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Understanding the New Tort of First Party Bad Faith in Wyoming: McCullough v. Golden Rule Insurance Company

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UNDERSTANDING THE NEW TORT OF FIRST PARTY BAD FAITH IN WYOMING: *McCullough v. Golden Rule Insurance Company*

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I. INTRODUCTION

In response to two questions certified by the Tenth Circuit Court of Appeals,[1] and following the lead of a majority of states which have considered the issue,[2] the Wyoming Supreme Court in the case of *McCullough v. Golden Rule Insurance Co.*[3] recently adopted the independent tort of first party bad faith. In so doing a sharply divided court[4] acknowledged for the first time in Wyoming that an insurance

1. As stated by Justice Urbigkit, writing for the majority in McCullough v. Golden Rule Ins. Co., 789 P.2d 855 (Wyo. 1990):

> We consider two questions certified from the United States Court of Appeals for the Tenth Circuit:
>
> Does an insurance company owe a duty of good faith to its policyholders not to unreasonably deny a claim for benefits under the policy, the breach of which duty gives rise to an independent tort action?
>
> If such a tort action is permitted, in addition to showing that the claim was denied unreasonably and without proper cause, must the policyholder demonstrate that the insurance company intentionally, knowingly, or recklessly denied the claim for benefits?

789 P.2d at 855.

2. *See infra* notes 11-42 and accompanying text.

3. 789 P.2d 855 (Wyo. 1990).

4. Justice Thomas filed a dissenting opinion, in which he expressed the fear that by adopting the tort of first party bad faith, the court may have adopted a tort rule for all breach of contract cases. In that event, "[t]he punitive damage claim then would

company that does not have a reasonable basis for refusing to pay a first party claim can be held liable to the policyholder in tort as well as for breach of contract. If such refusal involves willful or wanton misconduct, the insurer may face punitive damages as well.

As with the adoption of any new tort, *McCullough* naturally gives rise to more questions than answers. Indeed, aside from its holding that (1) a first party insurer may be held liable in tort for refusing or failing in bad faith to pay a claim;[5] (2) the test for determining whether bad faith exists is whether the insurer had a "fairly debatable" reason for refusing or failing to pay the claim;[6] and (3) the rules in Wyoming for determining whether the recovery of punitive damages is appropriate are no different in a first part bad faith case than for any other tort claim,[7] *McCullough* offers little guidance for resolving the myriad of questions which will inevitably arise in cases brought under the new tort. Although definitive answers to such questions must necessarily await the development of future case law by the Wyoming Supreme Court, there is, quite fortunately, an abundance of authority in other jurisdictions.[8] While not binding in the State of Wyoming, it is nonetheless possible to utilize such authority, particularly from the states of California[9] and Wisconsin,[10] to predict with some confidence the scope and meaning of the new tort of first party bad faith. The object of this article is not only to offer some

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have the same leverage in forcing settlements in all contract cases that it now has in personal injury and other tort cases." *Id.* at 861 (Thomas, J., dissenting).

Justice Golden also wrote a dissenting opinion, in which Justice Thomas joined. In short, Justice Golden's thesis is that existing breach of contract remedies under Wyoming law are adequate to both compensate the victim of first party bad faith and to deter insurers who might otherwise be inclined to engage in bad faith conduct. He, too, believes that the recovery of punitive damages should be prohibited in a first party bad faith case. *Id.* at 862-66 (Golden, J., dissenting).

5. *Id.* at 858 (Urbikit, J., writing for the majority).

6. *Id.* at 860.

7. *Id.* at 861.

8. In addition to an abundance of case law, there are a number of treatises that provide comprehensive treatment for the tort of first party bad faith, including: S. S. ASHLEY, BAD FAITH ACTIONS: LIABILITY AND DAMAGES (1987 and Supp. 1989); J. C. McCARTHY, RECOVERY OF DAMAGES FOR BAD FAITH (5th ed. 1990); W. M. SHERNOFF, S. M. GAGE & H. R. LEVINE, INSURANCE BAD FAITH LITIGATION (1987) [hereinafter W. M. SHERNOFF]; D. J. WALL, LITIGATION AND PREVENTION OF INSURER BAD FAITH (1985); and A. D. WINDT, INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSUREDS & INSURERS (1982 and Supp. 1987). An excellent journal devoted exclusively to this topic is Mathew Bender's *Bad Faith Law Update.*

9. California authority is significant because the *McCullough* court specifically adopted the independent tort thesis of Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973) as the basis for its decision. *McCullough*, 789 P.2d at 855. Therefore, California authority will undoubtedly become important in resolving other questions which arise concerning the new tort of first party bad faith.

10. Wisconsin authority is likewise significant because the majority opinion in *McCullough* embraced the "fairly debatable" standard set forth in Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W.2d 368 (1978) as the means by which to determine whether a claim was denied in bad faith. *McCullough*, 789 P.2d at 855. Accordingly, Wisconsin case law will undoubtedly become important in applying the standard to actual case examples.

analysis and comment on *McCullough* and its significance to Wyoming practitioners, but to raise, and hopefully answer, some of the questions the decision logically poses.

II. THE TORT OF FIRST PARTY BAD FAITH

The first decision to establish that a breach of the implied covenant of good faith and fair dealing is actionable in tort under a first party insurance contract was *Gruenberg v. Aetna Insurance Co.*, where the California Supreme Court court held in an oft-quoted pronouncement:

> It is manifest that a common legal principle underlies all of the foregoing decisions; namely, that in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract whether the company is attending to claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.[11]

Following the decision announced in *Gruenberg*, the question of whether first party bad faith was actionable in tort received widespread judicial attention in many states. In the remarkably short span of seventeen years, the courts in twenty-eight jurisdictions, including California, have adopted the rule enunciated by *Gruenberg*. In addition to California, they include state supreme court decisions in Alabama,[12] Alaska,[13] Arizona,[14] Arkansas,[15] Colorado,[16] Connecticut,[17] Idaho,[18] Iowa,[19] Kentucky,[20] Maine,[21] Mississippi,[22] Montana,[23] Nevada,[24] New Mexico,[25] North

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11. *Gruenberg*, 9 Cal. 3d at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486. *See infra* note 44 to distinguish between a "first party" contract and a "third party" contract.
12. Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d 1 (Ala. 1981).
13. State Farm Fire & Cas. Co. v. Nicholson, 777 P.2d 1152 (Alaska 1989).
14. Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127 (1982), *cert. denied*, 459 U.S. 1070 (1982).
15. Aetna Cas. & Sur. Co. v. Broadway Arms Corp., 281 Ark. 128, 664 S.W.2d 463 (1984).
16. Travelers Ins. Co. v. Savio, 706 P.2d 1258 (Colo. 1985).
17. Buckman v. People Express, Inc., 205 Conn. 166, 530 A.2d 596 (1987).
18. White v. Unigard Mut. Ins. Co., 112 Idaho 94, 730 P.2d 1014 (1986).
19. Dolan v. AID Ins. Co., 431 N.W.2d 790 (Iowa 1988).
20. Curry v. Fireman's Fund Ins. Co., 784 S.W.2d 176 (Ky. 1989) (*overruling* Federal Kemper Insurance Co. v. Hornback, 711 S.W.2d 844 (Ky. 1986)).
21. Gibson v. Nat'l Ben Franklin Ins. Co., 387 A.2d 220 (Me. 1978).
22. Weems v. American Sec. Ins. Co., 486 So. 2d 1222 (Miss. 1986).
23. Lipinski v. Title Ins. Co., 202 Mont. 1, 655 P.2d 970 (1982).
24. United States Fidelity and Guar. Co. v. Peterson, 91 Nev. 617, 540 P.2d 1070 (1975).
25. State Farm Gen. Ins. Co. v. Clifton, 86 N.M. 757, 527 P.2d 798 (1974).

Carolina,[26] North Dakota,[27] Ohio,[28] Oklahoma,[29] Rhode Island,[30] South Carolina,[31] South Dakota,[32] Texas,[33] and Wisconsin,[34] a Washington appellate court decision,[35] a Vermont federal district court decision,[36] and decisions from the District of Columbia[37] and the Virgin Islands.[38] Moreover, although the authorities are split in Illinois[39] (because the availability of statutory damages for first party bad faith has raised the issue of preemption) and New Jersey,[40] there are cases from these two jurisdictions which adhere to the majority rule. Additionally, the legislatures in two states, Florida[41] and Rhode Island,[42] have both adopted a cause of action for first party bad faith by statute and provide for recovery of all actual damages, attorney fees, costs, and where appropriate, punitive damages.

The majority in *McCullough* elected to adopt the *Gruenberg* tort of first party bad faith for several reasons. First, the court held that such a rule was a logical extension of the decisions of *Western Casualty & Surety Co. v. Fowler*,[43] in which the Wyoming Supreme Court

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26. Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976).
27. Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co., 279 N.W.2d 638 (N.D. 1979).
28. Hoskins v. Aetna Life Ins. Co., 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983).
29. Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1978).
30. Bibeault v. Hanover Ins. Co., 417 A.2d 313 (R.I. 1980).
31. Nichols v. State Farm Mut. Auto Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983).
32. Matter of Cert. of a Question of Law, 399 N.W.2d 320 (S.D. 1987).
33. Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987).
34. Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W.2d 368 (1978).
35. Escalante v. Sentry Ins., 49 Wash. App. 375, 743 P.2d 832 (1987).
36. Phillips v. Aetna Life Ins. Co., 473 F. Supp. 984 (D. Vt. 1979).
37. Washington v. Group Hospitalization, Inc., 585 F. Supp. 517 (D.D.C. 1984).
38. Justin v. Guardian Ins. Co., Inc., 670 F. Supp. 614 (D.V.I. 1987).
39. *Compare, e.g.*, Roberts v. Western-Southern Life Ins. Co., 568 F. Supp. 536 (N.D. Ill. 1983) (holding that Illinois statute imposing damage penalty upon insurers for vexatiously and unreasonably denying first party claims was not intended by legislature to limit right of insured to assert independent cause of action in tort for first party bad faith) *with* Debolt v. Mutual of Omaha, 56 Ill. App. 3d 111, 371 N.E.2d 373 (1978) (holding that Illinois statutory remedies preclude a common law tort remedy) *and* Barr Co. v. Safeco Ins. Co. of Am., 538 F. Supp. 248 (N.D. Ill. 1984) (concluding that the statute preempts claims for punitive tort damages but not claims for compensatory tort damages).
40. *Compare* DiSalvatore v. Aetna Cas. & Surety Co., 624 F. Supp. 541 (D.N.J. 1986) (predicting that New Jersey Supreme Court would follow *Gruenberg*) *with* Milcarek v. Nationwide Ins. Co., 190 N.J. Super. 358, 463 A.2d 950 (1983) (holding that first party bad faith gives rise to a contract action only).
41. FLA. STAT. § 624.155 (1984) allows recovery of actual damages, attorney's fees, costs, and where appropriate, punitive damages.
42. R.I. GEN. LAWS § 9-1-33 (1981) also allows recovery of actual damages, attorney's fees, costs, and where appropriate, punitive damages.
43. 390 P.2d 602 (Wyo. 1964). As the majority opinion stated:

> Wyoming law has a consistent thread running from the 1964 case of *Western Cas. and Surety Co.*, involving the third-party situation of a failure to settle and *Arnold*, (citations) involving first-party uninsured motorist coverage, so that recognition of the independent action for the tort of first party bad faith would be structurally consistent and could be expected.

McCullough, 789 P.2d at 858 (citations omitted).

In Justice Golden's dissent, on the other hand, reference is made to *Western Casualty* adopted the tort of "third party" bad faith,[44] and *Arnold v. Mountain West Farm Bureau Mutual Insurance Co.*,[45] where the court first recognized that a violation of the implied covenant of good faith and fair dealing was actionable, but declined to address the issue of whether such violation was actionable in tort or whether it constituted a breach of contract only.[46] Second, the majority opinion held that a first party insurance contract is one of those classes of contracts mentioned in *Tate v. Mountain States Telephone and Telegraph Co.*[47] which create a relationship between the parties out of which certain duties, independent of the express terms of the contract, are implied and imposed by law.[48] Third, the majority opinion recognized that a primary basis for imposing tort liability for insurers acting in bad faith is the superior bargaining power enjoyed by the insurer. That disparity in bargaining power has been implicitly acknowledged by the court in numerous decisions which have construed policy language contracts in favor of the insured.[49] And fourth, the majority opinion

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and *Arnold* as "threads of straw" which "unlike Rumpelstiltskin, the majority cannot spin them into gold." *Id.* at 863 (Golden, J., dissenting). Justice Golden placed a great deal of reliance on the 1893 decision of Kahn v. Traders' Ins. Co., 4 Wyo. 419, 471, 34 P. 1059, 1075 (1893), which held that "good faith is the very essence of these contracts of insurance . . . ." Justice Golden inferred from this language that the duty of good faith is imposed by the parties themselves, not by law, and is part of the contract. *McCullough*, 789 P.2d at 864 (Golden, J., dissenting).

44. Third party bad faith occurs where a liability insurer fails or refuses to settle a claim against its insured within the limits of the policy, thus exposing the insured unnecessarily to a judgment in excess of policy limits. In Western Cas. & Sur. Co. v. Fowler, 390 P.2d 602, 603, 606 (Wyo. 1964), for example, an employee sued his employer for injuries suffered in a fall from a ladder. The employer offered to settle for $2,813.80, but the employer's insurer rejected the offer. At trial, the employee obtained a judgment for $18,197.05, significantly in excess of the $10,000.00 policy limits. The court held that the insurer was guilty of bad faith in refusing to accept the offer of settlement within policy limits and must reimburse the insured for all damage payments the employer was forced to make to the employee.

In contrast to situations where an insurer contracts to indemnify the insured against liability to third parties, first party bad faith occurs in situations where the insurer contracts to pay benefits directly to the insured. *See infra* notes 155-68 and accompanying text.

45. 707 P.2d 161 (Wyo. 1985).

46. After holding that where one party breaches a contract of insurance in bad faith, the injured party can seek damages for breach of the implied covenant of good faith in an uninsured motorist coverage case, *Arnold*, 707 P.2d at 164, the court stated: "Punitive damages may be recoverable in an action in tort if the conduct constituting the breach rises to the level of an independent tort, but that claim is not here presented nor is it decided by us." *Id.*

47. 647 P.2d 58, 63 (Wyo. 1982).

48. *McCullough*, 789 P.2d at 858. Other Wyoming cases in which a special class of contracts has been held to exist and from which duties implied by law were imposed include Brubaker v. Glenrock Lodge Internat'l Ord. of O.F., 526 P.2d 52 (Wyo. 1974) (duty owed by landlord to a tenant); Cline v. Sawyer, 600 P.2d 725 (Wyo. 1979) (duty owed by contractor to a tenant); and Hursh Agency Inc. v. Wigwam Homes, Inc., 664 P.2d 27 (Wyo. 1983) (duty owed by insurance agent to his clients).

49. *McCullough*, 789 P.2d at 858. In support of its adoption of the rule of first party bad faith, the majority opinion held:

> Additionally, this court has at least inferentially recognized that insurance contracts involve unequal bargaining power by adoption of the rate of construction favoring the insured. *See Aetna Ins. Co. v. Lythgoe*, 618 P.2d 1057 (Wyo.

believed that the need to fully compensate the insured for all damages the insured may sustain as a result of the bad faith conduct of his first party insurer, as well as the need for a rule of law which would serve to deter such conduct, would best be met by the *Gruenberg* rule[50] rather than a rule which allowed the insured to pursue a contract remedy only.

When presented with the same issue as the Wyoming Supreme Court dealt with in *McCullough*, however, other states have declined to adopt the *Gruenberg* rule or its rationale. One such group of states has held that the insured may sue for breach of contract only and the damages he may recover are restricted to the damages he would have been entitled to if the contract had been performed.[51] Another group of states adopted the rule that the insured is restricted to a breach of contract theory, but allows the recovery of a broad array of consequential damages as a means of more fully compensating the insured for his injuries.[52] Still another position adopted by some states is that the common law action for breach of the covenant of good faith and

1980) and *Alm v. Hartford Fire Ins. Co.*, 369 P.2d 216 (Wyo. 1962). *See also* Comment, *Establishing the Tort of Bad Faith in Wyoming*, XX Land & Water L.Rev. 625, 628 (1985), which recites the inequality in bargaining power thesis. *See Neal v. State Farm Ins. Companies*, 188 Cal. App. 2d 690, 10 Cal. Rptr. 781 (1961).
Id. at 858.

Justice Golden, on the other hand, could not discern any meaningful relationship between the rule of construction which resolves ambiguities and uncertainties in favor of the insured and the premise that insurance contracts are entered into by parties with grossly uneven bargaining power. He stated that such a rule exists simply because the insurer wrote the contract, not necessarily because of any disparity in bargaining power between the insurer and insured. *McCullough*, 789 P.2d at 864-65 (Golden, J., dissenting). Justice Golden's analysis seems to ignore the fact that the insurer is able to write the contract *because* of the disparity in bargaining power between the insurer and the insured. There is probably more than one insured over the years who would have wanted to sit down and write his own contract of insurance if he had been allowed to do so.

50. *Id.* at 859 (Urbikit, J., writing for the majority).

51. Jurisdictions in this group include Kentucky, Federal Kemper Ins. Co. v. Hornback, 711 S.W.2d 844 (Ky. 1986); Michigan, Kewin v. Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 295 N.W.2d 50 (1980); Minnesota, Saltou v. Dependable Ins. Co., 394 N.W.2d 629 (Minn. Ct. App. 1986) (*but see* Olson v. Rugloski, 277 N.W.2d 385 (Minn. 1979), which expressly left open the issue of whether first party bad faith sounds in contract or tort); Oregon, Employers' Fire Ins. Co. v. Love It Ice Cream Co., 64 Or. App. 784, 670 P.2d 160 (1983); and Virginia, A & E Supply Co., Inc. v. Nationwide Mut. Fire Ins. Co. 798 F.2d 669 (4th Cir. 1986) (predicting Virginia law), *cert. denied*, 479 U.S. 1091 (1987).

52. Jurisdictions in this group include New Hampshire, Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 392 A.2d 576 (1978) (economic losses recognized as foreseeable); Utah, Beck v. Farmers Ins. Exch., 701 P.2d 795 (Utah 1985) (damages for mental anguish may be recovered); and West Virginia, Hayseeds, Inc. v. State Farm Fire & Cas. Co., 352 S.E.2d 73 (W. Va. 1986) (award for aggravation and inconvenience allowed). Other jurisdictions allow for the recovery of punitive damages in a contract action, including Indiana, Vernon Fire & Cas. Co. v. Sharp, 264 Ind. 599, 349 N.E.2d 173 (1976); Iowa, Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633 (Iowa 1984); Maryland, Johnson v. Federal Kemper Ins. Co., 74 Md. App. 243, 536 A.2d 1211 (1988); New Hampshire, Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 392 A.2d 576 (1978); New York, Fleming v. Allstate Ins. Co., 106 A.D.2d 426, 482 N.Y.S.2d 519 (1984), *cert. denied*, 106 S. Ct. 1493 (1986); and West Virginia, Hayseeds, Inc. v. State Farm Fire & Cas. Co., 352 S.E.2d 73 (W. Va. 1986).

fair dealing has been preempted by statute.[53] Ordinarily the type of statutes held to preempt the common law action of first party bad faith are those which provide alternative damage remedies.[54] In at least two cases, however, regulatory provisions designed to impose fines or other sanctions for insurers who engage in bad faith practices have been held to have preemptive effect.[55] Finally, some states have allowed cumulative remedies, i.e., the injured policyholder may pursue statutory remedies in addition to the remedies provided by the tort of first party bad faith.[56]

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53. *See e.g.*, W. M. SHERNOFF, *supra* note 8, § 6.04[4] at 6-44 to 6-45.

54. These jurisdictions include Georgia, GA. CODE ANN. §§ 33-4-6, -7-11(j), -34-6 (1982) (providing for a statutory damage award of twenty-five percent of the liability of the insurer, plus all reasonable attorney fees, upon a showing that the refusal to pay was in bad faith); *see* Globe Life & Accident Ins. Co. v. Ogden, 182 Ga. App. 803, 357 S.E.2d 276 (1987) (in absence of a showing of some special relationship between the insurer and insured which involves a public duty, the statutory damages available in Georgia are an insured's only remedy beyond contract damages for an insurer's failure to pay a claim); Illinois, ILL. ANN. STAT. ch. 273, § 767 (Smith-Hurd Supp. 1990) (providing for a statutory damage award not exceeding $5,000, in addition to attorney fees and costs, for vexatious and unreasonable delay in settling first party claims). *Compare* Kelly v. Stratton, 552 F. Supp. 641 (N.D. Ill. 1982) *with* Zakarian v. Prudential Ins. Co. of Am., 626 F. Supp. 420 (N.D. Ill. 1984) (state appellate court and federal district court decisions in Illinois are split concerning the issue of whether statutory damages preempts an independent cause of action in tort); Louisiana, LA. REV. STAT. ANN. § 22:658 (West 1978) (providing for a statutory damage award of ten percent of the total amount of first party losses, excluding life insurance, together with reasonable attorney fees, if the failure to pay the claim was arbitrary, capricious or without probable cause). *See* Bye v. American Income Life Ins. Co., 316 So. 2d 164 (La. Ct. App. 1975) (statutory damages available in first party bad faith cases are the exclusive remedy of the insured); Missouri, MO. REV. STAT. §§ 375.420 and 375.296 (1978) (providing for a statutory damage award of twenty percent of the first $1500 of the loss and ten percent of the amount of loss in excess of $1500, plus reasonable attorney fees, upon a finding that the insurer refused to pay such loss without reasonable cause or excuse). *See* Duncan v. Andrew County Mut. Ins. Co., 665 S.W.2d 13 (Mo. Ct. App. 1983) (cause of action in tort for first party bad faith is preempted by the availability of statutory damages, although the court also premised its decision on the lack of a fiduciary relationship between the insurer and insured in first party cases); Tennessee, TENN. CODE ANN. § 56-7-105(a) (1989) (providing for a statutory damage award of twenty-five percent of the liability of the insurer upon a showing that the refusal to pay the claim was not in good faith and that the failure to pay inflicted additional expense, loss or injury upon the insured). *See* Chandler v. Prudential Ins. Co., 715 S.W.2d 615 (Tenn. Ct. App. 1986) (bad faith penalty statute provides the exclusive remedy for damages resulting from the bad faith of a first party insurer).

55. Kansas, Spencer v. Aetna Life & Cas. Ins. Co., 227 Kan. 914, 611 P.2d 149 (1980) and Pennsylvania, D'Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 494 Pa. 501, 431 A.2d 966 (1981).

56. Several jurisdictions, most of which recognize the independent tort of first party bad faith, also imply a cause of action from state consumer protection statutes, including Oklahoma, Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977); Texas, Parkins v. Texas Farmers Ins. Co., 645 S.W.2d 775 (Tex. 1983); Montana, First Sec. Bank v. Goddart, 181 Mont. 407, 593 P.2d 1040 (1979); Connecticut, Mead v. Burns, 199 Conn. 651, 509 A.2d 11 (1986); Illinois, Fox v. Industrial Cas. Ins. Co., 98 Ill. App. 3d 543, 424 N.E.2d 839 (1981); Massachusetts, Dodd v. Commercial Union Ins. Co., 373 Mass. 72, 365 N.E.2d 802 (1977); Pennsylvania, Hardy v. Pennock Ins. Agency, Inc., 365 Pa. Super. 206, 529 A.2d 471 (1987); and Washington, Salois v. Mutual Of Omaha Ins. Co., 90 Wash. 2d 355, 581 P.2d 1349 (1978).

Additionally, the following jurisdictions imply a first party tort cause of action from state unfair claims settlement practice acts: California, Royal Globe Ins. Co. v.

These other approaches were specifically rejected by the court in *McCullough*. The first approach, the rule which restricts the insured to a breach of contract remedy to recover the "benefit of his bargain," was rejected by the majority opinion in *McCullough* because it would not fully compensate the insured for damage which bad faith behavior causes and would provide the insurer with no incentive to settle claims where liability was reasonably clear.[57] Quoting the Idaho Supreme Court in a recent opinion, the majority embraced the following statement:

> To deny an action in tort would deny such recovery and consequently encourage insurers to delay settlement. In contrast, an action in tort will provide necessary compensation for insureds and incentive for insurers to settle valid claims. . . . At worst, the availability of an action in tort will add nothing to the liability of insurers.[58]

The majority also rejected the second option, that of restricting the insured to a breach of contract remedy, but allowing for the recovery of a broad range of consequential damages.[59] This is the rule exemplified by *Beck v. Farmers Insurance Exchange*[60] and specifically advocated by Justice Golden in his dissenting opinion.[61] Implicitly, the majority opinion rejected this option because to adopt it would mean altering the "benefit of the bargain" rule traditionally followed in contract cases.[62] The majority also indicated that this rule would not provide the same deterrent or the same recovery of proximately caused damages as the rule establishing first party bad faith as actionable in tort.[63] Moreover, damage remedies would be fashioned on a case by case basis, adding uncertainty to both the scope of the remedy and deterrence to the offender prior to the time an actual judgment or verdict is rendered,[64] and the ultimate deterrent in cases of bad faith,

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Superior Court, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979); Connecticut, Griswold v. Union Labor Ins. Co., 186 Conn. 507, 442 A.2d 920 (1982); Montana, Klaudt v. Flink, 202 Mont. 247, 658 P.2d 1065 (1983); North Dakota, Farmer's Union Cent. Exch., Inc. v. Reliance Ins. Co., 626 F. Supp. 583 (D.N.D. 1985) (predicting North Dakota law); West Virginia, Jenkins v. J.C. Penney Cas. Ins. Co., 280 S.E.2d 252 (W. Va. 1981); and Texas, Aetna Cas. & Sur. Co. v. Marshall, 724 S.W. 770 (Tex. 1987).

57. *McCullough*, 789 P.2d at 859.

58. *Id.* (quoting *White*, 730 P.2d at 1018).

59. *Id.*

60. 701 P.2d 795 (Utah 1985).

61. *McCullough*, 789 P.2d at 866 (Golden, J., dissenting).

62. Inferentially, the majority opinion indicates that the "benefit of the bargain" rule would preclude recognition of some proximately caused damages. *Id.* at 859 (Urbikit, J., writing for the majority). As Justice Golden points out, however, there is Wyoming authority which recognizes the need for flexibility in the rules which govern the recovery of damages for breach of contract. *McCullough*, 789 P.2d at 865 (Golden, J., dissenting), quoting, Panhandle Eastern Pipeline Co. v. Smith, 637 P.2d 1020, 1027 (Wyo. 1981).

63. *Id.* at 859 (Urbikit, J., writing for the majority).

64. As stated in Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 401,

i.e. punitive damages, would be unavailable by definition in a first party bad faith case absent fraud at the inception of the contract.[65]

The third option available to the court, holding that the tort of first party bad faith is preempted by the availability of statutory damages or by regulatory provisions which appear in the Wyoming Insurance Code, was rejected by the majority opinion because the range of recoverable damages available under such statutes is not as broad as the damages recoverable under the tort of first party bad faith.[66] As a result, this particular remedy suffers from the same shortcomings as the breach of contract remedy, that is to say, it restricts the recovery of some damages actually sustained by the insured and does not sufficiently deter bad faith conduct on the part of insurers who indulge in bad faith practices.[67] Moreover, as the majority noted, the rule of statutory preemption, if adopted by the court, would logically extend to the tort of third party bad faith first enunciated by the Wyoming Supreme Court in *Western Casualty & Surety Co. v. Fowler*.[68] In other words, adopting the rule of statutory preemption would have had the effect of repealing *Fowler* and the tort of third party bad faith, because the statutory remedies for bad faith in the State of Wyoming are available in both third party and first party claims.

III. SIGNIFICANCE OF THE DECISION

McCullough did not hold that a cause of action exists against a first party insurer for acting in bad faith.[69] The cause of action for bad

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89 Cal. Rptr. 78, 94 (1970):

> A rule placing the emphasis where it belongs and permitting recovery of all proximately caused detriment in a single cause of action is more likely to engender public respect for and confidence in the judicial process than a rule which would require attorneys, litigants and judges to force square pegs into round holes.

65. A prime consideration in imposing tort liability for the violation of the duty of good faith and fair dealing is the generally accepted notion that traditional contract damages are totally inadequate to deter bad faith conduct on the part of the insurance industry. Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F. L. REV. 613 (1979).

66. WYO. STAT. §§ 26-1-101 to -36-106 (1983 & Supp. 1990). The only statutory damage provision in the State of Wyoming for first party bad faith is Wyoming Statutes Section 26-15-124(c) (1983), which provides for interest and attorney's fees for the unreasonable refusal to pay first party claims. *See infra* note 243.

As stated by the majority opinion:

> 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. It seldom is and would not be in Wyoming and we join the majority precept in rejection of statutory preemption.

McCullough, 789 P.2d at 859.

67. In his dissent, Justice Golden expressed the view that the damages which he perceives to be available in a breach of contract action, along with the Wyoming attorney's fees statute, WYO. STAT. § 26-15-124 (1983), are adequate to deter bad faith conduct. *McCullough*, 789 P.2d at 866 (Golden, J., dissenting).

68. *Id.* at 860.

69. As the Idaho Supreme Court similarly noted in *White*, 730 P.2d at 1017, the question before the *McCullough* court was "not whether a duty of 'good faith' exists

faith against a first party insurer had already been established by Wyoming case law prior to the time *McCullough* was decided.[70] Rather, *McCullough* held that the violation of the duty of good faith and fair dealing gave rise to an independent action in tort, as well as breach of contract.[71] The true significance of *McCullough* to the practitioner and the policyholder, therefore, lies in the benefit to the policyholder of being able to bring a bad faith action in tort as opposed, or in addition, to breach of contract.[72] The significance of being able to do so is suggested, in large part, by the *McCullough* opinion itself. Other matters involving the significance of *McCullough* and the tort remedy it fashions, however, may not be so apparent.

A. All Proximately-Caused Damages Are Recoverable

At the turn of the century, Chief Justice Holmes, writing for a unanimous court, held:

> When a man commits a tort, he incurs, by force of the law a liability to damages, measured by certain rules. When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass. But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured.[73]

As suggested by the majority in *McCullough*,[74] a matter of great importance to attorneys who bring bad faith claims against first party insurers, as well as those who defend them, is the question of whether extracontractual damages are recoverable from the insurer. Under the *Gruenberg* rule, as the majority points out, all proximately-caused

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[between an insurance company and its insured], but rather whether a breach of duty [on the part of either party to the contract] will give rise to an independent action in tort."

70. *Arnold*, 707 P.2d at 164, holding that "(w)here one party breaches the contract in bad faith, the injured party can seek damages for breach of the implied covenant of good faith."

71. In most cases it will be advantageous for the policyholder to bring a first party bad faith action in tort rather than under a breach of contract theory. He is not, however, required to do so. The policyholder may discover reasons in which it is desirable to bring a bad faith action under a contract theory even in a jurisdiction which has adopted tort of first party bad faith. *See, e.g.*, Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958), in which the court held that the policyholder may elect to characterize a bad faith action in tort or contract to take advantage of the longer statute of limitations in contract actions. *See also infra* notes 236-42 and accompanying text.

72. Obviously, the plaintiff's attorney should always allege a claim for relief for breach of contract in cases where he has filed suit against the insurer for first party bad faith. The insurer may have breached its contract, and hence be found liable for the amount of the claim, even though its refusal to pay the claim was not a bad faith refusal.

73. Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543 (1903).

74. *McCullough*, 789 P.2d at 859.

damages are recoverable by the insured.[75] Under the rule advocated by the minority,[76] some proximately caused damages may be recoverable and some may not be, depending upon the facts and circumstances of each particular case, primarily because not all proximately-caused damages are foreseeable by both parties at the time the contract was entered into.[77] An example of the type of economic loss that may not be recoverable under a contract theory is mentioned by the Idaho Supreme Court in *White v. Unigard Mutual Insurance Co.*:

> [T]he requirement that contract damages be foreseeable at the time of contracting in some cases would bar recovery for damages proximately caused by the insurer's bad faith . . . .
>
> Thus, an insured person whose business goes bust as a result of an insurer's bad faith would be able to recover whether the bust was foreseeable or not. For example, an insured who takes out a second mortgage on her business property *after* purchasing her policy, and who could not make her combined payments when the insurer delayed settlement, would recover at tort, but not at contract. To deny an action in tort would deny such recovery and consequently encourage insurers to delay settlement.[78]

This decision points to one of the problems inherent in damage recovery under a contract theory. If the type of damage for which recovery is sought arises only because of events that postdate the issuance of the insurance policy, it can hardly be said that such damage

75. *See* Atlas Constr. Co. v. Slater, 746 P.2d 352 (Wyo. 1987).

76. To prevent the recovery of punitive damages against first party insurers for bad faith conduct, the minority suggested that contract damages be broadened in first party bad faith cases as a means of more adequately compensating victims of bad faith. *McCullough*, 789 P.2d at 865-66 (Golden, J., dissenting).

77. *Compare* Kewin v. Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 295 N.W.2d 50 (1980), which adheres to the strict view that the policy amount plus interest is the sole measure of damages against an insurer wrongfully withholding policy benefits, *with* Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 392 A.2d 576 (1978), which expands the type of economic losses that should be deemed foreseeable under the rule first enunciated by Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854). In discussing the damages available under a contract theory, one authority stated:

> Until recently, insurance policies, at least in the first-party situation, were ordinarily treated as contracts to pay money, and plaintiff's recovery for a failure to pay benefits was limited to the amount due under the policy, plus interest. Consequential damages for failure to pay benefits due or delay in payment were generally limited by the rule of *Hadley v. Baxendale*, . . . and such items of damages as mental distress, medical expenses, or inconvenience caused by the insurer's breach of the policy were regarded as not having been within the contemplation of the parties when the contract was made and hence not recoverable. Although, as noted previously, these limitations have been eroded in many jurisdictions by recognition of the tort of bad faith, some jurisdictions still apparently adhere to the contractual approach to insurer's obligations and treat the question of compensatory damages accordingly.

W. M. SHERNOFF, *supra* note 8, § 7.03[1] at 7-8.

78. *White*, 112 Idaho at 97, 98, 730 P.2d at 1017, 1018 (citations omitted) (original emphasis).

was within the contemplation of the parties at the time the policy was issued. Fraudulent activity that occurs at the inception of the contract is actionable as a tort independent of the duty of good faith.[79] Equivalent conduct arising after the policy has been issued, however, is generally actionable only in those jurisdictions which have adopted the *Gruenberg* rule.[80]

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79. *Arnold*, 707 P.2d at 164. As a practical matter, it is nearly impossible to establish fraud at the inception of the contract under a first party policy of insurance. The egregious conduct which gives rise to a bad faith tort invariably arises after a claim is filed, not when the policy is issued. More importantly, however, the same policy reasons which may justify an award of punitive damages because an insurer fraudulently entered into a first party contract, that of publicly condemning some notorious action or inaction and deterring others from behaving similarly, Campen v. Stone, 635 P.2d 1121 (Wyo. 1981), apply with equal force where the post-claim conduct of the insurer is sufficiently egregious to meet the standards enunciated in *Campen*. It is egregious conduct itself which may warrant the imposition of punitive damages, not the fact that a contractual relationship between two parties provides the opportunity for such conduct to occur. The holding in *McCullough*, however, obviates this problem.

80. Application of other common law theories of tort has generally been unsuccessful in cases involving first party bad faith. Indeed, recognition of the tort of first party bad faith by jurisdictions which have adopted the majority rule is attributable in no small part to the unavailability or inapplicability of other common law tort theories.

Thus, recovery under a fraud theory is generally unavailing to the insured. As explained by one author:

> Under a fraud theory, the insured must generally show that the insurer had no intention of paying the claim at the time the contract was entered into. Since the plaintiff's grievance usually concerns improper settlement practices that took place after the claim arose, he or she may have difficulty establishing a fraudulent act relating to the making of the contract.

W. M. SHERNOFF, *supra* note 8, § 1.06[2] at 1-16 (citing Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 397, 89 Cal. Rptr. 78 (1970), citing Restatement (Second) of Torts 46, Comment j (1965)).

The tort of intentional infliction of emotional distress is likewise of limited utility in cases involving first party bad faith. As the same author pointed out:

> Although the tort of intentional infliction of mental distress has provided an initial theoretical foundation for recovery in tort for unfair claims practices, it is not an ideal remedy for such practices. As the *Fletcher* court noted, to recover under this theory, plaintiff must establish that the defendant's conduct was outrageous and, perhaps more importantly, that the plaintiff suffered "severe" emotional distress, which the court in *Fletcher* defined as distress that is "of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it."

Id. § 1.06[3] at 1-20.

The tort of intentional interference with contractual relationships has been recognized by the Wyoming Supreme Court on numerous occasions, *e.g.*, Dehnert v. Arrow Sprinklers, Inc., 705 P.2d 846 (Wyo. 1985). However, this particular tort would be unavailable in the usual case of first party bad faith. As the court in Board of Trustees, Etc. v. Holso, 584 P.2d 1009 (Wyo. 1978) illustrated, the tort of intentional interference with contractual relationships does not apply to actions between parties to an existing contract—it lies "only against outsiders who interfere with the contractual expectancies of others." *Id.* at 1017.

Conversion theories, moreover, have not been applied in cases of first party bad faith with any success, *e.g.*, A & E Supply Co. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669 (4th Cir. 1986). Indeed, the general unavailability of any other common law tort theories to redress the injuries of a victim of first party bad faith was referred to in *A & E Supply Co.*:

> While we sympathize with the plight of plaintiff and agree with the district court that the conduct of Nationwide Mutual Fire Insurance Company was discreditable, we cannot find in the above litany of torts one that both applies to the circumstances of this case and that Virginia law would recognize as an indepen-

Other situations abound where the insured has suffered significant financial or economic hardship as a result of an insurer who has denied, or even delayed payment of, a claim in bad faith, but which was not necessarily foreseeable by both parties to the insurance contract at the time the policy was issued. The insured may have to pay interest on funds he was forced to borrow because policy benefits were unjustifiably withheld.[81] Damages may result from the insured being forced into bankruptcy or from the inability to pay creditors, such as where the insurer's failure to pay policy benefits causes damage to the insured's credit standing or causes the insured to incur costs in defending lawsuits brought by the insured's creditors.[82] The insured may sustain damage in the form of additional loss of earnings, rental expenses, or replacement expenses if the insurer unreasonably withholds or delays payment of benefits.[83] He may lose employment opportunities as a result of his insurer's bad faith conduct,[84] or he may sustain loss simply because inflation significantly decreases the value of the insured's claim through the months or years required to compel the insurer to make payment.[85]

In all of these cases, it is really anyone's guess as to whether a breach of contract remedy affords the insured a basis for complete recovery. Indeed, damage components such as lost profits, loss of a business enterprise, loss of rents following a fire, loss of credit reputation, and the costs of being driven into bankruptcy have specifically been held not to be within the contemplation of the parties when the contract was entered into and hence unrecoverable.[86] It can hardly be said that such damages were reasonably foreseeable by the insurer unless it can also be said that *both* parties to the contract contemplated or anticipated at the time the insurer issued a first party policy of insurance that the insurer would subsequently act in bad faith. Because the duty of good faith and fair dealing is one imposed upon the parties to an insurance contract, rather than one which the parties impliedly consent to, it logically follows that resulting damages are foreseeable only in the event of a breach of the express terms of the contract, not for duties that are imposed on one party to the contract long after the contract was entered into. Under *McCullough*, these problems are avoided because all proximately caused damages are recoverable whether they were foreseeable by the parties to a contract

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dent basis for the award of punitive damages.
Id. at 672.

81. *See, e.g.*, Neal v. State Farm Ins. Cos., 188 Cal. App. 3d 690, 10 Cal. Rptr. 781 (1961).
82. *See, e.g.*, Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).
83. *Id.*
84. *See, e.g.*, Smith v. American Family Mut. Ins. Co., 294 N.W.2d 751 (N.D. 1980).
85. *See, e.g.*, Leslie Salt Co., v. St. Paul Mercury Ins. Co., 637 F.2d 657 (9th Cir. 1981).
86. *See* W. M. SHERNOFF, *supra* note 8, § 7.03[1] at 7-8.

or not.

One damage question which frequently arises is whether recovery for emotional distress should be allowed in a bad faith action.[87] Under a contract theory, damage for emotional distress is generally not recoverable.[88] One of the few exceptions among the jurisdictions which adhere to the rule advocated by the *McCullough* minority is the case of *Beck v. Farmers Insurance Exchange*, where the court held:

> In an action for breach of a duty to bargain in good faith, a broad range of recoverable damages is conceivable, particularly given the unique nature and purpose of an insurance contract . . . . [I]t is axiomatic that insurance frequently is purchased not only to provide funds in case of loss, but to provide peace of mind for the insured or his beneficiaries. Therefore, although other courts have been reluctant to allow such an award, we find no difficulty with the proposition that, in unusual cases, damages for mental anguish might be provable. The foreseeability of any such damages will always hinge upon the nature and language of the contract and the reasonable expectations of the parties.[89]

The more usual case, and one which clearly illustrates the inequity of the rule in jurisdictions which generally label first party bad faith as strictly a contract action, is that of *Saltou v. Dependable Insurance Co., Inc.*[90] In that case Saltou, a navy veteran who suffered from a service-connected nervous condition which had rendered him seventy percent disabled, purchased a mobile home and planned to live in it with his fiance, Hoppner, who was mentally retarded, dyslexic and epileptic. Saltou's total income in the preceding year consisted of $471 in VA benefits. Subsequently, the mobile home and its contents were destroyed by fire. Although a claim was promptly filed with Saltou's first party insurer, Dependable Insurance Company, the insurer refused to pay for the loss to the personal contents of the mobile home, causing severe financial and emotional problems for the insureds. In the ensuing litigation, the court held that such injuries were not compensable under Minnesota law:

> Although bad faith failure to pay insurance claims is not to be encouraged, and respondents took advantage of appellants' vulnerable mental and economic condition, appellants must show more than malicious failure to pay an insurance claim in order to recover extra-contractual damages.[91]

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87. *See* S. S. ASHLEY, *supra* note 8, § 8.04 at 8-9 to 8-14.
88. Farris v. U.S. Fidelity and Guar. Co., 284 Or. 453, 587 P.2d 1015 (1978). *See also* RESTATEMENT OF THE LAW OF CONTRACTS § 342 (1932).
89. *Beck*, 701 P.2d at 802 (citations omitted).
90. 394 N.W.2d 629 (Minn. Ct. App. 1986).
91. *Id.* at 633.

Under the rule advocated by the minority opinion in *McCullough*, this harsh result may be avoided. Quoting Corbin, for example, Justice Golden stated:

> There is sufficient authority to justify the statement that damages will be awarded for mental suffering caused by the wanton or reckless breach of a contract to render a performance of such a character that the promisor had reason to know when the contract was made that a breach would cause such suffering, for reasons other than mere pecuniary loss.[92]

Allowing a more complete recovery for damages sustained by victims of insurer bad faith in the manner suggested by Justice Golden, however, remains disadvantageous for other reasons. First of all, neither the litigants nor the attorneys know in advance of trial what the rules of the game are pertaining to damages in bad faith actions.[93] Second, there are no clearly established standards for determining which damages are foreseeable, and hence recoverable, and which are not, leading to the distinct possibility of inconsistent results within the same jurisdiction. There are no such limitations, and much less uncertainty, where all proximately caused damages are recoverable under a tort theory.[94]

B. Punitive Damages May Be Recoverable

Another significant aspect of the *McCullough* decision is that it leaves open the possibility of recovering punitive damages for bad faith which resulted from the willful and wanton actions of an insurer.[95] Unlike the rule in some states,[96] punitive damages are not recoverable in Wyoming in a breach of contract action unless fraud at

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92. *McCullough*, 789 P.2d at 865 (Golden, J., dissenting (quoting 5 A. CORBIN ON CONTRACTS, § 1076 at 429 (1964)).

93. Whether such damages as mental distress, loss of credit reputation, or loss of profits are recoverable should be known by the litigants and the attorneys in advance of the time the court adopts jury instructions. The recoverability of such damage components often determines whether an action is brought and, in any event, the ability to recover extracontractual damages doesn't have much of a deterrent effect upon insurers who commit bad faith if contract damage rules are left to "the feeling of the court" and applied on a case by case basis. *McCullough*, 789 P.2d at 865 (Golden, J., dissenting) (quoting Panhandle Eastern Pipeline Co. v. Smith, 637 P.2d 1026, 1027 (Wyo. 1981), quoting 5 CORBIN ON CONTRACTS, § 1002, at 33 (1964)).

94. *See* W. M. SHERNOFF, *supra* note 8, § 7.04[1] at 7-14 to 7-19.

95. *McCullough*, 789 P.2d at 860-61.

96. Jurisdictions which label first party bad faith as a contract action, but which allow for the recovery of punitive damages, include Indiana, Vernon Fire & Cas. Co. v. Sharp, 264 Ind. 599, 349 N.E.2d 173 (1976); Iowa, Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633; Maryland, Johnson v. Federal Kemper Ins. Co., 74 Md. App. 243, 536 A.2d 1211 (1988); New Hampshire, Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 392 A.2d 576 (1978); New York, Fleming v. Allstate Ins. Co., 106 A.D.2d 426, 482 N.Y.S.2d 519 (1984), *cert. denied*, 106 S. Ct. 1493 (1986); and West Virginia, Hayseeds, Inc. v. State Farm Fire & Cas. Co., 352 S.E.2d 73 (W. Va. 1986).

the inception of the contract is proven.[97] As a practical matter, such a requirement rules out the possibility of a punitive damage instruction in cases involving bad faith because the conduct which may give rise to any willful and wanton behavior on the part of the insurer invariably postdates the issuance of the policy.[98] Because first party bad faith now gives rise to an independent action in tort under *McCullough*, it does not matter when the willful and wanton activity occurred.[99] As the majority was careful to point out, however, the standard for determining whether punitive damages are recoverable against an insurer who has committed bad faith was not changed by *McCullough*. As stated by the court:

> Moreover, this decision today should not be interpreted as opening the floodgates for awarding punitive damages in each case where the claim of the bad faith tort may be submitted for trial determination. Although we recognize this tort, we believe that the awarding of punitive damages for the tort of bad faith should remain consistent in Wyoming law and require wanton or willful misconduct.[100]

Justice Golden, in dissent, asserted that the only real issue in *McCullough* involved the question of whether punitive damages should be recoverable in bad faith actions against first party insurers.[101] This is so, according to his dissent, because in the underlying action the damages awarded by the court under a breach of contract theory were no different than what would have been awarded under a tort theory where all proximately caused damages would ordinarily be recoverable.[102] Thus, Justice Golden observed:

> The parties to this appeal have no quarrel about the particular elements of damages for which the insured has been compensated upon proving the insurer's breach of the implied obligation

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97. *Arnold*, 707 P.2d at 164.

98. *Supra* note 79.

99. *McCullough*, 789 P.2d 862 (Golden, J., dissenting).

100. *McCullough*, 789 P.2d at 860-61. Under existing Wyoming law, punitive damages are recoverable only upon a showing of willful and wanton conduct in order to "publicly condemn some notorious action or inaction . . . ." *Campen*, 635 P.2d at 1123.

101. *McCullough*, 789 P.2d at 862 (Golden, J., dissenting). The objection by the dissenting justices to the rule adopted by the majority seems to be restricted to the fact that the *Gruenberg* rule enables the insured to recover punitive damages in an appropriate case.

102. The underlying action involved the denial of a claim by a health insurer on the basis that the condition for which claim was made was pre-existing. *McCullough*, 789 P.2d at 856. At trial, the insured sought payment of the claim, attorney's fees and damages for emotional distress. As Justice Golden noted, the jury returned a verdict of $3,546.28 representing policy proceeds, $10,000.00 for emotional distress and $31,309.91 in attorney's fees pursuant to Wyoming Statutes section 26-15-124(c) (1983). *McCullough*, 789 P.2d at 862 (Golden, J., dissenting). Under the peculiar facts of this case, apparently, additional damages would not have been available under a tort theory.

> of good faith and fair dealing contained in the insurance contract. As ably analyzed and skillfully presented to this court by appellate counsel, the true cutting edge of this certified question is whether the insured is also entitled to a chance to recover punitive damages. If the insured's action against the insurer is identified and treated legally as a tort action, then the insured is entitled to a chance to recover punitive damages under a requisite standard of proof. On the other hand, if the insured's action is deemed to be a breach of contract only, then the insured is not entitled to a chance to recover punitive damages unless, according to prevailing Wyoming law, the insurer engaged in fraudulent misconduct at the inception of the insurance contract.[103]

Justice Golden's observations may be correct insofar as the underlying action in *McCullough* was concerned. The insureds in the underlying action apparently did not sustain, nor claim, additional damages other than the amount of the claim itself, the emotional distress caused by the insurer in denying the claim, and the attorney's fees occasioned by the insurer in unreasonably denying payment of the claim. The *McCullough* decision arose, however, as a result of questions certified to the Wyoming Supreme Court by the Tenth Circuit Court of Appeals,[104] and the manner in which those questions are to be resolved affects all existing and future Wyoming insureds, not simply the litigants in *McCullough*. Thus, there are numerous cases in which the rule adopted in *McCullough* will involve substantial damages that are recoverable under a tort action which are not recoverable under a breach of contract theory.[105] The possibility of recovering punitive damages for the willful and wanton misconduct of a first party insurer may be a significant result of *McCullough*, but it certainly is not the only one.

C. *Tort Remedy Broadens the Scope of Bad Faith Conduct*

Under a contract theory, the cause of action for bad faith arises from the terms of the contract itself.[106] By definition, therefore, no bad faith cause of action under a breach of contract theory can arise unless it is associated with an effort by one contracting party to enforce the express or implied terms of a contract against the other.[107] Implied terms emanate from the expressed contract language either because the parties did not adequately express their understanding of the express terms of the contract or they simply did not consider a particular issue at the time of contracting.[108] Bad faith under a con-

103. *McCullough*, 789 P.2d at 862 (Golden, J., dissenting).
104. *Supra* note 1.
105. *See supra* notes 75-94 and accompanying text.
106. *McCullough*, 789 P.2d at 856.
107. *See* S. S. ASHLEY, *supra* note 8, § 1.02 at 1-2.
108. *Id.*

tract theory, therefore, can only arise if the conduct for which suit has been brought can be found to violate an express or implied term or provision of the contract which, unless enforced, frustrates the overall purpose of the parties in entering into an express contract.[109]

Under a tort theory, on the other hand, the cause of action for bad faith arises by virtue of the special relationship between the insurer and insured after a contract has been issued.[110] It is, therefore, one which is not created by the terms of the insurance contract itself, but rather by the relationship of the parties to the contract.[111] As such, it is a duty imposed solely by law.[112] Accordingly, a cause of action for bad faith under a tort theory may arise even though the insurer performs the express covenants of the policy by, for example, paying the first party claim of an insured up to the limits of the policy.[113]

The decision in *Rawlins v. Apodaca* illustrates this principle.[114] In this case, an insurer, who paid an insured the policy limits of $10,000 under a homeowner's policy for a fire loss caused by the negligence of a neighbor, refused to provide its insured with an investigative report concerning the origin of the fire. Subsequently it was determined that the same insurer had issued a homeowner's policy to the neighbor with liability limits of $100,000. By releasing the investigative report to its insured, the insurer would have materially aided the insured in prosecuting a liability claim against his neighbor, for which the insurer was also liable. In permitting a bad faith action, the Arizona Supreme Court held that a breach of the duty of good faith and fair dealing gives rise to a cause of action in tort which is separate from any cause of action for breach of the underlying insurance contract:

> Review of Arizona first-party and third-party cases demonstrates that the implied covenant of good faith and fair dealing can be breached even though the company performs its express covenants under the insurance contract. The implied covenant is breached, whether the carrier pays the claim or not, when its conduct damages the very protection or security which the insured sought to gain by buying insurance . . . . While the obligation of good faith does not require the insurer to relieve the insured of all

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109. Stated differently, a breach of the implied covenant of good faith and fair dealing under a contract theory is nothing more than a breach of the insurance contract. Breach of the covenant under a tort theory is a violation of a duty imposed by law, one which does not arise from the terms of the contract itself but rather from the relationship of the parties created by virtue of the decision of the insured to buy, and the insurer to sell, an insurance product.

110. *McCullough*, 789 P.2d at 858.

111. *Id.*

112. *Id.*

113. Rawlins v. Apodaca, 151 Ariz. 149, 726 P.2d 565 (1986).

114. *Id.*

possible harm that may come from his choice of policy limits, it does obligate the insurer not to take advantage of the unequal positions in order to become a second source of injury to the insured.[115]

Thus, by committing some act of bad faith, the insurer may also, but not always, violate the express terms of the policy, such as where the insurer refuses to pay a claim without any reasonable or arguable basis to do so.[116] Bad faith may also occur, however, even though the express terms of the policy are adhered to, such as where an insurer eventually pays the claim under the terms and provisions of the contract prior to litigation, but the unreasonable delay in doing so causes the insured injury or loss.[117]

Therefore, the duty of good faith and fair dealing, as one imposed and implied by law, may apply to a variety of interests infringed upon by the insurer beyond those expressly assumed under the terms and provisions of the insurance contract, provided that such interests arise by virtue of a contractual relationship between the insurer and the insured. The fact that the conduct proscribed by the duty of good faith and fair dealing ordinarily occurs in the performance or non-performance of the express terms of the contract is unimportant. Because it is the conduct of the insurer in performing the contract which is proscribed, rather than observance or non-observance of express or implied terms of the contract, a violation of the duty of good faith will arise in many situations in which the obligations of the insurer are not specifically expressed in the contract. Thus, the insurer may be held to have deprived the insured of benefits arising from the contract by such conduct as inadequately investigating a claim,[118] delaying payment of a first party claim,[119] forcing an insured to litigate or seek arbitration of a claim knowing that it has no substantial grounds to reject the claim,[120] engaging in trickery or deception,[121] deliberately misinterpreting records or policy provisions for the purpose of defeat-

115. *Id.* at 157, 726 P.2d at 573 (citations omitted).

116. Noble v. National Am. Life Ins. Co., 128 Ariz. 188, 624 P.2d 866 (1981).

117. *Rawlins*, 151 Ariz. at 156, 726 P.2d. at 572. *See also* Robinson v. North Carolina Farm Bureau Ins. Co., 86 N.C. App. 44, 356 S.E.2d 392 (1987), where the court held that payment of policy limits within the time frame prescribed by the policy does not preclude action for punitive damages for tortious conduct if bad faith delay and aggravating conduct in forcing the insured into an independent appraisal process is present, and Judah v. State Farm Fire and Cas. Co., 217 Cal. App. 3d 1181, 266 Cal. Rptr. 455 (1990), where the court held that there was a cause of action available for tortious breach of the implied covenant of good faith and fair dealing, even if the insurance policy provided no coverage for the underlying loss.

118. Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 598 P.2d 452 (1979), 157 Cal. Rptr. 482.

119. Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 925, 582 P.2d 980, 988, 148 Cal. Rptr. 389, 397 (1978).

120. United Serv. Auto. Ass'n v. Werley, 526 P.2d 28 (Alaska 1974).

121. Timmons v. Royal Globe Ins. Co., 653 P.2d 907 (Okla. 1982).

ing coverage,[122] using threats of dire consequences to force the insured to agree to an unfair settlement,[123] falsely accusing its insured of arson in defending a casualty claim,[124] exploiting the insured's vulnerable financial position following a loss covered by the policy,[125] making oppressive demands or imposing burdensome requirements not contained in the policy of insurance,[126] conditioning payment of the undisputed portion of the claim on the settlement of the disputed portion of the claim,[127] abusing the arbitration process,[128] retaliating against the insured for filing a claim by cancelling his policy,[129] abusing the insurer's subrogation rights,[130] and unfairly imposing a premium increase simply because the insured filed a claim.[131] Few of the above examples of first party bad faith would be actionable under a contract theory absent a violation of the express terms, or terms which must be implied to carry out the express terms, of the contract.

D. *Insured's Breach of Contract is Not a Defense to a Bad Faith Action*

The significance of *McCullough* is further heightened by other differences between tort law and contract law. Under a contract theory, the insured's nonperformance of contractual obligations will ordinarily constitute a defense to an action for the violation of the duty of good faith and fair dealing,[132] while under a tort theory the insured's breach of any condition precedent under the insurance policy cannot be asserted as a defense.[133] In *Viles v. Security National Insurance Co.*,[134] a case recently decided by the Texas Supreme Court, the court held that an insured's failure to submit a proof of loss within the period of time mandated in the contract for doing so did not bar the insured's tort claim against the insurer for bad faith. As stated by the court:

> In *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165 (Tex. 1987), this court recognized a duty on the part of insurers to deal fairly and in good faith with their in-

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122. *Fletcher*, 10 Cal. App. 3d at 395-96, 89 Cal. Rptr. at 89.
123. Mustachio v. Ohio Farmers Ins. Co., 44 Cal. App. 3d 358, 118 Cal. Rptr. 581 (1975).
124. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).
125. Neal v. Farmers Ins. Exch., 21 Cal. 3d at 923, 582 P.2d at 987, 148 Cal. Rptr. at 396.
126. Davis v. Allstate Ins. Co., 101 Wis. 2d 1, 303 N.W.2d 596, 600-01 (1981).
127. *Vernon Fire & Cas. Co.*, 264 Ind. at 615, 349 N.E.2d at 184.
128. Rios v. Allstate Ins. Co., 68 Cal. App. 3d 811, 137 Cal. Rptr. 441 (1977).
129. Spindle v. Travelers Ins. Co., 66 Cal. App. 3d 951, 136 Cal. Rptr. 404 (1977).
130. Faraino v. Centennial Ins. Co., 117 Misc. 2d 297, 458 N.Y.S.2d 444 (1982).
131. Hebert v. Guastella, 409 So. 2d 375 (La. Ct. App. 1982).
132. S. S. ASHLEY, *supra* note 8, § 7.09 at 7-16.
133. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).
134. 788 S.W.2d 566 (Tex. 1990).

> sureds. That duty emanates not from the terms of the insurance contract, but from an obligation imposed in law "as a result of a *special relationship* between the parties governed or created by a contract." *Id.* at 67. [citations] For this reason, we hold that a breach of the duty of good faith and fair dealing will give rise to a cause of action in tort that is separate from any cause of action for breach of the underlying insurance contract. Consequently, the Viles were not required to submit to the jury questions as to compliance with the proof of loss condition contained in their homeowner's policies, or alternatively a waiver thereof, as a prerequisite to maintaining a successful suit for breach of the duty of good faith and fair dealing.[135]

The insured's violation of other contractual duties which are typically found in a first party insurance policy would likewise not bar a bad faith action sounding in tort, even though the same violations may preclude a breach of contract action. Such duties would include the insured's duty to cooperate,[136] clauses which require the insured to take a physical examination or provide the insurer with access to the insured's books and records,[137] the duty not to commit fraud or swear falsely,[138] and the duty not to release tortfeasors who may have caused the insured's loss.[139]

This does not mean, however, that the insurer is required to waive its rights under the policy in order to avoid liability for bad faith. If the insured's conduct provides the insurer with the right under the policy to deny the claim, such as where the insured has delayed in presenting his claim, the insurer does not commit bad faith by invoking the statute of limitations.[140] Moreover, the insured's failure to comply with a contract condition may constitute a "fairly debatable" basis for denying the claim, such as where there was a complete failure to file a proof of loss.[141]

Likewise, the majority opinion in *McCullough* found that the duty of good faith and fair dealing emanates not from the contract itself but from the relationship of the parties to the contract.[142] If the same issue were to arise before the Wyoming Supreme Court, therefore, it is logical to assume that the duty of good faith and fair dealing would be found to give rise to a cause of action separate from the breach of the underlying insurance contract. As a result, it would not

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135. *Id.* at 567 (original emphasis).
136. Blake v. Aetna Life Ins. Co., 99 Cal. App. 3d 901, 160 Cal. Rptr. 528 (1979).
137. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).
138. A. D. WINDT, *supra* note 8, § 3.06 at 88-90.
139. Kardly v. State Farm Mut. Auto. Ins. Co., 207 Cal. App. 3d 479, 255 Cal. Rptr. 40 (1989).
140. S. S. ASHLEY, *supra* note 8, § 7.09 at 7-16.
141. *Viles*, 788 S.W.2d at 567.
142. *McCullough*, 789 P.2d at 856.

be necessary for the insured to prove compliance with the terms and conditions of the contract to successfully maintain an action for first party bad faith.

E. *Tort Statute of Limitations*

In most first party insurance policies, the insurer has contractually limited the time in which an action can be commenced to recover benefits under the policy,[143] a provision by which the insured is bound in a first party bad faith action if such action is characterized as sounding in contract only.[144] On the other hand, if bad faith is also characterized as a tort action, the insured's claim for relief is asserted on the basis of a duty imposed by law, rather than one under the contract, and therefore the insured is not subject to policy limitations restricting the time within which he must bring suit.[145]

Where the first party contract does not contain a provision limiting the time in which a suit can be commenced by the insured against the insurer, the insured may elect between a tort or contract theory of recovery and thus choose the statute of limitations which provides the longer limitations period.[146]

F. *Doctrine of Respondeat Superior*

Further, in Wyoming, as in most jurisdictions, the doctrine of *respondeat superior* imposes liability upon an employer for the acts of its employees when such acts are within the course and scope of employment.[147] Under a tort theory, therefore, an insurer may be held vicariously liable for the bad faith acts of its agents and adjusters when committed in furtherance of the insurer's business. As stated by one authority:

> It is apparent under this view of the doctrine of respondeat superior, an insurer cannot reasonably contend that it is not liable in compensatory damages for acts of a claims adjuster or

143. Wyoming Statutes sections 26-16-119 and -18-115 (1983) require life insurers and disability insurers to include a provision in their policy forms which allows the insured a minimum of three years in which to commence suit against the insurer. Research does not disclose any other instance in Wyoming in which a first party insurer is precluded from restricting the time in which the insured can initiate suit against his insurer. Typical contractual provisions limit the time in which an action can be commenced to a one year period.

144. Davis v. State Farm Fire & Cas. Co., 545 F. Supp. 370 (D. Nev. 1982).

145. *Id.* In Wyoming, the applicable statute of limitations for a bad faith action sounding in tort would be Wyoming Statutes section 1-3-105(a)(iv)(C) (1977), which provides for a period of four years within which suit may be brought after the cause of action accrues.

146. *Comunale*, 328 P.2d at 203. *Contra*, Wolfe v. Continental Cas. Co., 647 F.2d 705 (6th Cir. 1981) where the court held that the shorter tort statute of limitations in Ohio would govern a bad faith action.

147. Combined Ins. Co. v. Sinclair, 584 P.2d 1034 (Wyo. 1978).

> other employee who has acted in bad faith when wrongfully delaying or denying a claim for benefits since such conduct would seem clearly to be 'broadly incidental' to the individual's employment responsibilities. Indeed, any other result would effectively eliminate an insured's remedies for breach of the duty of good faith and fair dealing, as it has been consistently held that an insurer's agent is not a party to the insurance contract, and therefore may not be held liable for breach of the duty to act in good faith.[148]

Under a contract theory, it is clear that no direct action lies against agents or adjusters of insurers because they have no contractual relationship with the insured.[149] Unless the conduct of an insurer's employees or agents somehow breaches the express or implied terms of the contract, therefore, the insurer cannot be held liable for their bad faith conduct.[150]

G. Payment From Collateral Source

In a contract action, the insurer's liability for breach of the duty of good faith and fair dealing may, in whole or in part, be satisfied by payment from a collateral source.[151] In a tort action, payment from a collateral source does not extinguish, or even reduce, the tortfeasor's liability.[152] Thus, if an insurer's bad faith caused the insured severe emotional distress, for which treatment was obtained, the fact that the insured had health insurance coverage from a different insurer to pay for such treatment would not insulate the bad faith insurer from liability.

H. Recovery of Future Benefits

Finally, many bad faith actions involve first party insurance policies that would have provided benefits far into the future if the insurer had not violated its duty of good faith and fair dealing, an example being a disability income policy that provides monthly benefits during the term of disability. In a contract action, one may normally recover only those payments due up to the time of trial, whereas under a tort theory the insured may be able to recover damages for future payments as well.[153]

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148. W. M. SHERNOFF, *supra* note 8, § 7.05 at 37.
149. *Gruenberg*, 9 Cal. 3d at 576, 510 P.2d at 1038-39, 108 Cal. Rptr. at 486-87.
150. It should be noted that in some jurisdictions, however, an agent or adjuster owes the insured a duty of care, and hence the insured may bring suit against an agent or adjuster under a negligence theory. Continental Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281 (Alaska 1980).
151. Hurd v. Nelson, 714 P.2d 767 (Wyo. 1986).
152. *Id.*
153. *Egan*, 24 Cal. 3d at 824 n.7, 620 P.2d at 149 n.7, 169 Cal. Rptr. at 699 n.7.

IV. COVERAGES TO WHICH *MCCULLOUGH* APPLIES

With one very notable exception to be addressed below,[154] the decision in *McCullough* applies to all types of first party contracts, including life policies,[155] disability and health policies,[156] auto policies (excluding any liability coverage,[157] but including uninsured motorists coverage[158] and medical payments coverage[159]), property insurance,[160] title insurance,[161] and workmen's compensation insurance.[162] In other words, *McCullough* applies to any coverage where the insurer contracts with the insured to pay benefits directly to the insured. It does not apply to liability or "third party" coverages under which the insurer contracts to indemnify the insured against liability to third parties. Where the insurer breaches its duty to settle a claim against its insured under a liability coverage, the tort of "third party" bad faith applies under standards somewhat different than those announced in *McCullough*.[163] There is one type of indemnity policy to which the tort of first party bad faith applies, however, and that is the surety contract.[164] In *General Insurance Co. of America v. Mammoth Vista*

154. *See infra* notes 169-77 and accompanying text.

155. Mutual Life Ins. Co. v. Estate of Wesson, 517 So. 2d 521 (Miss. 1987). There are few reported cases involving bad faith on the part of life insurers, due in part, no doubt, to the fact that life insurers are faced with a maximum of one claim from their insureds, usually in an undisputed amount.

156. *See* W. M. SHERNOFF, *supra* note 8, § 5.20 at 5-20, where the author stated:

> From the policyholder's viewpoint, the need for good faith and fair dealing is paramount in the area of disability insurance. Without the protection and security of a disability insurance policy, the policyholder and his or her family may experience severe economic hardship and serious mental distress if the insured becomes unable to work and support his or her family. Thus, the law has a strong public interest in protecting persons who are disabled and are not treated fairly by their insurers.

157. Bad faith involving liability coverages, i.e., the failure of the insurer to settle claims in good faith within the limits of the insured's liability coverage, gives rise to a "third party" bad faith claim and falls within the ambit of Western Cas. & Sur. Co. v. Fowler, 390 P.2d 602 (Wyo. 1964). *See supra* note 44.

158. *Arnold*, 707 P.2d at 164. Inasmuch as *Arnold* involved an uninsured motorists claim, it provides direct authority that the Wyoming Supreme Court has extended the tort of first party bad faith to uninsured motorist coverages.

159. *See* W. M. SHERNOFF, *supra* note 8, § 5.01 at 5-3. A medical payments coverage within an automobile policy operates in the same manner as a low-limit health policy and thus is regarded as a first party coverage.

160. *See* W. M. SHERNOFF, *supra* note 8, § 5.40 at 5-57, 5-58.

161. Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975).

162. *See* W. M. SHERNOFF, *supra* note 8, § 5.23 at 5-52.1 to -52.8.

163. *Supra* note 157. In *Western Cas. & Sur. Co.*, 390 P.2d at 606, the court recognized and approved a trial court's instruction defining the duty of good faith in the context of an insurer's failure to settle a third party claim within policy limits as the duty to:

> exercise intelligence, good faith, and honest and conscientious fidelity to the common interest of the plaintiff as well as of the defendant and give at least equal consideration to the interest of the insured, and, if it fails to do so, it acts in bad faith.

164. *See* J. C. MCCARTHY, *supra* note 8, § 1.38 at 149-55.

Owners' Association, Inc.,[165] tort liability was extended to a surety on the basis that sureties were specifically subject to provisions of the California Insurance Code in the same fashion as first party insurers.[166] Indeed, the duty of the surety to perform in good faith has been extended to both the obligee of the bond[167] and the bond principal.[168]

The *McCullough* decision, however, does not apply to first party situations where an employer furnishes group life, health or disability insurance, in whole or part, as part of an employee benefit plan. In such cases, all state common law or statutory remedies, including the court-created tort of first party bad faith, are completely preempted, according to *Pilot Life Insurance Co. v. Dedeaux*,[169] by the Employees Retirement and Income Security Act (ERISA) of 1974.[170] An insurance policy is part of an ERISA plan if it is a plan, fund, or program established or maintained by an employer or an employee organization, or both, for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services, or severance benefits to participants or their beneficiaries.[171]

The Department of Labor has issued regulations excluding certain group insurance plans from ERISA coverage,[172] although as a practical matter, the vast majority of group health policies issued to employers will not meet the requirements for exclusion.[173] The signifi-

165. 174 Cal. App. 3d 810, 220 Cal. Rptr. 291 (1985).

166. The duty of good faith and fair dealing would undoubtedly extend to sureties in Wyoming. The case of State Sur. Co. v. Lamb Constr. Co., 625 P.2d 184 (Wyo. 1981) specifically held that sureties were subject to the attorney's fee provisions of Wyoming Statutes section 26-15-124(c) (1983). Moreover, sureties are included within the definition of an insurer by Wyoming Statutes section 26-1-102(a)(xvi) (Cum. Supp. 1990).

167. Szarkowski v. Reliance Ins. Co., 404 N.W.2d 502 (N.D. 1987).

168. In City of Portland v. G.D. Ward & Assoc., 89 Or. App. 452, 750 P.2d 171 (1988), the court held that the surety had a good faith duty to investigate the validity of claims against the bond principal, as well as the availability of counterclaims and defenses.

169. 481 U.S. 41 (1987).

170. 29 U.S.C. §§ 1001-1461 (1988).

171. 29 U.S.C. § 1002(1) (1988). *See also* Kanne v. Connecticut Life Ins. Co., 859 F.2d 96, 98 (9th Cir. 1988).

172. 29 C.F.R. § 2510.3-1(j) (1990). Under the regulations, an employee welfare benefit plan does not include a group insurance program offered by an insurer to employees or members of an employee organization under which (1) no contributions are made by the employer or employee organization; (2) participation by employees or members is voluntary; (3) the sole functions of the employer or employee organization are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs, and to remit them to the insurer; and (4) the employer or employee organization receives no consideration in connection with the program, other than reasonable compensation, excluding any profit, or administrative services actually rendered in connection with the payroll deductions or dues checkoffs. *Id.*

173. In order to be exempt, all four of the above requirements must be met. As a practical matter, the employer pays at least a part of the total premium in most group health insurance plans or will be deemed to have endorsed the plan by virtue of the

cance of the *Pilot Life* decision to the life and health insurance industry cannot be underestimated. The remedies of the insured or beneficiary under ERISA are restricted to the benefits[174] which were wrongfully withheld and, perhaps, attorney's fees.[175] Regardless of how egregious the insurer's conduct may be in adjusting claims under an employee welfare benefit plan or how much damage the insured or beneficiary may sustain as a result, the insurer is effectively immunized from liability for punitive damages, emotional distress or any type of economic loss.[176] Indeed, one author has predicted that attorneys will discontinue bringing suits against insurers who have issued group policies to employers for the benefit of their employees because most claims under such policies are comparatively small and the incentives normally supplied by extracontractual, and possibly punitive, damages, do not apply.[177]

V. THE STANDARD FOR DETERMINING BAD FAITH UNDER *MCCULLOUGH*

At least twenty-eight jurisdictions have adopted the common law rule that a violation of the duty of good faith and fair dealing by a first party insurer is actionable in tort.[178] The standard for determining whether or not a first party insurer's conduct constitutes bad faith is subject, however, to some disagreement among the various jurisdictions. Jurisdictions such as California,[179] Nevada,[180] Oklahoma,[181] South Carolina,[182] and Idaho,[183] hold that bad faith includes no blameworthy mental element. Under this view, the duty of good faith and fair dealing may be violated by the insurer without acting maliciously or immorally. Bad faith conduct may be found to exist if the insurer's actions in denying payment of a claim, in delaying payment of a claim for which coverage exists under the policy, or for inadequately investigating the claim to determine whether coverage exists, were unreasonable. This standard has been articulated by the California Supreme Court as follows:

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employer's involvement in setting the plan up. *See* Rizzi v. Blue Cross of S. Cal., 206 Cal. App. 3d 380, 253 Cal. Rptr. 541 (1988).

174. S. S. ASHLEY, *supra* note 8, § 9.15 at 157.

175. 29 U.S.C. § 1132(g) (1988).

176. Entitlement to any such damages would exist by virtue of state common law or statutory law and hence would be preempted.

177. S. S. ASHLEY, *supra* note 8, § 9.15 at 157 ("Though ERISA permits the court to award a successful claimant attorneys' fees, that prospect will not motivate many attorneys to undertake a case promising such a limited recovery.").

178. *See supra* notes 11-37 and 39-40 and accompanying text.

179. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

180. United States Fidelity & Guar. Co. v. Peterson, 91 Nev. 617, 540 P.2d 1070 (1975).

181. Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977).

182. Nichols v. State Farm Mut. Auto Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983).

183. White v. Unigard Mut. Ins. Co., 112 Idaho 94, 730 P.2d 1014 (1986).

> [I]n the case before us we consider the duty of an insurer to act in good faith and fairly in handling the claim of an insured, namely a duty not to withhold unreasonably payments due under a policy . . . . Where in so doing, it 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.[184]

At the other end of the spectrum, some jurisdictions hold that bad faith is not simply bad judgment or negligence but conduct which imports a dishonest purpose and means a violation of the duty of good faith and fair dealing through some motive of self-interest or ill will. Under this view, a finding of bad faith requires a showing of actual malice or a state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge. This position is adhered to by jurisdictions such as North Carolina,[185] Alabama,[186] Ohio,[187] Arkansas,[188] Mississippi,[189] and Connecticut.[190] Typical of the holdings of this class of cases is the Arkansas case of *Aetna Casualty and Surety Co. v. Broadway Arms*, which states:

> [I]n order to be successful a claim based on the tort of bad faith must include affirmative misconduct by the insurance company, without a good faith defense, and that the misconduct must be dishonest, malicious, or oppressive in an attempt to avoid its liability under an insurance policy. Such a claim cannot be based upon good faith denial, offers to compromise a claim or for other honest errors of judgment by the insurer. Neither can this type claim be based upon negligence or bad judgment so long as the insurer is acting in good faith.[191]

Although the majority in *McCullough* adopted the tort of first party bad faith from the California Supreme Court decision of *Gruenberg v. Aetna Insurance Co.*, it did not adopt the California standard for determining when bad faith exists. Rather, the majority

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184. *Gruenberg*, 9 Cal. 3d at 573-74, 510 P.2d at 1037, 108 Cal. Rptr. at 485 (original emphasis). The absence of any subjectively blameworthy component in the California concept of first-party bad faith was emphasized by the court in Austero v. National Cas. Ins. Co., 84 Cal. App. 3d 1, 26 n.22, 148 Cal. Rptr. 653, 670 n.22 (1978): "[T]he words 'bad faith' are actually an imprecise label for what is essentially some kind of unreasonable insurer conduct, and such words serve only to obscure and oversimplify the rationale of the decisions . . . ."

185. Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976).

186. Coleman v. Gulf Life Ins. Co., 514 So. 2d 944 (Ala. 1987).

187. Hoskins v. Aetna Life Ins. Co., 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983).

188. Aetna Cas. & Sur. Co. v. Broadway Arms Corp., 281 Ark. 128, 664 S.W. 463 (1984).

189. Weems v. American Sec. Ins. Co., 486 So. 2d 1222 (Miss. 1986).

190. Buckman v. People Express, Inc., 205 Conn. 166, 530 A.2d 596 (1987).

191. *Aetna Cas. & Sur. Co.*, 281 Ark. at 133, 664 S.W. 2d at 465.

adopted a standard for determining bad faith in between the position adopted by *Gruenberg*, that bad faith requires only a showing of unreasonableness, and the position adopted by others that actual malice must be shown. Referred to by some as an "intermediate" rule,[192] it is a standard for determining bad faith initially propounded by the Wisconsin Supreme Court in *Anderson v. Continental Insurance Co.*,[193] and subsequently adopted in such jurisdictions as the District of Columbia,[194] New Mexico,[195] Vermont,[196] Arizona,[197] Virgin Islands,[198] South Dakota,[199] Texas,[200] and Colorado.[201] The "intermediate" rule requires a showing of some mental element, but one short of actual malice or ill will.[202] Thus, under this view the insured must establish that the insurer was aware of its lack of any reasonable basis for denying the claim, or acted in reckless disregard of its need for such a reasonable basis. As initially stated by the Wisconsin Supreme Court:

> While we have stated . . . that, for proof of bad faith, there must be an absence of a reasonable basis for denial of policy benefits and the knowledge or reckless disregard of a reasonable basis for denial, implicit in that test is our conclusion that the 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 proofs submitted by the insured.
>
> Under these tests of the tort of bad faith, an insurance company, however, may challenge claims which are fairly debatable and will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis.
>
> 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. It is apparent, then, that the tort of bad faith is an intentional one.[203]

The majority in *McCullough* mistakenly referred to the "intermediate" or Wisconsin standard set forth as the "fairly debatable" standard.[204] In actual fact, the "fairly debatable" standard, which de-

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192. J. C. McCARTHY, *supra* note 8, § 1.9 at 44.
193. Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W.2d 368 (1978).
194. Continental Ins. Co. v. Lynham, 293 A.2d 481 (D.C. 1972).
195. State Farm Gen. Ins. Co. v. Clifton, 86 N.M. 757, 527 P.2d 798 (1974).
196. Phillips v. Aetna Life Ins. Co., 473 F. Supp. 984 (D. Vt. 1979).
197. Noble v. National Am. Life Ins. Co., 128 Ariz. 188, 624 P.2d 866 (1981).
198. Justin v. Guardian Ins. Co., Inc., 670 F. Supp. 614 (D.V.I. 1987).
199. Matter of Cert. of a Question of Law, 399 N.W.2d 320 (S.D. 1987).
200. Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210 (Tex. 1988).
201. Traveler's Ins. Co. v. Sairs, 706 P.2d 1258 (Colo. 1985).
202. J. C. McCARTHY, *supra* note 8, § 1.9 at 44.
203. *Anderson*, 271 N.W.2d at 376-77.
204. *McCullough*, 789 P.2d at 855.

scribes an insurer's right to contest questions of fact or law after an adequate investigation has revealed all of the facts and circumstances necessary to pass judgment on a claim, prevents an insurer's liability for bad faith under the California standard, the Wisconsin standard, or the "actual malice" standard. As stated by one authority:

> It would appear that under any of these three views, the existence of a bona fide dispute over coverage, or a finding that the insured's entitlement to the claimed benefits was 'fairly debatable,' precludes the insurer's bad faith for denial of a claim. This formulation has been repeated in a large number of cases . . . .[205]

The majority's use of the phrase "fairly debatable" to describe the standard for determining bad faith is, therefore, unfortunate and inaccurate. The right of the insurer to "fairly debate" realistic questions of liability refers to cases where a full and complete investigation has revealed a factual or legal dispute which leads the insurer to conclude that the claim may not be payable. In that event, "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."[206] A great number of bad faith claims, however, arise because the claim denial was based upon inadequate information, either as to the facts and circumstances surrounding the claim, the language used in the contract, or the law which determines whether the claim is payable.[207] In such cases the "fairly debatable" phrase does not accurately describe the standard used to determine bad faith because the facts and circumstances surrounding a claim must be known by the insurer before the proper payment or denial thereof can be fairly "debated."[208] In any case where it is claimed that the insurer did not adequately or properly investigate or evaluate the claim, it may be improper to instruct the jury that the good faith or bad faith of the insurer should be determined by whether the claim was "fairly debatable."[209]

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205. J. C. MCCARTHY, *supra* note 8, § 1.9 at 45-48, *citing, inter alia*, Pierce v. Combined Ins. Co. of Am., 531 So. 2d 654 (Ala. 1988); Lake Havasu Community Hosp. v. Arizona Title Ins. & Trust Co., 141 Ariz. 363, 687 P.2d 371 (Ct. App. 1984); Cato v. Arkansas Mun. League Mun. Benefit Fund, 285 Ark. 419, 688 S.W.2d 720 (1985); Hanson v. Prudential Ins. Co. of Am., 783 F.2d 762 (9th Cir. 1985) (California law); Sullivan v. Allstate Ins. Co., 111 Idaho 304, 723 P.2d 848 (1986); Stamps v. Estate of Watts, 528 So. 2d 812 (Miss. 1988); Manis v. Hartford Fire Ins. Co., 681 P.2d 760 (Okla. 1984); and Duir v. John Alden Life Ins. Co., 573 F. Supp. 1002 (W.D. Wis. 1983), *aff'd*, 754 F.2d 245 (7th Cir. 1985).

206. *McCullough*, 789 P.2d at 860.

207. *See, e.g.*, W. M. SHERNOFF, *supra* note 8, § 5.11[1] at 12-12.6.

208. As stated by Ward v. Fireman's Fund Ins. Co., 152 Ariz. 211, 213, 731 P.2d 106, 109 (Ct. App. 1986): "*An insurer that has fulfilled its duty of reasonable care, as by conducting an adequate investigation,* has the right to challenge and deny claims which are 'fairly debatable' without subjecting itself to bad faith liability if its decision is ultimately held erroneous" (emphasis added).

209. Research has not disclosed any case which specifically discusses this issue.

A. *Difference Between the California and Wisconsin Standards*

The majority in *McCullough* at various points referred to the Wisconsin standard for determining bad faith as an "objective" standard,[210] on the basis that the reasonableness of a claim denial is to be made by applying external criteria. It is apparent, however, that the Wisconsin test for determining bad faith also contains, in part, a subjective test. After analyzing the Wisconsin standard, the First Circuit Court of Appeals observed in a case governed by Rhode Island law:

> Thus both an *objective* and *subjective* component are required: 1) the absence of an objectively reasonable basis to deny, and 2) the insurer's subjective knowledge or its reckless disregard of the absence of such basis. The subjective component is essential, as the Wisconsin court states, to prove intentionality: " 'Bad faith' by definition cannot be unintentional." Bad faith can be inferred, however, from a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proof submitted by the insured.
>
> But while the subjective element can be inferred from an investigation that recklessly disregards the facts, the objective element must also be shown. This requires establishing that a reasonable insurer, proceeding under the facts and circumstances that a proper investigation would have revealed would not have denied payment of the claim.[211]

Thus, under this interpretation of the Wisconsin standard, an insurer's subjective bad faith can be inferred or imputed from an inadequate investigation. An improper investigation standing alone, however, does not establish bad faith if in fact the insurer had an objectively reasonable basis to deny the claim.[212] In other words, if the insured is not able to satisfy the objective test under the Wisconsin standard, the inquiry as to whether the insurer committed bad faith ends. The objectively unreasonable basis for denying the claim, however, can, and often does, consist of an inadequate or improper investigation.[213]

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210. *McCullough*, 789 P.2d at 860-61.

211. Pace v. Insurance Co. of N. Am., 838 F.2d 572, 584 (1st Cir. 1988) (citations omitted) (original emphasis). In all fairness to the First Circuit Court of Appeals, it would appear that if the element of actual knowledge is inferred or imputed, the second element has been established objectively rather than subjectively. Only where it is necessary to examine the actual, rather than imputed, knowledge of the insurer does a subjective element enter the equation. Perhaps this is why no reference to a subjective element is made by the majority opinion in *McCullough*.

212. *Id. See also* Aetna Cas. & Sur. v. Superior Court, 161 Ariz. 437, 439-40, 778 P.2d 1333, 1336 (Ct. App. 1989) ("An insurance company's failure to adequately investigate only becomes material when a further investigation would have disclosed relevant facts").

213. *See* S. S. ASHLEY, *supra* note 8, § 5.05 at 10-14.

It would therefore appear at first blush that the Wisconsin standard for determining bad faith, insofar as it requires some showing of actual or imputed knowledge in addition to the absence of a reasonable basis for denying the claim, is a more rigorous standard than that required in California, which requires only a showing that the insurer unreasonably withheld policy benefits. The difference in the two standards is delineated by an Arizona court in the case of *Trus Joist Corp. v. Safeco Insurance Co. of America*,[214] where the court rejected the California "negligence" standard and explained the additional element which must be established in Arizona:

> We disagree, however with plaintiffs' assertion that mere reasonableness is the sole standard for establishing bad faith or that an insurer's unreasonable conduct alone is sufficient to establish liability. For if, as plaintiffs argue, reasonableness under the circumstances is the sole standard for bad faith, the tort would simply be equivalent to a negligence action. Yet it has long been established in Arizona that negligence alone is insufficient to impose liability on an insurer for the tort of bad faith. [citations] On the other hand, while the tort of bad faith is often referred to as an 'intentional' tort, it is clear that a bad faith claim does not rise to the level of a traditional intentional tort in the sense that the insurer must know with substantial certainty that its actions will bring particular harm to the insured. [citations] Rather, the courts' references to the 'intentional' aspect of the tort of bad faith have been largely limited to the insurer's 'conscious oversight'—as opposed to mere mistake or oversight—rather than to a knowledge of impending harm to its insured. Thus, in *Apodaca*, our supreme court stated:
>
>> The 'intent' required [to establish a bad faith claim] is an 'evil hand'—the intent to do the act. Mere negligence or inadvertence is not sufficient—the insurer must intend the act or omission and must form that intent without reasonable or fairly debatable grounds. But an 'evil mind' is not required; the insurer need not intend to harm the insured . . . .[215]

Thus, under either the California or Wisconsin standard, a finding of bad faith does not require the insured to establish that the insurer had an "evil mind" or an intent to harm the insured. Likewise, there can be no bad faith on the part of a first party insurer under either standard if the insurer has acted reasonably. The difference between the two standards, therefore, lies in the fact that the inverse is not true, that is, simply because an insurer acts unreasonably does not always mean that the insurer has also acted in bad faith. As the court in *Trus Joist* explained:

214. 153 Ariz. 95, 103-04, 735 P.2d 125, 133-34 (Ct. App. 1986).
215. *Id.*

Negligent conduct which results solely from honest mistake, oversight, or carelessness does not necessarily create bad faith liability even though it may be objectively reasonable. Some form of consciously unreasonable conduct is required. This requirement of consciously unreasonable conduct is fulfilled either by the insurer's knowledge that it is acting improperly or by reckless conduct which permits such knowledge to be imputed to it. It is this second, subjective, element of knowledge that elevates bad faith to a quasi-intentional tort.[216]

The above analysis suggests that many claim denials which may constitute bad faith in states which have adopted the California standard would not be actionable in states, such as Wyoming, which have adopted the Wisconsin "intermediate" standard. In actual practice, however, it is doubtful there is a substantial difference between the two standards,[217] one reason being that in order to satisfy the first element of the Wisconsin standard, i.e., that payment of a claim was denied without a reasonable basis, one must necessarily find, at least in most instances, that the insurer either knew or should have known that a reasonable basis for failing to pay the claim did not exist. Inherent in a finding of unreasonableness, in other words, is the "knew or should have known" requirement, because claim denials are ordinarily the result of the intentional act of denying the claim or, where the unreasonableness is attributable to an inadequate claims investigation, from the reckless disregard of facts necessary to a fair evaluation of the claim. As a result, if the first test of the Wisconsin standard is satisfied, so, too, will the second part of the test, because an unreasonable denial of a claim will not, in the great majority of instances, have unintentionally occurred.

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216. *Id.*

217. W. M. SHERNOFF, *supra* note 8, § 5.03[3] at 5-10.3, stated that there is no longer any significant difference between the Wisconsin and California standards:

> However, a subsequent decision by the Wisconsin Supreme Court seems to indicate that, notwithstanding the language in *Anderson*, there is little difference between [the] standard for bad faith in Wisconsin and that set forth by the California Supreme Court in *Gruenberg*. In Fehring v. Republic Ins. Co., 118 Wis. 2d 299, 347 N.W.2d 595 (1984), the Wisconsin court held that a showing of bad faith could be made by establishing that a reasonable insurer under the circumstances would not have acted as the defendant insurer did. This standard seems very close to the standard set forth in *Gruenberg*.

In Brown v. Superior Court, 137 Ariz. 327, 336, 670 P.2d 725, 734 (Ariz. 1983), moreover, the court held:

> The tort of bad faith arises when an insurance company intentionally denies, fails to process, or fails to pay a claim without a reasonable basis for such action (citations). No matter how the test is defined, bad faith is a question of reasonableness under the circumstances.

For cases that have actually applied the Wisconsin standard, *see, e.g.*, Duir v. John Alden Life Ins. Co., 754 F.2d 245 (7th Cir. 1985); Fehring v. Republic Ins. Co., 118 Wis. 2d 299, 347 N.W.2d 595 (1984); James v. Aetna Life & Cas. Co., 109 Wis. 2d 363, 326 N.W.2d 114 (1982); Davis v. Allstate Ins. Co., 101 Wis. 2d 1, 303 N.W.2d 596 (Wis. 1981); Benke v. Mukwonago-Vernon Mut. Ins. Co., 110 Wis. 2d 356, 329 N.W.2d 243 (1982); and Lund v. American Motorists Ins. Co., 797 F.2d 544 (7th Cir. 1986).

Consistent with the foregoing analysis, the Arizona courts, which have adopted the Wisconsin standard for determining bad faith in first party cases, have indicated that the primary focus of a bad faith inquiry is the reasonableness of the insurer's actions rather than its state of mind.[218] The first component of the Wisconsin test, in other words, will ordinarily determine whether bad faith exists in first party cases. In *Sparks v. Republic National Life Insurance Co.*, the court held:

> Any action taken by the insurer on a claim submitted by an insured will necessarily be an intentional act. Whether the action amounts to bad faith depends upon whether the insured failed to honor a claim without a reasonable basis for doing so.[219]

In the author's experience, moreover, bad faith conduct will most often occur not because the insurer fully investigates the claim and thereafter refuses to make payment when the insurer knows the claim to be otherwise payable, but because the insurer did not properly and completely investigate the facts or the law necessary to fairly evaluate the claim prior to denying payment of the claim.[220] In the latter event, the second test under the Wisconsin standard will ordinarily be met because the knowledge on the part of the insurer that it did not have a reasonable basis for refusing to pay the claim will be inferred or imputed, thus leading to results similar to those which would obtain under the California standard.[221]

Finally, as noted above, the only meaningful difference between the California and Wisconsin standards for determining bad faith is that in California it is possible for a bad faith determination to attach for the mere negligent, but unintended, denial of a claim after the claim was properly investigated and evaluated, whereas under the Wisconsin standard a "conscious oversight" (but one which can be inferred or imputed if the investigation was flawed) must be established. It is doubtful even in California, however, that bad faith liability will attach when a claim denial results solely from an honest mistake, oversight or slight carelessness.[222]

218. *See, e.g.*, Ward v. Fireman's Fund Ins. Co., 731 P.2d 106, 108 (Ariz. Ct. App. 1986) ("[T]he primary focus of a bad faith inquiry is the reasonableness of the insurer's actions rather than its state of mind . . . .").

219. 132 Ariz. at 538, 647 P.2d at 1136.

220. An insurer courts economic disaster and invites large punitive damage awards for refusing to pay claims without some basis for withholding payment, even an unreasonable one.

221. In adopting the Wisconsin standard for determining bad faith, some courts have refrained from characterizing the second test as one which requires the insurer's knowledge or a reckless disregard of the lack of a reasonable basis for denying the claim, *Anderson*, 271 N.W.2d at 376, and have instead referred to the second test as one where "the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim." *Aranda*, 748 S.W.2d at 213.

222. *See* California Shoppers, Inc. v. Royal Globe Ins. Co., 175 Cal. App. 3d 1, 54-

Indeed, because it may be "reasonable" to conclude that an insurer will not handle every claim perfectly, one can legitimately ask whether an unintentional or mistaken denial of a claim can, at the same time, constitute an unreasonable denial, at least prior to the time that the inadvertent or mistaken action has been called to the attention of the insurer. In other words, a reasonable first party insurer will occasionally make mistakes.

In sum, there are three reasons why the results under the Wisconsin standard for determining bad faith will usually be the same as the results which would obtain under the California standard. First, the act of denying payment of a claim is an intentional act and the reasons for the denial of the claim are usually known or otherwise attributable to the insurer. Second, allegations of bad faith ordinarily arise as a result of an inadequate investigation of the facts or an improper evaluation of the claim, which usually itself is the unreasonable conduct which supports a bad faith claim. And third, claim denials which may result because of accident, mistake or inadvertence do not usually involve the type of unreasonable conduct necessary to support a finding of bad faith.

There is, on the other hand, a great deal of difference between the Wisconsin standard and that which is exemplified by such states as Arkansas, Ohio, Connecticut, and Mississippi.[223] In the latter states, either an intent to harm the insured or some act of malice or ill will on the part of the insurer is required to establish bad faith.[224] In other words, an "evil mind," or an intent to injure or harm the insured, and not simply an "evil hand," or the intent to do the unreasonable act, is required. Under the Wisconsin standard, the only intent required to support a finding of bad faith is an awareness of the unreasonable conduct, either actual, inferred or imputed.[225]

B. *The* Dutton *Rule*

In a 1982 case decided by the Alabama Supreme Court, *National Savings Life Insurance Co. v. Dutton,* the court devised what is now commonly known as the "*Dutton*" rule.[226] In that case the court held:

> In the normal case in order for the plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim, and, thus, entitled to recover

55, 221 Cal. Rptr. 171, 201 (1985), where the court held that "bad faith implies unfair dealing rather than mistaken judgment." In this case, the insurer's mistaken belief concerning the insured's identity precluded liability for bad faith.

223. *See supra* notes 185-90 and accompanying text.
224. *Id.*
225. *Supra* note 214.
226. 419 So. 2d 1357 (Ala. 1982).

on the contract claim as a matter of law. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury.[227]

In Alabama, therefore, the insured has no bad faith claim against a first party insurer unless he obtains, or is entitled to receive, a directed verdict under a breach of contract theory. In spite of a smattering of acceptance by some jurisdictions,[228] the *Dutton* rule has yet to be accepted by the mainstream of courts which have enunciated standards for determining bad faith.[229] Indeed, the rule itself has received its fair share of criticism as placing too heavy a burden on the plaintiff. As stated by one author:

> As the Alabama court itself recognized, the plaintiff-insured under such a test has a heavy burden. It is difficult to conceive of many cases when some factual issue would not exist regarding the insured's rights to payment under a first party policy. The requirement that the insured establish the right to policy benefits as a matter of law appears not to have been adopted in any other jurisdiction that recognizes the tort of bad faith and seems to be an unjustifiable restriction on the cause of action. By requiring that the insured establish entitlement to policy benefits as a matter of law, the Alabama rule in effect allows the insurer to avoid tort liability if the insurer can raise any factual dispute about the claim, no matter how unjustified its position may prove to be.[230]

One unstated reason why states such as Alabama and Mississippi have adopted a rule which imposes a heavy burden on the plaintiff to establish bad faith may have to do with the fact that the standard for determining bad faith in such jurisdictions is very nearly the same as the standard for establishing the plaintiff's right to punitive damages.[231] Inasmuch as the *McCullough* majority emphasized that the

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227. *Id.* at 1362.

228. The Mississippi courts have adopted the *Dutton* rule, *e.g.*, Blue Cross & Blue Shield v. Campbell, 466 So. 2d 833 (Miss. 1984). The only other decisions which have embraced the rule are Farmer's Union Cent. Exch., Inc. v. Reliance Ins. Co., 675 F. Supp. 1534 (D.N.D. 1987); Corrente v. Fitchburg Mut. Fire Ins. Co., 557 A.2d 859 (R.I. 1989); Callioux v. Progressive Ins. Co., 745 P.2d 838 (Utah Ct. App. 1987); and Justin v. Guardian Ins. Co., 670 F. Supp. 614 (D.V.I. 1987). Strangely enough, *Callioux v. Progressive Ins. Co.* emanates from a jurisdiction which has not adopted the tort of first party bad faith.

229. For a case which specifically rejects the *Dutton* rule, *see* Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 354, 723 P.2d 703 (Ct. App. 1985).

230. W. M. SHERNOFF, *supra* note 8, § 5.03[3] at 5-10.7.

231. *See, e.g.*, Vogel v. American Warranty Home Serv. Corp., 695 F.2d 877, 883 (5th Cir. 1983) where the court, in interpreting Mississippi law, held that if the insurer offers no justifiable reason or arguable basis under Mississippi law for denying a valid claim, the trial judge must submit to the jury the issue of whether punitive damages are owed. In a subsequent Mississippi decision, however, the court held that the fact

standard for obtaining a punitive damage award in Wyoming is different than the standard for establishing bad faith,[232] the proof necessary to establish bad faith need not create an unrealistic burden.

Because the rule operates so onerously, the Alabama Supreme Court itself has had to qualify the application of the *Dutton* rule in some cases. Thus, it is now the law in Alabama that the type of evidence used by the insurer to defeat a directed verdict on the bad faith claim must emanate from a source independent of the insurer.[233] It is also the rule in Alabama that the evidence to be considered in determining whether a directed verdict would be appropriate on the plaintiff's contract claim is that which was available to the insurer at the moment it denied the claim. In other words, a factual issue cannot be created by expert testimony developed after the claim was denied.[234]

Although the issue has apparently yet to be raised, it would seem as if the *Dutton* rule would have no application where the claim of bad faith rested on the insurer's failure to adequately investigate the claim in question. It makes little sense to premise a finding of bad faith for the failure to properly investigate on whether the plaintiff is entitled to a directed verdict on the underlying contract claim, because the factual issue upon which the directed verdict depends would, more than likely, be created by the insurer's faulty investigation.[235]

C. Is there a Different Standard Under a Contract Theory of Bad Faith?

In some cases the question of whether the standard enunciated by the majority in *McCullough* is more stringent than that which applies to determine bad faith under a contract theory may become important.[236] If, for example, the insured can establish that a first party

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that an insurer lacked an arguable reason for denying a claim did not automatically lead to the conclusion that the issue of punitive damages should be submitted to the jury. Rather, the court held, in the absence of an arguable reason for denying the claim, the insured must still make a showing of malice, gross negligence, or wanton disregard of the rights of the insured by the insurer. Life & Cas. Ins. Co. v. Bristow, 529 So. 2d 620, 624 (Miss. 1988).

232. *McCullough*, 789 P.2d at 860-61.

233. Jones v. Alabama Farm Bureau Mut. Cas. Co., 507 So. 2d 396 (Ala. 1987).

234. Aetna Life Ins. Co. v. Lavoie, 470 So. 2d 1060 (Ala. 1984), *vacated* on other grounds and remanded, 475 U.S. 813 (1986), *aff'd*, 505 So. 2d 1050 (Ala. 1987). *See also* King v. National Found. Life Ins. Co., 541 So. 2d 502 (Ala. 1989), where the court held that a major medical insurer which denied coverage for removal of an insured's cysts could not base its decision on reasons which were not known to it and considered by it at the time it denied the claim, no matter how legitimate the later discovered reasons were. There is no reason to believe that this particular rule, however, is or should be indigenous to Alabama.

235. *See supra* notes 206-09 and accompanying text.

236. *Supra* note 71. In the vast majority of jurisdictions which have adopted the tort of first party bad faith, the insured can proceed under a contract theory of bad faith and a tort theory at the same time. Rhode Island appears to follow a radically

insurer had no reasonable basis to deny his claim, but cannot establish that the insurer either knew or should have known that a reasonable basis for denying the claim was lacking, the insured may actually prefer to proceed under a contract theory rather than the tort theory adopted by *McCullough*.[237] Under a contract theory, the insured in Wyoming could assert that the California standard for determining bad faith, one of simple negligence, should be used rather than the Wisconsin standard, because in contract actions the insurer's state of mind is irrelevant.[238] As the Indiana Supreme Court has noted, "[a] promisor's motive for breaching his contract is generally regarded as irrelevant because the promisee will be compensated for all damages resulting from the promisor's breach."[239] It could therefore be argued under a contract theory that whether or not the insurer knew there was no reasonable basis for denying the claim is not a requirement for establishing bad faith.[240]

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different rule. In Bartlett v. John Hancock Mut. Life Ins. Co., 538 A.2d 997 (R.I. 1988), the court held there can be no cause of action for an insurer's bad faith refusal to pay a claim until the insured first establishes that the insurer breached its duty under the contract of insurance. If the insurer prevails on the breach of contract action, it could not, as a matter of law, have acted in bad faith in its relationship with its policyholder. The courts which follow the *Dutton* rule adhere to a similar rule, although the insured is apparently not precluded from proceeding under both theories at the same time. *See supra* notes 226-35 and accompanying text. In Reserve Life Ins. Co. v. McGee, 444 So. 2d 803, 809 (Miss. 1983), for example, "[a]t the conclusion of the evidence, the trial court . . . should determine whether . . . as a question of law, the insurer had a legitimate or arguable reason to deny payment of the claim." Thus, in Mississippi the trial court must determine upon the close of evidence that the insured is entitled to a directed verdict on his or her contract claim. Otherwise, the issue of bad faith is not submitted to the jury.

In the vast majority of jurisdictions, including those which have adopted the Wisconsin standard for determining bad faith, the question of whether the standard has been met presents a jury question. *E.g.*, Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127 (1982), *cert. denied*, 459 U.S. 1070 (1982).

237. The resolution of this issue would hinge upon whether plaintiff's counsel determined that the extracontractual damages he was seeking were reasonably foreseeable by the contracting parties. Justice Golden, at least, stated that damage rules in breach of contract cases must remain very flexible, implying that traditional notions of foreseeability in contract cases should be expanded. *McCullough*, 789 P.2d at 865-66 (Golden J., dissenting). In either event, if it appears that the damages sought by the insured are recoverable under either a tort or contract theory, it would appear that the standard for establishing bad faith is easier to meet under the contract theory. Of course, if the conduct of the insurer in denying the claim is sufficiently egregious to pursue a punitive damage recovery, the insured would forfeit the right to do so under contract theory. *See supra* note 79.

238. Burleson v. Illinois Farmers Ins. Co., 725 F. Supp. 1489 (S.D. Ind. 1989).

239. *Vernon Fire & Cas. Ins. Co.*, 349 N.E.2d at 180.

240. As one writer has noted:

> Traditional contract theory permits a promisor to elect, with impunity, either to perform a contractual obligation or to pay compensatory damages. If the promisor can be adequately compensated by a monetary award, specific performance will not be granted. The motive behind a promisor's breach of contract is irrelevant; contract compensation principles focus instead on placing the promisee in as good a position as the position he would have been in had the promisor performed. Contract compensation principles are thus generally indifferent to whether the breaching party negligently failed to perform, or willfully breached because of an inability to perform or in order to take advantage of a more profita-

There is very little authority identifying the standard utilized by the courts to determine whether an insurer has acted in bad faith under a contract theory. One of the few contract theory decisions which has addressed this issue is *Beck v. Farmers Insurance Exchange*, where the court held:

> Few cases define the *implied contractual obligation* to perform a first-party insurance contract in good faith. However, because the considerations are similar, we freely look to the tort cases that have described the incidents of the duty of good faith in the context of first-party insurance contracts. From those cases and from our own analysis of the obligations undertaken by the parties, we conclude that the implied obligation of good faith performance contemplates, at the very least, that the insurer will *diligently investigate* the facts to enable it to determine whether a claim is valid, will *fairly evaluate* the claim, and will thereafter *act promptly and reasonably* in rejecting or settling the claim.[241]

Beck apparently adopts a reasonableness standard to determine bad faith under a contract theory, which is consistent with the observation that the insurer's state of mind or knowledge of the absence of any valid reason for denying a claim should be irrelevant under a contract theory. Thus, if the insured found it advantageous to establish bad faith under a contract theory in the State of Wyoming, the applicable standard would be akin to the California standard, which requires only a showing of unreasonableness, and not the Wisconsin standard, which consists of the two-part test discussed above.[242]

The standard for establishing the insured's right to attorney's fees[243] in Wyoming should also be contrasted with the standard for establishing bad faith as adopted by the majority in *McCullough*. Under Wyoming's attorney's fee statute, the insured need only establish that his or her claim was denied unreasonably or without cause.

> ble opportunity. Punitive damages are viewed as inappropriate, since the purpose of the award is to compensate the promisee rather than to punish the promisor. Although in theory the promisee is to receive the benefit of the bargain, strict rules in fact circumscribe the promisor's liability.

Comment, *Tort Remedies for Breach of Contract: the Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 1986 COLUM. L. REV. 377, 378.

241. 701 P.2d at 801 (citations omitted) (emphasis added).

242. *Supra* note 238.

243. WYO. STAT. § 26-15-124(c) (1977) provides:

> In any actions or proceedings commenced against any insurance company on any insurance policy or certificate of any type or kind of insurance, or in any case where an insurer is obligated by a liability insurance policy to defend any suit or claim or pay any judgment on behalf of a named insured, if it is determined that the company refuses to pay the full amount of a loss covered by the policy and that the refusal is unreasonable or without cause, any court in which judgment is rendered for a claimant may also award a reasonable sum as an attorney's fee and interest at ten percent (10%) per year.

Unlike the Wisconsin standard for establishing first party bad faith, the insured need not establish the insurer's knowledge, or reckless disregard thereof, of the unreasonableness of the claim denial in order to satisfy the requirement for obtaining attorney's fees. Thus, there may be some factual situations in Wyoming in which the insured will be entitled to attorney's fees even though he is unable to satisfy the Wisconsin test for establishing first party bad faith.[244] The inverse, however, should not be true. If the insured is able to prove bad faith under the Wisconsin standard, he has automatically established his right to attorney's fees under Wyoming law.

VI. DOES *MCCULLOUGH* APPLY TO OTHER TYPES OF BAD FAITH CONDUCT?

It is easy to assume that the *McCullough* holding applies to all types and categories of first party bad faith. As the following analysis indicates, however, such is not necessarily the case. *McCullough* should not be read at the present time to automatically extend the tort of first party bad faith beyond the area of claim denials. That is not to say, however, that *McCullough* will not be found to apply to other types of first party bad faith.

A. *Failure or Refusal to Defend*

There can be no question but that an insurer who unjustifiably refuses to defend its insured against a third party claim has breached its contract and can be held liable for consequential damages that occur as a foreseeable result of the breach.[245] Similarly, several courts hold that an insurer may be held liable under a contract theory for breach of the implied covenant of good faith and fair dealing when it refuses to defend its insured.[246] The courts, however, are split on the question of whether the failure or refusal of an insurer to defend its insured against the liability claim of a third party, with nothing more, is actionable in tort.[247] One authority predicted that the courts which hold that an unreasonable refusal to pay a first party claim is actionable in tort will likewise find that an insurer's breach of its duty to

244. *See supra* notes 210-25 and accompanying text.

245. S. S. ASHLEY, *supra* note 8, § 4.07 at 10. "If the insurer breaches its covenant to defend, it breaches the contract of insurance and, in principle, should incur liability for damages according to the rules normally applicable in contract cases."

246. *See, e.g.*, Drop Anchor Realty v. Hartford Fire Ins. Co., 126 N.H. 674, 496 A.2d 339 (1985). *Contra*, Farris v. U.S. Fidelity and Guar. Co., 284 Or. 453, 587 P.2d 1015 (1978).

247. *See* Annotation, *Insurer's Tort Liability for Consequential or Punitive Damages for Wrongful Failure or Refusal to Defend Insured*, 20 A.L.R.4TH 23 (1983). Note, however, that if an insurer refuses to defend, but had an opportunity to accept a settlement offer within policy limits, it may be held liable to the insured for third party, rather than first party, bad faith. *See* Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958). *See also*, S. S. ASHLEY, *supra* note 8, § 4.11 at 26.

defend can also be tortious,[248] and in fact the tendency of courts has been to lean in that direction.[249] Thus, in the leading case, the North Dakota Supreme Court held as follows:

> We cannot differentiate between a failure to pay . . . and . . . a failure to defend, if the insurer breaches its covenant to act fairly and in good faith in discharging its contractual responsibilities. Insofar as claims for emotional distress and mental suffering are made, the failure of the insurer to defend the insured against a multithousand-dollar action filed by a third party against the insured may be significantly greater than the failure to pay a claim to the insured under a . . . policy . . . .[250]

There is scant authority on the standard applied to determine whether an unjustified refusal to defend gives rise to the tort of first party bad faith.[251] The Seventh Circuit Court of Appeals, however, applying Wisconsin law, has held that the "fairly debatable" standard applies in duty to defend cases.[252]

Based upon the cases which have held that liability can attach for the bad faith refusal to defend in California[253] and Wisconsin,[254] it is likely that the Wyoming Supreme Court will follow suit when the issue arises.

B. Wrongful Cancellation and Non-renewal

Another issue which *McCullough* does not directly address is whether an insurer may be held liable in tort for the wrongful cancellation or non-renewal of a first party insurance policy. Again, there is some split of authority among jurisdictions which have considered the issue. In Alabama,[255] for example, the court specifically held that a contract remedy is the only remedy available where an insurer wrongfully cancels, terminates, or repudiates a contract of insurance, even though the tort of bad faith is available in Alabama if the insurer

248. A. D. WINDT, *supra* note 8, § 4.32 at 163.

249. *See, e.g.*, Tibbs v. Great Am. Ins. Co., 755 F.2d 1370 (9th Cir. 1985); Lipinski v. Title Ins. Co., 202 Mont. 1, 655 P.2d 970 (1982); Black v. Fireman's Fund Am. Ins. Co., 115 Idaho 448, 767 P.2d 824 (Ct. App. 1989); Safeco Ins. Co. of Am. v. Mirczak, 662 F. Supp. 1155 (D. Nev. 1987); and State Farm Fire & Cas. Co. v. Price, 101 N.M. 438, 684 P.2d 524 (Ct. App. 1984).

250. Smith v. American Family Mut. Ins. Co., 294 N.W.2d 751, 758 (N.D. 1980).

251. Cases which address the issue seem to apply a "reasonableness" standard, holding an insurer liable for the bad faith refusal to defend only where the refusal was unreasonable. *See, e.g.*, Lampliter Dinner Theater, Inc. v. Liberty Mut. Ins. Co., 792 F.2d 1036 (11th Cir. 1986).

252. Lund v. American Motorists Ins. Co., 797 F.2d 544 (7th Cir. 1986). In this case the court held that the insurer's refusal to defend was "fairly debatable" because the insured had no coverage under the policy at issue.

253. *See* Tibbs v. Great Am. Ins. Co., 755 F.2d 1370 (9th Cir. 1985).

254. *See* Lund v. American Motorists Ins. Co., 797 F.2d 544 (7th Cir. 1986).

255. Watkins v. Life Ins. Co., 456 So. 2d 259, 263 (Ala. 1984).

wrongfully denies the payment of a claim.[256] Other jurisdictions, most notably California, hold that the cancellation provisions of an insurance contract are subject to the covenant of good faith and fair dealing, which is actionable in tort, just as much as are other provisions of the contract.[257] In *Spindle v. Travelers Insurance Co.* the court engaged in the following analysis:

> We are unable to discern any logical basis for distinguishing between an insurer's conduct in settling a claim made pursuant to the policy and that involved in an insurer's cancelling a policy if bad-faith conduct is the basis for the cancellation. The situations are similar in that the ultimate result of the conduct of the insurer effectively deprives the insured of the benefit of his bargain, i.e., the coverage for the period for which he paid a premium. Cancellation provisions of a contract are subject to the covenant of good faith and fair dealing just as are other provisions of a contract. No plausible reason exists why cancellation provisions of a contract should be treated differently from other contractual provisions insofar as application of the implied covenant of good faith and fair dealing is concerned . . . .[258]

When the issue involves an insurer's bad faith liability for the non-renewal of a policy, rather than cancellation, a different result has obtained on the basis that the insured normally has no contractual right to have his policy renewed at the expiration of the term.[259] Thus, in *Armstrong v. Safeco Insurance Co.*,[260] the Washington Supreme Court distinguished other cases in which a good faith duty was held to exist by holding:

> In those cases, the insurer was under a contractual obligation to provide coverage and a defense to the insured, who was in an extremely vulnerable position should the insurer fail to uphold its duties under the contract. In this case, however, the Armstrongs argue the duty of good faith forces an insurer to negotiate and accept a *new* contract of insurance. According to the Armstrongs' paradigm, this obligation continues for the duration of the insured's life. Such reasoning is not in line with our past decisions,

256. A subsequent Alabama decision, Waldon v. Cotton States Mut. Ins. Co., 481 So. 2d 340 (Ala. 1985), held that a tort remedy was available for wrongful cancellation as long as cancellation was raised as a defense for the nonpayment of a claim.

257. *See* W. M. SHERNOFF, *supra* note 8, § 3.30 at 66.1-69.

258. 66 Cal. App. 3d 951, 958, 136 Cal. Rptr. 404, 408 (1977).

259. As stated by one authority:

> Where there is no clause in the policy expressly granting a privilege or imposing a duty of renewal, neither party has any right to require a renewal. Thus, the rights of the parties under such a contract are mutual in the sense that neither is bound to renew the contract. And under such a policy the insured may decline to renew the policy at the end of a premium payment period. 18 COUCH ON INSURANCE 2D § 68.12 (rev. ed. 1983).

260. 111 Wash. 2d 784, 765 P.2d 276 (1988).

nor in line with the Legislature's intent. An insurer's decision whether to renew a policy does not rise out of a contractual obligation, and it does not implicate an insured's vulnerable dependence upon the insurer.[261]

Because the *McCullough* majority adopted "the independent tort thesis of *Gruenberg v. Aetna Insurance Co*,"[262] it is likely that the court will also extend the tort of first party bad faith to a wrongful cancellation of a first party insurance contract and that the standard for determining bad faith would be the "fairly debatable" standard adopted from Wisconsin. In Wyoming, however, a first party insurer is not statutorily required to renew a policy of insurance at the end of its term.[263] Thus, even though an insurer in Wyoming must furnish precise reasons for not renewing a contract,[264] it would appear that even an arbitrary non-renewal of a first party contract would not give rise to bad faith liability under any theory, at least as long as there is no contractual obligation on the part of the insurer to renew the coverage.[265]

C. *Other Types of Unreasonable Insurer Conduct*

Because most disputes over first party insurance contracts do not arise until some economic interest of the policyholder has been violated, most instances in which bad faith conduct is alleged are somehow connected, as in *McCullough*, with the refusal or failure of an insurer to timely pay a first party claim. As discussed above, the issue of an insurer's bad faith can also arise in connection with an insurer's duty to defend or cancellation or non-renewal of the policy. Nonetheless, efforts to expand the tort to matters unrelated to payment of a claim, defending the insured, or cancellation of the policy will inevitably occur. Indeed, in other jurisdictions, an action for bad faith has already been extended to an abuse of the insurer's right of subrogation,[266] unfair premium increases,[267] spoliation of evidence,[268] an insurer's failure to respond to an insured's request for clarification of the latter's rights under the policy,[269] postclaim underwriting,[270] un-

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261. *Id.*, 765 P.2d at 278.
262. *McCullough*, 789 P.2d at 855.
263. WYO. STAT. § 26-35-203 (Cum. Supp. 1990).
264. WYO. STAT. § 26-35-203(c) (Cum Supp. 1990).
265. *McCullough*, 789 P.2d at 855.
266. Brunet v. American Ins. Co., 660 F. Supp. 843 (D. Vt. 1987) (insurer may incur liability for bad faith if it withholds its consent to insured's settlement of claim where insurer's subrogation rights are worthless).
267. Hebert v. Guastella, 409 So. 2d 375 (La. Ct. App. 1982).
268. Upthegrove Hardware, Inc. v. Pennsylvania Lumbermans Mut. Ins. Co., 146 Wisc. 2d 470, 431 N.W.2d 689 (1988).
269. Carolina Bank & Trust Co. v. St. Paul Fire & Marine Co., 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983).
270. *See* W. M. SHERNOFF, *supra* note 8, section 5.22[2] at 40-40.1, where the author defined postclaim underwriting as a practice whereby the insurer conducts no

warranted offsets,[271] failure to inform the insured of remedial rights,[272] or impeding an insured's recovery of an uninsured portion of the loss.[273] Undoubtedly, additional issues will arise in the future. By definition, bad faith may be limited only by the disingenuity of the parties to an insurance contract. As one court has stated:

> The fact that plaintiff's allegations do not fall within presently recognized variants of the bad faith theme does not necessarily mean that he has failed to state a cause of action for the tort of bad faith. The contours of the bad faith cause of action are not necessarily defined by currently recognized types of bad faith cases. The implied covenant of good faith not only entails a duty that the insurer will act fairly and honestly in resolving disputes with its insured, but concomitantly requires that neither party will do anything which will injure the right of the other to secure the fruits of the agreement.[274]

VII. WHO OWES THE DUTY UNDER *McCULLOUGH*?

A. *Insurers*

Under *McCullough*, insurance companies who have a direct contractual relationship with the insured owe him or her a duty of good faith and fair dealing, the violation of which is actionable in tort.[275] This would include reciprocals[276] and fraternal benefit societies,[277] as long as such entities are risk-bearing entities and have issued a contract of insurance to the insured, but would exclude all reinsurers,[278] the Wyoming Insurance Guaranty Fund,[279] and various exchanges,[280] such as Lloyds of London.[281]

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investigation of the insured's prior medical history until a claim is submitted, at which time, in an attempt to avoid liability, the insurer scrutinizes the claimant's prior medical history for any nondisclosure of prior health problems.

271. Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

272. Sarchett v. Blue Shield, 43 Cal. 3d 1, 729 P.2d 267, 233 Cal. Rptr. 76 (1987).

273. *Rawlings*, 151 Ariz. at 149, 726 P.2d at 565.

274. *Rios*, 68 Cal. App. 3d at 817, 137 Cal. Rptr. at 444.

275. *McCullough*, 789 P.2d at 858.

276. Reciprocal insurers are regulated in Wyoming by Wyoming Statutes sections 26-27-101 to -129 (1977).

277. Fraternals are regulated in Wyoming by Wyoming Statutes sections 26-29-201 to -238 (Cum. Supp. 1990).

278. The lack of any legal or contractual relationship between the insured and any reinsurer who may have assumed part of the risk from the primary insurer precludes the reinsurer from owing any duty of good faith or fair dealing to the insured. Reid v. Ruffin, 314 Pa. Super. 46, 460 A.2d 757 (1983).

279. *See* Interstate Fire & Cas. Ins. Co. v. California Ins. Guar. Ass'n, 125 Cal. App. 3d 904, 178 Cal. Rptr. 673 (1981). *See also*, Wyoming Statutes section 26-31-106(c)(iv) (Cum. Supp. 1990), which provides that the association's liability to any claimant or policyholder is restricted to the amount of a covered claim.

280. Cloud v. Illinois Ins. Exch., 701 F. Supp. 197 (W.D. Okla. 1988).

281. Squibb-Mathieson Int'l Corp. v. St. Paul Mercury Ins. Co., 44 Misc. 2d 835, 254 N.Y.S.2d 586 (1964). In this case the court found that Lloyd's only negotiated and

B. Agents, Employees, Adjusters and Attorneys

Generally speaking, the courts have held that one who is not a party to the underlying contract of insurance, including agents, employees, attorneys or adjusters who work on behalf on insurers,[282] does not owe a duty of good faith and fair dealing to the insured. Under *McCullough*, there is no reason why any other result would obtain.

There are, however, exceptions to the above rule, the most notable of which involves management groups[283] or marketing entities[284] to whom adjustment or marketing activities have been delegated by the insurer. Thus, in *Williams v. Farmers Insurance Group, Inc.*,[285] the court found a unique relationship between the insurer and a management group and stated:

> Thus, strict adherence to the general rule that liability for bad faith breach may be imposed only against a party to the insurance contract would permit Farmers to shield itself from liability through the device of a management company. This would deny plaintiffs recovery from the claims-handling entity primarily responsible for their damages.[286]

Note should be taken, however, that agents,[287] adjusters[288] and attorneys[289] have all been held directly liable to the insured on a negligence, rather than a bad faith, theory. Based upon the authority of *Hursh Agency, Inc. v. Wigwam Homes, Inc.*,[290] it is likely that the Wyoming Supreme Court would recognize comparable duties. Thus, the fact that such individuals are not subject to the duty of good faith and fair dealing may not be significant. Indeed, under a negligence theory, the standard for holding such individuals liable may well represent less of an obstacle to the insured than if he were to attempt to do so under a bad faith theory.[291]

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effected the issuance of policies by and among its members. The activities of Lloyd's were akin to the activities of insurance brokers such as St. Paul Mercury Ins. Co. As such, Lloyd's was not a risk-bearing entity and did not have a contractual relationship with the insured.

282. *Gruenberg*, 9 Cal. 3d at 576, 510 P.2d at 1039, 108 Cal. Rptr. at 487. "Obviously, the non-insurer defendants were not parties to the agreements for insurance; therefore, they are not, as such, subject to the implied duty of good faith and fair dealing."

283. Delos v. Farmers Ins. Group Inc., 93 Cal. App. 3d 642, 155 Cal. Rptr. 843 (1979).

284. *Sparks*, 132 Ariz. at 539-40, 647 P.2d at 1137-38.

285. 781 P.2d 156 (Colo. Ct. App. 1989).

286. *Id.* at 158.

287. Hursh Agency v. Wigwam Homes, Inc., 664 P.2d 27 (Wyo. 1983).

288. Continental Ins. v. Bayless & Roberts, Inc., 608 P.2d 281 (Alaska 1980).

289. Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (1984).

290. 664 P.2d 27 (Wyo. 1983).

291. *See supra* notes 236-42 and accompanying text.

C. Insureds

The issue of what duties the insured may owe under the covenant of good faith and fair dealing arises in two different ways. The first is whether an insured who commits bad faith can be held liable by his insurer. In principle, there is no reason why the insured does not have the same duty to an insurer as the insurer has to the insured, inasmuch as "[t]here is an implied covenant of good faith and fair dealing in every contract that *neither party* will do anything which will injure *the right of the other* to receive the benefits of the agreement."[292] Thus, in *Liberty Mutual Insurance Co. v. Altfillisch Construction Co.*, the court held:

> Faced with this sweeping and portentous pronouncement on the force and dignity of such covenants [of good faith and fair dealing], we find no difficulty in construing the scope of their impact to devolve alike upon the insured as well as the insurer and that *a breach thereof by the insured would lead to the same legal consequences as any garden variety breach of contract.* Thus it is here. Given Liberty's expectation of opportunities to subrogate in the event of payment of a loss caused by the negligence of a third party, it was clearly a breach of the insured's implied covenant of good faith and fair dealing for Conexco to frustrate that expectation by contracting away such opportunity before the loss occurred.[293]

Critical to the court's analysis of the insured's duty of good faith is the reference to such duty as a "garden variety breach of contract." No court, including the court in *Liberty Mutual*, has held the insured liable to his or her insurer in tort for the breach of the implied covenant of good faith and fair dealing,[294] meaning that punitive damages, and probably extracontractual damages, are not an exposure that the insured realistically faces for violating the covenant.[295]

The second issue which may arise in connection with the duty of good faith which the insured may owe to an insurer is the concept of

292. *Comunale*, 50 Cal. 2d at 658, 328 P.2d at 200 (emphasis added).

293. 70 Cal. App. 3d 789, 797, 139 Cal. Rptr. 91, 95 (1977) (emphasis added).

294. W. M. Shernoff, *supra* note 8, § 2.03[3][a] at 2-13. *See also*, Houser, *Comparative bad faith: the two-way street opens for travel*, 23 IDAHO L. REV. 367 (1986-87). It is clear that some of the reasons cited by the majority opinion for holding a first party insurer liable in tort for bad faith would not apply where the insured's bad faith is at issue. The insured, for example, does not enjoy a superior bargaining position over the insurer, *McCullough* 789 P.2d at 858, and the insured does not possess the discretion to determine whether claims are paid, third party claims are defended, or policies of insurance cancelled.

295. Under a strict contract theory, the insured would face no exposure for punitive damages, and would be liable for extracontractual damages only to the extent such damages were contemplated by both parties at the time the contract was entered into. *Supra* notes 77 and 79.

"comparative bad faith," that is, the question of whether the insured's bad faith can offset, in whole or part, any bad faith on the part of the insurer in the same way that a tortfeasor's negligence may be offset by the negligence of the plaintiff.[296] This question has received little attention from the courts, at least outside of California,[297] although one court affirmed an award of $14,300 in compensatory damages in favor of the insured based on a special verdict that had attributed seventy-four percent of the damages to the insurer's bad faith and twenty-six percent of the damages to the insured's bad faith.[298]

It is doubtful, however, that the Wyoming Supreme Court would recognize any concept of "comparative bad faith" because of the majority's characterization of first party bad faith as an intentional tort.[299] In Wyoming, the willful or wanton misconduct of one party is not compared with the simple negligence of another party under Wyoming's comparative negligence statute,[300] at least for purposes of allowing the actor to benefit from his own willful misconduct.[301] Thus, one authority has stated:

> If bad faith is characterized as an intentional tort, most courts would hold that the plaintiff's negligence does not diminish his or her recovery. On the other hand, the doctrine has been applied in many situations in which liability is imposed based upon conduct that is more culpable than mere negligence.[302]

The decisions which recognize comparative bad faith in California, therefore, can be distinguished on the basis that first party bad faith is not recognized as an intentional tort in California.[303]

VIII. TO WHOM IS THE DUTY OWED?

A. *Contractual Relationship Generally Required*

Generally speaking, the party who wishes to assert a bad faith claim must have a direct contractual relationship with the insurer which issued the policy of insurance.[304] Exceptions include those who

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296. *See, e.g.*, J. C. MCCARTHY, *supra* note 8, § 1.24 at 98-102.

297. *See* cases cited by S. S. ASHLEY, *supra* note 8, § 6.14 at 40-41. California cases which have addressed the issue include California Cas. Gen. Ins. Co. v. Superior Court, 173 Cal. App. 3d 274, 218 Cal. Rptr. 817 (1985); Los Angeles Memorial Coliseum Comm. v. NFL, 791 F.2d 1356 (9th Cir. 1986); and Safeco Ins. Co. of Am. v. Tholen, 117 Cal. App. 3d 685, 173 Cal. Rptr. 23 (1981).

298. Fleming v. Safeco Ins. Co. of Am., 160 Cal. App. 3d 31, 206 Cal. Rptr. 313 (1984).

299. *McCullough*, 798 P.2d at 860.

300. WYO. STAT. § 1-1-109 (1977).

301. Barnette v. Doyle, 622 P.2d 1349 (Wyo. 1981).

302. W. M. SHERNOFF, *supra* note 8, § 2.03[3][b] at 2-16 to 2-16.1.

303. *Gruenberg*, 9 Cal. 3d at 566, 510 P.2d at 1032, 108 Cal. Rptr. at 480.

304. United Fire Ins. Co. v. McClelland, 780 P.2d 193 (Nev. 1989). *See also* Messner, Inc. v. Travelers Indem. Co., 620 F. Supp. 1444 (W.D. Wis. 1985). In this case, the

may have a right to policy benefits, but who are not directly contracted with the insurer, such as unnamed or additional insureds,[305] beneficiaries under a first party policy,[306] and surety bond obligees.[307] Of these categories, the unnamed or additional insureds are numerically the most important because they include, for example, all relatives of the named insured and all persons using the automobile with the permission of the named insured under an automobile policy, passengers under an uninsured motorist coverage, unnamed employees under an employer's liability policy or, for purposes of medical payments coverages under an automobile policy, any passenger suffering bodily injury in an automobile, provided that the named insured has medical payments coverage.[308] The duty of good faith and fair dealing is owed to this category of insureds even though such insureds have no direct contractual relationship with the insurer which owes the duty and, indeed, do not likely pay a premium for the coverage and are even often unaware of their status as insureds until after the accident occurs.[309]

Another category of claimants who are not directly contracted to the insurer, but who may assert a bad faith claim, are assignees of the insured,[310] although questions involving assignments of bad faith claims generally involve third party, rather than first party, bad faith.[311]

B. *Third Party Claimants*

In a few states, third party claimants have been provided with a direct statutory remedy against first party insurers for the unreasonable denial of a third party claim.[312] In these jurisdictions, therefore, it

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court held that a loss payee under a policy insuring property in which the lender held a security interest could not sue the insurer for bad faith because the lender was not a named insured and therefore was not a party to the contract of insurance.

305. Cancino v. Farmers Ins. Group, 80 Cal. App. 3d 335, 145 Cal. Rptr. 503 (1978).

306. Roach v. Atlas Life Ins. Co., 769 P.2d 158 (Okla. 1989). *Contra*, *Austero*, 62 Cal. App. 3d at 511, 133 Cal. Rptr. at 107.

307. *Supra* note 167.

308. *See, e.g.* S. S. ASHLEY, *supra* note 8 at § 6.03 at 3-4.

309. *Id.* at 4.

310. Reichert v. General Ins. Co. of Am., 68 Cal. 2d 822, 442 P.2d 377, 69 Cal. Rptr. 321 (1968) (cause of action in first party cases held assignable and thus assertable only by bankruptcy trustee).

311. In the typical case, the third party obtains a judgment in excess of the policy limits against the insured and then releases the insured in exchange for an assignment of the insured's cause of action for bad faith against the insurer. *See* S. S. ASHLEY, *supra* note 8, § 6.05-6.08.

312. Montana, *Klaudt*, 202 Mont. at 247, 658 P.2d at 1065; West Virginia, *Jenkins*, 167 W. Va. at 397, 280 S.E.2d at 252; and California, *Royal Globe*, 23 Cal. 3d at 880, 592 P.2d at 329, 153 Cal. Rptr. at 842. As a result of *Royal Globe*, California was the first jurisdiction to afford third party claimants a direct cause of action against a liability insurer. Insofar as third party claimants are concerned, however, the California Supreme Court recently overruled *Royal Globe* in Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. App. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

is possible for the victim of a tortfeasor's negligence to bring suit directly against the tortfeasor's liability carrier if the victim's claim is unreasonably denied or, where liability of the tortfeasor is reasonably clear, for failure to fairly settle the claim. It is not likely that such a cause of action would be recognized by the Wyoming Supreme Court for reasons set forth in *Julian v. New Hampshire Insurance Co.*[313] In that case the United States District Court for the District of Wyoming held that the Wyoming Unfair Claims Settlement Practices Act[314] does not create a private right of action on the part of third party claimants against first party insurers. As stated by the court:

> As with acts in other states, Wyoming penalizes unfair claims settlement practices that are committed or performed with such frequency as to indicate a general business practice. As such, "it does not readily lend itself to enforcement by a private cause of action arising from a single claim." [citations omitted]. Second, the Wyoming Insurance Commissioner has power to examine and inquire into violations of the Insurance Code, enforce the Insurance Code with impartiality, execute the duties imposed upon him by the Insurance Code, and [has] the powers and authority expressly conferred upon him by or reasonably implied from this code. [citation omitted]. Finally, as illustrated by WYO. STAT. §26-15-124(c), the Wyoming Legislature knows how to expressly create a private right of action if it chooses to do so. Having reviewed WYO. STAT. §26-13-124 . . . this court cannot conclude that the legislature intended to create a private right of action under this section.[315]

C. *The Wyoming Consumer Protection Act*

A remedy which may be available to certain individuals who do not have a direct contractual relationship with an insurer, but who have been injured by the unreasonable, unfair or deceptive actions of insurers, and one which thus far has apparently been overlooked by Wyoming litigants,[316] is the Wyoming Consumer Protection Act.[317] Under this act "[a] person relying upon an uncured unlawful deceptive trade practice may bring an action under this act for the damages he has actually suffered as a consumer as a result of such unlawful deceptive trade practice."[318]

313. 694 F. Supp. 1530 (D. Wyo. 1988).
314. WYO. STAT. § 26-13-124 (Cum. Supp. 1990).
315. *Julian*, 694 F. Supp. at 1533.
316. The author is unaware that the Wyoming Consumer Protection Act has ever been pleaded in a bad faith complaint against an insurer. In any event, there is no case law in Wyoming construing the private remedy statute in the Wyoming Consumer Protection Act, WYO. STAT. § 40-12-108(a) (1977).
317. WYO. STAT. §§ 40-12-101 to -112 (1977 & Cum. Supp. 1990).
318. WYO. STAT. § 40-12-108(a) (1977) (citations omitted).

The first inquiry in determining whether this legislation affords those who deal with first party insurers a civil remedy is to determine whether an "insurance transaction" falls within the definition of a "consumer transaction." The latter term is defined by the act as meaning the "[a]dvertising, offering for sale, sale or distribution of any merchandise to an individual for purposes that are primarily personal, family or household"[319] and would definitely encompass certain types of first party insurance products[320] as long as "merchandise" is defined in such a way so as to include the solicitation or sale of an insurance policy. That term is defined as including: "[a]ny service or any property, tangible or intangible, real, personal or mixed, or any other object, ware, good, commodity, or article of value wherever situated."[321]

Under this definition, a homeowner's policy, for example, would certainly constitute "intangible" property[322] or "any other object, ware, good, commodity, or article of value . . . ."[323] If so, then a consumer may be entitled to recover damages he sustains as a result of the unlawful and deceptive trade practices committed by a "person"[324] as the same are listed in the act,[325] and which, as a result of a 1987 amendment by the Wyoming Legislature,[326] now include the generic category of "unfair or deceptive acts or practices." Because the act specifically creates a civil cause of action, it is likely that the Wyoming Supreme Court, if the issue were before it, would incorporate the Wyoming Unfair Claims Settlement Practices Act and, perhaps, the Wyoming Unfair Trade Practices Act[327] into the "unfair or deceptive

319. WYO. STAT. § 40-12-102(a)(ii) (1977).

320. Obviously, health or disability insurance, most life insurance, family or individual auto insurance, homeowner's insurance, and residential title insurance would all be examples of coverage which is primary "personal, family or household." On the other hand, it is clear that any insurance policy purchased for a commercial purpose, such as a business auto or property policy, or even a life policy where a business partner is named as the beneficiary, would not be actionable under the Wyoming Consumer Protection Act.

321. WYO. STAT. § 40-12-102(a)(vi) (1977).

322. This issue was raised in *Dodd*, 365 N.E.2d at 807, where the court held that an automobile insurance policy constituted both the sale of a property right and the sale of a service within the meaning of a Massachusetts statute comparable to Wyoming Statutes section 40-12-102(a)(vi) (1977). The right to payment from an insurance policy is a recognized property right. *See* 1 COUCH ON INSURANCE 2D § 1.11 at 17-18 (rev. ed. 1983).

323. WYO. STAT. § 40-12-102(a)(vi) (1977).

324. A "person" is defined by Wyoming Statutes section 40-12-102(a)(i) (1977) as "a natural person, corporation, trust, partnership, incorporated or unincorporated association or any other legal entity." Since all insurers are a legal entity of some type, they would fall within the definition of a "person" for purposes of the Wyoming Consumer Protection Act.

325. WYO. STAT. § 40-12-105 (Cum. Supp. 1990).

326. 1987 Wyo. Sess. Laws, ch. 168 § 1 (codified as amended at WYO. STAT. § 40-12-105(a)(xv) (Cum. Supp. 1990)). The new amendment adds to the list of unlawful practices enumerated in Wyoming Statutes section 40-12-105(a) (Cum. Supp. 1990) one who "[e]ngages in unfair or deceptive acts or practices."

327. WYO. STAT. §§ 26-13-101 to -123 (1977). What has been referred to as the Wyoming Unfair Claims Practices Act actually consists of one statute, WYO. STAT. §

acts or practices" language of the new amendment.[328]

If the above analysis is correct, its significance is threefold. First, the statutory cause of action under the Wyoming Consumer Protection Act creates a larger class of prospective defendants than does the tort of first party bad faith. The duty to refrain from engaging in unlawful or deceptive trade practices extends to all individuals and legal entities, not simply insurers.[329] The only limitation on such duty is that the "person" committing the unlawful or deceptive act must have acted in "the course of business"[330] and "in connection with a consumer transaction."[331] Thus, any individual or entity who advertises an insurance product or solicits or offers for sale any insurance product, where such activity constitutes a "consumer transaction," is potentially liable to the consumer under the Wyoming Consumer Protection Act. On the other hand, the duty of good faith and fair dealing under *McCullough* extends, for the most part, only to the actual parties to an insurance contract.[332]

Second, the statutory cause of action under the Wyoming Consumer Protection Act creates a larger class of prospective plaintiffs than does the tort of first party bad faith. An example will illustrate. Assume an individual applies for a health insurance policy and is led

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26-13-124 (Cum. Supp. 1990), of the Wyoming Unfair Trade Practices Act. In addition to defining unfair claims settlement practices, the latter act prohibits numerous other unfair methods and deceptive acts, including misrepresentation, false advertising, "twisting," defamation, boycott, coercion and intimidation, unfair discrimination in premium rates, rebates, and illegal dealing in premiums.

328. *See, e.g., Dodd*, 373 Mass. at 72, 365 N.E. 2d at 802; *Hardy*, 365 Pa. Super. at 206, 529 A.2d at 471; Salois v. Mutual of Omaha Ins. Co., 90 Wash. 2d 355, 581 P.2d 1349 (1978); and WVG v. Pacific Ins. Co., 707 F. Supp. 70 (D.N.H. 1986). It does not appear that the provisions of the Wyoming Insurance Code, WYO. STAT. §§ 26-1-101 to -33-11 (1977), would preempt an action against an insurer under the Wyoming Consumer Protection Act for the same reasons that the Wyoming Insurance Code was held by the majority opinion in *McCullough* not to preempt the tort of first party bad faith. *McCullough*, 789 P.2d at 859-60. Nor does it appear that a pattern of unlawful activity under Wyoming Statutes section 26-13-124 (Cum. Supp. 1990) must be established in order to proceed under the Wyoming Consumer Protection Act, even though to be subject to fines or penalties under the Wyoming Insurance Code, an insurer must commit unfair and deceptive acts "with such frequency as to indicate a general business practice . . . ." WYO. STAT. § 26-13-124(a) (1977). As the court in *WVG*, 707 F. Supp. at 72-73 held under similar legislation in New Hampshire:

> A pattern of illegal activity need not be established under RSA ch. 358-A. By enacting a separate provision in the Consumer Protection Act for private actions, RSA ch. 358-A:10, the legislature overtly created an avenue for consumers to redress individual wrongs. The purpose of RSA ch. 417 'is to regulate trade practices in the business of insurance, and not to redress individual wrongs.' (citations) The Consumer Protection Act, on the other hand, 'is a comprehensive statute designed to regulate business practices for consumer protection.' (citations) Thus, it appears that plaintiff's claim under the Consumer Protection Act is neither exempted pursuant to RDA ch. 358-A:3, I, nor precluded by the existence of a regulatory body under RSA ch. 417.

329. WYO. STAT. § 40-12-102(a)(i) (1977).
330. WYO. STAT. § 40-12-105(a) (Cum. Supp. 1990).
331. *Id.*
332. *See supra* notes 275-95 and accompanying text.

to believe by his agent, as well as by the promotional material of the insurer, that a policy will be approved and timely issued. In fact, the insurer delays for several months in issuing the policy and, in the meantime, the applicant has a heart attack and ends up in the intensive care unit of his local hospital. Under the tort of first party bad faith, the insurer is not liable because the requisite contractual relationship was never created.[333] The agent is not liable under a bad faith theory because he would not have been a contracting party even if the policy had issued.[334] Under the Wyoming Consumer Protection Act, however, the applicant may have a cause of action against both the insurer and the agent because both were acting in the course of their business and in connection with a consumer transaction.

Third, the range of conduct which may be actionable under the Wyoming Consumer Protection Act appears much broader than the range of conduct actionable under the tort of first party bad faith. Indeed, it not only includes, without limitation, every "unfair" or "deceptive" act or practice connected with a consumer transaction,[335] but it includes all other practices enumerated by the Act.[336] Apparently, there is no requirement that the actor must intend to injure or harm the consumer, nor that the actor knew or should have known that such acts were unfair or deceptive at the time of injury.[337] Finally, it does not appear that the deceptive acts or practices which may be actionable under the Wyoming Consumer Protection Act are restricted to claims practices or trade practices designated as unfair or deceptive by the Wyoming Insurance Code. It is clear that any civil action thereunder is cumulative to the insured's common law remedies against the insurer, including the tort of first party bad faith.[338] On the other hand, the Act only applies to "uncured" practices.[339]

Unquestionably, there appear to be some situations where the Wyoming Consumer Protection Act may provide a remedy to one involved in an insurance transaction which would not be available under the duty of good faith and fair dealing.[340] Unlike legislation in other

333. *Gruenberg*, 9 Cal. 3d at 576-77, 510 P.2d at 1039, 108 Cal. Rptr. at 487.
334. *Id.*
335. WYO. STAT. § 40-12-105(a)(xv) (Cum. Supp. 1990). It seems fairly clear that the unfair or deceptive denial of a claim, for example, is sufficiently related to a consumer transaction to give rise to a private action. Indeed, in *Salois*, 581 P.2d at 1351, the Washington Supreme Court specifically held that its Consumer Protection Act applied to post-sale activities.
336. *Salois*, 90 Wash. 2d at 359-60, 581 P.2d at 1351.
337. WYO. STAT. § 40-12-108(a) (1977).
338. WYO. STAT. § 40-12-112 (1977).
339. A civil action may only be commenced for an "uncured" deceptive or unfair practice under Wyoming Statutes section 40-12-108(a) (1977). An "uncured unlawful deceptive trade practice" under 40-12-102(ix) (1977) is one where, after notice has been given by the consumer to the insurer of the unlawful practice and the damage suffered therefrom, the insurer does not offer to cure the practice within fifteen days after receipt of such notice or has not cured within a reasonable time after its acceptance of the offer to cure.
340. *See supra* notes 332-33 and accompanying text.

states, however, neither treble damages nor punitive damages are provided for by the Wyoming Act.[341]

IX. CONCLUSION

The insurance public in Wyoming has been provided with a new remedy to counter bad faith practices on the part of first party insurers. By adopting the tort of first party bad faith, the Wyoming Supreme Court has recognized the special contractual relationship which exists between the insurer and insured, one which allows recovery of all proximately caused damages caused by an insurer's bad faith and creates a substantial disincentive to engage in bad faith practices by creating the possibility of a punitive damage award in appropriate cases.

While insurers now face tort liability for bad faith practices in Wyoming, not every breach of contract will give rise to a bad faith claim by Wyoming insureds. If the failure to pay a claim is not without a reasonable or "fairly debatable" basis, and unless the insurer either knew or should have known that there was no reasonable basis for failing to pay a legitimate claim, no bad faith liability will attach even though the insurer may still be liable to the insurer under a contract theory.

The majority opinion in *McCullough* did not attempt to resolve the numerous questions which will inevitably arise under the new tort of first party bad faith. Such questions must await future resolution by the Wyoming Supreme Court. In the meantime, practitioners must resort to the case law of such jurisdictions as California, from which the majority opinion adopted the tort of first party bad faith, and Wisconsin, which has articulated the most popular standard for determining when bad faith exists, to predict how such questions will be resolved. Only after insurers transacting the business of insurance in Wyoming, insureds who purchase insurance products from such insurers, and attorneys who represent both parties to the transaction have had more experience with the new tort can further comment be made about whether the objectives which the majority sought to accomplish in *McCullough v. Golden Rule* become its legacy.

341. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 93A. Attorney's fees, however, are recoverable if the consumer initiates a class action against one who engages in deceptive trade practices. WYO. STAT. § 40-12-108(b) (1977).