LIABILITY FOR ECONOMIC HARM

CHAPTER 3

INTERFERENCE WITH ECONOMIC INTERESTS

§ 20 A. Bad-Faith Performance of First-Party Insurance Contract

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§ 20 A. Bad-Faith Performance of First-Party Insurance Contract

An insurer is subject to tort liability to its insured when:

(1) the insurer's claims processing of a first-party insurance policy lacks a reasonable basis;

(2) the insurer knew of the lack of a reasonable basis or acted in reckless disregard of the lack of a reasonable basis; and

(3) the insurer's deficient performance is a factual cause of harm to the insured and within the insurer's scope of liability.

Comment:

a. History, terminology, scope, and cross-reference. This Section covers "first-party" insurance, which is insurance persons, businesses, or other entities, purchase for their protection from loss—or for the protection of their families. Common examples include health insurance, life insurance, and disability insurance. By contrast with first-party insurance, "third-party" insurance, sometimes called "liability insurance," covers liability risks of the insured that occur when a third party sues or otherwise asserts a claim against the insured for tortiously causing harm.

Frequently, insurance policies are hybrids, containing coverage for first-party losses as well as third-party losses. So, for example, both standard-form automobile policies and homeowners' policies contain coverage for specified losses suffered by the insured as well as liability coverage for certain tort claims by third parties. This Section addresses not just pure first-party policies (such as life-insurance policies), but also the first-party coverages of those hybrid policies. Bad faith arising from the liability aspects of those hybrid policies is covered in the Restatement of the Law, Liability Insurance. See Comment *b*. Insurance is a state-law issue; there is (with only limited exceptions) no federal common law of insurance.

Prior Torts Restatements did not address the liability of first-party insurers that acted in bad faith in performing their obligations contained in an insurance policy, as this tort first emerged in 1973 in the seminal case of Gruenberg v. Aetna Insurance Co., 510 P.2d 1032 (Cal. 1973), after the publication of the first two volumes of the Second Restatement of Torts. Bad faith by liability (third-party) insurers is addressed in Restatement of the Law, Liability Insurance §§ 49 and 50 and incorporated by reference in Comment *b.* As that Restatement observed, "[m]uch of the relevant law governing insurance bad faith has been developed in the first-party insurance context." Id. § 4, Comment *b*. This Section, of course, is based in and draws from, that governing law.

b. Bad-faith performance of third-party insurance contracts. Like their first-party counterparts, liability insurers are subject to tort liability for certain actions (or inactions) in their claims processing. A liability insurer might incur such liability in one of two primary (though nonexclusive) ways. First, a liability insurer might incur tort liability if it breaches its duty to make reasonable settlement decisions. That obligation—to settle liability claims reasonably—is peculiar to liability insurance, requires only unreasonable conduct in the settlement context, and has no counterpart in this Section. For discussion, see Restatement of the Law, Liability Insurance §§ 24 and 27 (explaining that some jurisdictions ground this liability in tort while others rely on contract).

Second, a liability insurer might incur bad-faith tort liability if it fails to perform its contractual obligations without a reasonable basis for its conduct and with knowledge of its duty to perform or in reckless disregard of its obligation to perform. *Those* third-party bad-faith claims, which are very similar to the first-party claims addressed by this Section, are addressed in id. §§ 49 and 50. The provisions in the Liability Insurance Restatement are incorporated by reference in this Restatement.

c. The special nature of insurance contracts. Courts that impose tort obligations on insurers often say that tort liability arises from insurers' breach of the duty of good faith and fair dealing—a duty implied in all contractual agreements. Yet, as many courts also acknowledge, bad-faith tort liability is not ordinarily available for breach of contract. Nevertheless, consistent with this Section, a strong majority of jurisdictions authorizes bad-faith claims in the special context of insurance law. Courts explain this differential treatment by pointing to exceptional aspects of an insuring agreement, which include the following realities: (1) there is a significant disparity in market power between insurers and insureds, and, among other things, this disparity results in contracts of adhesion for all standard-form (and some other) policies; (2) the insurance industry is suffused with public-interest concerns—its extensive regulation reflects the public aspects of insurance; (3) concomitantly with (2), insurance contracts play a critical role in the American economy by transferring and distributing risk—and, in so doing, these contracts facilitate productive economic activity; (4) insureds rely on insurance—and insureds reasonably expect that insurers will perform their coverage obligations promptly when losses occur and when financial compensation is urgently needed; (5) some insureds are economically fragile and vulnerable, particularly after suffering a significant loss; and (6) without liability for insurance bad-faith, there exist inadequate alternative mechanisms to ensure that insurers will promptly and reasonably process claims and pay covered losses.

d. The dual subjective and objective nature of the bad-faith tort. To make out a prima facie case of first-party bad faith, the plaintiff-insured must prove both that there was no reasonable basis for the defendant-insurer's claims processing and that, in its claims-processing conduct, the defendant-insurer knew or acted in reckless disregard of the lack of reasonable basis. Thus, the first element focuses on whether the insurer's challenged conduct was objectively unreasonable. The second element, a subjective one, requires proof that the insurer knew its conduct was unreasonable or acted in reckless disregard of facts or legal authority that revealed the unreasonableness.

Knowledge, a matter exclusively within the ken of the insurer, will often be proved through circumstantial evidence. Since juridical entities cannot themselves have knowledge, knowledge by an insurer's employee or agent satisfies this element of the standard for the bad-faith tort.

This dual standard, although not always precisely articulated in this fashion by courts, reflects the predominant view and parallels the standard adopted in the Restatement of the Law, Liability Insurance § 49, for third-party (liability) insurer bad faith.

In adopting this dual objective–subjective standard, courts have recognized both the policy reasons explained in Comment *c* and the countervailing concerns that insurers should not be pressured by the threat of tort damages to pay unmeritorious claims; nor should insurers be deterred from fully investigating and challenging dubious or questionable claims. Neither insureds nor insurers benefit if insurers pay for claims for which there is no coverage.

A few courts formally have adopted different standards than the one in this Section. On the more stringent side of the continuum, some courts predicate bad faith liability on a showing that the insurer engaged in oppressive, dishonest, or malicious conduct, along with a subjective state of mind requiring ill will, hatred, or revenge. Yet, in operationalizing that standard, courts tend to take a relatively indulgent view of whether the facts satisfy that standard; few insurers, after all, are motivated by hatred or ill will toward a particular insured, even when engaging in egregious claims-processing conduct. On the more lenient side of the continuum, some courts require only that the insurer's actions or decisions were objectively unreasonable. The dual standard adopted in this Section charts a middle course between these two alternatives—one that comports with the majority of courts recognizing the bad-faith tort.

e. The various bases for bad-faith claims processing. Bad faith in claims processing may include: (1) denials of claims for which no reasonable basis exists for the denial; (2) offers of settlement in amounts below the minimum that would be reasonable based on the facts of the claim and the scope of coverage; (3) investigations that take an unreasonably long time, that are unreasonably onerous or demanding, or that are otherwise unreasonable; (4) imposing conditions on insureds during claims processing that are unreasonable or impossible to fulfill; (5) conditioning payment for an uncontested aspect of a claim on the insured agreeing to a global settlement of the claim; (6) misrepresentations about coverage; (7) improper destruction of evidence; or (8) overpaying to accelerate the exhaustion of policy limits when the policy otherwise would fund ongoing obligations. "Claims processing" as used in this Section covers the insurer's

conduct from the time when a claim based on an insurance policy is made through to final resolution of the claim.

f. Intentional or negligent tort. Some courts and commentators have sought to pigeon-hole the insurance bad-faith claim as either an intentional or negligent tort. In the form adopted in this Section, it is neither exclusively one nor the other; it straddles, and contains elements of, both.

The conduct aspect of the bad-faith tort is similar to negligence insofar as it adopts an objective standard based on reasonableness. But the subjective knowledge element cannot be squared with negligence, as an actor can act negligently without any knowledge of, indeed while remaining oblivious to, the risk and without appreciating that the conduct is unreasonable. Accordingly, the tort of insurance bad-faith, recognized here, is not one that sounds neatly in negligence.

On the other hand, nor does it resemble an intentional tort. The objective unreasonableness aspect, for one, is not consistent with intentional torts. The subjective-knowledge element, meanwhile, does have a passing similarity to the intent requirement of intentional torts in that an insurer, aware of an unreasonable position or unreasonable conduct in its claims processing, would likely satisfy the "substantial certainty" prong for intent. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 1(b). But the insurer's recklessness with regard to the unreasonableness of its own conduct, while reflecting a higher degree of culpability than negligence, is not the equivalent of intentionally causing harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 2, Comment *a* (contrasting the serious wrongdoing of recklessness with intentionally causing harm). Courts and commentators should accept this tort for the hybrid that it is rather than laboring to place it into the traditional tort taxonomy.

g. Timing of insurer's knowledge of facts supporting good faith. An insurer who claims a reasonable basis for denying a claim may, in an action under this Section, rely on any facts uncovered during its investigation as a basis for its denial of, or failing to accept, coverage of the insured's claim. In defending itself against a claim of bad faith for denying coverage, an insurer may not rely on facts of which it became aware only after its denial of the claim.

Comment *g* applies only when a claim is denied, in contrast to instances in which an insurer is subject to liability for different claims-handling practices (such as unreasonably delaying payment—or any of the other bases for liability described in Comment *e*). In those latter circumstances (in the absence of a denial), Comment *g* has no effect.

h. Factual cause and scope of liability. An insurer may act in an egregiously culpable manner but not cause any harm to its insured, just as *any* tortfeasor may act in an egregiously culpable manner but, due to fortuity, not inflict injury. In either instance, the same factual cause rules applicable to other torts apply to bad-faith claims—and, pursuant to these rules, an insurer is liable only if its misconduct actually causes harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 26-28. Thus, an insurer who fails reasonably to investigate a claim because of a cynical policy to reduce administrative costs is not liable under this Section if the claim is for an uncovered loss; nor is the insurer liable if the insurer cynically denies a claim for which there is, in fact, a justifiable basis for denial. However, an insurer that engages in dilatory claims investigation or processing may be liable for any harm caused by the delay in payment or for other harm that the deficient claims processing caused. Simply, if the insurer harms the insured, the insurer may be subject to liability under this Section; if the insurer causes no harm to the insured, the insurer is not liable under this Section, no matter how egregious its conduct.

Even if an insurer's outrageous, dilatory, or otherwise unreasonable conduct does not give rise to bad-faith tort liability because it fails to meet the factual cause requirement of paragraph (3), the insurer nevertheless may be liable for negligent or intentional infliction of emotional distress if the requirements for one of those torts are satisfied. See Comment *j*; Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 46 and 47.

Illustration:

1. Lana's home was badly burned under mildly suspicious circumstances. A few months before the fire, County Farm, Lana's insurer, had adopted an internal policy to pursue possible fraud aggressively—and, pursuant to that policy, it conducts a biased and unreasonable investigation that seeks only to find evidence of fraud by Lana. Notwithstanding its myopic focus, County Farm completes its investigation in a timely fashion. In the course of the investigation, County Farm uncovers evidence that creates a genuine issue about the merits of the claim (evidence that could have been found in a proper investigation), although Lana ultimately overcomes County Farm's initial denial of the claim. Pursuant to this Section, County Farm is not liable to Lana for bad faith because its biased investigation did not cause Lana harm; even a reasonable investigation would have led to the same initial insurer decision.

In addition to factual cause, the harm suffered by the insured must be within the insurer's scope of liability. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 29. Sometimes referred to as proximate cause or legal cause, the Liability for Physical and Emotional Harm Restatement employed the new "scope of liability" terminology because it better describes the function of this element of a case and because proximate cause is often used to mean something different from this element. See id. Special Note on Proximate Cause.

Illustration:

2. Alan's home becomes uninhabitable because of storm damage, and he submits a claim for the loss to his insurer, Habitable Home Insurance. Habitable unreasonably delays paying for the costs of repair, even though it knows that there is no basis for its delay. During this time, Alan uses money he had set aside for a vacation in Rio de Janeiro to repair his home. When Habitable still has not paid the claim as the date for his vacation approaches, Alan changes the location for his vacation to a more economical place, St. Louis. While in St. Louis, Alan is the victim of a mugging, during which his luxury watch is stolen. Habitable's delay in paying Alan's claim satisfies the standard for bad faith in paragraphs (1) and (2) and is also a factual cause of the loss of jewelry (per paragraph (3)). But Habitable is not liable for the watch's loss because (also per paragraph (3)) the loss of the watch is not within the scope of Habitable's liability; theft of a watch is, as a matter of law, not among the risks created by bad-faith delays in claims processing.

i. Obligation reasonably to investigate. As Comment *e* makes plain, an insurer's obligation of good faith and fair dealing is not limited to the claims decision it ultimately makes. An insurer must act reasonably in investigating a claim when there are factual or legal matters that must be resolved. An insurer acting reasonably will: engage in a prompt investigation that does not unreasonably delay resolution of the claim; hire independent and unbiased experts when expertise is required to determine relevant facts; and even-handedly seek and give due regard to all of the facts bearing on the coverage issue, claim, and the amount of the loss (although, in so doing, an insurer is entitled to consider the fact that insureds do not have a concomitant obligation of even-handedness in filing and supporting their claims). Beyond that, a reasonable insurer will: respond appropriately when additional material facts are provided after an initial denial of a claim; resolve any legal issues bearing on the legitimacy of the claim without bias favoring itself; and consider

all possible bases for coverage and not truncate inquiry when one basis for coverage is not established if there are other provisions in the policy that might provide coverage.

Insurers engaging in bad-faith investigations are subject to liability for harm caused by the insurer's breach of the duty of good faith and fair dealing, which includes the obligation to act reasonably in claims investigations. See Comment *e*.

Illustration:

3. Laura, who has a homeowner's insurance policy with Jackson Insurance Co., discovers that a window has fallen out of the wall of her living room, and the floor in one part of the living room has given way in her 100-year-old house. Laura hires an investigator who reports that a fungus is responsible for the condition that led to the mishaps and that her home is at risk of imminent collapse. Jackson initially determines that the claim is not covered based on an exclusion for any damage caused by "wet or dry rot." That narrow determination is reasonable, but Jackson, even though aware of the possibility of *other* bases for coverage, denies Laura's claim without investigating or considering whether the damage is covered by an "additional coverage" section of Laura's policy that provides coverage for "an actual collapse" "due to decay"—an action that is unreasonable. Jackson is subject to liability for bad faith based on its failure to investigate whether coverage exists under the additional coverage section of the policy.

j. Other tortious conduct by an insurer. Before the bad-faith tort claim became well recognized, a number of courts permitted insureds to recover extra-contractual damages from insurers based on the tort of intentional infliction of emotional distress. The significance of intentional infliction of emotional distress as a remedy for insurer misconduct has declined with the advent of the insurance bad-faith tort because the hurdles to recovery for intentional infliction are generally more stringent, requiring not only intentional or reckless conduct in interfering with the insured's emotional tranquility, but also extreme and outrageous behavior and a showing that the victim suffers severe emotional harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 46. However, this claim remains available when circumstances warrant, including on those occasions when coverage is fairly debatable, so that denial was not unreasonable, but the insurer engages in extreme and outrageous conduct in investigating the claim.

Besides intentional infliction of emotional distress, an insurer's conduct in its claims processing may constitute another tort, such as defamation or negligent infliction of emotional

distress. For defamation, see Restatement Third, Torts: Defamation and Privacy § __ (forthcoming). For negligent infliction of emotional distress, see Restatement Third, Torts: Liability for Physical and Emotional Harm § 47. If the elements of another tort are established, the insurer is liable for that tort. In other words, the availability of a bad-faith claim does not preempt other torts that the insurer may commit in its claims-processing conduct.

k. Fiduciary duty. An insurer does not have a fiduciary duty to its insured in its processing of first-party insurance claims; the insurer is not required to take the insured's interests as primary over the insurer's. But, nor is the insurer in the opposite position; it cannot prioritize its own interests over the interests of the insured. The insurer must, in other words, act in a way that gives equal weight to its and its insured's often divergent interests. The insurer must act in a way that recognizes the insured's interest in recovering for legitimately covered losses and the insurer's coequal interest in not paying uncovered claims. Or, to put the point in slightly different terms, the insurer must act as a neutral decisionmaker in resolving whether coverage exists and other contested aspects that arise in the processing of the insured's claim. The bad-faith claim recognized in this Section provides fully adequate remedies without the need to resort to the fiduciary-duty obligation. See Restatement Third, Torts: Liability for Economic Harm § 16, Comment *b*.

l. Judge and jury. Both the objective and subjective elements of the bad-faith tort are generally mixed questions of law and fact reserved for the factfinder. There are two exceptions, however. First, when the question that must be assessed is whether the insurer's denial of coverage was reasonable based on the policy or statutory language—and that inquiry turns on the interpretation of specific policy or statutory language—courts must assess whether the insurer acted reasonably as a matter of law. Addressing that limited matter as a legal one is consistent with the rule that interpretation of insurance policy or statutory language is a matter for the court because a legally trained official is better able to make that determination than a lay adjudicator.

Illustrations:

4. Same facts as Illustration 3, involving the falling-down house, except that Laura's home suffers a total collapse. Controlling precedent in the jurisdiction provides that damage due to fungus constitutes "decay." Laura makes a claim for $190,000, the policy limits. Jackson does not respond to her claim for 100 days—and when it finally does respond, it offers her $97,500. In so doing, it provides no reason for the discounted sum,

and it refuses to negotiate with Laura. Whether there was a reasonable basis for Jackson's claims-processing behavior is a matter for the jury.

5. Same facts as Illustration 3, except that there is no "additional coverage" section of the policy so that the issue on whether the insurer had a reasonable basis for denying coverage turns on the interpretation of Laura's insurance policy—and particularly the meaning of the terms "wet or dry rot." That determination is a legal one and consequently one for the court.

Second, in instances in which the plaintiff claims bad faith based only on the insurer's denial of coverage and the facts bearing on whether coverage exists are not in dispute, the question of whether the insurer had a reasonable basis for denying coverage is a legal one for the court.

m. State unfair-insurance-claims-practices provisions. Virtually all states have enacted statutory provisions prohibiting specified unfair claims practices. In most states, the statutes are not enforceable through private rights of action. However, in jurisdictions recognizing common-law bad-faith claims, the insurer's violation of such provisions may be considered in determining whether there was a lack of reasonable basis in the insurer's claims processing.

n. Negligence and honest mistakes. As paragraph (2) and Comments *d* and *e* make plain, insurers' ordinary negligence or insurers' good-faith mistakes are not an adequate basis for bad-faith tort liability. Before liability is imposed under this Section, there must be unreasonable conduct by the insurer in its claims processing *and* awareness or reckless disregard of that unreasonable conduct in denying the insured the benefits of proper performance. Numerous courts have expressed concern that the bad-faith tort might impose liability on every insurer that makes an innocent but incorrect judgment about the validity of a claim. Incorrect judgments, however, without more, are insufficient to satisfy this Section. The incorrect judgment must be both one that a reasonable insurer would not make, *and* the insurer must know that its conduct lacks a reasonable basis or acts recklessly in remaining ignorant of the lack of reasonable basis in the claims-processing process.

In an effort to cordon off routine erroneous determinations by insurers, some courts insist that insurance bad faith is an "intentional tort." Such a characterization is misleading, as explained in Comment *f.*

Illustrations:

6. Same facts as Illustration 3, regarding the falling-down house, except that there is no additional coverage section in Laura's policy. Jackson's denial of Laura's claim under the standard policy provisions that exclude damage due to wet or dry rot, while determined to be incorrect by the court because that language was ambiguous in its application to fungus, is reasonable or, alternatively, fairly debatable. Jackson is not liable to Laura for bad faith in its denial of her claim.

7. Same facts as Illustration 3, except that Laura's home suffers a total collapse. Laura makes a claim for $190,000, the policy limits. Jackson does not respond to Laura's claim for 100 days (despite an insurance regulation requiring responses within 60 days)—and when it finally does respond, it offers her $97,500. In so doing, Jackson provides no reason for the discounted sum, and it refuses to negotiate with Laura who Jackson knows has become homeless, owing to her home's destruction. Jackson is subject to liability to Laura for its bad-faith claims processing.

o. Independent contractors hired to perform claims processing. Frequently, claims processing is performed by the insurer's employees. In such instances, the insurer will, under ordinary vicarious liability principles, be liable for the employees' conduct that consists of bad-faith. In other instances, an insurer may choose to contract out to third-party independent contractors some or all of the tasks involved in processing its insureds' claims. While the insurer is free to do so, it nevertheless remains vicariously liable for the independent contractors' bad-faith misconduct. To put the point in a slightly different way—one frequently used by courts—the insurer has a nondelegable duty to conduct its claims processing consistent with its obligation of good faith and fair dealing. Although enforced in a tort claim, the insurer's duty arises from the insurance contract. A party to a contract may not avoid its liability for breach of the the contract by delegating its obligations to another.

p. Damages. A plaintiff who prevails in a first-party insurance bad-faith claim is entitled to the benefit of the insurance coverage, if not otherwise recovered in a contract claim, as well as consequential damages. Thus, contrary to the general contract-law rule, a prevailing plaintiff is entitled to recovery for all consequential economic losses and emotional harm that are within the insurer's scope of liability (proximate cause). See Comment *h*; Restatement Third, Torts: Liability for Physical and Emotional Harm § 29 (discussing scope of liability). Family members who suffer

lost consortium due to emotional harm to an insured family member may recover damages for emotional harm. See id. §§ 48 A and 48 C (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)). Notwithstanding the American rule that each party generally bears its own attorneys' fees, an insured may also be entitled to recover reasonable attorneys' fees incurred in establishing that coverage exists that are otherwise unrecoverable but not the fees required to establish bad faith. In addition, if an insurer's conduct is sufficiently culpable to meet the jurisdiction's standard for punitive damages, those damages may be obtained as well.

REPORTERS' NOTE

Comment a. History, terminology, scope, and cross-reference. The *Gruenberg* case, the first to recognize a tort claim against a first-party insurer, relied on prior third-party insurance bad-faith cases requiring insurers to act reasonably in negotiating a settlement when there was a risk of a judgment in excess of the insurer's coverage. Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1036-1038 (Cal. 1973). In both *Gruenberg* and its third-party predecessors, the California Supreme Court relied on the implied covenant of good faith and fair dealing contained in all contracts. A number of other courts followed this same pattern of recognizing first-party claims based on third-party insurance precedent regarding settlement practices. See, e.g., Chavers v. Nat'l Sec. Fire & Cas. Co., 405 So. 2d 1, 5 (Ala. 1981); Hoskins v. Aetna Life Ins. Co., 452 N.E.2d 1315, 1319 (Ohio 1983); Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1, 16 (1992) ("The origins of the tort of bad faith in first-party insurance cases are to be found in third-party insurance contracts, that is, liability insurance.").

Today, the vast majority of states permit recovery of extra-contractual damages either through a bad-faith tort claim, a statutory claim (discussed in more detail in the Reporters' Note to Comment *o*), or by permitting extra-contractual damages in a breach-of-contract claim against the insurer. See STEPHEN S. ASHLEY, BAD FAITH ACTIONS LIABILITY & DAMAGES § 2:15 (2019 update) (cataloguing states' approaches and reporting that a majority of states recognize claims for bad faith or otherwise permit extra-contractual damages, while identifying 13 states that do not and three that have not addressed the matter); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 702 (2d ed. 2016 & Supp.) (explaining that "most states" have adopted first-party bad faith or equivalent provisions permitting recovery of extra-contractual damages); LORELIE S. MASTERS, JORDAN S. STANZLER & EUGENE R. ANDERSON, INSURANCE COVERAGE LITIGATION § 11.07, at 12-40 (2d ed. 2000 & Supp. 2023) ("[T]he majority of states . . . have found that breach of the duty of good faith and fair dealing under first-party claims may subject insurance companies to tort liability."). Delaware is an example of a state that situates bad-faith claims in the contract rather than tort law. See Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 264 (Del. 1995) (stating "we take the occasion to adopt the contractual basis for a bad faith action," and limiting

recovery for emotional distress to instances in which it is accompanied by physical harm). One jurisdiction that has declined to adopt a bad-faith tort claim is the District of Columbia. See Choharis v. State Farm Fire & Cas. Co., 961 A.2d 1080, 1088-1090 (D.C. 2008) (rejecting bad-faith tort claim against insurers while identifying other tort claims that might be available, which exist in their "own right independent of the contract, and any duty upon which the tort is based must flow from considerations other than the contractual relationship").

Comment c. The special nature of insurance contracts. For cases endorsing the various aspects of insurance contracts that make them exceptional, see:

1) *Vast disparity of bargaining power; contracts of adhesion.* Healy Tibbitts Constr. Co. v. Employers' Surplus Lines Ins. Co., 140 Cal. Rptr. 375, 379 (Cal. Ct. App. 1977) (observing that "insurance contracts are regarded as contracts of adhesion expressing the superior bargaining power of the insurer"); White v. Unigard Mut. Ins. Co., 730 P.2d 1014, 1019 (Idaho 1986) (adopting first-party bad faith while observing "[i]t is in fact these 'adhesionary aspects' of the insurance contract which have prompted this court in the past to come to the aid of the insured"); Eagle Star Ins. Co. v. Int'l Proteins Corp., 360 N.Y.S.2d 648, 650 (App. Div. 1974) ("Contracts of insurance have been referred to as 'Contracts of Adhesion' in view of the disadvantageous bargaining position which generally exists between the parties and, under such circumstances, are narrowly construed against the insurer" (citation omitted)), aff'd, 346 N.E.2d 249 (N.Y. 1976); Skaling v. Aetna Ins. Co., 799 A.2d 997, 1003 (R.I. 2002) (acknowledging that the court's adoption of the bad-faith tort was "[i]n recognition of the imbalance in the bargaining positions of the parties to an insurance contract").

2) *Public nature of insurance.* Findley v. Time Ins. Co., 573 S.W.2d 908, 910 (Ark. 1978) (observing that "insurance companies, like common carriers and utilities, are regulated and clearly affected with a public interest"); Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 146 (Cal. 1979) (explaining the insurance industry as providing a "vital service labeled quasi-public in nature"); Best Place, Inc. v. Penn Am. Ins. Co., 920 P.2d 334, 339-340 (Haw. 1996), as amended (June 21, 1996) (observing that numerous laws regulating the insurance industry reveal the legislature "has recognized that the insurance industry affects the public interest"); Curry v. Fireman's Fund Ins. Co., 784 S.W.2d 176, 178 (Ky. 1978) ("[F]irst-party insurance is recognized as essential. From cradle to grave, individuals willingly pay premiums to insurance companies to obtain financial protection against property and personal loss."); LORELIE S. MASTERS, JORDAN S. STANZLER & EUGENE R. ANDERSON, INSURANCE COVERAGE LITIGATION § 11.07[A], at 10-40 to 10-41 (2d ed. 2000 & Supp. 2023) (discussing first-party insurance bad faith and public-policy considerations supporting the bad-faith tort); William M. Goodman & Thomas Greenfield Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CAL. L. REV. 309, 346 (1974) (observing that "insurers' obligations are also rooted in their status as purveyors of a vital service labeled quasi-public in nature"); Jay M. Feinman, *The Insurance Relationship As Relational Contract and the "Fairly Debatable" Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 557 (2009)

(recognizing that "the single insurance contract is an instance of a system of insurance on which policyholders, dependents, tort victims, and society at large depend to provide security in the event of harm").

3) *Risk transfer and distribution.* See Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1, 8-10 (1992) (detailing the important work of risk transfer for economic development).

4) *Reliance and reasonable expectations of the insured.* Noble v. Nat'l Am. Life Ins. Co., 624 P.2d 866, 867 (Ariz. 1981) (recognizing the special nature of insurance contracts and reciting the role of "securing the reasonable expectations" of insureds for special treatment of those contracts); Crisci v. Sec. Ins. Co., 426 P.2d 173, 179 (Cal. 1967) (noting that, "among the considerations in purchasing liability insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss"); see generally Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966-977 (1970) (identifying and developing principle of insured's reasonable expectations).

5) *Economic fragility of insureds.* See *Noble*, 624 P.2d at 868 ("Often the insured is in an especially vulnerable economic position when such a casualty loss occurs."); *Best Place, Inc*., 920 P.2d at 344 (explaining that the insured "seeks protection and security from economic catastrophe"); Hoskins v. Aetna Life Ins. Co., 452 N.E.2d 1315, 1319 (Ohio 1983) (recognizing that the insured "may be in dire financial straits and therefore may be especially vulnerable to oppressive tactics by an insurer seeking a settlement or a release"); Arnold v. Nat'l Cnty. Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (adverting to unscrupulous insurers taking advantage of "insured's misfortunes"); WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 5.02[1], at 5-4.1 (2d ed. 2019) ("[R]isks which are insured are normally ones which an insured cannot afford to bear without insurance, so the occurrence of such a loss exerts pressure on an insured to obtain a prompt settlement, even if that may mean foregoing full compensation . . . .").

6) *Lack of adequate incentives, absent tort liability.* DiSalvatore v. Aetna Cas. & Sur. Co., 624 F. Supp. 541, 543 (D.N.J. 1986) ("Recognition of an action permitting an insured to recover damages in excess of the actual amount owed under the contract would provide an effective means of countering the existing incentives for an insurance company to wrongfully delay or deny payment."); *Best Place, Inc*., 920 P.2d at 346 ("Without the threat of a tort action, insurance companies have little incentive to promptly pay proceeds rightfully due to their insureds, as they stand to lose very little by delaying payment."); Curry v784 S.W.2d at 178 (expressing concern that, without the availability of a bad-faith claim, the insurer could "delay payment by litigation with no greater possible detriment than payment of the amount justly owed plus interest"); Skaling v. Aetna Ins. Co., 799 A.2d 997, 1003 (R.I. 2002) (observing that "limiting an insured to recovery of the policy limits for a breach of the insurance contract, without the threat of punitive damages or awards in excess

of the policy limits, would do little to promote the prompt payment of claims or to prevent an unscrupulous insurer from refusing payment or delaying settlement of legitimate claims"); *Arnold*, 725 S.W.2d at 167 (noting that "insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed"); Kenneth S. Abraham, *The Natural History of the Insurer's Liability for Bad Faith*, 72 TEX. L. REV. 1295, 1309 (1994) (explaining the effect of bad-faith liability on insurer incentives to engage in dilatory and other unfair claims practices); Phyllis Savage, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims—An Emerging Trend*, 45 FORDHAM L. REV. 164, 169 (1976) ("Because [the contract measure of damages] so severely restricts the maximum available recovery, it is in the insurer's best interest to delay payment as long as possible.").

For further discussion of why the insurer's bad-faith breach of an insurance contract is properly subject to special treatment, see Cary v. United of Omaha Life Ins. Co., 68 P.3d 462, 466 (Colo. 2003), as modified on denial of reh'g (May 19, 2003) (observing that "insurance contracts are not ordinary commercial contracts"); Dolan v. Aid Ins. Co., 431 N.W.2d 790, 791-792 (Iowa 1988) (cataloguing reasons for recognizing bad-faith claims); BARKER & KENT, supra § 1.05[1], at 1-20; Jay M. Feinman, *The Insurance Relationship As Relational Contract and the "Fairly Debatable" Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 557-559 (2009) (outlining other distinct aspects of insurance contracts).

Comment d. The dual subjective and objective nature of the bad-faith tort. The Wisconsin Supreme Court, in Anderson v. Continental Ins. Co., 271 N.W.2d 368 (Wis. 1978), set forth the two-part standard for bad faith that has influenced many other courts adopting bad-faith claims and on which the black letter of this Section is based:

> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. . . .
>
> . . .
>
> The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.

Id. at 376-378; see also Noble v. Nat'l Am. Life Ins. Co., 624 P.2d 866, 868 (Ariz. 1981) (adopting the *Anderson* standards); Braesch v. Union Ins. Co., 464 N.W.2d 769, 778 (Neb. 1991) ("We conclude that the *Anderson* standard of care strikes a proper balance between the respective rights of the insurer and the policyholder."); McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 855 (Wyo. 1990) ("[W]e adopt . . . the 'fairly debatable' objective standard care analysis of *Anderson* . . . for any award of extra-contractual damages."); WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 5.03[2], at 5-14 (2d ed. 2019) ("The *Anderson* standard has been adopted by most courts recognizing expanded recovery for bad faith and by the Restatement of the Law of Liability Insurance."); Jay M. Feinman, *The Insurance*

Relationship As Relational Contract and the "Fairly Debatable" Rule for First-Party Bad Faith, 46 SAN DIEGO L. REV. 553, 561 (2009) (characterizing *Anderson* as "[p]erhaps the most widely cited formulation" of the standard for bad faith); accord Douglas R. Richmond, *Bad Insurance Bad Faith Law*, 39 TORT TRIAL & INS. PRAC. L.J. 1, 5-6 (2003) ("An insured charging first-party bad faith generally must establish (1) that the insurer's conduct was unreasonable and (2) that the insurer knew or reasonably should have known that it was being unreasonable in its handling or payment of the claim at issue. This two-part test applies no matter what type of first-party coverage is in dispute.").

Sometimes the objective element is expressed by courts as a claims decision that is not "fairly debatable," the equivalent of a lack of a reasonable basis for the insurer's claim decision. As the *Anderson* court stated in its seminal decision, "when a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *Anderson,* 271 N.W.2d at 376. Given their equivalence, courts may choose as a matter of custom and style whether to employ "fairly debatable" or "reasonable basis" in jury instructions. It would, however, be redundant to instruct on both "reasonable basis" and "fairly debatable." See *Noble*, 624 P.2d at 868 (treating "fairly debatable" and denials without a "reasonable basis" as equivalent antonyms).

The existence of a fairly debatable question about a claim should not be understood or treated as an affirmative defense. Because saying a claim is "fairly debatable" is the equivalent of saying that an insurer had a "reasonable basis" for its denial, it is an element of the plaintiff's prima facie case for which the plaintiff bears the burden of proof. Thus, an insurer who seeks to prove that a claim was fairly debatable is seeking to negate the existence of a prima facie element of plaintiff's claim rather than proving an affirmative defense. See BARKER & KENT, supra § 17.05[10][a], at 17-124 (stating that "whether a claim is 'fairly debatable' is not really a defense, but is a fundamental aspect of what must be established in order to impose bad faith liability"). Reference to "fairly debatable" as a defense is, unfortunately, common. See, e.g., Schuessler v. Wolter, 310 P.3d 151, 162 (Colo. App. 2012) (observing that "the defense of fair debatability is not a threshold inquiry"); Sanderson v. Am. Fam. Mut. Ins. Co., 251 P.3d 1213, 1217 (Colo. App. 2010) (stating that a showing that the claim was "fairly debatable" is not sufficient to defeat a bad-faith claim).

When the bad-faith claim involves a coverage issue and when the insurer ultimately denies coverage, some courts employ the standard for judgment as a matter of law contained in Fed. R. Civ. Pro. 50(a) (or a state-court counterpart) as the standard for whether the insurer had a reasonable basis for denying the insured's claim. These courts reason that, if the factual record, after appropriate investigation by the insurer, is one requiring jury resolution to determine whether coverage exists, then the insurer *necessarily* had a reasonable basis for denying coverage. An early and explicit such case is Nat'l Sav. Life Ins. Co. v. Dutton, 419 So. 2d 1357, 1362 (Ala. 1982). There, the court, acknowledging that the bad-faith tort was at an "embryonic" stage and that the burden on plaintiff to establish a claim was a heavy one, stated that if there was a fact issue with regard to coverage of the insurance claim, the tort claim failed. See also Blue Cross & Blue Shield v. Campbell, 466 So. 2d 833, 843 (Miss. 1984) (declaring that, "unless the trial judge grants a directed verdict to the insured plaintiff on the contract claim, then, as a matter of law, the insurance

carrier has shown a reasonably arguable basis to deny the claim"); Pickett v. Lloyd's, 621 A.2d 445, 454 (N.J 1993) (stating, in dicta, "[u]nder the 'fairly debatable' standard, a claimant who could not have established as a matter of law a right to summary judgment on the substantive claim would not be entitled to assert a claim for an insurer's bad-faith refusal to pay the claim"). In other cases, such a standard is only implicit in the reasoning of the court. See Cont'l Cas. Co. v. Howard, 775 F.2d 876, 880-881 (7th Cir. 1985) (applying Indiana law) (adverting to the standard of review for a directed verdict and then proceeding to canvas the record to determine if there was a reasonable basis for the insurer to deny the claim). For courts that do employ the judgment-as-a-matter-of-law standard for determining whether there was a reasonable basis for the insurer's claims handling, the determination would be one of law for similar reasons to the reasons explained why courts must resolve issues related to the meaning of insurance policy language. See Tarsio v. Provident Ins. Co., 108 F. Supp. 2d 397, 401 (D.N.J. 2000) (recognizing, while criticizing, that under New Jersey law, the court was required in bad faith claim to determine whether summary judgment would have been appropriate on coverage issue).

Among those courts adopting the judgment-as-a-matter-of-law standard, most do so cautiously, recognizing that there are or may be exceptions. See *Dutton*, 419 So. 2d at 1362 (softening its adoption of the judgment-as-a-matter-of-law standard by stating that it would be true "[i]n the normal case" and "[o]rdinarily, to describe a factual issueif the evidence produced … creates a fact issue" for the jury, it will negate a bad faith claim"); *Campbell*, 466 So. 2d at 843 (adding the qualifier "in the vast majority of cases"); 2 WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 17.03[4][b], at 17-26-30.1 (2d ed. 2019). Importantly, even if such a "directed verdict" shortcut is adopted, it must be limited to disputes over whether coverage exists; it has no bearing on the reasonableness of an insurer's investigation, delay, settlement offers, or other claims-processing misconduct.

Other courts reject the equivalence of the directed-verdict standard with whether the insurer had a reasonable basis for denying coverage. E.g., Hillman v. Nationwide Mut. Fire Ins. Co., 855 P.2d 1321, 1325 (Alaska 1993) ("*Dutton* does not state the Alaska rule of law."); Brewer v. Am. & Foreign Ins. Co., 837 P.2d 236, 238 (Colo. App. 1992) ("We reject defendant's assertion . . . that, since plaintiff could not, as a matter of law, have properly been awarded a directed verdict on the underlying arson claim, his bad faith claim must, as a matter of law, be denied. . . . The test for an insurer's duty for good faith and fair dealing with its insured is one of reasonableness under the circumstances."); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995) (rejecting, in its entirety, the directed-verdict standard); Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d 250, 254 (Iowa 1991) ("We do not agree that the mere denial of a plaintiff's motion for a directed verdict automatically establishes that the issue is 'fairly debatable.'"); Farmland Mut. Ins. Co. v. Johnson, 36 S.W.3d 368, 375 (Ky. 2000), as modified (Feb. 22, 2001) (observing that "the existence of jury issues on the contract claim does not preclude the bad faith claim"); Peterson v. W. Nat'l Mut. Ins. Co., 946 N.W.2d 903, 911 (Minn. 2020) (rejecting the judgment-as-a-matter-of-law standard and explaining the difference between a judge making that determination and an insurer deciding whether to honor an insurance claim); Skaling v. Aetna Ins. Co., 799 A.2d 997,

1003 (R.I. 2002) (overruling prior precedent that adopted the directed-verdict standard and concluding that the directed-verdict standard for proof of reasonable basis "is unworkable and unjust," while further explaining that a conflict in testimony between insured and insurance adjuster or insurer would require jury determination but should not be dispositive on whether a reasonable basis existed); Jones v. Farmers Ins. Exch., 286 P.3d 301, 304 (Utah 2012) ("It is not the law in Utah that, when the insurance company argues a claim was fairly debatable, the case must be resolved by the court as a matter of law.").

Conduct supporting a finding of bad faith can occur in a variety of circumstances. See Ruwe v. Farmers Mut. United Ins. Co., 469 N.W.2d 129, 135 (Neb. 1991) ("The tort of bad faith embraces any number of bad faith settlement tactics, such as inadequate investigation, delays in settlement, false accusations, and so forth."); Fetch v. Quam, 623 N.W.2d 357, 361 (N.D. 2001) ("This duty of good faith imposed on an insurer . . . include[s] a duty of fair dealing in paying claims, providing defense to claims, negotiating settlements, and fulfilling all other contractual obligations.").

Behavior supporting a finding of bad faith can take myriad forms, and it can occur at different times throughout the claims process. Such behavior includes failing reasonably to investigate a claim, making an unreasonably low settlement offer, and insisting on a global settlement of plaintiff's claim when one aspect of the claim is undisputed. E.g., Lockwood v. Geico Gen. Ins. Co., 323 P.3d 691, 698 (Alaska 2014) (identifying all of the first three in the list above as potential bases for a jury finding of unreasonable conduct in claims processing); Drop Anchor Realty Tr. v. Hartford Fire Ins. Co., 496 A.2d 339, 344 (N.H. 1985) (insurer taking "unfair advantage of the plaintiff's weakened position by making [unjustifiably low] settlement offers . . . to force the plaintiff to accept less than the true value of its compensable losses"). Such behavior also includes failing to consider all of the evidence possessed by the insurer by "cherry picking" evidence only favorable thereto, Peterson v. W. Nat'l Mut. Ins. Co., 946 N.W.2d 903, 911 (Minn. 2020), as well as conducting a biased investigation that seeks to find only evidence supporting a denial of coverage, Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 400 (Ohio 1994); 1 WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 5.04[1][a], at 5-20 (2d ed. 2019) ("Because the insurer must pay the claim if there is coverage, it has a private incentive to find facts that defeat coverage. To assure that the insurer also looks for facts that would support coverage, duties to investigate are imposed . . . by . . . the common law of bad faith."). It also encompasses drawing conclusions from circumstantial evidence based on mere speculation rather than reasonable inference. E.g., LeForge v. Nationwide Mut. Fire Ins. Co., 612 N.E.2d 1318, 1323 (Ohio Ct. App. 1992) (assuming, without evidence, that insured's current symptoms were caused by preexisting condition rather than accident). And, it encompasses unreasonable delay in investigating a claim that results in late payment of benefits, Daney v. Haynes, 630 So. 2d 949 (La. Ct. App. 1993) (violation of statutory claims practices act providing time limits for payment of claims), as well as an unjustified delay in providing the benefits the insured is entitled to, under the insurance agreement, LeRette v. Am. Med. Sec., Inc., 705 N.W.2d 41, 49 (Neb. 2005) ("[W]e reject [the insurer's] argument asserting that its ultimate payment of benefits in this case precluded a judgment in favor of the [insured] on the bad faith claim [asserting unreasonable delay].");

Pickett v. Lloyd's, 621 A.2d 445, 457-458 (N.J. 1993) ("In the case of processing delay, bad faith is established by showing that no valid reasons existed to delay processing the claim and the insurance company knew or recklessly disregarded the fact that no valid reasons supported the delay.") .

Often, the second subjective element can be proved only by circumstantial evidence because, as with intent in criminal law, unless the defendant admits to having the requisite knowledge or intent, only circumstantial evidence is available. See *Anderson*, 271 N.W.2d at 377 (explaining that "knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured"); *Peterson*, 930 N.W.2d at 451 (finding that unreasonable actions by insurer justified the lower court's (acting as finder of fact) inference of reckless disregard); Dhyne v. State Farm Fire & Cas. Co., 188 S.W.3d 454, 458 (Mo. 2006) (recognizing that circumstantial evidence is sufficient to prove willful refusal to pay claim); Wadeer v. N.J. Mfrs. Ins. Co., 110 A.3d 19, 26 (N.J. 2015) (explaining that "knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless . . . indifference to facts or to proofs submitted by the insured").

The many courts adopting this dual objective–subjective standard have recognized the tension inherent in, on the one hand, enabling insurers fully to investigate questionable claims and to deny claims that are fairly debatable without being subject to bad-faith liability and, on the other, ensuring that insureds—who are often vulnerable and at the insurer's mercy—are treated fairly and in good faith. Courts have expressed the view that the dual standard offers the best balance between these competing but important goals. See, e.g., McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 860 (Wyo. 1990) ("The logical premise of the debatable (or arguable) standard is that if a realistic question of liability does exist, the insurance carrier is entitled to reasonably pursue that debate without exposure to a claim of violation of its duty of good faith and fair dealing."); see also BARKER & KENT, supra § 5.02[2], at 5-6 to 5-9 (explaining that insurers need latitude to investigate and deny claims so as to preserve premiums paid for deserving claims and to avoid increasing premiums to cover fraudulent or unmeritorious claims).

Some courts, including the California Supreme Court in the seminal *Gruenberg* case, have adopted a more lenient standard than the one adopted in this Section, imposing liability whenever the insurer acts without reasonable or proper reason in denying or investigating a claim. See Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1037 (Cal. 1973) (holding insurer subject to liability when insurer fails "without proper cause, to compensate its insured for a loss covered by the policy"); see also Seifert v. Farmers Union Mut. Ins. Co., 497 N.W.2d 694, 698 (N.D. 1993) (explaining that, when the insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing") (quoting Corwin Chrysler–Plymouth, Inc. v. Westchester Fire Ins. Co., 279 N.W.2d 638, 642 (N.D. 1979)); BARKER & KENT, supra § 5.03[1], at 5-12 ("While the [*Gruenberg*] test is a minority rule, it is followed in a number of other states.").

By contrast with the lenient standard in California, other courts have adopted a more stringent standard, requiring oppressive, dishonest, or malicious conduct and a subjective state of mind requiring ill will, hatred, or revenge. See, e.g., Rathbun v. Ward, 866 S.W.2d 403 (Ark. 1993). Yet, as noted in the Comments, in operationalizing that standard, courts tend to take a more lenient view of whether that standard is satisfied. See, e.g., Columbia Nat'l Ins. Co. v. Freeman, 64 S.W. 3d 720, 723-725 (Ark. 2002) (holding that several actions by insurer that might best be characterized as having no reasonable basis were sufficient evidence for the factfinder to find "oppressive conduct carried out with a state of mind characterized by ill will").

In addition, some courts have adopted a stringent standard because they confronted only the narrow question of whether the plaintiff could recover punitive damages. As explained in Comment *p*, recovery of punitive damages in bad-faith claims should be limited to those instances in which the insurer engages in sufficiently culpable conduct to meet the jurisdiction's ordinary standard for awarding punitive damages. Thus, in Pirkl v. Nw. Mut. Ins. Ass'n, 348 N.W.2d 633, 636 (Iowa 1984), the Iowa Supreme Court first recognized that a bad-faith claim for punitive damages could be made, but it limited such claims to insurer behavior that was malicious, illegal, or immoral. Later, the court adopted the *Anderson* standard for bad-faith claims, while retaining the *Pirkl* standard for recovery of punitive damages.

In some jurisdictions, the bad-faith tort claim is not recognized, but other alternatives provide a functional equivalent. For example, Minnesota has a statute that incorporates the *Anderson* standard for liability and awards statutory damages, including attorney's fees and, where the insurer's behavior is sufficiently egregious, punitive damages. See MINN. STAT. ANN. § 604.18; see also FLA. STAT. ANN. § 624.155. Other jurisdictions permit the recovery of extra-contractual damages in a breach-of-contract case against the insurer. See, e.g., ME. REV. STAT. ANN. tit. 24-A, § 2436-A; MD. CODE ANN., CTS. & JUD. PROC. § 3-1701; Jarvis v. Prudential Ins. Co. of Am., 448 A.2d 407, 408 (N.H. 1982).

Comment f. Intentional or negligent tort. Some courts have characterized the bad-faith claim as an intentional tort without recognizing that all intentional torts, save for the highly controversial prima facie tort, require an intent to cause a specific harm. See, e.g., Standard Life Ins. Co. of Indiana v. Veal, 354 So. 2d 239, 248 (Miss. 1977) (concluding that the "refusal to pay the legitimate claim in this case was an intentional wrong," without identifying what harm the insurer intended); Hein v. Acuity, 731 N.W.2d 231, 235 (S.D. 2007) (describing first-party bad-faith claim as an intentional tort).

Comment g. Timing of insurer's knowledge of facts supporting good faith. Insurers may not justify the reasonableness of their decision to deny a claim based on information that emerges after the denial of the claim. See, e.g., Skaling v. Aetna Ins. Co., 799 A.2d 997, 1014 (R.I. 2002) (facts about insured's use of alcohol at the time of the accident were unknown when the claim was denied and cannot be used in defense of the bad-faith claim); Walz v. Fireman's Fund Ins. Co., 556 N.W.2d 68, 70 (S.D. 1996) ("The issue [of bad faith] is determined based upon the facts and law available to Insurer at the time it made the decision to deny coverage.").

Comment h. Factual cause and scope of liability. Consistent with paragraph (3) and Comment *h*, courts refuse to permit bad-faith recovery when insurers engage in dubious claims investigating or handling practices but there actually existed a reasonable basis to deny or delay the claim, although they often fail to identify factual cause as the reason for such denial. See State Farm Fire & Cas. Co. v. Brechbill, 144 So. 3d 248, 258 (Ala. 2013) ("The existence of an insurer's lawful basis for denying a claim is a sufficient condition for defeating a claim that relies upon the fifth element of the insurer's intentional or reckless failure to investigate"); Waller v. Truck Ins. Exch., Inc., 900 P.2d 619, 639 (Cal. 1995), as modified on denial of reh'g (Oct. 26, 1995) (liability insurance policy) ("It is clear that if there is no *potential* for coverage and, hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer.").

Although not always articulated, the basic tort-law principle that defendant's tortious conduct must be a factual cause of legally cognizable harm supports the decisions by these courts. As Douglas Richmond, a prominent commentator, put it when discussing an insurer's conduct in Rawlings v. Apodaca, 726 P.2d 565 (Ariz. 1986):

> To be sure, Farmers' [the insurer's] conduct in this instance was offensive. Farmers' reprehensible conduct may have been actionable fraud, it might have been actionable as the intentional infliction of emotional distress or the tort of outrage, it might have constituted negligent infliction of emotional distress, and it might have amounted to tortious interference with the Rawlings' [the plaintiffs'] business interests. Farmers' conduct did not constitute bad faith, however, because Farmers did nothing to injure the Rawlings' rights to receive the policy benefits for which they bargained, which is what the implied duty of good faith and fair dealing protects. Farmers paid the Rawlings the $10,000 they were owed under their policy. That the Rawlings may not have pleaded tort causes of action other than bad faith does not through some default mechanism transform Farmers' conduct into something that as a matter of law it was not.

Douglas R. Richmond, *Bad Insurance Bad Faith Law*, 39 TORT TRIAL & INS. PRAC. L.J. 1, 10-11 (2003). Farmers' conduct may have been egregious, but that conduct did not cause harm—and so the conduct would not have been actionable under this Section based on paragraph (3).

Contrary to the requirement of paragraph (3) of this Section, some courts permit a bad-faith claim when the insurer fails to conduct its investigation as a reasonable insurer would, even though, at the end of the day, the claim is, or properly would be, denied. As the Washington Supreme Court observed in such a case: "[The insurer] would have us adopt the same 'no harm, no foul' rule, in which bad faith is not actionable, as a matter of law, when the insured's policy does not provide coverage for the loss. We decline to do so." Coventry Assocs. v. Am. States Ins. Co., 961 P.2d 933, 937 (Wash. 1998). Actually, the court paid considerable homage to "no harm, no foul," which reflects the basic proposition of tort law that requires the defendant's tortious conduct to have caused the harm for which the plaintiff seeks recovery. The court limited damages

to the costs of investigation incurred by the insured that were caused by the insurer's bad-faith investigation, rejecting the insured's claim that it should obtain coverage by estoppel or a return of a portion of the premium paid by the insured. Id. at 940; see also United Techs. Corp. v. Am. Home Assur. Co., 118 F. Supp. 2d 181, 189 (D. Conn. 2000) (permitting recovery for "procedural bad faith" without identifying the harm the insured suffered due to the insurer's bad faith); Lloyd's & Inst. of London Underwriting Cos. v. Fulton, 2 P.3d 1199, 1207-1209 (Alaska 2000) (adopting a combination of estoppel and presumption of prejudice in a third-party insurance dispute to provide coverage to insured after a determination that an exclusion in the policy barred coverage); Safeco Ins. Co. of Am. v. Butler, 823 P.2d 499, 512 (Wash. 1992) (employing estoppel to provide coverage for third-party insurance claim despite exclusion in policy found applicable to deny coverage). Other courts, while declining to permit recovery for a loss that was not covered by the policy, permit recovery for harm to an insurer's intangible invasion of an insured's emotional security in the belief that the insurer will treat the insured's claim fairly and in good faith, in effect recognizing a claim for dignitary harm in the claims-processing arena. See, e.g., Deese v. State Farm Mut. Auto. Ins. Co., 838 P.2d 1265, 1269 (Ariz. 1992) ("However, the insured also is entitled to receive the additional security of knowing that she will be dealt with fairly and in good faith."). This Section declines to follow the lead of these more permissive courts because there is no substantial body of case law supporting any of the disparate efforts to award bad-faith damages and because of the lack of persuasiveness of the supporting rationales.

In addition, some courts, including the Alabama Supreme Court, carve a middle path; they permit an inference that coverage existed whenever the insurer fails to conduct a good-faith investigation. See State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 304 (Ala. 1999) (declaring that "the knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred and imputed to an insurance company when there is a reckless indifference to facts or to proof submitted by the insured"). The effect of this inference is to permit the factfinder to decide there was no reasonable basis for denying coverage. The insurer is, of course, free to overcome this inference, by proving that there was no coverage for the claim or that there was reasonable doubt about the existence of coverage.

Illustration 1, involving possible arson, is based loosely on Guebara v. Allstate Ins. Co., 237 F.3d 987, 993 (9th Cir. 2001) (applying California law). There, the issue was whether a genuine coverage dispute precluded a bad-faith claim.

Comment i. Obligation to investigate. Numerous cases address instances in which insurers failed to conduct a reasonable investigation into facts relevant to whether coverage exists. In addition to cases and sources cited in the Reporters' Note to Comment *d*, see Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 145 (Cal. 1979) ("To protect [the insured's legitimate] interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim."); Jordan v. Allstate Ins. Co., 56 Cal. Rptr. 3d 312, 321 (Cal. Ct. App. 2007), as modified on denial of reh'g (Apr. 20, 2007) (finding that, although insurer reasonably determined that exclusion in policy prevented coverage, insurer breached its good-faith duty by failing to consider whether coverage existed under an "additional coverage" provision); Hatch v. State Farm Fire &

Cas. Co., 842 P.2d 1089, 1098-1099 (Wyo. 1992) (holding that the insurer's investigation of a fire that destroyed the insured's home, in which the insurer required the insured to provide a 275-page inventory of items in the house, including listing the number of cornflakes remaining in cereal container and specifying the amount of salt left in a salt shaker could be found to have engaged in bad-faith investigation of claim); see generally 1 WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 5.04, at 5-20 to 5-47 (2d ed. 2019).

Consistent with Comment *i*, the basic principle applicable to insurers' investigations is that insurers should regard the interest in avoiding an incorrect denial of coverage as equal to the interest in avoiding an incorrect decision providing coverage. See Rawlings v. Apodaca, 726 P.2d 565, 572 (Ariz. 1986) (recognizing insurer's "obligation to give equal consideration to the insured's interests"); Silberg v. California Life Ins. Co., 521 P.2d 1103, 1109 (Cal. 1974) (observing that, to satisfy its duty of good faith and fair dealing, an "insurer is obligated to give the interests of the insured at least as much consideration as it gives to its own interests"); Foster v. Stonebridge Life Ins. Co., 291 P.3d 105 (Kan. Ct. App. 2012) (declaring that "the insurer has a duty to diligently search for evidence which supports insured's claim and not merely seek evidence upholding its own interests") (quoting 14 COUCH ON INSURANCE § 207:25, at 207-241 (3d ed. 2005)).

Illustration 2, involving the possibility of additional coverage, is loosely based on Jordan v. Allstate Ins. Co., 56 Cal. Rptr. 3d 312, 321 (Cal. Ct. App. 2007), as modified on denial of reh'g (Apr. 20, 2007).

Comment j. Other tortious conduct by an insurer. The Restatement Third of Torts: Liability for Physical and Emotional Harm § 46 contains the elements of the intentional-infliction tort. It provides: "An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm." Consistent with Comment *j*, it is well established that seriously deficient claims-handling practices can give rise to a claim for the intentional infliction of emotional distress. See Eckenrode v. Life of Am. Ins. Co., 470 F.2d 1, 5 (7th Cir. 1972) (applying Illinois law) (holding plaintiff's allegations of insurer's refusal to pay life-insurance benefits stated a claim for intentional infliction of emotional distress); Fletcher v. W. Nat'l Life Ins. Co., 89 Cal. Rptr. 78 (Cal. Ct. App. 1970) (permitting recovery on an intentional-infliction-of-emotional-distress standard). For discussion of the standards for liability under the intentional-infliction tort, see generally WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 1.05[3][c], at 1-26 (2d ed. 2019).

The court in Hatch v. State Farm Fire & Cas. Co., 842 P.2d 1089, 1099 (Wyo. 1992), put it well in a case in which the insurer had not engaged in bad faith but had processed the claim in a culpable manner:

> Even though the insurer here had a "fairly debatable" reason for not paying the claim in the first place, i.e., its belief that the loss was the result of arson, it cannot properly go beyond a reasonable denial of the claim and engage in unreasonable or unfair behavior to gain an unfair advantage. A "fairly debatable"

> reason to deny a claim is not a defense against torts that may flow from engaging in oppressive and intimidating claim practices.

The court detailed the abusive investigation conducted by the insurer:

> Appellants were required to file an extremely detailed inventory of items that were in the house at the time of the fire, consisting of 275 pages. For example, they were told that they must list how many cornflakes were left in the cereal box before the fire, and how much salt was in the salt shaker. Appellants were threatened by State Farm representatives with the cooperation provision in the policy unless they did everything they were told. Appellants were required to make unreasonable reports, statements and inventories, even after State Farm had decided to reject their claim.
>
> State Farm took over the Hatch house, ousted the Hatch family from possession, and searched the house from top to bottom. State Farm conducted several unsupervised searches of the home and entered the home without permission. State Farm would not allow appellants to have free access to their house for eight days after the fire (August 4–12). A State Farm representative told Mrs. Hatch that all they would ever receive for their belongings was the same price they could get for each item at a garage sale. Hatches were given an unrealistic deadline in which to file this inventory. A team of five State Farm representatives interviewed Mrs. Hatch four different times. One interview lasted five hours with no break for lunch. Mrs. Hatch characterized the State Farm representatives as rude, abrupt, sarcastic, unprofessional, and hostile. Additionally, the sworn statements of the Hatch's twin boys, ten years old, were taken.
>
> On August 12, 1987, Mr. Hatch was told the investigation was complete; nevertheless, State Farm representatives continued to enter the house into September. Mr. Hatch asked for a copy of State Farm's investigative reports. A copy was promised, but not timely delivered. Mr. Hatch asked appellee Murphy to send a copy of the investigative report to his lawyer. Murphy refused and said that Mr. Hatch would regret having retained an attorney. Murphy also said that State Farm would not have required an itemization of the property removed from the house if they had not contacted a lawyer.
>
> Appellants charge State Farm with concealing information received from Northern Gas; also, exculpatory and other documents were alleged to have been withheld or concealed from the prosecutor in the arson case. State Farm required that appellants sign releases for creditors in and out of the state to give it information about the appellants. These creditors were then contacted. Medical releases were demanded from Mr. Hatch and one of his children; also, mental health records of a daughter were demanded about a problem in 1984. Mr. Hatch's military and employment records were demanded.

Id. at 1098. See also Fletcher v. W. Nat'l Life Ins. Co., 89 Cal. Rptr. 78, 93 (Cal. Ct. App. 1970) (holding that an insurer can be liable for intentional infliction of emotional distress for extreme

and outrageous behavior in claim processing); Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 68-74 (Mo. 2000) (affirming award of damages for defamation based on insurer's statement that insured committed arson); Bennett v. ITT Hartford Grp., Inc., 846 A.2d 560, 565 (N.H. 2004) (insurer's post-claim conduct taking control of product suspected of causing fire loss and misrepresenting to insured that insurer would actively pursue subrogation claim against product manufacturer and protect insured's recovery of uninsured losses justified independent tort claim against insurer notwithstanding jurisdiction's refusal to recognize first-party bad-faith tort claim).

Comment k. Fiduciary duty. In some third-party (rather than first-party) bad-faith cases, courts have characterized the insurer's duty to settle as one involving a fiduciary duty, requiring the insurer to protect the insured from an excess-coverage verdict. That conception makes sense, as, in the third-party context, the insurer takes over defense of the claim and, in effect, represents the insured's interest in avoiding an excess judgment. See Hartford Acc. & Indem. Co. v. Foster, 528 So. 2d 255, 265 (Miss. 1988) (stating "the insurer has a fiduciary duty to look after the insured's interest at least to the same extent as its own"); Hadenfeldt v. State Farm Mut. Auto. Ins. Co., 239 N.W.2d 499, 505 (Neb. 1976) (approving jury instruction characterizing third-party insurer as a fiduciary); Alt v. Am. Fam. Mut. Ins. Co., 237 N.W.2d 706, 712 (Wis. 1976) (characterizing bad-faith refusal to settle as "breach of a known fiduciary duty"); Robert H. Jerry, II, *The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History*, 72 TEX. L. REV. 1317, 1340 (1994) (observing that "the contractual undertaking of the insurer [to defend its insured] is fundamentally a promise to act as a fiduciary").

That situation, in which an insurer, controlling the defense, would otherwise be able to jeopardize its insured's financial interest for its own benefit is not present in the first-party insurance context. See William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1229-1230 (1994) (characterizing the third-party insurer as a fiduciary with regard to defending the insured while observing that "third-party insurance is different from first-party insurance"); Mark Gergen, *Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235, 1238-1239 (1994) (distinguishing the insurer's obligation to settle a third-party insurance claim from its obligation to resolve first-party claims); see also Pirkl v. Nw. Mut. Ins. Ass'n, 348 N.W.2d 633, 635 (Iowa 1984) (distinguishing third-party settlement obligations, which involve a fiduciary relationship, from first-party claims).

The Seventh Circuit Court of Appeals captured the difference in Craft v. Economy Fire & Cas. Co., 572 F.2d 565, 569 (7th Cir. 1978) (applying Indiana law) (citation omitted):

> Under third party liability coverage, when the insured is sued by a third party, the insurance company takes over the defense of the suit and the insured cannot settle the matter without the permission of the insurer. It is this control of the litigation by the insurer coupled with differing levels of exposure to economic loss which gives rise to the "fiduciary" nature of the insurer's duty. In the uninsured motorist situation there is no element of "control" of the insured's side of the litigation by the insurance company which would give rise to a "fiduciary" duty. It does not necessarily follow that the insurer is completely free of any obligation of good faith

> and fair dealing to its insured, since the latter duty is based on the reasonable expectations of the insured and the unequal bargaining positions of the contractants, rather than the insurance company's "control" of the litigation.

Comment l. Judge and jury. The provisions of Comment *l* are reflected in virtually all of the case law on this subject. See Jeffers v. Farm Bureau Prop. & Cas. Ins. Co., 2014 WL 4259485, at *4 (D. Ariz. 2014) ("[B]oth [the objective and subjective] elements present fact questions ordinarily reserved for the jury."); Lockwood v. Geico Gen. Ins. Co., 323 P.3d 691, 696 (Alaska 2014) (assuming, without discussing, that both elements of the standard for bad faith are for jury determination); Zolman v. Pinnacol Assur., 261 P.3d 490, 497 (Colo. App. 2011) ("What constitutes reasonableness under the circumstances is ordinarily a question of fact for the jury."); Int'l Indem. Co. v. Collins, 367 S.E.2d 786, 788 (Ga. 1988) ("Ordinarily, the question of good or bad faith is for the jury, but when there is no evidence of unfounded reason for the nonpayment, or if the issue of liability is close, the court should disallow imposition of bad faith penalties."); Willis v. Swain, 304 P.3d 619, 637 (Haw. 2013) ("In general, whether an insurer has acted in bad faith is a question of fact."); Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 12 (Iowa 1990) (holding that determination of bad faith was one for the factfinder); Marquis v. Farm Fam. Mut. Ins. Co., 628 A.2d 644, 648 (Me. 1993); Miss. Power & Light Co. v. Cook, 832 So. 2d 474, 484 (Miss. 2002) (approving jury instruction on whether insurer had a reasonable basis for denial of a claim); DeBruycker v. Guar. Nat'l Ins. Co., 880 P.2d 819, 821 (Mont. 1994) ("The court properly allowed the jury to decide whether Guaranty and Crop Hail had a 'reasonable basis' to deny the DeBruyckers' claim."); Lawton v. Great Sw. Fire Ins. Co., 392 A.2d 576, 580 (N.H. 1978) (explaining that the determination of whether the defendant's delay constituted bad faith is a matter for the jury); Sloan v. State Farm Mut. Auto. Ins. Co., 85 P.3d 230, 232 (N.M. 2004) ("under New Mexico law, a punitive-damages instruction should be given to the jury in every common-law insurance-bad-faith case where the evidence supports a finding either (1) in failure-to-pay cases (those arising from a breach of the insurer's duty to timely investigate, evaluate, or pay an insured's claim in good faith), that the insurer failed or refused to pay a claim for reasons that were frivolous or unfounded"); Skaling v. Aetna Ins. Co., 799 A.2d 997, 1003 (R.I. 2002) (explaining that "the issue of insurer bad faith is an issue of fact to be submitted to the jury"); Walz v. Fireman's Fund Ins. Co., 556 N.W.2d 68, 70 (S.D. 1996) ("Whether Insurer acted in bad faith in conducting an inadequate investigation or failing to review caselaw is a question of fact for the jury or other trier of fact."); Jerry v. Kentucky Cent. Ins. Co., 836 S.W.2d 812, 815 (Tex. App. 1992) (affirming lower court's finding, sitting as finder of fact, that insured home was vacant at time it was destroyed by fire was supported by sufficient evidence).

Cases holding or ruling in a way that makes the determination of reasonableness a legal matter for the court when the issue turns on the meaning of policy or statutory language include: Franceschi v. Am. Motorists Ins. Co., 852 F.2d 1217, 1219 (9th Cir. 1988) (applying California law) (affirming grant of summary judgment on insured's bad-faith claim when coverage depended on whether policy term of "medical treatment" included diagnostic treatment); Starkville Mun. Separate Sch. Dist. v. Cont'l Cas. Co., 772 F.2d 168, 170 (5th Cir. 1985) (applying Mississippi law)

(affirming trial court's dismissal of bad-faith claim where coverage turned on the meaning of the word "loss" in the plaintiff's insurance policy); Whitaker v. State Farm Mut. Auto. Ins. Co., 768 P.2d 320, 324 (Kan. Ct. App. 1989) (affirming trial court's determination that insured was not entitled to statutory award of attorney's fees for "unreasonable" denial of coverage based on dispute over the meaning of "accident"); Soniat v. Travelers Ins. Co., 538 So. 2d 210, 216 (La. 1989) (ruling that insurer had a reasonable basis for denying coverage when issue revolved on interpretation of whether the policy had been "terminated" or "cancelled" prior to when covered loss occurred); Wright v. League Gen. Ins. Co., 421 N.W.2d 647, 650 (Mich. Ct. App. 1988) (affirming trial court's grant of summary judgment on bad-faith claim where issue of reasonableness turned on meaning of the phrase "involved in the accident" contained in statute governing no-fault auto-insurance scheme); Transcon. Ins. Co. v. Washington Pub. Utilities Districts' Util. Sys., 760 P.2d 337, 347 (Wash. 1988) (affirming trial court's determination that, while insurer's interpretation of policy language was incorrect, it acted reasonably in denying coverage and therefore was not liable for bad faith); Starczewski v. Unigard Ins. Grp., 810 P.2d 58, 62 (1991) (Wash. Ct. App. 1991) (holding, as a matter of law, that while insurer's interpretation of appropriate amount of repair costs recoverable was incorrect based on policy language, insurer had reasonable basis for its position).

For cases that rule as a matter of law whether there was a reasonable basis for denial of coverage when the facts relevant to coverage are not in dispute, see Case v. Toshiba Am. Info. Sys., Inc., 7 F.3d 771, 773 (8th Cir. 1993) (applying South Dakota law) (affirming grant of summary judgment to workers'-compensation insurer sued for bad-faith denial of insured's claim based on evidence that plaintiff had a long history of smoking, an alternative and nonoccupational explanation for plaintiff's disease); Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co., 108 Cal. Rptr. 2d 776, 787 (Cal. Ct. App. 2001) (stating "as long as there is no dispute as to the underlying facts, it is for the court, not a jury, to decide whether the insurer had 'proper cause'"); Zolman v. Pinnacol Assur., 261 P.3d 490, 499 (Colo. App. 2011) (holding that, despite the general rule that the determination of whether the insurer behaved reasonably is a question of fact, in this case, it is a matter of law because of evidence provided by physicians that insured did not require care for which she sought coverage); Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 474 (Iowa 2005) ("[I]f it is undisputed that evidence existed creating a genuine dispute as to the negligence of an uninsured or underinsured motorist, the comparative fault of the insured, the nature and extent of the insured's injuries, or the value of the insured's damages, a court can almost always decide that the claim was fairly debatable as a matter of law."); Prince v. Bear River Mut. Ins. Co., 56 P.3d 524, 535 (Utah 2002) ("The trial court's conclusion that [insured's] claim was fairly debatable under the facts of this case is a question of law that we review for correctness.").

The largest pocket of decisions contrary to the first paragraph of this Reporters' Note exists in the Fifth Circuit Court of Appeals. There, in cases governed by Mississippi law, the Fifth Circuit has repeatedly asserted that the question of whether the insurer had a reasonable basis for denying (or delaying payment for) the claim is a matter of law for the court. See James v. State Farm Mut. Auto. Ins. Co., 743 F.3d 65, 70 (5th Cir. 2014) (applying Mississippi law) (providing conflicting

language on whether the trial court must decide as a matter of law whether a reasonable basis for denial existed); Broussard v. State Farm Fire & Cas. Co., 523 F.3d 618, 628 (5th Cir. 2008) (applying Mississippi law) ("The question of whether State Farm had an arguable basis for denying the Broussards' claim 'is an issue of law for the court.'"); Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 873 (5th Cir. 1991) (applying Mississippi law) (stating in a case that had both factual and legal issues to determine coverage and bad faith, "[w]hether State Farm had an arguable reason to deny Mrs. Dunn's claim is an issue of law for the court"); see also 2 WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 17.04[2][a]-[c], at 17-76 to 86 (2d ed. 2019) (arguing that determination of whether an insurer had a reasonable basis for denial of a claim is a matter of law for the court, citing *James*).

The Fifth Circuit has persisted in this position even though Mississippi law is to the contrary. The Mississippi Supreme Court in *Cook,* supra, approved a jury instruction on the issue of whether a reasonable basis existed. Indeed, on appeal of summary judgment for the insurer, the same court observed that, before submitting the issue to a jury, the trial court should determine that the evidence is sufficient for an affirmative finding, the usual sufficiency-review standard applicable to all determinations of fact. Jenkins v. Ohio Cas. Ins. Co., 794 So. 2d 228, 232 (Miss. 2001). In *Dunn*, the Fifth Circuit cited a Mississippi case, Bankers Life & Cas. Co. v. Crenshaw, 483 So. 2d 254, 256 (Miss. 1985), aff'd on other grounds, 486 U.S. 71 (1988), for the proposition that the court is to decide whether the insurer had a reasonable basis for denying the claim. But only a misreading of *Crenshaw* could support that proposition, as the case involved an insurer's appeal of a jury verdict that found bad faith and awarded punitive damages; the issue on appeal was only the propriety of submitting a claim for punitive damages to the jury. Similarly, the *James* court cited two Mississippi Supreme Court cases to support its statement that bad faith is a matter for the court. Neither of those cases stand for that proposition.

Other support for the proposition that bad faith is generally a matter for the court is scarce. For two such cases, see Dalrymple v. United Services Auto. Ass'n, 46 Cal. Rptr. 2d 845 (Ct. App. 1995) (while articulating the standard rule of submission of bad-faith issues to the jury, ruling that whether the insurer's bringing and pursuing a declaratory-judgment action to determine coverage was appropriate was a matter for the court, analogizing that determination to lack of proper cause in malicious-prosecution claim); Koch v. Prudential Ins. Co., 470 P.2d 756, 759-760 (Kan. 1970) (stating that the determination of whether the insurer denied the claim without "just cause or excuse" is for the court).

Comment m. State unfair-insurance-claims-practices provisions. At least 45 states have enacted model legislation developed by the National Association of Insurance Commissioners that addresses insurers' abusive claim processing conduct. See Diana C. White, *Liability Insurers and Third–Party Claimants: The Limits of Duty,* 48 U. CHI. L. REV. 125, 146 n.75 (1981). Professor Roger Henderson explains the genesis of these statutes (frequently called unfair-claims-practices acts) and their limitations in the task of assisting individual insureds whose insurers engaged in bad faith in its claims handling:

> In the 1970s, the National Association of Insurance Commissioners (NAIC) began to develop model legislation aimed at unfair claims settlement practices of the insurance industry. Although this legislation, or some variation of it, has now been adopted by all but a half-dozen states, it has not materially aided the individual claimant. The model legislation prohibits certain acts by an insurer only when committed flagrantly and in conscious disregard of the statute or with such frequency as to indicate a general business practice. In such circumstances, the state insurance regulator is empowered to seek injunctive relief or penalties to enforce the statutory provisions. This language, when coupled with the fact that the legislation is silent as to any remedies on behalf of individual claimants, led the courts, with only a very few exceptions, to refuse to recognize that the legislation created a private cause of action on behalf of an insured for money damages. This was a serious shortcoming.
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> An individual insured seldom could obtain timely relief by complaining to the state insurance regulator. Without legal assistance, it was difficult for an insured to prove a flagrant and conscious violation of the law or that the insurer engaged in a general practice of abuse. Only after a large number of insureds complained against a particular insurer could the insurance commissioner act. By that time, it was usually too late for many of the insureds. Consequently, the efforts of the NAIC proved to be less than adequate for the task. As a result, many individuals who had been harmed by the wrongful acts of insurers were still without a remedy even when complaints were filed with their state insurance commissioner.
>
> In sum, the legislative and administrative responses, either through provisions for attorneys' fees and penalties or prohibitions on unfair insurer claims practices in general, did not stem the tide of social pressure for relief from unjustified delays in processing and arbitrary refusals to pay claims. This left only one other route open to claimants—the courts.

Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1, 14-15 (1992).

In some states, statutory language clearly establishes that the insured is not entitled to bring a private right of action for a violation of a state unfair claims practices act. See, e.g., ALASKA STAT. § 21.36.125(b) ("The provisions of this section do not create or imply a private cause of action for a violation of this section."); ARIZ. REV. STAT. ANN. § 20-461(D) ("Nothing contained in this section is intended to provide any private right or cause of action to or on behalf of any insured or uninsured resident or nonresident of this state."); GA. CODE § 33-6-37 ("Nothing contained in this [Unfair Claims Practices] article shall be construed to create or imply a private cause of action for a violation of this article."); OHIO ADM. CODE 3901-1-54(B) ("Nothing in this rule shall be construed to create or imply a private cause of action for violation of this rule."); S.D. CODIFIED LAWS § 58-33-69 (providing that nothing in the state's Unfair Trade practices Act

"grants a private right of action"). The NAIC Model Legislation on which a number of state statutes are based, explicitly states that it does not create a private right of action. See National Association of Insurance Commissioners, Model Unfair Claims Settlement Practices Act § 1 ("nothing herein shall be construed to create or apply a private cause of action for violation of this Act").

Although uncommon, a state's unfair-claims-practices act might include a provision that provides a private right of action. See WASH. REV. CODE § 48.30.015(2) (providing for recovery of up to three times actual damages plus attorney's fees and costs in a private right of action).

A number of state unfair-claims-practices acts, meanwhile, do not provide a private right of action, but do provide other statutory remedies for insureds whose insurers fail to process claims in a reasonable fashion. See, e.g., ARK. CODE ANN. § 23-79-208(a)(1) (providing a private claim for failing to pay losses within the time specified in the insurance policy and providing remedies of an additional 12 percent of the loss and attorney's fees); GA. CODE ANN. § 33-4-6 (providing a penalty of 50 percent of the claim or $5000, whichever is greater in addition to attorney's fees for bad-faith breach of an insurance contract); WASH. REV. CODE § 48.30.015(2) (providing for recovery of up to three times actual damages plus attorney's fees and costs); WYO. STAT. ANN. § 26-15-124 (providing attorney's fees and 10 percent interest for failure to pay a claim within 45 days of a claim); see generally BARKER & KENT, supra § 1.07[2], at 1-40.

When the statute does not speak explicitly to whether a private right of action exists, the vast majority of courts have denied a private right of action arising from violation of a state's unfair-claims-practices act. See, e.g., Lockwood v. Geico Gen. Ins. Co., 323 P.3d 691, 697 n.15 (Alaska 2014) (rejecting the notion that Alaska's unfair-claim-settlement-practices act creates a private right of action); Rizzo v. State Farm Ins. Co., 305 P.3d 519, 527 (Idaho 2013) (stating that the Act "does not give rise to a private right of action whereby an insured can sue an insurer for statutory violations committed in connection with the settlement of the insured's claim") (quoting White v. Unigard Mut. Ins. Co., 730 P.2d 1014, 1021 (Idaho 1986)); Weis v. State Farm Mut. Auto. Ins. Co., 776 N.E.2d 309, 311 (Ill. App. Ct. 2002) ("[A] violation of the insurance rules contained in Title 50 of the Illinois Administrative Code does not give rise to a private cause of action."); Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255, 259-260 (Iowa 1991) (holding that Iowa does not recognize a "private cause of action" under its statute governing fair claims practices); Earth Scientists (Petro Servs.) Ltd. v. U.S. Fid. & Guar. Co., 619 F. Supp. 1465, 1470 (D. Kan. 1985) (concluding that Kansas Supreme Court would not find a private right of action in state Unfair Trade Practices Act); Rocanova v. Equitable Life Assur. Soc. of U.S., 634 N.E.2d 940, 944 (N.Y. 1994) ("[T]he law of this State does not currently recognize a private cause of action under Insurance Law § 2601."); Aduddell Lincoln Plaza Hotel v. Certain Underwriters at Lloyd's of London, 348 P.3d 216, 224 (Okla. Civ. App. 2015) ("The [Unfair Claims Settlement Practices Act] does not create a private remedy.").

Often, courts so ruling rely on the explanation that enforcement of the insurance regulations is the sole authority of the department of insurance. See Bernacchi v. First Chicago Ins. Co., 52 F. 4th 324, 330 (7th Cir. 2022) (applying Illinois law) (holding that a violation of the insurance rules

contained in Title 50 of the Illinois Administrative Code does not give rise to private cause of action because the Illinois Department of Insurance has the sole authority to enforce the codes, and the proper remedy for a party who alleges a violation is to submit a complaint to the department.); Weis v. State Farm Mut. Auto. Ins. Co., 776 N.E.2d 309, 311 (Ill. App. Ct. 2002) ("The enforcement of the insurance rules was clearly delegated to the Department of Insurance, and, as such, we conclude that a plaintiff cannot plead or pursue a private cause of action based on an insurer's violation of these rules."); see also STEPHEN S. ASHLEY, BAD FAITH ACTIONS LIABILITY & DAMAGES § 9:3 (updated 2021) ("Though a few states have agreed with the conclusion that the unfair claims settlement practices statutes support private claims, most have rejected private causes of action.").

The Reporters' research has found only a few courts that recognize a private right action arising under a state unfair-claims-practices act, and most of those cases involve third-parties asserting the claim against a liability insurer. E.g., Farmer's Union Cent. Exch. Inc. v. Reliance Ins. Co., 626 F. Supp. 583, 590 (D.N.D. 1985) (stating that, in the absence of contrary state court authority: "This court concludes that the duties imposed by [the state's unfair-claims-practices act] may be the basis for an action sounding in tort. It is apparent from the provisions of that chapter that the statute was enacted to protect persons filing claims against insurers."); Auto-Owners Ins. Co. v. Conquest, 658 So. 2d 928, 930 (Fla. 1995) (permitting private action for violation of Florida unfair-claims-practices act); Indiana Ins. Co. v. Demetre, 527 S.W.3d 12, 34 (Ky. 2017) (permitting recovery of attorney's fees in claim against liability insurer based on Kentucky Consumer Protection Act); Nationwide Mut. Ins. Co. v. Holmes, 842 S.W.2d 335, 342 (Tex. App. 1992) (holding insured could recover damages and attorney's fees in suit against liability insurer under Texas's Deceptive Trade Practices Act); Taylor v. Nationwide Mut. Ins. Co., 589 S.E.2d 55, 60 (W. Va. 2003) (acknowledging the court's previous holding that a private right of action exists for violations of the state's Unfair Trade Practices Act). For a few rare cases finding that the state's unfair-claims-practices act impliedly creates a private right of action, see generally BARKER & KENT, supra § 10 (comprehensive cataloguing of state statutes addressing insurer behavior).

Apart from the question of whether there is a private right of action, there exists the question of what role (if any) the statutory violation has in the plaintiff's common law claim. Although the doctrine of negligence per se applies to statutory violation for ordinary negligence cases, see Restatement Third, Torts: Liability for Physical an Emotional Harm § 14, most courts have rejected the use of statutory violations as the equivalent of a per se violation of the bad-faith standard. See Dinner v. United Servs. Auto. Ass'n Cas. Ins. Co., 29 F. App'x 823, 827 (3d Cir. 2002) (applying Pennsylvania law) (holding that a violation of the Unfair Insurance Practices Act, the regulations promulgated thereunder, and the Unfair Claims Settlement Practices provisions, do not constitute a per se violation of the bad-faith standard); Hart v. Prudential Prop. & Cas. Ins. Co., 848 F. Supp. 900, 904 (D. Nev. 1994) (rejecting plaintiff's contention that violation of the state's Unfair Practices Act constitutes per se bad faith). But see Moody v. Oregon Cmty. Credit Union, 505 P.3d 1047, 1057 (Or. Ct. App.), rev. allowed, 512 P.3d 446 (Or. 2022) (holding that a violation of state Unfair Claims Settlement Practices Act was sufficient to support negligence per se claim

against life insurer that allegedly failed to conduct a reasonable investigation of whether death was accidental).

However, courts have been more amenable to the admissibility of a violation of a state regulation as relevant to the fact finder's determination of bad faith. See, e.g., Jordan v. Allstate Ins. Co., 56 Cal. Rptr. 3d 312, 323 (Cal.Ct. App. 2007), as modified on denial of reh'g (Apr. 20, 2007) (holding expert's testimony about insurer's violation of state Unfair Insurance Practices Act was admissible in bad-faith suit); Miglicio v. HCM Claim Mgmt. Corp., 672 A.2d 266, 271 (N.J. Super. 1995) ("[A]ny deviation from the [unfair claims practices] standards may be considered as evidence of bad faith."); Heyden v. Safeco Title Ins. Co., 498 N.W.2d 905, 909-910 (Wis. Ct. App. 1993) (violation of state statute specifying insurance unfair methods and practices may be relied on by expert testifying that insurer engaged in bad faith). However, in some instances, the state's regulation may not have relevance to the legal issues in a bad-faith claim. See Dinner v. United Serv. Auto Ass'n Cas. Ins. Co., 29 Fed. Appx. 823, 828 (3d Cir. 2002) (applying Pennsylvania law) (holding that proposed evidence that insurer violated state regulations while handling insured's claim was properly excluded in the insured's bad faith action because those violations were potentially prejudicial and did not bear on whether the insurer lacked a reasonable basis for denying benefits and knew or acted in reckless disregard of the lack of reasonable basis); Aduddell Lincoln Plaza Hotel v. Certain Underwriters at Lloyd's of London, 348 P.3d 216, 224 (Okla. Civ. App. 2014) ("The Unfair Claims Settlement Practices Act may provide guidance to a trial court in determining whether to grant summary judgment, but it does not function as an appropriate guide for a jury to determine bad faith.").

Another impediment to the use of Unfair Claims Practices Acts in bad-faith litigation is that, often, the statutes require a regular course of misconduct or that violations occur with sufficient frequency to demonstrate a business practice. The model NAIC's Unfair Claims Settlement Practices Act requires a prohibited act to be committed flagrantly and in conscious disregard of the Act or with such frequency to indicate a general business practice. See NAIC Resource Center Model Laws, available at https://content.naic.org/sites/default/files/model-law-900.pdf.

Courts have repeatedly rejected the argument that state regulation, including claims-practices regulation, preempt the bad-faith tort claims based on unreasonable insurer claims processing. See, e.g., State Farm Fire & Cas. Co. v. Nicholson, 777 P.2d 1152, 1157 (Alaska 1989) ("[T]he State has limited means with which to police the insurance industry. Furthermore, the statutory remedies fail to compensate the insured for damages involved in the insurer's bad faith denial of coverage."); Aetna Cas. & Sur. Co. v. Broadway Arms Corp., 664 S.W.2d 463, 465 (Ark. 1984) ("Neither of these [statutory provisions regulating insurers and providing] remedies deals with the area of bad faith much less pre-empts it."); McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 859 (Wyo. 1990) ("Preclusion by alternative statutory remedy has been denied acceptance in most jurisdictions unless the remedy would be as broad as the bad faith tort claim."). But cf. Spencer v. Aetna Life & Cas. Ins. Co., 611 P.2d 149, 156-158 (Kan. 1980) (holding that Kansas statutes providing recovery of attorney's fees and penalizing unfair claims processing acts

presumptively provide sufficient remedies for insureds so as render tort-based first-party bad faith claims unnecessary).

Comment n. Negligence and honest mistakes. Illustration 4, involving the home collapse, is based loosely on Barry v. Nationwide Mut. Ins. Co., 298 F. Supp. 3d 826 (D. Md. 2018).

Comment o. Independent contractors hired to perform claims processing. The Reporters' research has failed to find a single case denying the non-delegable duty principle stated in this Comment. Courts affirming it include Patterson v. Westfield Ins. Co., 2019 WL 11253086, at *9 (N.D.W. Va. 2019) (denying insurer's motion for summary judgment of bad-faith claim based on insurer's vicarious liability for independent contractor's actions in processing claim); Walters v. F.J. Simmons & Others, 818 P.2d 214, 223 (Ariz. Ct. App. 1991) ("[A]n insurer who owes the legally imposed duty of good faith to its insureds cannot escape liability for a breach of that duty by delegating it to another, regardless of how the relationship of that third party is characterized."); Mendoza v. McDonald's Corp., 213 P.3d 288, 305 (Ariz. Ct. App. 2009) (extending *Walter* to the award of punitive damages in a bad faith claim based on advice provided by attorney during the processing of a claim); Cary v. United of Omaha Life Ins. Co., 68 P.3d 462, 466 (Colo. 2003), as modified on denial of reh'g (May 19, 2003) ("The duty [of good faith and fair dealing] is non-delegable so that insurers cannot escape their duty of good faith and fair dealing by delegating tasks to third parties."); De Dios v. Indem. Ins. Co. of N. Am., 927 N.W.2d 611, 621 (Iowa 2019), amended (May 14, 2019) ("An insurer cannot delegate its duty of good faith. Therefore, an agent of the insurer, while acting on the insurer's behalf by carrying out the insurer's contractual obligations, is under the same duty of good faith as the insurer itself. Under varying circumstances, the good faith requirement has been held to also apply to attorneys of the insured."); Jessen v. Nat'l Excess Ins. Co., 776 P.2d 1244, 1248 (N.M. 1989) (stating that insurer "was not relieved of liability because McManaman was an independent contractor"); Timmons v. Royal Globe Ins. Co., 653 P.2d 907, 914 (Okla. 1982) (holding that the trial court's refusal to instruct the jury on the difference between an agent and independent contractor was not error because the insurer was liable regardless); Fair v. Nash Finch Co., 2012 WL 13173043 (D.S.D. 2012) (treating third-party administrator as an employee for purposes of vicarious liability); Natividad v. Alexsis, Inc., 875 S.W.2d 695, 696 (Tex. 1994) (holding that a "non-delegable duty of good faith and fair dealing is owed by an insurance carrier to its insureds due to the nature of the contract between them giving rise to a 'special relationship'"); Kosovan v. Omni Ins. Co., 496 P.3d 347, 361 (Wash. Ct. App. 2021) (holding that an insurer's duty for claims handling is non-delegable); Majorowicz v. Allied Mut. Ins. Co., 569 N.W.2d 472, 475 (Wis. Ct. App. 1997) ("An insurer's duty to act in good faith in its dealings with its insured is non-delegable. An insurer cannot escape liability for bad faith by delegating its responsibilities to attorneys or other agents."); see also WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 7.01[1], at 7-2 to 7-3 (2d ed. 2019) (stating the non-delegability of claims processing and citing cases so holding); STEVEN PLITT ET AL., COUCH ON INSURANCE 3d § 198:17 (2023 Update) ("An insurer cannot delegate its duty of good faith.").

Comment p. Damages. Because bad faith is a tort, rather than contract, claim, consequential damages are determined based on tort law, which permits recovery of all damages within the tortfeasor's scope of liability (proximate cause). See Restatement of the Law, Liability Insurance § 5, Reporters' Note to Comment *a* (AM. L. INST. 2019). Because insurance bad faith is a category of conduct that has significant potential to cause emotional harm, damages for such harm are also available. Restatement Third, Torts: Liability for Physical and Emotional Harm § 47(b) (AM. L. INST. 2012) (permitting recovery for negligently inflicted emotional distress for categories of "activities, undertakings, or relationships" in which negligent conduct is especially likely to cause serious harm"); Restatement Third, Torts: Remedies § 21 (a) (1) (same). Consistent with that principle, most courts that have addressed the matter permit recovery for emotional harm. See, e.g., Time Ins. Co. v. Burger, 712 So. 2d 389, 393 (Fla. 1998) (finding that a plaintiff is authorized to recover "damages for emotional distress in a first-party bad faith claim against a health insurance company"); see also WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 9.04[4][d], at 9-18 (2d ed. 2019) ("In a few jurisdictions, recovery of emotional distress damages is not permitted or is specially limited."); STEVEN PLITT ET AL., COUCH ON INSURANCE (3d ed. updated 2022) ("In those jurisdictions where a bad-faith claim is viewed as sounding in tort, the insured can obtain a full range of damages, including those for emotional distress . . . .").

In addition, the insured's spouse and children may have a claim for loss of consortium when the insured's emotional distress had a detrimental effect on the relationship with the insured's family member. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 48 A, Comment *n* (in Restatement Third, Torts: Concluding Provisions (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)); id. § 48 C, Comment *d*; Restatement Third, Torts: Remedies § 25 (same); BARKER & KENT, supra § 9.04[4][a], at 9-16. Courts affirming recovery for loss of consortium for insurer bad faith include: Skinner v. Metro. Life Ins. Co., 829 F. Supp. 2d 669, 687 (N.D. Ind. 2010); Poling v. Motorists Mut. Ins. Co., 450 S.E.2d 635, 638 (W. Va. 1994) (third-party insurance). But see Bornstein v. Fireman's Fund Ins. Co., 623 F. Supp. 814, 816 (E.D. Wis. 1985) (denying claim for consortium because insurer owed no contractual obligation to spouse).

Either by statute or common-law decision, some states permit insureds to recover attorneys' fees required to establish coverage for the insured's loss. See, e.g., GA. CODE ANN. § 33-7-11 (providing for recovery of attorneys' fees for bad faith in failing timely to pay uninsured motorist benefits); N.H. REV. STAT § 491:22-b (authorizing attorneys' fees in declaratory-judgment action to establish coverage); 42 PA. STAT. AND CONS. STAT. ANN. § 8371 (providing for recovery of attorneys' fees when insurer acts in bad faith); Allen v. USAA Cas. Ins. Co., 2022 WL 19646, at *4 (N.D. Ala. 2022) (holding insureds could recover attorneys' fees if successful in their bad-faith claim against homeowners' insurer); Mustachio v. Ohio Farmers Ins. Co., 118 Cal. Rptr. 581, 584 (Ct. App. 1975) ("It follows as a matter of course that if the insurer's tortious conduct makes it reasonable for the insured to seek the protection of counsel, the insurer is responsible for that item of damages."). See also Restatement Third, Torts: Remedies § 16(b)(2) (authorizing

recovery of attorneys' fees for bad-faith conduct by insurer); Lemasters v. Nationwide Mut. Ins. Co., 751 S.E.2d 735, 737 (W. Va. 2013) (holding insureds could recover attorneys' fees incurred in establishing coverage for uninsured-motorist-coverage claim but not fees for prosecuting bad-faith claim); Restatement of the Law, Liability Insurance § 50, Comment *b* (AM. L. INST. 2019) (same).

Numerous cases support the view contained in Comment *p* on the availability in bad-faith litigation of punitive damages for sufficiently culpable insurer behavior. Some include Rawlings v. Apodaca, 726 P.2d 565, 578 (Ariz. 1986) ("Thus, we establish no new category of punitive damages for bad faith cases. Such damages are recoverable in bad faith tort actions when, and only when, the facts establish that defendant's conduct was aggravated, outrageous, malicious or fraudulent."); Enrique v. State Farm Mut. Auto. Ins. Co., 142 A.3d 506, 512 (Del. 2016) (declaring that "punitive damages are available as a remedy for bad faith breach of the implied covenant of good faith where the plaintiff can show malice or reckless indifference by the insurer"); Best Place, Inc. v. Penn Am. Ins. Co., 920 P.2d 334, 347 (Haw. 1996), as amended (June 21, 1996) (adopting general standard of culpability for punitive damages in bad-faith claims); Weinstein v. Prudential Prop & Cas. Ins. Co., 233 P.3d 1221, 1251-1253 (Idaho 2010) (analyzing whether newly enacted statute governing punitive damages was applicable to bad faith based on when that claim arose); Erie Ins. Co. v. Hickman, 622 N.E.2d 515, 520 (Ind. 1993) ("The standard for awarding punitive damages for the commission of a [bad-faith] tort remains unchanged."); Pioneer Life Ins. Co. v. Moss, 513 So. 2d 927, 930 (Miss. 1987) (explaining that bad faith is insufficient for recovery of punitive damages, which requires, in addition, proof of "willful or malicious wrong, or act[ing] with gross or reckless disregard for the insured's rights"); U.S. Fid. & Guar. Co. v. Peterson, 540 P.2d 1070, 1072 (Nev. 1975) ("While the record supports the court's determination that there was sufficient evidence of the insurance company's bad faith to justify an instruction on consequential damages, the necessary requisites to support punitive damages are not present."); Anderson v. Cont'l Ins. Co., 271 N.W.2d 368, 379 (Wis. 1978) (declaring that bare proof of bad faith was insufficient for punitive damages, which additionally requires a showing of "aggravation, insult or cruelty, with vindictiveness or malice").