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Gary L. Graham
Partner, Garlington, Lohn & Robinson

Bradley J. Luck
Associate, Garlington, Lohn & Robinson

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THE CONTINUING DEVELOPMENT OF THE TORT OF BAD FAITH IN MONTANA

Gary L. Graham* and Bradley J. Luck**

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I. INTRODUCTION

From relative obscurity as a simple phrase defining conduct, "bad faith" has rocketed into prominence as an often utilized and more frequently threatened tort theory of recovery. The "fleshing out" process of the new tort is in its infancy. The plethora of factual circumstances in which application of the doctrine is sought is indicative of the common appeal of the remedy and uncertainty about its scope.1

* B.S., Montana State College; J.D., University of Montana, 1969. Mr. Graham is a partner in the firm of Garlington, Lohn & Robinson in Missoula, Montana.

** B.A., University of Montana; J.D., University of Montana, 1977. Mr. Luck is an associate in the firm of Garlington, Lohn & Robinson in Missoula, Montana.

1. For an excellent discussion of the early history of the bad faith tort in Montana, see Harman, An Insurer's Liability for the Tort of Bad Faith, 42 Mont. L. Rev. 67 (1981).
There are essentially four different contexts in which the tort theory of bad faith is presently being urged: first party liability, first party benefit, third party, and non-insurance actions. Although the terminology and elements are essentially the same in each context, each involves its own special considerations in application.

First party liability actions involve the relationship of an insured and an insurer arising out of a liability insurance policy. These usually involve assertions of failure to settle within policy limits, failure to defend, failure to investigate, or failure to accomplish some other duty specifically expressed by the policy or required by statute. First party benefit actions involve suits directly against an insurer for benefits claimed to be due under an insurance contract. Most commonly, these are simply suits for damages arising from either failure to pay or wrongful termination of health, disability, life, and other insurance benefits.

The remaining application in a liability insurance context is the most recent and clearly most controversial. It involves a third party action against an insurer which may be prosecuted in addition to the party's tort action against the insured. Finally, there are "bad faith" actions in other contexts which, although slow in their initial development, have the potential of becoming as significant as the insurance suits.

In recent years, societal demands for relief from "bad faith" activities by both insurance and non-insurance entities have combined with legislative and judicial activities making such relief available. This coalescence of demand and availability of remedy will undoubtedly initiate a burst of activities to define the parameters of the remedy. As a consequence, much of the speculation necessarily involved in the prognostication of the future of the "bad faith" action will be rapidly eliminated.

This article is inspired primarily by a concern over the ques-

Some duplication of information from that article has been necessary to provide the proper context for the present discussion.

2. First party liability actions most frequently involve the failure of an insurer to perform the obligations it has assumed under an automobile liability policy. Problems may also arise, however, under other types of liability policies.

3. This situation differs from first party liability and third party direct actions because it involves only the insured and the insurer.

4. These unique actions arise from situations where liability insurance is in force protecting the insured against tort liability. The injured party not only relies on the insured's right to indemnification under the policy, but can also proceed directly against the insurance company for certain violations of statutory law.

5. Bad faith principles have been applied in Montana to cases involving employment contracts, workers' compensation, and attorney's fees.
tions presented, but unanswered, by the Montana Supreme Court's recent decision in Klaudt v. Flink. These difficult problems, involving both substantive and procedural matters, are now being faced on an increasingly frequent basis by counsel for claimants, insureds, and insurers, and by the insurance personnel who make critical decisions in these areas daily.

II. POLICY BACKGROUND

Insurance policies, which provide the basic relationship upon which the "good faith" obligation is formed, have (at least in recent years) almost universally been deemed contracts of adhesion. As a consequence, courts have almost always construed contract provisions that could be deemed ambiguous in favor of the insured and against the insurer. In good part, this approach to interpretation of insurance policies stems from the unequal bargaining position inherent in mass-produced and mass-marketed insurance policies. Legislative awareness of possible inequities in the insurer-insured relationship has led over the years to supervision of the insurance industry as a quasi-public entity. The attempt to minimize the perceived inequities in bargaining positions culminated in Montana in the 1977 adoption of section 33-18-201 of the Montana Code Annotated, prohibiting unfair claim settlement practices. That section imposes duties and responsibilities upon insurance companies in addition to the strict language of the insurance contract.

10. MONT. CODE ANN. § 33-18-201 (1983). Section 33-18-201 is commonly and inaccurately referred to as the "Unfair Trade Practices Act." It is actually one of various statutes making up chapter 18 of title 33, which chapter is entitled "Unfair Trade Practices." Section 33-18-201 itself has no specific title other than the descriptive heading, "Unfair claim settlement practices prohibited." In construing the statute in Klaudt v. Flink, __ Mont. ___, 658 P.2d 1065, 1066, the court somewhat ambiguously referred to it as being part of the "Unfair Trade Practices Section of the Montana Insurance Code." Care should be taken not to confuse § 33-18-201 with the Montana Unfair Trade Practices and Consumer Protection Act of 1973, which is codified at MONT. CODE ANN. §§ 30-14-101 to -604 (1983).
11. MONT. CODE ANN. § 33-18-201 (1983) provides in its entirety:

Unfair claim settlement practices prohibited. No person may, with such frequency as to indicate a general business practice, do any of the following:
(1) misrepresent pertinent facts or insurance policy provisions relating to coverages at issue;
(2) fail to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
One of the prime factors behind expansions of the insurer's obligations is the need to align the expectations of the insured when he purchases the policy with the ultimate result obtained when a claim is made under that policy. An individual purchases an insurance policy with the expectations that the insurer will indemnify him against losses within the coverage limitations of the policy. The insured seeks to purchase protection and security. This expectation is perhaps justified, if not entirely motivated, by insurers' advertisements promising security and freedom from worry. 12

Frequently, economic duress has been the chief bargaining tool of insurers. Disputes between insureds and insurers typically result from threatened or actual financial losses by insureds. Failure to pay proper claims has an adverse social effect. Conversely, payment of all claims without regard to the appropriateness of the claim has adverse effects because of the extreme price society would have to pay. The proper balance is difficult to find and maintain. The legislature has taken away much of the insurer's

(3) fail to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
(4) refuse to pay claims without conducting a reasonable investigation based upon all available information;
(5) fail to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
(6) neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
(7) compel insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;
(8) attempt to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
(9) attempt to settle claims on the basis of an application which was altered without notice to or knowledge or consent of the insured;
(10) make claims payments to insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments are being made;
(11) make known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
(12) delay the investigation or payment of claims by requiring an insured, claimant, or physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
(13) fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or
(14) fail to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

ability to take advantage of its insureds by economic duress. The courts, by developing the new bad faith tort, have as a practical matter given the insured the ability to use economic duress as a bargaining tool.

III. FIRST PARTY LIABILITY ACTIONS

A. Early Federal Decisions

The first firm steps toward the adoption of a separate bad faith cause of action in Montana occurred in 1962 in Jessen v. O’Daniel, 13 a federal district court case. Judge Jameson provided the groundwork. Jessen involved a claim for failure to settle a liability claim within policy limits. Judge Jameson’s threshold task was to recognize the company’s obligation to exercise ordinary care and diligence in several respects, and to delineate the parameters of that responsibility. 14 After examining each of the specific acts alleged, Judge Jameson detailed several rules of law which, to this day, remain the primary considerations in Montana first party liability situations. The mere fact that an insurer is unsuccessful in its defense of the insured at trial is insufficient to show that the defense was not made in good faith. Error in judgment alone does not provide a sufficient basis for holding an insurer liable in excess of its express policy limits. 15 Dwarfing those two rules, however, was one which has been a harbinger of the developments in this area: “the insurer must give the interests of its insured equal consideration with its own interests and must in all respects deal fairly with the insured.” 16

As a prelude to the determination of what constituted bad faith, Judge Jameson faced the decision that had troubled other courts: whether to apply a traditional negligence analysis or, instead, to adopt the relatively new concept of recovery for breach of a fiduciary duty to act in good faith. In this respect Judge Jameson’s dilemma was similar to that faced by a California appellate court in Brown v. Guarantee Insurance Co. 17 a few years earlier. In

14. Judge Jameson found that the insurer was obliged to exercise reasonable care in (1) investigating and interviewing witnesses; (2) giving due consideration to applicable law; (3) adequately preparing for trial; (4) appraising and evaluating for settlement; and (5) negotiating settlement where a fair appraisal of the case so required. Jessen, 210 F. Supp. at 319.
15. Id. at 325.
16. Id. at 326.
Brown the court analogized the relationship of insured and insurer to that of principal and agent or beneficiary and trustee, and found that any liability on the insurer's part for failure to settle within policy limits had to be based on bad faith rather than mere negligence. 18 Although the court treated the insured's action as one arising out of tort rather than contract, it looked to the insurance contract to gauge the extent of the insurer's duty. Because a policy expressly limits indemnification, it would be "a harsh measure to hold the insurer liable for amounts often far in excess of the agreed limit." 19 The court therefore found substantial culpability to be a prerequisite for recovery.

The analysis by Judge Jameson in Jessen seems to have followed the same reasoning. The essential question—whether an insurer's only obligation is to act in good faith or whether it is additionally required to exercise due care—was duly posed. The court's conclusion clearly adopted, at least for the purposes of that case, the bad faith theory of recovery. It is obvious from the way the court reviewed the two theories that the negligence test would constitute a stricter scrutiny of an insurer's conduct than the bad faith test. 20 Since the insurer was found to have exercised bad faith in relation to its insured, there was no need to examine further the applicability of negligence.

In Jessen the court also established the factors to be considered in a "failure to settle" bad faith case. They are:

1. whether, by reason of the severity of the plaintiff's injuries, any verdict is likely to be greatly in excess of the policy limits; (2) whether the facts in the case indicate that a defendant's verdict on the issue of liability is doubtful; (3) whether the company has given due regard to the recommendations of its trial counsel; (4) whether the insured has been informed of all settlement demands and offers; (5) whether the insured has demanded that the insurer settle within policy limits; (6) whether the company has given due consideration to any offer of contribution made by the insured. 21

It is noteworthy that the court did not attempt to articulate a precise definition of bad faith but rather observed that each case must be decided on its own facts. Judge Jameson also pointed out that each of the six factors must be considered in determining whether the company has exercised good faith and that no single factor is decisive. Jessen thus provided an early example of bad

18. Id. at 685, 319 P.2d at 74.
19. Id.
21. Id. at 326-29 (footnotes omitted).
faith as an independent tort in Montana without clearly articulating the bounds of the new concept.

Judge Jameson was also the author of the second excursion into bad faith in Montana. *Fetter Livestock Co. v. National Farmers Union Property & Casualty Co.*,22 decided in 1966, also involved an alleged breach of duty to settle within policy limits. Again the insured alleged negligence and bad faith. The court applied the *Jessen* rules and made specific reference to the language of the Ninth Circuit in its affirmation of the *Jessen* decision.23 The Ninth Circuit had clearly stated that it is the breach of the fiduciary duty of the insurance company to look after the interests of the insured as well as its own that gives rise to a bad faith action.24

One interesting feature of *Fetter* is that the opinion referred to negligence and bad faith almost interchangeably. The court spoke of "negligently and in bad faith"25 and "negligence or bad faith,"26 and asked whether the insurer "breached its fiduciary duty to its insured and was guilty of bad faith."27 Judge Jameson concluded that under the facts the plaintiff failed to establish negligence or bad faith in the insurer's handling of the defense, including its failure to pay the settlement demand.

B. Montana Cases

In *Fowler v. State Farm Mutual Automobile Insurance Co.*,28 a 1969 case, the Montana Supreme Court had the opportunity to rule directly on the question of the insurer's liability for failure to accept a settlement offer within its policy limits.29 The Montana court adopted the reasoning of *Jessen* and *Fetter*, particularly noting the insurer's fiduciary duty to look after the interests of the insured as well as its own.

Since the *Fowler* complaint was framed in terms of negligence and bad faith, both issues were examined. Applying the six-factor

23. *Id.* at 10.
26. *Id.* at 14.
27. *Id.* at 10-11.
29. State Farm had $10,000 policy limits but offered only $2500 on behalf of the insured. Claimant demanded $7500; unable to settle, claimant proceeded to trial and was awarded slightly more than $20,000. State Farm paid about $10,000 and the insured settled the remaining portion of the judgment for $4000. In the suit alleging negligence and bad faith, the insured obtained reimbursement of the $4000 plus attorney's fees from State Farm.
Jessen test, the court ultimately concluded that there was a lack of proof of any bad faith or even anything amounting to negligence sufficient to show a lack of good faith. Again, negligence seemed to be treated as an appropriate theory of recovery, but with secondary status to the theory of bad faith arising from breach of the insurer's fiduciary duty.

The 1973 decision in Thompson v. State Farm Mutual Automobile Insurance Co. involved a claim of bad faith in the insurer's handling of the insured's defense. The unsuccessful defense resulted in a judgment in excess of policy limits. The action against State Farm also involved a claim for failure to settle within policy limits.

The case is particularly significant because of its apparently approving reference to the definition of bad faith in the trial court's instructions—a rare attempt at a succinct definition of bad faith in the reported Montana cases. The trial court instructed the jury that bad faith was "a willful failure to respond to plain and well-understood obligation." The requirement of willfulness echoed the culpability requirement in Brown v. Guarantee Insurance Co. In Thompson, the court reversed a judgment in favor of the insured because of lack of proof of bad faith or negligence amounting to bad faith. The court did not discuss further or attempt to quantify the amount or type of negligence that would have amounted to bad faith.

The Thompson court, in applying the six-factor Jessen test, noted that in reviewing the conduct of the insurer it is inappropriate to utilize "20-20 hindsight vision." The conduct under scrutiny had to be considered in light of the circumstances existing at the time. A microscopic examination, years after the fact, made with the luxury of actually knowing the outcome of the original proceeding was not appropriate. Such a rule limiting the application of hindsight is consistent with the purposes of the bad faith theory. It must be remembered that if bad faith exists in a given situation it arose upon the occurrence of the acts in question; bad faith does not arise at some later date as a result of an unsuccess-

31. There was some uncertainty under the facts in Thompson as to whether a demand within policy limits was made, and whether the insurer kept the insured informed of all offers and demands. In any event, the court found that four of the six Jessen factors were not implicated, so that evidence of bad faith was lacking. Thompson, 161 Mont. at 217-19, 505 P.2d at 428-30.
32. Id. at 219, 505 P.2d at 430.
33. See supra text accompanying note 19.
34. Thompson, 161 Mont. at 217, 505 P.2d at 429.
ful day in court.

Thompson collaterally involved another issue which to date has not been specifically addressed by the Montana Supreme Court. The jury, in addition to awarding general damages for bad faith, also awarded $750 to the insured for mental pain and suffering. Because the judgment was reversed on the bad faith issue, it was unnecessary to decide whether mental pain and suffering constitute a valid element of damages in a bad faith case.

Lipinski v. Title Insurance Co., a 1982 case, involved both first party liability and first party benefit claims. Lipinski claimed that the title company not only failed to determine and disclose easements on the property he was purchasing, but also failed to provide a defense for him in two lawsuits arising from those undisclosed rights. The first party liability claim arose in the context of the title company's assertion that punitive damages should not have been awarded for its failure to defend Lipinski.

The trial court had concluded that the title company acted in bad faith in refusing to defend Lipinski. The supreme court left no room for doubt as to whether an independent tort of bad faith existed. It stated: "Should there be any doubt, we now expressly hold that insurance companies have a duty to act in good faith with their insureds, and that this duty exists independent of the insurance contract and independent of statute." Although the actual damages awarded were based on breach of contract, the court found that they could as easily have been found to flow from the "prima facie tort of bad faith," thus supporting an award of punitive damages.

In summary, bad faith resulting from a breach of the fiduciary duty owed by an insurer to its insured is the preferred form of recovery in first party liability actions. Negligence remains a factor but is only operative if it is sufficient to amount to bad faith. All actions must be judged in the context of the time and place in which they occurred. Willful or culpable conduct appears to be a prerequisite. Error in judgment is not sufficient to establish bad faith. The fact that the underlying suit results in a judgment in excess of policy limits does not by itself establish bad faith. The right to recover when there is a question of failure to settle within policy limits is conditioned upon passing the six-factor test established in Jessen. Damages consist of the amount of the excess judgment, attorney's fees, and, in the appropriate case, punitive

35. __ Mont. __, 655 P.2d 970 (1982).
36. __, 655 P.2d at 977.
37. __.
damages. The question of whether, in this context, recovery is allowed for mental pain and suffering, has not been answered.

IV. FIRST PARTY BENEFIT ACTIONS

A. Initial Development

The second area of bad faith—first party benefit actions—Involves attempts by insureds to recover benefits to which they are entitled under their insurance policy. In such situations, plaintiffs have traditionally sought recovery of withheld benefits by bringing a breach of contract action. The exclusivity of that theory of recovery began to crumble in 1967 with the Montana Supreme Court's decision in State ex rel. Larson v. District Court. 38

The action was based on a credit disability insurance policy issued to the purchaser of a used car. In addition to seeking benefits due under the contract, the insured also sought exemplary damages based on the insurer's allegedly fraudulent acts. The insurer, relying on well-established precedent, claimed that such damages were improper in a simple contract action. The court, noting that the insured had also asserted a violation of insurance laws, upheld his right to proceed with his punitive damages claim. 39

The situation arose again in Helton v. Reserve Life Insurance Co., 40 a federal district court case. The insurer had moved to strike claims for punitive damages and emotional distress arising from the insurer's failure to pay benefits promptly. Relying on Larson, the court refused to strike the punitive damage claim. The court dismissed the emotional distress claim, however, in essence predicting that the Montana Supreme Court would not have found liability for emotional distress caused by nonviolent conduct where there was no fear for personal safety. Although the conduct of the insurer was alleged to be "bad," the court characterized it as amounting to no more than a deliberate stalling and an ultimate failure to pay. It was not the "extreme misconduct" required for

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38. 149 Mont. 131, 423 P.2d 598 (1967).
39. After termination of disability payments, the insured sued for breach of the contractual obligation to pay benefits, also alleging that this breach violated Montana law in a malicious, oppressive, and fraudulent manner. The insurer, relying upon Westfall v. Motors Ins. Corp., 140 Mont. 564, 374 P.2d 96 (1962), argued that punitive damages were not proper in a contract action. The court distinguished Westfall on the basis that the insured there had not alleged a statutory violation. In Larson, the insured alleged a breach of Mont. Rev. Codes Ann. § 40-4011 (1947) (requiring indemnification immediately upon receipt of proof of loss).
recovery.\textsuperscript{41}

In 1979, the Montana Supreme Court directly discussed bad faith in a first party benefit case. First Security Bank \textit{v. Goddard}\textsuperscript{42} arose from a dispute over liability under a policy of credit disability insurance. As in \textit{Larson}, the court noted that a cause of action may sound in tort although it arises out of a breach of contract.\textsuperscript{43} This occurs where the breach of contract also breaches a duty owed independently of the contract.\textsuperscript{44} The court found that the insurer not only had the contractual duty to make payment of valid claims, but also had a statutory duty to do so.\textsuperscript{45} A breach of statutory duty gave rise to tort liability and allowed, as a measure of damages, the tort compensation standard. In dicta, the court noted that “the insurer’s duty of good faith and fair dealing with its insureds in the payment of claims has statutory blessing and authority.”\textsuperscript{46} This brief mention of good faith and fair dealing signaled the direction of future cases relating to first party benefits in Montana. Interestingly, this initial—and rather indirect—mention of good faith in a first party benefit context came more than a decade after the initial adoption of bad faith principles in a first party liability action.\textsuperscript{47}

B. Recent Cases

While most of the cases involving first party liability bad faith claims arose before the 1980’s, the first party benefit bad faith action has developed in Montana in the last few years. The first of these cases was \textit{Weber v. Blue Cross}.\textsuperscript{48} The \textit{Weber} majority held that health service corporations, including Blue Cross, are not subject to the Montana Insurance Code.\textsuperscript{49} Because the trial court had erroneously given instructions with respect to the Insurance Code,  

\textsuperscript{41} Id. at 1323.
\textsuperscript{42} 181 Mont. 407, 593 P.2d 1040 (1979).
\textsuperscript{43} Id. at 419, 593 P.2d at 1047.
\textsuperscript{44} Id.
\textsuperscript{45} Id. The insurer’s “independent” duty arose from \textsc{Mont. Code Ann.} § 33-21-105 (1983), which requires that “[a]ll claims shall be settled as soon as possible and in accordance with the terms of the insurance contract.”
\textsuperscript{46} Goddard, 181 Mont. at 420, 593 P.2d at 1047.
\textsuperscript{47} See supra text accompanying notes 28-32. Goddard was decided after the adoption of § 33-18-201, but that statute was not mentioned, presumably because the suit arose before the statute’s effective date. For further discussion of Goddard, see Harman \textit{supra} note 1, at 85-89.
\textsuperscript{49} \textsc{Mont. Code Ann.} title 33 constitutes the Montana Insurance Code [hereinafter referred to as Insurance Code].
a judgment for plaintiff was reversed. The supreme court, however, affirmed the trial court's denial of defendant's motion for a directed verdict on a separate tort claim of bad faith, and approved submitting that issue to the jury. Blue Cross was thus found to have an obligation to act in good faith with its members.

The rationale for imposing this duty of good faith was almost precisely the same as that supporting the obligation of an insurance company to deal in good faith. Blue Cross had a superior bargaining position; its applicants had no voice in preparing their contracts; and insured members were vulnerable to oppressive tactics when filing a claim.

Following closely behind Weber was Lipinski v. Title Insurance Co. The bad faith discussion related solely to breach of the duty to defend a first party liability claim. The court, however, in the first party benefit context, did find that a title company owes its clients a duty of reasonable care in conducting a title search. It concluded that a title policy would cover the damages resulting from the negligent failure to note a title defect. The award of damages, based on the cost of removing the defect, was affirmed to the extent of the policy limits.

Harris v. American General Life Insurance Co. carried the concept of bad faith even further. American General had issued an insurance policy under which Harris, the insured's father, was beneficiary. There was a basic $10,000 benefit with a $10,000 accidental benefit rider. The accidental death benefit was not payable if death resulted from suicide, voluntary or involuntary asphyxiation by inhalation of gas, or taking of poison. The insured died under questionable circumstances. The insurance company sent the plaintiff a check for the basic benefits with a restrictive endorsement constituting a full release if endorsed and negotiated. The restrictive endorsement read: "Accepted in full and final settlement of all claims against American General Life Insurance Company on Policy B 697465."
insurance company initially refused to pay the accidental death benefit because of the circumstances surrounding the insured’s death. Plaintiff refused to endorse the check and demanded unconditional payment of the face value of the basic policy proceeds. Shortly after plaintiff filed suit, the company tendered a check for the basic benefits with no restrictions.

Plaintiff proceeded to trial seeking the accidental death benefits and punitive damages for bad faith. The jury awarded $30,000 in punitive damages because the insurance company had acted in bad faith. The jury, however, refused to award the accidental death benefits. In other words, the jury found that the insurance company’s decision not to pay accidental death benefits was correct, but that the way in which it handled the matter deserved punishment.

The Supreme Court affirmed, holding that the company’s violation of section 33-18-201 of the Montana Code Annotated constituted a statutory violation sufficient to support a punitive damages award as in Larson and Goddard. The import of that conclusion is substantial. First, the court directly applied Section 33-18-201 to first party claims. Second, in what appears to be a retreat from the Lipinski "holding, the court seemed to require a violation of the Insurance Code to sustain punitive damages.

The unfair claim settlement practices section requires a frequency of unfair practices sufficient to indicate a general business practice. Apparently the court found that condition satisfied by the testimony of the manager of life and disability claims that other claims were handled in a similar fashion.

Although the jury did not award accidental death benefits, the supreme court found that actual damages supporting the punitive damages award existed by virtue of a loss of approximately three months interest, a shortage in the premium refund of $14.11, and attorney’s fees. This case followed the trend, clearly apparent in Lauman v. Lee and Miller v. Fox, toward virtual elimination of

658 P.2d at 1090.
57. Id. at —, 628 P.2d at 1091.
58. Mont. Code Ann. § 33-18-201 (1983). Defendant was found to have violated subs. (13), under which a person may not “fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage. . . .”
59. See supra text accompanying notes 38-47.
60. In Lipinski, — Mont. at —, 655 P.2d at 977, the independent tort of bad faith was the basis upon which punitive damages were assessed.
63. — Mont. —, 658 P.2d at 1092.
the actual damages requirement.

The theory under which the Harris majority allowed recovery of punitive damages was not without substantial dispute. Justice Morrison did not agree that there was a violation of the Insurance Code as a matter of law. Instead, he reminded the majority that it was not necessary to find a violation of the Insurance Code to support an award of punitive damages. According to Justice Morrison, the claim was grounded in the tort of bad faith and the jury was consequently entitled to award punitive damages if it found that the insurer's conduct was sufficiently culpable to satisfy the requirements of oppression and malice. Justice Shea agreed that the verdict should be affirmed on the basis that the insurance company did not act in good faith. He noted that the insurance company had a clear duty to settle immediately the part of the claim that was undisputed, and that a jury could have concluded that the failure immediately to settle was in bad faith. Justice Weber, in dissent, and Justice Shea in his concurrence agreed that section 33-18-201 did not give rise to a private action in tort.

The most recent decision in the first party benefit context, St. Paul Fire & Marine Insurance Co. v. Cumiskey, was a declaratory judgment action brought by an insurer. The counterclaim by the insured, based on both statutory and common law duties to settle insurance claims in good faith, was quickly disposed of by the court. The statutory claim was deficient because the insured did not plead or present any evidence that St. Paul had failed to settle claims with such frequency as to indicate a general business practice.

The primary support for the common law counterclaim was that the filing of the declaratory judgment action was in bad faith since the claim should have been paid. The lower court entered a directed verdict in favor of St. Paul and the supreme court affirmed. It held that in a proper case an insurer may use a declaratory judgment action in order to obtain a determination of the validity, continuance, or coverage of the insurance policy, a

64. 174 Mont. 504, 571 P.2d 804 (1977).
65. Harris, ___ Mont. at ___, 658 P.2d at 1094 (Morrison, J., concurring).
66. Id.
67. Id. at ___, 658 P.2d at 1094-95 (Shea, J., concurring).
68. Id. at ___, 658 P.2d at 1094 (Weber, J., concurring).
70. The dispute involved a fire insurance policy. The insurer contested the claim on the basis that the fire had been intentionally started and therefore was not within the coverage of the policy.
71. Cumiskey, ___ Mont. at ___, 665 P.2d at 226.
determination of the extent of liability, or a determination of the insurer's duty under the policy.\(^{72}\) The appropriate use of such a remedy does not necessarily constitute bad faith.

The general rules that can be derived from the first party benefit cases are somewhat less specific than those from the first party liability cases. Certainly it can be said that a common law tort action in bad faith is recognized and is separate from the traditional contract action. A majority of the Montana Supreme Court has also found a statutory bad faith action arising out of violation of section 33-18-201 of the Insurance Code.\(^{73}\) In such situations, a court may award the amount of benefits withheld, attorney's fees to collect those benefits, and punitive damages. Recovery for mental pain and suffering and emotional distress has not been specifically approved.

V. THIRD PARTY ACTIONS

A. The California Development

Historically, an injured claimant could proceed directly against the tortfeasor's insurance company only under direct action statutes or under special limited circumstances. The rationale was that the injured claimant was a stranger to the contract of insurance to whom the insurer owed no duty. Only after the injured claimant obtained a judgment and the judgment remained unsatisfied could that "third party" proceed directly against the insurer in the absence of a direct action statute.\(^{74}\)

*Royal Globe Insurance Co. v. Superior Court,\(^{75}\)* a 1979 California case, signaled the beginning of the end of this isolation of the insurer from the third party claimant. *Royal Globe* sent shock waves through the insurance industry and defense bar and prompted plaintiffs' and claimants' counsel in other jurisdictions to attempt to obtain the same direct action result. Prior to *Royal Globe* it had been held fundamental "that the insurer's duty to settle was owed to the insured alone, and that no such duty was owed to the injured party."\(^{76}\) Just three years earlier, the California Supreme Court considered a variety of potential bases upon which a duty might be extended to a third party claimant. It un-

\(^{72}\) *Id.* at ——, 665 P.2d at 227.
\(^{73}\) See supra text accompanying notes 55-62.
\(^{75}\) 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979).
equivocally rejected all of them on the basis that the duty to settle was intended to benefit the insured and not the injured claimant. 77

In Royal Globe, the court abruptly reversed its former position. In essence, the court held that a third party claimant could sue an insurer for violating California's Unfair Trade Practices Act. 78 The key part of the holding was the court's determination that the insurance statutes created a private cause of action in addition to providing for internal regulatory enforcement. 79 Royal Globe strenuously argued that creation of such a private right was not within the legislative intent or contemplation at the time the statute was enacted. The court, however, relied on two earlier decisions in class actions to support its conclusion that a private right of action existed. The court also rejected Royal Globe's argument that, because the insurer's duty runs only to the insured, third party claimants were precluded from relying on the Act for a theory of recovery. The court determined that in listing the types of prohibited conduct the California Legislature intended for the Act to refer to the insurer's conduct toward both claimants and insureds. 81

In allowing this new theory of recovery, the California court placed some limitations on its use. Under Royal Globe, the insurer and the insured may not be sued in the same lawsuit, and the suit against the insurer may not proceed until the liability of the insured is first determined. The purpose for these two rules is threefold: (1) to prevent the prejudicial use of evidence of liability insurance in an action against the insured; (2) to prevent the insured from being prejudiced by discovery initiated by the injured claimant against the insurer in the statutory action; and (3) to assist in determining damages resulting from the insurer's breach by first determining the amount of damages owed by the insured to the

77. Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 553 P.2d 584, 132 Cal. Rptr. 424 (1976). Murphy was distinguished in Royal Globe on the basis that the third party plaintiff in the former case sought to rely on the insurer's contractual duty to its insured, whereas the plaintiff in the latter case relied on a statutory duty owed by the insurer to a third party claimant. See infra notes 78-81 and accompanying text.


79. 23 Cal. 3d at 884, 592 P.2d at 332, 153 Cal. Rptr. at 845.
BAD FAITH

third party.82

Granting the claimant a right to sue an insurer directly constitutes a fundamental change in the nature of the insurer’s obligation. Good faith law previously required the exercise of fair dealings and good faith between the insurer and the insured. The insurer had been found responsible to its insured for the investigation, negotiation, and settlement of a case if appropriate. Royal Globe requires, in obedience to California’s Unfair Trade Practices Act, prompt, fair, and equitable settlement when liability has become reasonably clear. Although the interests of an insured and a third party claimant are not always identical, Royal Globe apparently obliges the insurer to satisfy both.

B. Klaudt v. Flink

Montana, like California, had a long uninterrupted history of denying third party claimants a direct action against insurers. This position shifted dramatically in Klaudt v. Flink.83 The case reached the Montana Supreme Court on an appeal from a judgment dismissing State Farm Mutual as a party defendant. As the court articulated it,

The sole issue presented by this appeal is whether the Montana Unfair Trade Practices section of the Insurance Code, specifically section 33-18-201(6), MCA, gives the plaintiffs a cause of action against a defendant’s insurer which can be prosecuted jointly with an action against the defendant insured?84

The court first recited the traditional rule that the duty to settle was “a fiduciary duty running from the insurer to the insured”85 rather than to any third party claimant. The court refused to accept, however, that the insurance commissioner’s authority under the Insurance Code is the exclusive remedy for unfair trade practices.86 In addition to the commissioner’s power to prevent or

82. Id. at 891-92, 590 P.2d at 336-37, 153 Cal. Rptr. at 849-50.
84. Id. at ----, 658 P.2d at 1066.
85. Id.
86. Under Mont. Code Ann. § 33-18-1004(1) (1983), the commissioner is authorized to issue desist orders to insurers who engage in unfair or deceptive acts. Under § 33-18-1005, anyone who violates a valid cease and desist order is subject to a civil penalty of up to $1000 per day, not to exceed $10,000. In Klaudt, the court pointed to § 33-18-1005(5), which provides: “This section shall not be deemed to affect or prevent the imposition of any penalty provided by this code or by other law for violation of any other provision of this chapter, whether or not any such hearing is called or held or such desist order issued.” Applying the rules of statutory construction set out in Montana Power Co. v. Cremer, 182 Mont. 277, 596 P.2d 483 (1979), the court held that the legislature intended to provide a
punish violations, the court held that a private civil cause of action could be maintained under section 33-18-201. The court found that the legislature intended to impose on insurers an obligation to claimants as well as to insureds. To this extent, the Montana decision paralleled *Royal Globe*. Based on the statute, claimants were found to have a direct private right of action against the tortfeasor’s insurance company.

In addition to adopting the third party direct action, the court provided assistance to claimants in procedural matters relating to the new remedy. Section 33-18-201 of the Montana Code Annotated specifies that the statute is violated when unfair claim settlement practices occur “with such frequency as to indicate a general business practice.” The court noted that this proviso constitutes a limitation on the pursuit of third party actions, but also held that multiple violations of the statute arising in the course of a single claim could be sufficient to establish the requisite business practice frequency.

The most controversial of the procedural rulings in *Klaudt* relates to the timing of the actions. The *Klaudt* majority specifically held that the third party action “may be filed and tried before, concurrent with, or after liability has been determined.” No other court has allowed such a result. The obvious question of the effect of concurrent trials on the traditional prohibition against mention of insurance coverage in liability actions was raised but disposed of summarily. The court simply noted that Rule 411 of the Montana Rules of Evidence prohibits the introduction of evidence of insurance coverage only “where it is offered for the purpose of showing negligence or liability.” Since the issues of bad faith and negligence or liability would be tried separately, the court concluded that the rule would not be violated.

The majority properly realized that many would view the result as being harsh. Justice Morrison, citing potential confusion and prejudice, dissented from the court’s conclusion that the cases could be consolidated and tried before the same jury. He agreed, however, that section 33-18-201 created a private right of action that may be brought at any time so long as it is not consolidated.

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private civil action for breaches of insurers’ obligations. *Klaudt*, __ Mont. at __, 658 P.2d at 1067.

88. __ Mont. at __, 658 P.2d at 1068.
89. *Id.* at __, 658 P.2d at 1067 (emphasis added).
90. *Id.*
92. *Klaudt*, __ Mont. at __, 658 P.2d at 1068.
with the action against the tortfeasor. Justices Weber and Shea, consistent with their opinions in first party cases, disagreed with the majority's conclusion that the statute created a private cause of action. Justice Shea observed:

By interpreting the statutes as permitting third party claims against insurance companies who insure an alleged tortfeasor, we have ignored the plain wording of the Unfair Trade Practices chapter of the Montana Insurance Code. In resorting to the so-called rules or statutory construction to reach this result, the majority has further ignored and tortured the rules of statutory construction. The result is judicial legislation run rampant.

C. Klaudt's Procedural Problems

1. Evidence of Liability Insurance

Although Klaudt represents a major departure from former substantive law, it may well be true that its procedural holdings will create the greater difficulties in practice. The most significant of the procedural matters is the court's determination that the third party action can proceed ahead of, concurrently with, or after the basic tort action. A long line of Montana cases beginning with Vonault v. O'Rourke has recognized the prejudice arising from, and refused to allow, mention of insurance in typical tort actions. D'Hoodge v. McCann stated the general rule:

Under Montana law it is not permissible to convey to the jury in a tort action that a defendant is protected by liability insurance. . . . Ordinarily injection of the fact that defendant is protected by liability insurance into such a case, directly or indirectly, by evidence, argument, or remarks constitutes reversible

93. Id. (Morrison, J., concurring and dissenting).
94. Id. (Weber, J., dissenting).
95. Id. at ——, 658 P.2d at 1071 (Shea, J., dissenting).
96. Id. at ——, 658 P.2d at 1071 (Shea, J., dissenting).
97. Klaudt, Mont. at ——, 658 P.2d at 1067. The court in Klaudt discussed only one of the three reasons given in Royal Globe for not trying the action against the insurer until after the action against the insured has been completed. See supra text accompanying note 82.
98. 97 Mont. 92, 33 P.2d 535 (1934).
The adoption of the Montana Rules of Evidence did not change that rule. The commission comments to Rule 411\textsuperscript{101} state that existing law is generally consistent with the rule.\textsuperscript{102} None of the recognized exceptions to the general rule were present in the circumstances in Klaudt. As recently as 1982, in Sioux v. Powell,\textsuperscript{103} the Montana court affirmed that introduction of evidence of liability insurance is generally not admissible under Rule 411 or under Montana case law.

An analysis of cases considering the issue reveals that the court has regarded the mention of insurance coverage as immaterial, incompetent, and prejudicial.\textsuperscript{104} The mention of insurance is considered prejudicial because it may result in an award of excessive damages or an improper determination of liability. The court has held that mere interjection of the fact that a defendant is protected by liability insurance constitutes reversible error.\textsuperscript{105}

2. Settlement Offers

Another consideration in the wake of the Klaudt decision involves the admission at trial of offers to settle. Rule 408 of the Montana Rules of Evidence\textsuperscript{106} renders compromise offers and evidence of conduct or statements made in compromise negotiations inadmissible. In a third party claim seeking to establish bad faith in failing to settle an action, most of the matters discussed during negotiations, including the precise amounts of the offers and demands, would undoubtedly need to be admitted. To inject the

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\textsuperscript{100} Id. at 359, 443 P.2d at 750 (citations omitted).

\textsuperscript{101} Mont. R. Evid. 411 provides:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

\textsuperscript{102} Mont. R. Evid. 411 commission comments.

\textsuperscript{103} Mont. Evid. 411, 647 P.2d 861 (1982).

\textsuperscript{104} Id.; D’Hoodge v. McCann, 151 Mont. 353, 443 P.2d 747 (1968); Avery v. City of Anaconda, 149 Mont. 495, 428 P.2d 465 (1967); Adams v. Misener, 113 Mont. 559, 131 P.2d 472 (1942); Vonault v. O’Rourke, 97 Mont. 92, 33 P.2d 535 (1934).

\textsuperscript{105} D’Hoodge, 151 Mont. at 359, 443 P.2d at 750.

\textsuperscript{106} Mont. R. Evid. 408 provides in part:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.
amounts of offers and demands and other settlement negotiations into the claimant's action against the tortfeasor-insured would be highly prejudicial, particularly to the tortfeasor-insured.

The only advantage to the injured claimant in trying the bad faith case before or simultaneously with the action against the tortfeasor-insured would be to prevent delay in the third party claim. This advantage is essentially illusory because a fair determination of the damages arising from an unfair insurance practice would likely be closely related to the result against the insured tortfeasor. Perhaps the most significant result of allowing an early hearing on the third party claim is pressure on the insurance company to pay claims regardless of merit.

3. Separate Trials

The relationship between Klaudt and the rules on consolidation and bifurcation of trials is also noteworthy. Rule 42(a) of the Montana Rules of Civil Procedure requires, as a prerequisite to consolidation, that the actions involve common questions of law or fact. Rule 42(b) allows the court in furtherance of convenience or to avoid prejudice to order separate trials of any issues or claims, including third party claims. Neither of these rules was mentioned in Klaudt. That failure is particularly surprising in light of the court's holding in State ex rel. Hereim v. District Court.

Hereim involved an action for damages arising from an automobile collision. As the case developed, Hereim's insurer became involved directly as a third party defendant. Relying on Vonault v. O'Rourke, D'Hoodge v. McCann, and other insurance cases, the court found that the trial court had erred in denying a motion for a separate trial of the third party complaint. The natural result of a suggestion to the jury that the defendant was indemnified against a judgment for damages would be highly prejudicial to his

107. MONT. R. CIV. P. 42(a) provides:
When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

108. MONT. R. CIV. P. 42(b) provides:
The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

110. 97 Mont. 92, 33 P.2d 535 (1934).
111. 151 Mont. 353, 443 P.2d 747 (1968).
rights, especially in a closely balanced case. The court found that such a suggestion could not be avoided where the actions were consolidated.\textsuperscript{112} Separate trials would eliminate the possibility of prejudice.\textsuperscript{113}

4. \textit{Discovery}

Another problem arising from \textit{Klaudt} is the effect on the defense of the insured of discovery accomplished in pursuing the claim against the insurer. Such discovery would normally not be permitted in the ordinary personal injury action.\textsuperscript{114} In an action against the insurer, matters dealing with settlement strategy, case evaluation, work product, and preparation for litigation would presumably be discoverable, at least to some extent. Access to and admission of this evidence could substantially prejudice the insured tortfeasor, since it might lead to damages in excess of his policy limits.

Traditionally, trial preparation materials and matters peculiarly within the attorney's work product have not been discoverable.\textsuperscript{115} To determine whether the insurance carrier has exercised good faith, however, the reasons for the decisions made with respect to the insured and the third party claimant become relevant. Discovery of those reasons entails discovery of the insurance company's documents and files relating to a particular claim. The thoughts and evaluations of the person handling the claim on behalf of the insurance company could thus become available to plaintiff's counsel, and could be used in the action against the tortfeasor. The effect of this information on the personal liability of the tortfeasor could be devastating. If there were no such thing as insurance policy limits, this simultaneous discovery might be

\begin{footnotesize}
\begin{enumerate}
\item[112.] \textit{Hereim}, 154 Mont. at 115-16, 460 P.2d at 757.
\item[113.] The supreme court recently denied an application for a writ of supervisory control in a case where the district court denied a motion for separate trials of the basic tort and bad faith actions. \textit{State ex rel. Shalz v. District Court}, No. 83-518 (Mont. Jan. 23, 1984) (order denying writ of supervisory control). No satisfactory rule can be derived from that order because of the fragmented opinions. Chief Justice Haswell and Justices Harrison and Sheehy agreed that the question of separate trials is a matter of discretion for the trial court. Justices Morrison, Weber, and Gulbrandson dissented on the basis that consolidating the two actions works irreparable prejudice to the litigants. Justice Shea restated his disagreement with the majority holding in \textit{Klaudt}, but concurred in the denial of the writ because he thought any change in the \textit{Klaudt} consolidation rules should be based on the full record of a trial where consolidation has occurred.
\item[114.] \textit{Mont. R. Civ. P. 26(b)(2)} does permit an injured party to discover "the existence and contents of any insurance agreement" that may be used to satisfy a judgment, but it does not authorize the party to discover materials generated by the insurer in assessing a claim or preparing a defense.
\item[115.] \textit{Mont. R. Civ. P. 26(b)(3)}.
\end{enumerate}
\end{footnotesize}
justifiable. If, however, one is to give the insured tortfeasor equal consideration with the injured claimant, some restrictions must be placed on discovery and use of this confidential information.

5. Conflicts of Interest

Clearly counsel representing the tortfeasor-insured will be unable to represent the insurer in the third party claim. The interests of the insured and the insurer under those circumstances would almost inevitably diverge. Also, the attorney representing the insured might be called as a witness in the third party claimant action against the insurer. While claimant’s need to obtain separate counsel to prosecute the action against the insurance company is not as clear, there undoubtedly would be situations where that would be required. Claimant’s attorney is likely to be called as a witness in the third party claim against the insurance company because of his participation in settlement negotiations. Obviously, this duplication would increase the cost of litigation where a bad faith third party claim is asserted.

6. Dependency of Claims

Finally, Klaudt did not discuss the propriety of awaiting the outcome of the claimant’s action against the tortfeasor to assist in the determination of damages in the third party action. Where the statutory action is based on failure to exercise good faith in settlement, anomalous results may occur if trial of the third party action is not deferred until the basic tort action is concluded. A violation of the statute may be found in a case where the claimant subsequently fails to recover against the alleged tortfeasor. The Montana Supreme Court apparently failed to consider that there could be contrary findings in the two actions. It would be a strange result indeed if an insurance company were held liable for not attempting in good faith to settle a claim and another jury subsequently found that the insured was not liable on the tort action by claimant.

D. After Klaudt

Since Klaudt there has been only one Montana decision involving a third party claim. In Richardson v. Safeco Insurance Co.,117 the parties negotiated a settlement of an accident claim and plaintiff signed a release of all claims against the insurer. After re-

ceiving payment, plaintiff brought suit against the insurer and its agent, alleging bad faith in the manner of settlement resulting in emotional and mental distress.

The court held that plaintiff's claim, if any, against the insurer had matured before the release was signed, and that plaintiff's failure to retain the right to sue barred action on the bad faith claim. A different result might have occurred had the document specifically released only the insured from further liability and specifically reserved rights of action against the insurer.

The state of the law in third party actions against an insurer is clearly in an early stage of development. At present, Montana recognizes the right of a third party claimant to proceed against an insurer for violations of those duties specified in section 33-18-201(6). The action by the third party claimant against the insurer can proceed before, concurrently with, or after the action against the tortfeasor. Joint trial of the statutory violation and the personal injury action does not violate Montana law, although it involves discussion of insurance in apparent violation of Rule 411. In order to establish a statutory violation it is necessary to show a general business practice of unfair claim settlement practices. Such a practice can be shown by more than one act within the handling of the same claim. A general release of the insurer from all claims arising from the accident results in the release of all claims, including bad faith claims arising prior to the execution of such release.

VI. BAD FAITH IN OTHER CONTEXTS

A. Employment Cases

Two recent decisions arising out of the same lawsuit have provided the basis for a potential expansion of the tort of bad faith to other contractual relationships. Gates v. Life of Montana Insurance Co.118 (Gates I) involved an oral at will employment contract. Among other claims, plaintiff sought relief for breach of the implied covenant of good faith and fair dealing, the tort of wrongful discharge, and intentional infliction of emotional distress. Gates I involved an appeal from a summary judgment entered for defendant. The court found that there is a covenant of good faith and fair dealing implied in an employment contract, even one "at will."119 It specifically referred to the requirement of good faith in

119. Id. at ___, 638 P.2d at 1067.
insurance contracts and in commercial transactions. The court recognized the necessity of balancing the interests of the employer in controlling his work force with the interests of the employee in job security.

*Gates I* also examined the question of intentional infliction of emotional distress and found that cause of action defective. The court noted that plaintiff had testified she was "rather disturbed" and "kind of in shock." Citing *Helton v. Reserve Life Insurance Co.*, the court held that these allegations were insufficient to entitle claimant to recover. The matter was remanded for a resolution of factual issues in the bad faith action.

Upon remand and jury trial, plaintiff was awarded $1891 in compensatory damages and $50,000 in punitive damages. The trial court entered judgment for plaintiff on the compensatory damages but granted judgment notwithstanding the verdict in favor of defendant on punitive damages.

In *Gates v. Life of Montana Insurance Co.* (*Gates II*), the essential question was whether punitive damages could be awarded for violation of the covenant to deal fairly with an employee. The court found the employer's duty to deal fairly to exist apart from and in addition to any contractual terms agreed upon by the parties. In that respect, the duty of good faith and fair dealing arising in an employment context is similar to that arising from an insurance contract. The court held that, because the duty was imposed by operation of law, its breach has a remedy in tort. The court reinstated the award of punitive damages.

Thus *Gates I* and *Gates II* clearly establish that a duty of good faith and fair dealing can arise as an extra-contractual obligation out of a contractual relationship. The correlative tort action of "bad faith" provides a remedy for violation of that duty.

Another recent case outside the insurance context is significant for its ruling on a venue question in a bad faith action. In *Whalen v. Snell*, an attorney sought to collect an unpaid fee.
The complaint also alleged bad faith on the defendant's part in repudiating his obligation to pay, and sought punitive damages. The attorney's office and the services at issue were performed in Yellowstone County, but defendant resided in Garfield County and claimed it as the proper venue. The Montana Supreme Court acknowledged the general rule that the proper venue is the county where the defendant resides, noting the exceptions for contract actions and tort actions, which may be tried in the county where they were performed or committed. Rather than differentiate between the tort or contract rule the court simply held that the complaint sounded in tort and that the bad faith occurred, if at all, in Yellowstone County, because payment was to be made there. Apparently, any county in which the complained of activity occurred can be an appropriate venue for a bad faith action.

B. Workers' Compensation

Hayes v. Aetna Fire Underwriters established that a claimant has the right to bring an action in district court against an insurer and its adjuster for independent intentional torts committed in the processing of a workers' compensation claim. The court found that such an action did not violate the exclusivity of the statutory workers' compensation remedy because the tortious conduct that gave rise to the action did not arise out of the original employment relationship. This result was noted as controlling in Vigue v. Evans Products Co., where the claim was for intentional torts in the adjustment of the claim or the presence of bad faith. Thus the tort of bad faith has reached an area where remedies have traditionally been limited by statute.

VII. Conclusion

The tort of bad faith is here to stay. The private right of action derived from section 33-18-201 is probably firmly established also. Expansion of the tort of bad faith into other traditionally contractual areas is likely to continue. The implied duties of good faith and fair dealing will continue to spawn variations of tort recovery, at least in situations where parties to a contract have unequal bargaining positions. Private rights of action based on statu-
tory duties may lead to further possibilities of tort recovery, since other legislation designed to regulate industry may be subject to Klaudt-type interpretation.

As the law continues to develop in this area, more precise statements of the elements of bad faith will be articulated. Cases to date have presented somewhat different views as to the elements, depending on the factual setting and the particular basis for the bad faith claim.

Other questions remaining unanswered involve statutes of limitation and assessment of damages. First party actions may include both contract and tort claims. If the contract action controls, limitations could be based on a written insurance contract (or other controlling contract), on an oral contract such as an at will employment contract, or on the implied covenants of good faith and fair dealing. If tort limitations apply, actions would have to commence within three years. In third party actions, the court would presumably be guided by the two-year statute of limitations for a liability created by statute, since third party actions are based on Insurance Code violations.

At this time it is not certain that damages for mental and emotional pain and suffering can be recovered. The cases make it clear that an assessment of punitive damages in a bad faith action is appropriate. The malice traditionally required for recovery of punitive damages can, in bad faith cases, be actual or implied. The Montana Supreme Court has not, however, retreated from long-established principles delineating the purpose and scope of punitive damage awards. The plaintiff is never entitled to punitive damages as a matter of right, without regard to the situation or sufficiency of evidence. Particularized circumstances of intent

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132. The applicable statute, Mont. Code Ann. § 27-2-202 (1983), prescribes periods of eight years for actions on "any contract, obligation, or liability founded upon a written instrument in writing," five years for actions on "a contract, account, or promise not founded on an instrument in writing," and three years for actions on other obligations or liabilities.


135. The supreme court recently adopted an explicit standard for presumed malice: When a person knows or has reason to know of facts which create a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or indifference to that risk, his conduct meets the standard of willful, wanton, and/or reckless to which the law of this State will allow imposition of punitive damages on the basis of presumed malice.


and aggravation must be present before such an award is made.\textsuperscript{137} Such awards are proper only where the conduct at issue is of such a nature as to require additional penalty for warning, deterrent, and punishment.\textsuperscript{138}

Because of the crippling procedural problems, the authors urge that \textit{Klaudt} be modified to allow the trial of the third party action against an insurer to proceed only after trial or settlement of the claimant's action against the tortfeasor.

The emerging bad faith law has as its impetus a realignment of the previous inequalities in bargaining position between insureds or claimants and insurance carriers or employers. Some adjustments in those relationships were undoubtedly needed.

One must keep in mind, however, that recognition and exaltation of an individual's rights to the neglect of public or societal rights can be destructive. Spreading to many the cost of an injury to one may serve a valid public interest. When windfall awards, however, are spread too frequently among members of the public, the utility of the theory diminishes. It must not be forgotten that the public at large as policyholders and premium-payers are also the ultimate judgment debtors. As problems present themselves for solutions in the area of bad faith the courts must remain cognizant of all of these interests and only through a reasonable recognition and balancing will justice obtain.


For a discussion of the need to distinguish between the conduct giving rise to tort liability and the nature of the conduct justifying punitive damages, see Gulf Atlantic Life Ins. Co. v. Barns, 405 So. 2d 916 (Ala. 1981).