of this section, the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments, the insured shall be the prevailing party. If the insured is the prevailing party, the court in rendering judgment shall add interest on the verdict at the rate of 15% per year from the date the loss was payable pursuant to the provisions of the contract to the date of the verdict." Footnote 1, p. 292.

(Author's note: In 1977 the statute was amended with the following: "This provision shall not apply to uninsured motorist coverage.")

3. Prevailing Party Attorney's Fee Award Is To Consider The Amount Involved, The Relative Modest Recovery And A Failure To Present Sufficient Evidence To Submit A Punitive Damage Instruction.

Hall v. Globe Life and Accident Insurance Company, 1998 OK CIV APP 163, 968 P.2d 1260 (Life Insurance Policy):

"Evaluation of the case may be encompassed by the first part of the eighth [*Burk*] factor - - the amount involved. Because of the limitation on pleading tort damages, 12 O.S. 1991 § 2008(A)(2), settlement offers between the parties may be the most realistic measure of what the party believes the amount involved in the case to be. We would be reluctant to hold that a trial court could not consider the fact that a party mistakenly valued a $30,000 case as a $1,000,000 case and expended time and money accordingly. Likewise, a trial court should be able to consider that a party valued a case at $40,000, but expended time and money as if it were a $1,000,000 case, just because of the possibility of recovering attorney fees. We cannot hold that consideration of settlement offers was error. . . .

[I]t is also clear that subsequent Supreme Court cases have clarified the *Oliver* language so that the *Burk* factors may also be used to reduce the lodestar."

4. 36 O.S. § 3629(B) Allows For Fees In Bad Faith Cases.

Thompson v. Shelter Mutual Insurance, 875 F.2d 1460 (10th Cir. 1989) (Fire Insurance):

"[36] O.S. § 3629(B) allows fees for time spent preparing and trying a claim of bad faith, provided the plaintiff succeeds on his claim of bad faith and also meets the statutory requirement of obtaining a total judgment larger than the greatest settlement offer made by the insurer." P. 1464.

5. Prevailing Party Attorney's Fees Available Under 36 O.S. § 3629(b) When Only The Tort Of Bad Faith Alleged.

First Bank of Turley, 1996 OK 105, 928 P.2d 298 (Liability Coverage):

"Under Oklahoma law, attorney's fees are available in any suit on an insurance policy 'so long as the "core element" of the damages sought and awarded is composed of the insured loss.' *Taylor v. State Farm Fire & Casualty Co.*, 1999 OK 44, 981 P.2d 1253, 1256.

The decision in *Taylor*, answering certified questions from this court, clarified that § 3629 does in fact apply to bad faith suits such as First National's, regardless of any contract claim on the policy itself. The 'core element' of the damages First National sought was in fact the insured loss; the expenses incurred in defending the Neece suit."

6. The Common Law Right To Attorney's Fees In Bad Faith Cases Does Not Depend Upon A Prevailing Party Status.

First Bank of Turley, 1996 OK 105, 928 P.2d 298 (Liability Coverage):

"[T]he district court did not rule on whether First National is entitled to attorney's fees under Oklahoma common law. See *Christian v. American Home Assurance Co.*, 577 P.2d 899, 906 (Okla. 1977) (holding that, in a case where an insured successfully sued its insurer for bad faith 'the trial court, in exercise of its equitable power, may award attorney's fees' under the common law). The creation of the statutory right to recover attorney's fees from an insurance company did not abrogate the common law right to attorney's fees where bad faith is shown. See *Brashier v. Farmers Insurance Co.*, 925 P.2d 20, 23-24 (Okla. 1996). The common law right does not depend on prevailing party status. See *Id*. at 24."

7. 36 O.S. § 3629(B) Does Not Prohibit Prevailing Party Attorney's Fees Even In Uninsured Motorist Bad Faith Claims.

Brashier v. Farmers Insurance Company, Inc., 1996 OK 86, 925 P.2d 20 (Uninsured Motorist):

"Because the statute's [36 O.S. § 3629 (B)] exclusion of UM coverage is *not all-inclusive*, we hold that the terms of §3629 may be made applicable solely to contract-based UM claims and cannot affect recovery for a bad-faith tort claim against a UM carrier who did not prevail when sued *ex delicto* for refusal to settle. *Id.* at 25.

. . .

The language of § 3629 is not comprehensive enough to abrogate the teachings of *Christian* and *Burk*. At the very most, § 3629 *dis*allows recovery of counsel fee by the prevailing party in a contract action to enforce UM coverage." *Id.* at 27.

8. Recovery Of Attorney's Fees In UM Bad Faith Cases Adhere To The American Rule.

Barnes v. Oklahoma Farm Bureau Mutual Insurance Company, 2000 OK 55, 11 P.3d 162 (Underinsured Motorist Coverage):

"In short, we can no longer sanction the teaching of *Brashier* and remain true to the American Rule principle that attorney fees, with certain limited exceptions, are not recoverable in the absence of contractual provision or specific statutory authority allowing their recovery. If attorney fees are to be recoverable in UM/UIM litigation brought by an insured against his/her insurer, like that brought here by Barnes, in our view, it is the Legislature that must authorize such a course, as it has done for other types of insurer/insured litigation in § 3629(B). ¶55.

N17. We note our decision in this case is limited to UM/UIM lawsuits by insureds against their insurance companies, i.e., a situation where no statute or contractual provision allows for the recovery of attorney's fees. Compare *Taylor v. State Farm*, 1999 OK 44, 981 P.2d 1253 [non UM/UIM bad faith insurance case falling under 36 O.S. 1991, § 3629(B) - -

where under tort-related theory of liability the core element of the damages sought and awarded is composed of the insured loss (i.e. the policy benefits) the reasonable attorney fees incurred for time spent preparing and prosecuting a bad faith claim are recoverable].

. . .

[W]hether Barnes can prove herself entitled to such fees under the *Owens* exception will be a question for the trial court upon proper presentation of pleadings and proof."

9. For An Insurer To Be A Prevailing Party Under A 36 O.S. § 3629(B) Offer, It Must Make A Written Offer In Excess Of The Judgment.

Driver Music v. Commercial Union Insurance Companies, 94 F.3d 1428 (10th Cir. 1996) (Commercial Fire Policy):

"Section 3629(B) expressly requires a 'written' offer of settlement. *Id.* at 1432.

. . .

That CUIC's offer was transcribed by the court reporter at the time it was made -- making it a writing in the broad sense of that term -- does not convert the offer into a 'written offer of settlement' within the meaning of § 3629(B). Section 3629(B) contemplates not merely the contemporaneous memorialization of an oral offer but, . . . the 'submission' of a written offer to the insured. In our judgment, the statute demands more than the mere possibility or availability of a writing." *Id.* at 1433.

10. Insurer Waives Its Right To Attorney's Fees When It Does Not Submit A Written Offer Within Ninety Days.

Cales v. LeMars Mutual Insurance Company, 2003 OK CIV APP 41, 69 P.3d 1206 (Commercial Property Insurance):

¶12 "Secondly, Insurer did not comply with § 3629(B) because it did not 'submit a written offer of settlement or rejection of the claim to the insured' within 90 days after Cales presented Insurer with the supplemental proof of loss following the first denial of the claim. Once it is determined that Insurer has breached the terms of § 3629(B), we hold *Shinault v. Mid-Century Insurance Co.*, 1982 OK 136, 654 P.2d 618, applies and Insurer has waived its right to an attorney's fee under that statute."

11. Insurer Not Entitled To Attorney's Fees Under 3629(b) Where No Offer Or Rejection In Writing.

American Commerce Insurance Company v. Harris, 664 F.Supp.2d 1220 (E.D. Okla. 2009) (Homeowner's Insurance policy):

Under Section 3629(B), an insurer prevailing in litigation with an insured may recover attorney's fees *only if* it tendered a written settlement offer or rejected the insured's claim within 90 days of receipt. . . . American Commerce argues that no response to Harris' fraudulent proof of loss was necessary because it voided the policy, but this argument misses the point; whether or not any response was required, American Commerce cannot recover attorney's fees under Section 3629(B) unless *there was* a response. P. 1221-22.

12. Attorney's Fees Should Be Prorated According To The Theory Of Recovery.

Driver Music v. Commercial Union Ins. Co. 94 F.3d 1428 (10th Cir. 1996) (Commercial Insurance):

"After an evidentiary hearing, the district court rejected Driver's request for attorney's

fees in the amount of $276,682.00 and awarded its fees in the amount of $100,000.00. The Court reasoned that under the circumstances, including Driver's failure to prevail on its bad faith claim, $100,000.00 was an appropriate award of attorney fees, more proportionate to the verdict than Driver's request." *Id.* at 1431.

13. In Awarding §3629(B) Attorney's Fees Court May Exclude Time Solely For Dismissed Bad Faith Claim.

Henderson v. Horace Mann Insurance Company, 560 F.Supp.2d 1099 (N.D. Okla. 2008) (Automobile Collision Coverage):

"[The unpublished decision of] *Sims v. Great American Life Insurance Co.*, 207 Fed. Appx. 908, 910 (10th Cir. 2006), the Tenth Circuit held that 'the district court need disallow only those attorney's fees related specifically to the issue of whether [the insurer] acted in bad faith in failing to pay [the] claim. . . .' *Id.* Although *Sims* recognized that a plaintiff cannot recover fees related solely to an unsuccessful bad faith claim, it noted that 'bad faith and contract claims overlap to an extent.' *Id.; Quail Creek*, 129 Fed. Appx. at 471. ('We note that a bad faith action is inextricably intertwined with a breach-of-contract claim.')" At p. 1105.

14. No Attorneys Fees Under §3629(B) Where Core Element Is Not Recovery Of The Insurance Proceeds.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005) (Automobile Liability Policy):

¶ 68. "Where the core element of the damages sought and awarded in a suit by an insured against his/her insurer for breach of the implied duty of good faith and fair dealing is composed of the insureds loss, §3629(B) allows recovery of reasonable attorneys fees to the prevailing insured for time spent preparing and prosecuting a tort suit. ...Rather than having as its core element the insured loss or monetary policy benefit, the primary focus and heart of insured's suit against insurers involved his attempt to recover uninsured financial losses **not covered by the policy of insurance and to recover damages for embarrassment, and mental pain and suffering**. (Emphasis that of the Court.)"

15. Where No Contract Claim Allowed, Prevailing Party Fees And Prejudgment Interest Still Available.

Taylor v. State Farm Fire and Casualty Company, 1999 OK 44, 981 P.2d 1253 (Homeowner's Policy):

"Counsel-fee award under § 3629 depends *not* on the theory of liability imposed *but on the recovery* of the insured loss as the prevailing party's core element of reparations. Ever since this court's pronouncement in *Oliver's Sports Center, Inc. v. Nat'l Standard Ins. Co.*, § 3629 has been held to *authorize counsel-fee awards in both contract and tort claims* against the insurer, so long as the insured loss constitutes the core element of the awarded recovery."

16. Good Faith Mistake As To Proper Party To Pay Does Not Relieve Insurer Of Statutory Attorney's Fees.

Williams v. Old American Insurance Company, 1995 OK CIV APP128, 907 P.2d 1105 (Life Insurance Policy):

"The substance of Old American's argument . . . is . . . that its good faith actions should excuse it from liability for pre-judgment interest and attorneys fees.

. . .

We reject Old American's argument on this issue. . . . In *Williams I*, the court,

describing Old American's 'good-faith' argument as immaterial, noted established Oklahoma law that 'an insurer who chooses to pay one of two or more competing claimants does so at its own risk.' (Citation omitted.) Although an insurer's erroneous but arguably good faith payment might be relevant to a trial court's award of interest and fees when the decision whether to award fees at all is *discretionary* with the Court, good faith is not relevant when the award of fees and interest is *mandatory* [under 36 O.S. § 3629(B)]."

17. In Federal Court, Offer By Insurer Made After 90 Days Only Protects From Insurer Paying Fees.

Oulds v. Principal Mutual Life Insurance, 6 F.3d 1431 (10th Cir. Okla. 1993) (Health Insurer):

"An insurer's failure to make an offer within 90 days [pursuant to 36 O.S. § 3629], while acting to deprive the insurer of a chance to claim fees, does not make it impossible for the insurer to protect itself from a fee claim by the insured. . . . Contrary to plaintiff's argument, this rule applies to any offer of settlement made to the insured, not just to those which are made within the 90-day window."

18. Where an Insurer Declines to Either Deny or Offer Settlement Within 90 Days of Receipt of a Proof of Loss, the Insurer Is Not Entitled to Attorney Fees under 36 O.S. § 3629.

AG Equipment Company v. AIG Life Insurance Company, Inc., 691 F.Supp.2d 1295 (Feb. 11, 2010) (Stop-Loss Coverage):

"AIG argues that AG did not submit sufficient proof of loss to trigger the 90 day period under § 3629, and it should be permitted to recover attorney fees, even though it is undisputed that AIG did not reject or offer to settle the claim until this case had been pending for at least a year after the claim was filed." *Id.* at 1304.

. . .

"The insurer's penalty for failing to reject or offer to settle a claim within 90 days is the loss of any opportunity to recover attorney fees, even if the insurer is the prevailing party in a lawsuit." *Id.* at 1305.

. . .

"AIG did not dispute the adequacy of the proof of loss when it originally received AG's claim for reimbursement of Ash-Kurtz's medical expenses and, given the size of the disputed insurance claim, it is reasonable to infer that AIG initially deemed the proof of loss sufficient. While AIG retained the right to investigate whether it was obligated to reimburse AG for Ash-Kurtz's medical expenses, it could not indefinitely hold AG's claim in abeyance without waiving its right to collect attorney fees under § 3629. See *Driver Music Co. Inc. v. Commercial Union Insurance Co.*, 94 F.3d 1428, 1432 (10th Cir. 1996)." *Id.* at 1305.

19. 36 O.S. § 1219 Also Provides For Prevailing Party Fees Taxed As Costs.

Alsobrook v. National Travelers Life Insurance Company, 1992 OK CIV APP 168, 852 P.2d 768 (Health Insurance Policy):

"[Company] argues the trial court improperly assessed attorney's fees which were requested by Deborah pursuant to 36 O.S. Supp. 1987 § 1219. It provides in pertinent part:

In the administration, servicing or processing of any individual, group or blanket accident and health insurance policy, it shall be an unfair trade practice for any insurer to fail to notify a policyholder in writing of the cause for delay in payment of any claim where said

claim is not paid within thirty (30) days after receipt of proof of loss; the notification shall be by mail with return receipt requested. In addition, if a claim is not paid within sixty (60) days of proof of loss, the insurer shall pay interest . . . Provided that in the event litigation should ensue based upon such a claim, the prevailing party shall be entitled to recover a reasonable attorney's fee to be set by the court and taxed as costs against the party or parties which do not prevail."

20. No Attorney's Fees For Bad Faith In Uninsured Motorist Case Under 36 O.S. § 1219.

Barnes v. Oklahoma Farm Bureau Mutual Insurance Company, 2004 OK 25, 94 P.3d 25 (Uninsured/Underinsured Motorist Coverage):

¶19 "Plaintiff sought to assert a statutory basis for the award under 36 O.S. § 1219, which allows for attorney fees in certain claims upon 'accident and health' policies. We find that uninsured motorist insurance is not accident and health insurance as defined by § 1219 and § 703."

21. Where Stop-loss Coverage More Closely Resembles Reinsurance or Excess Coverage it Does Not Come under 36 O.S. § 703's Definition of Accident and Health Insurance and Thus Does Not Come under the Prevailing Party Attorney's Fees of 36 O.S. § 1219.

AG Equipment Company v. AIG Life Insurance Company, Inc., 691 F.Supp.2d 1295 (Feb. 11, 2010) (stop-loss coverage):

"[T]he Court agrees with the magistrate judge's determination that the stop-loss policy issued by AIG to AG does not qualify as accident and health insurance under § 703, and AIG was not required to comply with the notice requirements of § 1219 when reviewing the disputed insurance claim. Thus, AIG may also not recover attorney fees under § 1219(G) as the prevailing party in litigation concerning a disputed claim under an accident and health insurance policy." *Id.* at 1304.

22. Insurer's Litigation Conduct Relevant To Determine Amount Of Fees Awarded.

Alsobrook v. National Travelers Life Insurance Company, 1992 OK CIV APP 168, 852 P.2d 768 (Health Insurance Policy):

"In the order awarding attorney's fees, the trial court made the following findings:

> The time and effort required to properly prepare and try this case and to obtain and present the difficult and technical evidence and testimony was extensive.
>
> The defendant National Travelers Life Company contributed to the complexity and extensiveness of the present litigation by its refusal to cooperate in pre-litigation discovery and its denial of the agency of defendant Tim Longest throughout the lawsuit and approximately two days of jury trial.
>
> Once litigation became required for the recovery of benefits, the plaintiff insured was required to fully and completely litigate all issues.
>
> The trial court held an evidentiary hearing on the issue and took the matter under

advisement. In its order, the court appropriately denied charges for time spent by legal assistants. The trial court had authority to award attorney's fees, and the award was based upon the evidence presented."

23. No Litigation Bad Faith Attorney's Fees In UM Case For Prelitigation Bad Faith.

Barnes v. Oklahoma Farm Bureau Mutual Insurance Company, 2004 OK 25, 94 P.3d 25 (Uninsured/Underinsured Motorist Coverage):

¶ 19 "As an exception to the American Rule, plaintiff sought to recover attorney fees for oppressive litigation conduct under authority of *City National Bank v. Owens*. But the conduct complained of was not oppressive conduct during litigation so as to trigger the trial court's inherent power to award attorney fees. We agree with the trial court that the actions complained of do not fall within the *City National* bad faith litigation conduct exception to the American Rule."

24. A Section 1101.1 Offer of Judgment Is Substantive Statute And Must Follow FRCP 68 Which Includes Attorney Fees As Costs In Federal Court.

Scottsdale Insurance Company v. Tolliver, 262 F.R.D. 606 (N.D. Okla. 2009) (Dwelling Insurance Policy):

"When state and federal procedural rules are in direct conflict, defendants are correct that the federal rule controls. There is no dispute that Rule 68 and § 1101.1 conflict as to the manner of making an offer of judgment and, under *Hanna*, a party must follow Rule 68 when making an offer of judgment in federal court. Scottdale's offer of judgment was made pursuant to Rule 68 and § 1101.1 but Scottsdale relied on § 1101.1 as its substantive basis to seek an award of attorney's fees. . . . Scottsdale would have violated a strong federal policy against filing an unaccepted offer of judgment with the Court and Scottsdale appropriately followed Rule 68's procedure for making an offer of judgment to defendants. . . . *Scottsdale* clearly intended to make an offer under Rule 68 and § 1101.1, and its offer would have been stricken if it followed the procedure required by § 1101.1. Scottsdale followed the correct procedure for making an offer of judgment in federal court, and the offer is not invalid due to Scottsdale's decision not to file the unaccepted offer with the court." *Id.* at 610.

. . .

"Under Rule 68, the term 'costs' includes attorney fees only when the substantive statute underlying a party's claim or defense authorizes an award of attorney fees. [Citation omitted.] However, in diversity cases, state law governs an award of attorney fees as long as the state statute does not conflict with a valid federal statute or procedural rule. [Citations omitted.] In situations when a federal rule or statute does not permit attorney fees but a state statute would allow attorney fees, the state statute controls in a diversity case. [Citation omitted.] Thus, the general rule is that a state fee-shifting statute is substantive under *Erie*, and such statutes are enforceable in diversity cases in federal court." *Id.* at 611.

X. INTEREST

1. A Prevailing Plaintiff Is Entitled To Prejudgment Interest On A UM Bad Faith Claim.

Brashier v. Farmers Insurance Company, Inc., 1996 OK 86, 925 P.2d 20 (Uninsured Motorist Coverage):

"Because the UM recovery represents recompense for one's personal injuries, a

judgment in a bad-faith claim for loss sustained by a UM insured would entitle the victor to the § 727(A)(2) prejudgment interest." *Id.* at 26.

2. Interest In Bad Faith Case Allowed.

Taylor v. State Farm Fire and Casualty Company, 1999 OK 44, 981 P.2d 1253 (Homeowner's Insurance Policy):

"Prejudgment interest *on the insured property loss* recovered in a bad-faith refusal action is authorized by § 3629(B), to be construed together with § 6, as an additional item of damages to the insured, *whenever* the insured is the prevailing party and the insured loss was for a liquidated amount or for an amount capable of ascertainment by reference to well-established market values."

3. Interest Statute Provides For Compounding And A Fluctuating Interest Rate.

Cox v. Kansas City Life Insurance Company, 1999 OK 57, 983 P.2d 1025 (Life Insurance Policy):

"Here the trial court applied the new interest rate only prospectively after the passage of the 1997 amendments to 12 O.S. § 727. Those amendments showed that the legislature intended, for the first time, to make changes in the interest rate and compounding apply prospectively."

4. Interest Accrues Where There Is No Tender Of Judgment.

Cox v. Kansas City Life Insurance Company, 1999 OK 57, 983 P.2d 1025 (Life Insurance Policy):

"There's nothing inequitable about allowing the Pelters interest here. Had Kansas City Life been seriously enough concerned about the interest accruing on the judgment against it, it would only have had to make a tender after November 15, 1996, of the amount of the judgment and accrued interest owed and expressly left open the question of its liability on the Stearman verdict. Kansas City Life did not do so."

5. Litigated Life Insurance Claims Get Fifteen Percent (15%) Interest Rather Than Three Percent (3%).

Hall v. Globe Life and Accident Company, 1999 OK 89, 998 P.2d 603 (Life Insurance Policy):

"The rate specified in § 4030.1 applies generally to late payment of the proceeds of a policy of life insurance. Section 3629(B), by contrast, applies specifically to late claims which have been litigated and in which the insured prevailed. . . .

Both statutes address the issue of late payment of insurance proceeds. However, § 3629(B) applies specifically to litigated claims. Therefore, the specific provision, specifying a rate of 15%, prevails over the general provision for late payments, found at § 4030.1."

6. No Prejudgment Interest Recoverable Where §3629(B) Is Not Applicable And Where There Are Not Special Jury Findings Splitting The Damages Into Identifiable Components.

Badillo v. Midcentury Insurance Company, 2005 OK 48, 121 P.3d 1080 (Okla. 2005)

(Automobile Liability Policy):

¶71 "No prejudgment interest is recoverable under §3629(B) for the reasons stated in the immediately preceding part of this opinion, i.e., the core element of the recovery he sought and that was awarded to him via the jury verdict (upon which the judgment under review was based) did not consist of the insured loss.

. . .

¶74 There can be no question that under *Timmons v. Royal Globe Insurance Company* (Timmons II), 1985 OK 76, 713 P.2d 589, when a severed element of damage recovery in the form of recompense for embarrassment, and mental pain and suffering is allowed and separately identified in a jury verdict, §727(E) applies to allow prejudgment interest thereon. The general verdict in this matter, as already mentioned, however, did not separately identify those damages awarded for personal injury or injury to personal rights, and those for financial loss. Accordingly, the matter appears to be placed squarely within the following pronouncement from *Timmons II*, "[i]f damages 'by reason of personal injuries' are shown to have been intermixed with other elements of damage in one general verdict, the provisions of 12 O.S. 1971 §727(2) [as applicable here, 12 O.S. 2001, §727(E)] cannot be invoked for allowance of prejudgment interest.

. . .

¶75 In our view, in the circumstances of this case, only a special jury finding splitting the damages awarded into separately identifiable components would be sufficient to provide a basis for prejudgment interest under §727(E).

. . .

¶76 Basically, insureds reliance on §6 suffers from the same infirmity as does his reliance on §727, to wit: he seeks to separate a general jury verdict into distinct components, that we do not believe may rightfully be so separated.

XI. FEDERAL DIVERSITY JURISDICTION

1. No Diversity Jurisdiction When Underlying Tortfeasor And Carrier Sued.

Thoendel v. Holland, Vanguard Insurance Co., and State Farm Mutual Automobile Insurance Co., 663 F.Supp. 77 (W.D. Okla. 1987) (Automobile Collision Benefits):

"Under 28 U.S.C. § 1441(c), the claim against the non-resident defendant must be separate and independent from the claim or cause of action asserted against the resident defendant in order for that portion of the claim to be properly removed.

. . .

[T]he claims against all of the Defendants in the case at bar arise out of the same automobile accident. Though different theories may be involved in the various claims, none of the claims are so distinct as to be deemed separate and independent for removal purposes." P. 78.

2. The USAA Diversity Rule.

Tuck v. United Services Automobile Association, 859 F.2d 842 (10th Cir. 1988), cert. denied, 109 S.Ct. 1534 (Uninsured Motorist Policy):

"For purposes of diversity jurisdiction, the citizenship of an unincorporated association is the citizenship of the individual members of the association. (Citations omitted.) This rule has been frequently criticized because often, as in this case, an unincorporated association is, as a practical matter, indistinguishable from a corporation in the same business." P. 844.

3. The Solution To The USAA Diversity Rule.

"It is well-settled that non-diverse parties may be dismissed in order to preserve diversity jurisdiction." (Citations omitted.) P. 845.

4. A Negative Pregnant Denial That The Claim Did Not Exceed $75,000 Is An Admission That The Amount In Controversy Is Sufficient For Removal.

Murchison v. Progressive Northern Insurance Company, 564 F.Supp.2d 1311 (E.D. Okla. 2008) (Uninsured/Underinsured Motorist Coverage):

"In her response to Defendant's fifth request for admission, Plaintiff *denied* that she was not seeking an amount in excess of $75,000. This paper, therefore, confirmed to Defendant the fact that Plaintiff was likely seeking an amount in excess of $75,000. Defendant filed its Notice of Removal within 30 days of its counsel of record receiving this 'paper from which it . . . first [could] be ascertained that the case [was] one which . . . [had] become removable.' P. 1314.

In any event, Defendant did include facts sufficient to establish that the amount in controversy exceeds the requisite jurisdictional amount. Defendant specifically stated that Plaintiff's medical bills themselves exceeded $75,000. That economic analysis of Plaintiff's claims, combined with Plaintiff's denial of the requested admission, is sufficient to support diversity jurisdiction. P. 1315."

5. A Claim Of Bad Faith And Punitive Damages Does Not In Itself Allow Removal.

Herndon v. American Commerce Insurance Company, 651 F.Supp.2d 1266 (N.D. Okla. 2009) (Uninsured Motorist Coverage):

After close analysis of *McPhail* and Northern District of Oklahoma cases applying *McPhail*, this Court interprets *McPhail* to require a removing Defendant to meet the initial hurdle of : (1) "'establish[ing] what the plaintiff stands to recover'" by providing a factually supported "'estimate'" of the total value of plaintiff's claims; and (2) proving any "contested factual allegations that support the estimate" by a preponderance of the evidence. *McPhail*, 529 F.3d at 954. P. 4.

. . .

[N]either the Petition or the Removal Notice provide the Court with any similar particulars regarding the basis for Plaintiff's assertion that her claim was denied in bad faith. In such circumstances, Defendant has failed to prove such claim's potential value for purposes of establishing an estimate of the amount that will be at issue in this litigation. P. 5.

. . .

[I]n this case, the Petition provides no specific facts in support of the punitive damages claim, and the Removal Notice offers nothing more than the Petition's assertion of a punitive damages claim. This type of conclusory assertion by Defendant does not allow the Court to attach any greater value to the punitive damages claim than that sought in the Petition. P. 6.

Based on the Petition and Removal Notice, Defendant has failed to provide the Court with any type of reasonable estimate of Plaintiff's claims and has failed to establish jurisdictional facts that would support a finding that the amount in controversy requirement is satisfied. . . . Defendant has failed to provide any reasonable estimation of what is at stake as to the remaining claims for bad faith or punitive damages, and the Petition seeks only in excess of $10,000.00 as to such claims. Accordingly, Defendant has not "affirmatively establish[ed] jurisdiction by proving jurisdictional facts that ma[k]e it possible that

$75,000.00 [is] in play" in this litigation. See *McPhail*, 529 F.3D at 955.

6. The Value Of Paid Policy Benefits Must Be Excluded In Determining Federal Jurisdiction.

Singleton v. Progressive Direct Insurance Company, 49 F.Supp.3d 988, (N.D. Okla. 2014) (Uninsured Motorist and Med Pay Coverage):

Where Singleton has already received Progressive's payment of $100,000 for the UIM benefits under her policy, however, she cannot seek to recover that amount again, and indeed, she does not claim to do so. The value of Singleton's breach of contract claim, then, must exclude the value of UIM policy benefits Progressive has already paid. The value of the claim is instead limited to damages resulting from Progressive's alleged failure to "pay policy benefits in a timely manner and to perform a reasonable valuation of [Singleton's] claim." Singleton's petition does not assign a specific value to these damages, and Progressive provides no facts in its notice of removal to suggest that the value of this portion of her claims even remotely approaches $75,000. Singleton's breach of contract claim therefore does not independently satisfy the amount-in-controversy requirement. *3

7. Petition Which Alleges Unfair Dealing When Plaintiff Was Entitled to $100,000 in Policy Benefits Is Sufficient for Federal Diversity Jurisdiction.

Singleton v. Progressive Direct Insurance Company, 49 F.Supp.3d 988, (N.D. Okla. 2014) (Uninsured Motorist and Med Pay Coverage):

A defendant must nevertheless offer more than a "conclusory statement" that punitive damages are sought under Oklahoma law and that such law authorizes recovery in excess of that jurisdictional amount. *Herndon v. American Commerce Insurance Co.*, 651 F.Supp.2d 1266, 1273 (N.D. Okla. 2009). To hold otherwise would require courts "to conclude that every civil action asserting a punitive damages claim under Oklahoma law necessarily satisfies the amount in controversy requirement . . . simply because the maximum potential recovery exceeds $75,000." *Id.* . . . .

Considering the petition and notice of removal together, the court finds that Progressive has not merely offered a "conclusory statement" invoking punitive damages, but has affirmatively established that the amount in controversy exceeds the jurisdictional amount. Where Singleton asks for actual damages exceeding $10,000, a punitive damages award of $65,000 or more would reach the jurisdictional threshold. This would require no more than a single-digit ratio of punitive damages to actual damages, even after Progressive deflated the denominator with a $100,000 payment just prior to the initiation of this action. See *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (holding that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," though even greater ratios may still comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages"). Singleton's petition, meanwhile, alleges that Progressive failed to properly investigate her claims, delayed payments, or withheld them altogether, and used its unequal bargaining position to overwhelm and take advantage of her, though it knew that she was entitled to receive $100,000 in UIM benefits under her policy. These allegations supply the required underlying facts supporting Progressive's assertion that the value of Singletons' claim for punitive damages exceeds the amount required to surpass the jurisdictional threshold.

The court therefore finds that Progressive has shown by a preponderance of the evidence that Singleton's claim for punitive damages, particularly when considered along

with her request for actual damages, places an amount exceeding $75,000 in controversy. (*4).

XII. CONCLUSION

The definition of the tort of bad faith or unreasonable failure to settle within the policy limits is not one capable of a single, simple or concise definition without application to the facts of each case. *Davis v. National Pioneer Insurance Company*, 1973 OK CIV APP 9, 515 P.2d 580. It is the entire course of conduct of an insurance carrier in failing to deal fairly and in good faith with an insured which must be looked at by a jury in evaluating whether or not the carrier has violated the standard of failure to deal fairly and in good faith. *Timmons, supra*. Such acts can take the form of anything a creative insurance company can scheme and devise in wrongfully refusing to make payment to an insured under the law and policy existing at the time the performance was being requested. *Timmons v. Royal Globe Insurance Company*, 1982 OK 97, 653 P.2d 907 at 917; *Buzzard v. The Honorable Mike McDanel*, 1987 OK 28, 736 P.2d 157 at 159.

The claim for relief known as "bad faith" will continue to have its contours defined as new factual cases present themselves to the Court. In the meantime, a very general definition is the insurer's unreasonable conduct in violating its duty to deal fairly and in good faith with its insured.

XIII. APPENDIX

2020 INSURANCE BAD FAITH LAW UPDATES

1. *Shotts v. GEICO*, 943 F.3d 1304 (10th Cir. 2019) (Underinsured Motorist Coverage):

As Legal Gatekeeper Tenth Circuit Either Accepts Defendant's Facts Or Weighs The Disputed Evidence On Summary Judgment To Find A Legitimate Dispute Of Value.

> To determine whether a Plaintiff has made this [bad faith] showing, **courts assess**[1]
>
> "whether the insurer had a good faith belief in some justifiable reason for the actions…that are claimed violative of the [insurer's] duty of good faith and fair dealing." *Badillo,* 121 P.3d @ 1093-94.[2] Courts make this determination "in light of all facts known or knowable concerning the claim at the time Plaintiff requested the company to perform its contractual obligation." *Oulds*, 6 F.3d @ 1439 (quotations omitted). "[U]ntil the facts…have established what might reasonably be perceived as tortious conduct on the part of the insurer, the legal gate to submission of the issue to the jury remains closed." *Id.* @ 1437. (emphasis mine)
>
> *Shotts* @ 1314-1315.
>
> ...

[1] The *Badillo* citation does not say it is for the Court to assess the legitimacy of a dispute.

[2] 10th Circuit left out *Badillo's* quote and citation to *McCorkle v. Great Atlantic Insurance Co.*'s holding: "What is reasonable is always a question to be determined by the trier of fact."

This case presents a legitimate dispute. Although GEICO and Mr. Shotts have access to the same sets of medical records, the parties disagree about the nature and extent of his injuries. Mr. Shotts claims he had a normal spine before the accident and insists that his peptic ulcer developed only after the crash.[3] GEICO by contrast maintains that Mr. Shotts's spinal problems predate the accident and that he "was already taking the medications that...caused his Peptic Ulcer." The record contains evidence from which "a reasonable jury could find in favor of the insurer." *Oulds*, 6 F.3d @ 1442. Specifically, a reasonable jury could conclude from Mr. Shotts's medical records that his pre-existing back injuries generated at least some of his post-accident medical expenses.[4] The jury could also find that Mr. Shotts overestimates the value of his claim because some of his expenses were not necessitated by the accident. This is "strong evidence that a dispute is 'legitimate'." *Id.*

Because the medical records in this case **could** support a finding that Mr. Shotts's back problems and peptic ulcer pre-dated or are unrelated to the accident, there is a legitimate dispute between the parties. Accordingly, we cannot conclude as a matter of law that GEICO breached the duty of good faith by refusing to pay Mr. Shotts's requested claim. *See Bannister*, 692 F.3d @1127-28. (emphasis mine) *Shotts* @1316.

If There Is A Legitimate Dispute As To Value, The Plaintiff Must Prove Insurer Overlooked Facts Or Failed To Conduct Reasonable Investigation For Bad Faith To Exist.

"[E]ven if there is a legitimate coverage dispute between the parties, an insurer's failure to conduct a reasonable investigation may give rise to a bad faith claim. *See Buzzard*, 824 P.2d @ 1109; *see also, Bannister,* 692 F.3d @ 1128 ("[T]he jury may decide the issue...if there is evidence that the insurer failed to investigate [the] claim.")

...

"Under Oklahoma law,...an insurer's investigation need only be reasonable, not perfect." *Roberts v. State Farm Mutual Auto Insurance Co.*, 61 F. App'x 587, 592 (10th Cir. 2002) (unpublished) (citing *Buzzard*, 824 P.2d @ 1109). Accordingly, "'when a bad faith claim is premised on inadequate investigation, the [claimant] must make a showing that material facts were overlooked or that a more thorough investigation would have produced relevant information' that would have delegitimized the insurer's dispute of the claim." *Bannister*, 692 F.3d @ 1128 (quoting *Timberlake*, 71 F. 3d @ 345). "[E]vidence of inadequate investigation must 'suggest a sham defense or an intentional disregard of incontrovertible facts' in order to be put to a jury." *Id.*; *see also Oulds*, 6 F.3d @ 1442.

...

Mr. Shotts argued at summary judgment that "GEICO biasedly refused to consider and evaluate all of [his] permanent lifetime injuries"; "intentionally placed an unreasonably low dollar evaluation" on the claim; and "unfairly looked for ways to reduce, delay[,] or deny [his] claim." App., Vol. 3 at 45. But he did not offer specific evidence to support these bare allegations. For example, although Mr. Shotts alleged that Ms. Henley used a biased

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[3] The evidence submitted showed a new fractured thoracic vertebrae and herniation which the Court never acknowledges, plus an aggravation of a low back pre-existing condition. The peptic ulcer issue was waived and was not an issue.

[4] Plaintiff argued Medications before and after the collision had nothing to do with whether there was a new fracture and herniation of the thoracic spine.

computer tool to conduct her evaluation, he provided no evidence to show the computer system was faulty or that the valuation was arbitrary.

Mr. Shotts also stated that Ms. Henley's "[f]ailure to properly consider important favorable information to the insured...is bad faith," but he did not explain when or how Ms. Henley overlooked information that might have been favorable to his claim. *Id.* at 47. He asserted that Ms. Henley ignored his Workers' Compensation records, which "would [have] suggest[ed] an injury more significant than a strain," *Id.* at 40, but he did not explain how those records would have contradicted the other medical records Ms. Henley reviewed or "changed the underlying *facts* already known to [her]," *Timberlake*, 71 F.3d @ 345. Finally, he argued that Ms. Henley "should have...investigated and evaluated facts" such as the difference between the before and after MRI's [sic.] and X-rays, the permanence of the injuries, [and] the value of the lifelong additional pain," but he did not provide evidence to show that Ms. Henley did not do this during her investigation. App., Vol. 3 at 48.[5] *Shotts* @ 1316-1317.

Tenth Circuit Misapplies And Misstates Oklahoma Law To Create New Rule That Waiver Of Subrogation Extinguishes UM Carrier's Duty To Drop Down To Dollar One And Promptly Pay UM Claim.

"In Oklahoma, UM insurers enjoy statutory subrogation rights. Okla. Stat. Ann. Tit. 36, § 3636(F). These rights allow UM insurers to pay an insured's claim and then seek reimbursement from the underinsured at-fault driver's insurer. This process operates as follows. When insured individuals involved in an accident with an underinsured driver reach a tentative agreement to settle with that driver's insurer, they must notify their UM insurer and submit documentation of any pecuniary losses. *Id.* § 3636(F)(1). The UM insurer has 60 days to 'substitute its payment to the insured for the tentative settlement amount'- that is to pay the injured individual the amount owed by the underinsured driver's insurer. *Id.* § 3636(F)(2). If the UM insurer chooses to **substitute payment**, the injured individual receives payment for the **entire value of the claim directly from the UM insurer, but loses the right to receive any payment from the underinsured driver's insurer**. The UM insurer is then 'entitled to the insured's right of recovery,' *Id.*, and can exercise its subrogation rights to seek repayment from the underinsured motorist's insurer."

A UM insurer may waive its subrogation rights, *see Buzzard*, 824 P.2d @ 1110. It may also forfeit the rights by failing to substitute payment within 60 days. *See* Okla. Stat. Ann. Tit. 36, § 3636(F)(2) ("if the [UM] coverage insurer fails to pay the insured the amount of the tentative tort settlement within sixty (60) days, the [UM] coverage insurer has no right to the proceeds of any settlement or judgment....").

...

Oklahoma Courts have labeled this requirement as a "speedy payment mechanism" *Phillips v. N.H. Ins. Co.*, 263 F.3d 1215, 1225 (2001), and have specified that it "entitle[s] [injured parties] to swift payment" of UM policy benefits, *Mustain,* 925 P.2d @ 535." *Shotts* 1308-1309.

Oklahoma case law recognizes a connection between the prompt-payment requirement and a UM insurer's subrogation rights. For example, Oklahoma Courts have specified the prompt-payment requirement does not apply if an insured party intentionally interferes with or destroys a UM insurers subrogation rights. *See Porter v. MFA Mutual*

[5] (Naifeh Footnote) Both GEICO's damage worksheet and deposition testimony showed failure to give a dollar value for the new fractured and herniated thoracic disc or for the aggravation of pre-existing condition. GEICO's adjuster admitted that she was not supposed to use the computer system except only on third-party cases. GEICO's adjuster also admitted the computer system could not provide any number for aggravation of pre-existing conditions.

Insurance Co., 643 P.2d 302, 305 (Okla. 1982); *Torres v. Kansas City Fire & Marine Insurance Co.*, 849 P.2d 407, 413 (Okla. 1993). And when the Oklahoma Supreme Court specified in *Burch* that the prompt-payment requirement applies "from the first dollar up to the policy limits," 977 P.2d @1064, it emphasized that, although the UM insurer was obligated to pay the full amount of the Plaintiff's claim, the insurer could still "proceed in its own right against the tortfeasor." *Id.* @ 1065. The *Burch* Court also observed that it might be unfair to require the UM insurer to "duplicate coverage" but it concluded this would not happen when the UM insurer could obtain payment through subrogation. *Id.* It emphasized that its holding "[did] not make the UM carrier the final indemnitor" because "*[t]he UM carrier is statutorily subrogated* to the rights of its insured against the [underinsured at-fault driver]." *Id.* Put differently, *Burch* used the UM insurer's ability to "seek recovery of paid indemnity through an exercise of its right of subrogation" as justification for the first-dollar payment requirement. *Id.* (emphasis mine) *Shotts* @ 1318-1319.

...

Although "being legally able to exercise subrogation rights is not the *sine qua non* of an obligation to pay a [UM] claim," *Phillips*, 236 F.3d @ 1222, the principles articulated in Oklahoma case law suggest that a UM insurer's duty to render payment is linked to its ability to exercise subrogation rights. *Burch*, in particular, indicates the Courts crafted the first-dollar payment requirement with an insurer's subrogation rights in mind. Here, GEICO waived its subrogation rights. In doing so, it relinquished its ability "to proceed in its own right against the tortfeasor." *Burch*, 977 P.2d @ 1065. Under these circumstances, requiring first-dollar payment would force GEICO to make a payment that it could not later recoup from Farmer's. This would, in essence, make GEICO "the final indemnitor for the injured party's loss" - an outcome the *Burch* Court sought to avoid. *Id.* **We thus conclude that GEICO's waiver of subrogation rights extinguished its duty to render a prompt, first-dollar payment.** (emphasis mine)

Policy considerations support this conclusion. Requiring first-dollar payment when a UM insurer has waived its subrogation rights would enable injured parties to obtain double recovery.[6] Specifically, an injured party could (1) obtain a settlement offer from the underinsured motorist's insurer, (2) request the UM insurer waive its subrogation rights, (3) request and accept a first dollar payment from the UM insurer and then, (4) accept the underinsured driver's settlement offer.[7] This would allow the injured party to recover from

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[6] This statement of the Court is directly contrary to ***Burch***: "Section 3636 does not say that the amount of damages for which the UM carrier is responsible cannot be reduced by the amount of liability insurance. Thus, contrary to the *Roberts v. Mid-Continent Casualty Co.* holding, the proviso in § 3636 does not address whether first-dollar damages are payable by the carrier or only the excess over the tortfeasor's liability limits." *Burch,* ftnote 33. This is because the injured party can never recover more than the amount of his **damages**.

[7] This is where the 10th Circuit's confusion of subrogation for payment of UM coverage with substitution under the speedy payment mechanism under 36 O.S. § 3636(F) without considering the reasonable value of the total claim led it to its misguided ruling. The Court defined subrogation as simply meaning "substitution" without considering the statutory meaning of "substitution" under

the UM insurer and the underinsured driver's insurer. But because the UM insurer would have waived its subrogation rights, it would not be able to recoup its payment from the underinsured driver's insurer. The UM insurer's payment would thus "create a duplicate pool of insurance," *Burch*, 977 P.2d @ 1065, and would allow the injured party to receive payments from two insurers that could not later seek reimbursement from one another. The UM carrier's payment also would not operate as "a temporary expedient to facilitate prompt payment to the insured," *Burch*, 977 P.2d @ 1065, but would instead be a final and unrecoverable payment to the injured party.

Because GEICO waived its subrogation rights, requiring GEICO to render prompt, first-dollar payment would allow Mr. Shotts to recover twice for his injuries: once from GEICO, and once from Farmer's. We decline to permit that outcome. Instead, we hold that GEICO's waiver extinguished its duty to promptly pay the full value of Mr. Shotts's claim. Mr. Schotts thus cannot show that GEICO's failure to pay constituted bad faith. (emphasis added) *Shotts* @ 1318 - 1320.

Where No Bad Faith Claim Exists, There Can Be No Punitive Damages.

...Mr. Shotts' punitive damages claim is derivative of and dependent on his bad faith claim. Because both of those claims fail, his request for punitive damages must fail too. *Shotts @ 1320.*

2. *Hamilton v. Northfield Insurance Company*, 2020 OK 28, 473 P.3d 22 (Commercial Property Insurance):

Offers By Insurer Made After Section 3629(B) 60-Day Window No Longer Protects Insurer From Paying Fees.

¶1 The United States Court of Appeals for the Tenth Circuit certified to this Court two questions of law:

> 1. In determining which is the prevailing party under 36 O.S. § 3629(B), should a court consider settlement offers made by the insurer outside the sixty- (formerly, ninety-) day window for making such offers pursuant to statute?
>
> 2. In determining which is the prevailing party under 36 O.S. § 3629(B), should a court add to the verdict costs and attorneys fees incurred up until the offer of settlement for comparison with a settlement offer that contemplated costs and fees?

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36 O.S. § 3636(F). *See Shotts* @ 1308. There is no contract UM policy benefits paid by substitution of the tortfeasor's liability limits under the "speedy payment mechanism". The Court confused payment of UM benefits with payment of substituted tortfeasor's liability coverage under 36 O.S. §3636(F)(2).

¶2 We answer the first question with a "no." The statute at issue in this case - 36 O.S. § 3629(B) - creates an incentive for insurance companies to promptly investigate and resolve claims submitted by their insureds. It allows attorney fees to the prevailing party if a dispute arises over the payment of benefits and litigation eventually results between the insurer and the insured. Answer the first question, we conclude that a court may consider only those timely offers of settlement of the underlying insurance *claim* - and not offers to resolve an ensuing *lawsuit* that results from the insurer's denial of the same - when determining the prevailing party for purposes of awarding attorney fees and costs under section 3629(B).

¶3 Our answer to the first question also resolves the second. Section 3629(B) contemplates only those offers made by the insurer to settle the insured's claim within the prescribed sixty- (formerly, ninety-) day window. Quite plainly, the statute never discusses an offer to settle a lawsuit initiated beyond that period - the whole purpose of the statute is to avoid litigation by creating fee-shifting disincentives if the insured's claim is not speedily resolved. Because the federal court's second question necessarily relates solely to offers made in the course of litigation *after* the lapse of the statute's crucial sixty- (formerly, ninety-) day period, we must answer this question in the negative as well. We caution however, that this second answer of "no" is strictly limited to the specific context of determining prevailing-party status under section 3629(B) alone. ...

Duty For Prompt Payment By The Insurer Arises In Part By Statutory Mandate

¶14 Oklahoma places a premium on incentivizing prompt payment of insurance claims. As we have before explained:

> The statutory duty imposed upon the insurer to accept or reject the claim within ninety [now, sixty] days of the receipt of the proof of loss recognizes that 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....

Lewis v. Farmers Ins. Co., 1983 OK 100, ¶6, 681 P.2d 67, 69; see also Christian v. Am. Home Assurance Co., 1977 OK 141, ¶¶ 20-21, 577 P.2d 899, 903 ("Our Insurance Code requires insurance companies to make *immediate* payment of claims.... This statutory duty imposed upon insurance companies to pay claims *immediately*, recognizes a substantial part of the right purchased by an insured is the right to receive the policy benefits promptly.") (emphasis added).

Time Frame For Judging Insurer's Bad Faith Actions Is The Window Of Time In Making Decision to Pay or Deny

¶15 These same rationales are reflected in our state's adoption of the Unfair Claims Settlement Practices Act (UCSPA), which mirrors section 3629(B) by requiring insurers to either pay or deny a claim within sixty days of receiving a proof of loss. *See* 36 O.S. Supp. 2018 § 1250.7(A)...Indeed, we may presume the Legislature's 2018 amendment to section 3629(B) - narrowing its time limit from ninety to sixty days - was done in furtherance of ensuring uniformity with the UCSPA's sixty-day mandate. Relatedly, **in the bad-faith context** we have clarified that the time frame for judging the reasonableness of an insurer's actions is that initial window in which the insurer makes the decision to pay or deny the claim. *Buzzard v. Farmers Ins. Co.,* 1991 OK 127, ¶14, 824 P.2d 1105, 1109 ("[A] claim must be paid promptly unless the insurer has a reasonable belief that the claim is legally or factually insufficient.... The knowledge and belief of the insurer during the time period the

claim is being reviewed is the focus of a bad-faith claim.")

3. *Hammond v. Lyndon Southern Insurance Company and Jupiter Managing General Agency, Inc.,* 2020 W.L. 4820720, __ F.Supp. __, (W.D. Okla. August 19, 2020) (Auto Collision and Comprehensive Coverage):

The Insurer Must Conduct A Reasonably Appropriate Investigation, Not The Insured.

[W]hen presented with a claim by its insured, an insurer 'must conduct an investigation reasonably appropriate under the circumstances' and 'the claim must be paid promptly unless the insurer has a reasonable belief that the claim is legally or factually insufficient.' *Newport*, 11 P.3d @ 195 (quoting *Manis v. Hartford Fire Ins. Co.*, 681 P.2d 760, 762 (Okla. 1984)); *See Buzzard v. Farmers Ins. Co.,* 824 P.2d 1105, 1109 (Okla. 1991); *See also Bannister v. State Farm Mut. Ins. Co.*, 692 F.3d 1117, 1128 (10th Cir. 2012). *Hammond* @ *5.

The Insurer Must Promptly Investigate And Pay.

An insurer's duty "to timely and properly investigate an insurance claim is intrinsic to an insurer's contractual duty to timely pay a valid claim." *Brown*, 157 P.3d @ 122 (emphasis omitted). *Hammond* @ *5.

Conflicting Evidence Of Reasonableness Is Always For The Jury.

"If there is conflicting evidence from which different inferences may be drawn regarding the reasonableness of an insurer's conduct, then what is reasonable is always a question to be determined by the trier of fact by a consideration of the circumstances in each case." *Newport*, 11 P.3d @ 195; *accord Badillo*, 121 P.3d @ 1093.

...

Plaintiff has presented sufficient facts from which reasonable jurors could find that Defendants did not conduct a timely investigation or take appropriate actions under the circumstances and, instead, unreasonably denied Plaintiff's insurance claim based solely on her alleged failure to provide proof that the loss occurred during the policy period. The reasonableness of Defendant's conduct to ensure that Plaintiff received the benefits of her insurance policy is reasonably subject to different conclusions and must be resolved by a trier of fact. *Hammond* @ *5.

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