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Feature
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GIVING UP THE SPEAR
Will a Quartet of State Supreme Court Decisions Quell the Effort to Sue Insurance Adjusters Personally?

> *Towards thee I roll, thou all-destroying but unconquering whale; to the last I grapple with thee; from hell's heart I stab at thee; for hate's sake I spit my last breath at thee. Sink all coffins and all hearses to one common pool! and since neither can be mine, let me then tow to pieces, while still chasing thee, though tied to thee, thou damned whale! Thus, I give up the spear!*

--Captain Ahab [1]

The power to sue insurance company representatives personally is the great white whale of insurance "bad faith" law. The plaintiffs' bar has been pursuing it for half a century, with little success. Each generation of lawyers and judges, it seems, must view the issue with fresh eyes and a new lens. And it appears that each recent decade sees an academic advocate who professes to see a trend around the corner that will usher in an era of such liability. [2] In recent years, the supreme courts of Colorado, Iowa, Washington, and Oklahoma have all held that plaintiffs may not recover against the personal assets of representatives of insurance companies under certain theories of bad faith or extracontractual liability. In so ruling, these courts have established a trend against permitting such recovery. The breadth of these decisions' reasoning should allow insurance adjusters to breathe more easily for at least a season.

The stakes of this question are greater than they appear at first blush. One could be forgiven for not appreciating why plaintiffs and their lawyers desire to sue adjusters personally. After all, insurers possess far more assets than do their adjusters. And insurance companies already must pay for whatever bad faith damages their representatives cause. On its own, the idea of suing an insurance adjuster personally makes little sense.

Those who attempt such lawsuits, however, see gold beneath the surface. The primary aim of suing adjusters personally is not necessarily to collect from the adjuster's bank account (although that is an option) but to exert tactical leverage against the more important target: the insurer. Lawsuits against adjusters in their personal capacities create strategic advantages against the insurer that in theory may be "cashed in" as settlement or trial value. These tactical advantages are many. Joining the adjuster, for instance, may enable forum shopping. If the adjuster is local, joining the adjuster could prevent the insurer from removing a bad faith lawsuit filed in state court to federal court. It also creates a second set of claims to avoid summary judgment. [3] And it has an *in terrorem* effect on adjusters by empowering plaintiffs to disrupt their personal and business lives, thereby allowing repeat-playing plaintiffs' lawyers to punish or reward adjusters' claim decisions in specific claims.

Such advantages--which drive the attempts to sue adjusters personally-- have an unseemly quality about them. They smack of advantage-seeking unrelated to the merits of claims. Perhaps for that reason, plaintiffs typically do not mention them when advocating for personal adjuster liability in court. Instead, plaintiffs raise a host of other types of arguments that have largely failed.

***11** This article surveys the legal landscape and explains why courts are likely to continue rejecting personal liability of insurance company representatives for the time being.

Under Common Law, Agents Do Not Personally Assume Principal's Legal Duties

To understand why the plaintiffs'-side effort to hold adjusters personally liable has failed, it is necessary to start at the beginning. In general, the common law has not required employees or agents to assume personal liability for the obligations of a principal for which they act. "Generally, an agent is not liable for actions taken on behalf of the principal." [4] "An agent is not liable for harm to a person other than his principal because of his failure adequately to perform his duties to his principal, unless physical harm results from reliance upon performance of the duties by the agent, or unless the agent has taken control of land or other tangible things." [5] "An agent who intentionally or negligently fails to perform duties to his principal is not thereby liable to a person whose economic interests are thereby harmed." [6]

This is true of both contractual and tort duties. An agent or employee generally does not assume a personal duty to pay the contractual debts of the principal. [7] The Supreme Court of Indiana's opinion in *Greg Allen Construction Co. v. Estelle* expresses this concept with clarity:

> The proper formulation of the reason Allen is not liable here is that his negligence consisted solely of his actions within the scope of his authority in negligently carrying out a contractual obligation of the corporation as his employer. Nothing he did, and therefore nothing the corporation did, constituted an independent tort if there were no contract. [8]

Nor does an employee or agent generally assume the principal's tort duties personally; rather, "[a]n agent is subject to tort liability to a third party harmed by the agent's conduct *only* when the agent's conduct breaches a duty that the *agent* owes to the third party." [9]

Justifications for the Tort of Bad Faith

If insurance law consisted solely of contract law, there could be no personal liability of adjusters. And in the beginning, courts applied ordinary contract law to insurance claim handling. [10] For that reason, under ordinary agency principles, insurance company representatives have not traditionally assumed personal liability for the insurer's duties.

But things changed. Courts eventually found contract law insufficient to protect consumers from the "improper economic motivation" of insurers "to delay or refuse to pay valid insurance claims." [11] Courts expressed concerns arising from several aspects of the insurer-insured relationship.

First, in the context of liability insurance, the "insured surrenders control of the defense and places her potential monetary liability in the insurer's hands." [12] Insureds, courts believed, were vulnerable to liability insurers' control of defense and settlement, which called for additional legal protection. [13]

Second, some courts reasoned that insureds deserved additional legal rights, beyond mere contract rights, in part because the "motivation of the insured when entering into an insurance contract differs from that of parties entering into an ordinary commercial contract. By obtaining insurance, an insured seeks to obtain some measure of financial security and protection against calamity, rather than to secure commercial advantage." [14]

Third, some courts desired to empower insureds with additional legal rights to balance "unequal bargaining power and the nature of insurance policies, which potentially allow unscrupulous insurers to exploit their insureds' misfortunes when resolving or settling claims." [15] As Douglas Richmond has noted, some courts saw claim handling in certain instances as "a game of the

strong against the weak," in which a "valid and legitimate claim can be settled for far less than its actual value if the need for funds by the victim is great enough and the insurance company is obstinate enough to use its knowledge of that fact to force acceptance of a lesser sum." [16] The Supreme Court of Rhode Island explained this problem in the context of an uninsured motorist coverage claim:

> Traditionally, recovery in contract for breach of a unilateral or independent obligation to pay a certain sum of money is confined to the actual amount owed under the contract plus legal interest. A.A.A. Pool Service & Supply, Inc. v. Aetna Casualty & Surety Co., R.I., 395 A.2d 724 (1978); Williston, Contracts § 1410 at 604 (3d ed. 1968). Recovery under a contract theory alone, therefore, effectively guards an insurer's pocketbook against any threat of punitive damages. In this atmosphere, insurers, backed by sufficient financial resources, are encouraged to delay payment of claims to their insureds with an eye toward settling for a lesser amount than that due under the policy. [17]

Courts allowed tort damages for certain claim handling conduct "because contract remedies may be insufficient and a disincentive to pay benefits in a timely fashion." [18]

The original justifications for bad faith focus on insurers, not their employees personally or their other representatives. For instance, insureds under liability policies "surrender" control of defense and indemnity to the insurer, not to its employees acting in their individual capacities. Likewise, insureds' "motivation" to obtain peace of mind relates to the benefits provided by the insurer, not its employees' own wallets and bank accounts. The insurer-- not its employees personally--may in theory possess "unequal bargaining power," giving rise to courts' concerns about claim handling. None of the original justifications for recognizing the tort of bad faith focused on any issue connected to personal liability of insurance company employees. "Modern insurance bad faith claims have their genesis in contract," and insurers' employees are not parties to the insurance contract. [19]

***12 Early Cases Relevant to Personal Liability of Insurance Company Representatives**

As recognition of the tort of bad faith in multiple insurance contexts spread across the country from the 1950s to the early 1990s, courts confronted a wave of attempts to sue adjusters or other insurance company representatives directly. In many cases, courts rebuffed these attempts, citing traditional agency and contract doctrines to limit the universe of bad faith defendants.

In 1970, in a decision that remains influential, the Supreme Court of Pennsylvania rejected personal liability of adjusters in *Hudock v. Donegal Mutual Insurance Co.* [20] There, the court reviewed the trial court's order "sustaining the demurrer of the insurance adjusters." [21] The claiming party in *Hudock* had sued the claim adjusters on the basis that "action by the adjusters outside the scope of their authority--essentially the failure, by means of unreasonable or fraudulent acts and delays, to negotiate in good faith an adjustment of the claim--... constituted a breach of the insurance contracts and rendered [them] personally liable for the breach." [22] The court affirmed the dismissal, reasoning that "actions by the adjusters beyond the scope of their authority could not result in the imposition upon them of contractual duties to the appellants which they had never assumed." [23] Citing agency and contract principles, *Hudock* rejected the notion that "an agent becomes liable in assumpsit on his principal's contract when he prevents the performance of that contract by actions which exceed the scope of his authority." [24]

Likewise, in 1973, in *Gruenberg v. Aetna Insurance Co.*, the California Supreme Court recognized the tort of first-party insurance bad faith but also ruled that insurer employees and agents "acting for and on behalf of" the insurer "cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged." [25] Three years later, in 1976, in *Iversen v. Superior Court*, the California Court of Appeal applied this rule to an insurer-employed adjuster. [26] The court reasoned that "[s]ince Iversen is an agent of the insurer and not a party to the contract of insurance, he is not bound by the implied covenant and owes no duty to the insured not to breach it." [27] Another three years later, in 1979, the California Supreme Court ruled in *Egan v. Mutual of Omaha Insurance Co.* that the same principles precluded personal liability of insurers' managerial personnel. [28] In 1984, the Court of Appeals of Minnesota rejected a claim for bad faith against an independent adjuster as a matter of law. [29] Also in 1984, the Supreme Court of Mississippi

adopted *Gruenberg*.[30] In 1985, the Court of Appeal of Louisiana relied on similar reasoning to reject personal tort liability of an adjuster in a first-party property claim.[31] In 1986, a New York appellate court explained that although "the plaintiff may have been an incidental beneficiary" of the policy, that did not create privity with the adjuster, and no claim therefore could be brought against the adjuster.[32] In 1995, a Florida appeals court found that no claim could be brought against the insurer's agents for negligence.[33]

Insurers did not win every battle in the first wave. In 1980 and 1986, respectively, the courts of last resort in Alaska and New Hampshire found that adjusters personally owed a duty of care during claim handling and paved the way for some personal liability of adjusters in handling claims.[34] These two rulings, however, had some but not much influence on other jurisdictions.

Until the early 1990s, most jurisdictions largely followed the lead of the larger states, such as California and Pennsylvania, in rejecting personal liability of insurer representatives.[35] As late as 2006, the reporters for the *Restatement (Third) of Agency* explained, "Most cases treat an adjuster retained by an insurer as an agent of the insurer who is not liable to third parties for economic loss."[36] All in all, in the initial phase of legal recognition of insurance bad faith claims, plaintiffs largely failed to persuade courts to extend the reach of those claims to adjusters or other insurer representatives personally.

In the Early 1990s, a New Theory of Adjuster Personal Liability Emerges

Plaintiffs and their attorneys did not give up the spear. In the 1990s, "insurance bad faith litigation ha[d] become a high stakes field"[37] for a variety of reasons, including the effort to hold adjusters liable personally. The field of bad faith law became more contentious and rancorous. One author writing during this period remarked, "There now exists a nightmarish extracontractual insurance culture."[38]

Plaintiffs succeeded in this environment in persuading several courts to permit lawsuits against adjusters personally, based on a new theory grounded in state unfair claim practices acts. Over 40 states have adopted some form of the National Association of Insurance Commissioners (NAIC) Model Unfair Claims Settlement Practices Act (Model Act).[39] The Model Act

> is designed to prevent insurers from disputing claims on pretext or to force claimants to litigate valid claims to judgment in the hope of wearing them down to accept a settlement for less than the value of the loss. The Model Act authorizes a state's ***13** insurance commissioner to enforce its provisions through investigation and sanctions, if warranted.[40]

And it prohibits specific improper claim practices.[41]

The NAIC "did not intend the Model Act to include a private right of action."[42] Several state legislatures nevertheless enacted versions of the Model Act that included such a right of action.[43] And some courts have implied such a right of action.[44]

These state model acts--especially those creating a private right of action-- supplied plaintiffs with an alternate theory for suing adjusters personally. In 1993, the theory bore fruit. In *O'Fallon v. Farmers Insurance Exchange*, the Montana Supreme Court permitted an extracontractual lawsuit against a claim adjuster personally.[45] The trial court had permitted the claim adjuster to be held liable under Montana's version of the Model Act.[46] The adjuster moved to dismiss the complaint against him "on the basis that he was not an 'insurer' under the provisions of the Unfair Trade Practices Act, and therefore, not subject to liability for violation of its terms."[47] This resembles the arguments that had largely prevailed for decades.

On appeal, *O'Fallon* blazed a new trail and found a duty running from the adjuster to the insured under Montana's version of the Model Act.[48] Montana law had previously implied a common law right of action for violations of the state's model act.[49] *O'Fallon* extended the private right of action to adjusters personally because the state's model act governed their conduct. The court reasoned: "Section 33-18-201, MCA, provides that 'no person' may engage in the prohibited conduct. Person is defined

in § 33-1-202(3), MCA, as 'an *individual*, insurer, company ... or any other legal entity.'" [50] "It is clear from the language of § 33-18-201, MCA, that not just insurers, but also claims adjusters, are prohibited from engaging in the acts that are prohibited." [51] But in creating a private right of action against adjusters personally under Montana's model act, the court required plaintiffs to meet a significantly higher burden of proof. [52] And the court limited the remedy against adjusters to just those damages resulting from the adjuster's own "breach" of the state's model act. [53] *O'Fallon* did not require adjusters to pay the insurance benefits or all bad faith damages attributable to the insurer's collective conduct.

A species of the theory that prevailed in *O'Fallon* spread to Texas in 1998, five years later. In *Liberty Mutual Insurance Co. v. Garrison Contractors, Inc.*, the Texas Supreme Court relied on the Texas Deceptive Trade Practices Act's provision forbidding a "person" from engaging in deceptive insurance practices to find that adjusters could be sued personally under that act. [54] Texas permits private actions based on violations of its insurance code. Texas's insurance code defined a "person" as "any *individual*, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers, adjusters and life insurance counselors." [55] The court construed the insurance code broadly to govern adjusters personally, if they serviced insurance claims (and thus engaged "in the business of insurance"), and held that a private right of action arises against them under the code. [56] As in *O'Fallon*, the court did not expressly require adjusters personally to pay the insurance benefits owed under the insurance policy.

Five years after *Garrison Contractors*, in 2003, the Supreme Court of Appeals of West Virginia adopted another version of the same theory under that state's model act in *Taylor v. Nationwide Mutual Insurance Co.* [57] West Virginia implies a private cause of action for violations of its model act. [58] *Taylor* held that this private right of action created personal liability for adjusters for certain claim handling conduct because the state's model act applied to a "person," defined as

> any *individual*, company, insurer, association, organization, society, reciprocal, business trust, corporation, or any other legal entity, including agents and brokers. "Person" also includes hospital service corporations, medical service corporations and dental service corporations as defined in article twenty-four [§§ 33-24-1 et seq.] of this chapter, and health care corporations as defined in article twenty-five [§§ 33-25-1 et seq.] of this chapter. [59]

Taylor concluded that adjusters personally come within the statutory definition of "person" because "a claims adjuster is an individual." [60] "Accordingly," the court ruled, "a cause of action exists in West Virginia to hold a claims adjuster employed by an insurance company personally liable for violations of the West Virginia Unfair Trade Practices Act, W.Va.Code § 33-11-1 to -10." [61] One commentator noted later that *O'Fallon*, *Garrison Contractors*, and *Taylor* potentially portended an "emerging split of authority" on the issue of personal liability of adjusters. [62]

***14 In the Late 1990s and Early 2000s, Courts Largely Reject Adjuster Liability**

After *O'Fallon*, plaintiffs continued their general efforts to sue adjusters and other insurer representatives personally. In 2009, Jeffrey Stempel published a 120-plus-page article in the *Connecticut Insurance Law Journal* arguing that, "in order to improve the claims process," "managing general agents, third-party administrators and independent contractor claims adjusters" should be liable directly, including under theories such as bad faith. [63]

In a series of decisions issued during the late 1990s and early 2000s, courts across the country continued to weigh in on whether insurer representatives could be sued directly. Plaintiffs and their attorneys met with some limited success. In 2002, a panel of an Oklahoma intermediate appellate court found that independent adjusters owe a duty of care to insureds personally. [64] In 2005, the U.S. District Court for the Southern District of Ohio held that an adjuster had not been fraudulently joined in a lawsuit against the insurer and that the adjuster could be held liable personally for claim handling conduct under Ohio law. [65] After reviewing various Ohio authorities, none of which "specifically discuss[ed] the issue of the liability of the adjuster," the court held that the insurer and its adjuster "have not met their burden of showing that plaintiff's claims against [the adjuster] are not colorable," in part because "[d]efendants have cited no Ohio authority which specifically disallows such claims" and in part because some cases suggested Ohio "may" allow them. [66]

Courts reached similar conclusions in Arizona, Florida, and South Carolina in 2006, 2008, 2010, 2011, and 2012, leaving open the possibility that adjusters may be sued personally in those jurisdictions in some circumstances. [67] The U.S. District Court for the District of South Carolina relied expressly on *O'Fallon* and *Garrison Contractors* in concluding that adjusters could possibly be sued personally under South Carolina law and that an adjuster had not been fraudulently joined in a bad faith lawsuit. [68]

By and large, however, insurer representatives continued to win most of the adjuster-liability battles in the late 1990s and early 2000s. As even Stempel acknowledged in his 2009 article arguing for independent adjuster liability, "the sheer weight of history and precedent have made it difficult for reformist decisions ... to get traction in other jurisdictions." [69] In 2015, the U.S. Court of Appeals for the Seventh Circuit in *Lodholtz v. York Risk Services Group, Inc.*, issued an opinion surveying the law and finding that "the majority of states have held that a claims adjuster owes no independent duty to the insured." [70] The cases finding no duty of adjusters personally spanned the post-*O'Fallon* period from 1995 to 2014 and applied the laws of Alabama, Arizona, California, Connecticut, Florida, Louisiana, Missouri, Nevada, New York, North Carolina, Oklahoma, South Carolina, and Vermont. [71]

Quartet of State Supreme Court Cases Rejecting Personal Adjuster Liability

Although insurer representatives were still getting the better of the adjuster liability argument in the courts, as with many legal issues, most of the courts issuing decisions were not courts of last resort. The possibility of state supreme courts issuing decisions finding a path to personal adjuster liability--as *O'Fallon*, *Garrison Contractors*, and *Taylor* did-- continued to exist.

Since 2014, however, four courts of last resort in influential insurance jurisdictions have weighed in on the adjuster liability issue. All four state supreme courts rejected a rule creating such liability in the circumstances before them. Moreover, the four decisions collectively articulated broad rationales against recognizing personal adjuster liability. These decisions may quell and perhaps end the decades-long effort to hold adjusters liable personally for extracontractual damages arising from claim handling.

Trinity Baptist. In 2014, the Supreme Court of Oklahoma issued its decision in *Trinity Baptist Church v. Brotherhood Mutual Insurance Services, LLC*. [72] The court's foray into this area is significant, given that an Oklahoma appellate court had ruled in 2002 that certain insurer representatives owe an independent duty of care to insureds, [73] the Supreme Court of Oklahoma had denied a writ of certiorari in that prior matter, [74] and the 2002 pro-liability appellate ruling had been undisturbed for 12 years. Because it changed prior law, *Trinity Baptist* may serve as a barometer of where this legal issue is likely trending.

In *Trinity Baptist*, the court answered no to the question of "whether an independent insurance adjuster owes a legal duty to the insured such that it may be liable to the insured for negligence in its adjustment of the claim." [75] No justice of the court dissented. [76] In *Trinity Baptist*, a church submitted a claim to its property insurer for alleged storm damage to its ***15** "sanctuary building." [77] At length, the church sued the insurer and its independent claim adjuster for bad faith. [78] The trial court dismissed the adjuster on summary judgment on the basis that it owed no legal duty to the insured. [79] On appeal, the Supreme Court of Oklahoma affirmed. [80]

Citing the classic California decisions of *Gruenberg* and *Egan*, the court began with the general rule that insurers alone ordinarily owe a duty of good faith and fair dealing to insureds. [81] The court next acknowledged an exception to the rule for third parties to the insurance contract with a "special relationship" to the insured. [82] Such a relationship may exist in the very narrow and unusual cases in which "a plan administrator performs many of the tasks of an insurance company, has a compensation package that is contingent on the approval or denial of claims, and bears some of the financial risk of loss for the claims." [83] *Trinity Baptist* ultimately concluded that no special relationship existed between the independent adjuster and the insured. [84] None of the factors for establishing a special relationship existed in that case. [85] Accordingly, the adjuster did not owe a duty of good faith and fair dealing to the insured, and no claim for bad faith could be asserted against it. [86]

For good measure, *Trinity Baptist* also rejected the insured's claim for gross negligence against the independent adjuster.[87] In so doing, the court identified a number of important public policies and other arguments militating against personal adjuster liability.[88] These policy considerations have been, and will likely continue to be, influential.

In examining whether adjusters themselves owe their own duty to the insured directly, the court explained that a "legal duty is an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[89] The court identified a number of reasons why the law should not create a separate duty running from adjusters to insureds:

- The insurer--not the adjuster--"contractually controls the responsibilities of its adjuster and retains the ultimate power to deny coverage or pay a claim."[90]

- Creating "a separate duty from the adjuster to the insured would thrust the adjuster into what could be an irreconcilable conflict between such duty and the adjuster's contractual duty to follow the instructions of its client, the insurer."[91]

- The insurer's own duty of good faith is nondelegable, and the insurer is liable for an adjuster's conduct, thus reducing or eliminating any basis to impose a separate duty on the adjuster personally.[92] From "a policy standpoint it makes little sense to hold that the adjuster has an independent duty when the insurer itself is subject to liability for the adjuster's mishandling of claims in actions alleging breach of contract and bad faith."[93]

- The insurer has a "special relationship" with the insured that is "unique" and not shared by adjusters.[94]

- "[I]mposing tort liability on independent adjusters would create a redundancy unjustified by the inevitable costs that eventually would be passed on to insureds."[95]

In light of these policy considerations, *Trinity Baptist* held that the adjuster owed no duty of good faith and fair dealing to the insured and also owed "no legal duty that would allow [the insured] to recover in tort for any negligence in [the adjuster's] investigation and adjustment of the claim."[96]

De Dios. Five years after *Trinity Baptist*, in 2019, a divided Iowa Supreme Court issued its decision in *De Dios v. Indemnity Insurance Co. of North America*.[97] The court answered a question certified by the U.S. District Court for the Northern District of Iowa: "In what circumstances, if any, can an injured employee hold a third-party claims administrator liable for the tort of bad faith for failure to pay workers' compensation benefits?"[98] The Iowa Supreme Court answered that no legal duty authorizes such a claim under Iowa law.[99]

De Dios supported its conclusion by examining the original purposes for recognizing the tort of bad faith, none of which were served by extending the tort to independent adjusters. Iowa recognized first-party insurance bad faith in 1988 because contract remedies were inadequate to remedy insurers' wrongful conduct and because insureds needed additional rights "due to the inherently unequal bargaining power between the insurer and insured."[100] Iowa law extended the tort of bad faith to workers' compensation insurance in part based on the "affirmative obligations" imposed on insurers by Iowa's workers' compensation statutory scheme.[101]

None of these justifications for recognizing bad faith supported imposing liability on adjusters directly. The court explained: "When we consider these existing grounds for bad-faith liability in the workers' compensation field, it is difficult to see how they would apply to third-party administrators." [102] After all, Iowa's workers' compensation scheme imposed no affirmative obligations on adjusters themselves. [103] And none of the reasons for recognizing workers' compensation bad faith in the first instance-- such as "unequal bargaining power" or the inadequacy of contractual remedies-- could apply to a third party to the workers' compensation insurance contract.

Unable to ground adjuster liability in existing Iowa law or policy, the *De Dios* plaintiff advocated for Iowa to follow the approach adopted in Colorado. [104] Colorado allows suits against independent claim administrators under a narrow test like the one applicable in Oklahoma: "When a third-party administrator performs many of the tasks of an insurance company and bears some of the financial risk of loss for the claim, the administrator has a duty of good faith and fair dealing to the insured." [105]

The Iowa Supreme Court declined to take "that step." [106] Adopting an approach more restrictive than even Oklahoma's or Colorado's, *De Dios* stated flatly that it would keep the "workable bright line" in existing law, which imposes bad faith obligations solely on insurers. [107]

***16** Two justices dissented in *De Dios*. [108] The dissent largely recapitulated Stempel's 2009 article advocating for direct liability of insurer representatives and its concept that case law is still "evolving." [109] The dissent stated that "[n]o one can seriously doubt that the potential of a bad-faith claim is a powerful deterrent that tends to prevent an insurance company from taking advantage of its position of power in the claims handling process." [110] But the dissent did not explain why, if this is so, there would be any need for every independent or other adjuster to also be personally liable for bad faith. If anything, this observation cuts in the opposite direction. If existing bad faith law powerfully deters insurers "from taking advantage," there would be no need for direct adjuster liability in addition to that already-powerful deterrent.

Perhaps to address this flaw in its reasoning, the dissent claimed without citation or basis that "insurance companies are increasingly 'outsourcing' insurance operations to third parties." [111] The third parties, the dissent implied, lack adequate accountability. [112] But as courts rejecting personal liability of adjusters have recognized from the beginning, the insurer itself is accountable for what adjusters do and maintains control over its agents and employees. The dissent never explained why holding the insurer fully accountable is inadequate. Nor could the dissent do so, given that the dissent itself stated that bad faith law powerfully deters insurers from improper conduct. Moreover, the dissent in *De Dios* took a very soft stance, arguing merely that adjusters should be potentially liable only when they are the "substantial equivalent of an insurer." [113] Had the dissent prevailed, Iowa's law would look much like Oklahoma's, which is generally seen as a jurisdiction that frowns upon and does not allow direct suits against adjusters except in the narrowest of circumstances. [114] It says a great deal about the judiciaries' direction on this issue that the "bookend" positions adopted by the majority and dissenting opinions in *De Dios* consisted of the following: (1) a bright-line rule against adjuster liability (i.e., the majority's position) or (2) a rule allowing adjuster liability in extremely rare circumstances (i.e., the dissenters' position).

***Keodalah*.** Also in 2019, the Washington Supreme Court addressed the issue of personal adjuster liability in *Keodalah v. Allstate Insurance Co.* [115] The insured in *Keodalah* submitted an uninsured motorist claim arising from a collision between a motorcycle and a truck that the insured occupied. [116] Unhappy with the adjuster's claim handling, the insured sued both the insurer and the adjuster in her personal capacity. [117] The insured brought a bad faith claim, among other claims, against the adjuster personally. The trial court dismissed the claims, but the "Court of Appeals reversed ..., holding that the statutory duty of good faith imposed by RCW 48.01.030 applied to individual insurance adjusters and breach of that statutory duty could serve as a basis for Keodalah's bad faith and [Consumer Protection Act] claims against Smith." [118] The Washington Court of Appeals found that adjusters personally owed a duty to insureds sufficient to support bad faith litigation, based on the following statutory provision defining the "public interest" in insurance:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance. [119]

"All persons" included the adjuster, according to the Washington Court of Appeals, who therefore owed a duty to act in good faith directly to the insured. [120] The court of appeals' reasoning echoed that of *O'Fallon* and similar cases.

A closely divided Supreme Court of Washington reversed by a 5-4 vote. [121] Although adjusters do owe a statutory duty to act in good faith, that fact did not necessarily create a private right of action, much less a bad faith claim, for violation of the duty. [122] *Keodalah* applied a three-part test to determine whether a statutory duty creates a private right of action: "(1) whether the plaintiff is within the class for whose benefit the statute was enacted, (2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy, and (3) whether implying a remedy is consistent with the underlying purpose of the legislation." [123]

The court concluded that none of the three parts of the test supported a private right of action. First, the statute in question described the "public interest," not a benefit for an identifiable class of persons. [124] Second, the "relevant statutory and historical context" for the statute showed that the legislature had deliberately chosen not to create a private right of action, given that the insurance statutory scheme specified its enforcement mechanisms elsewhere. [125] From a historical perspective, a claim for bad faith already existed when the ***17** legislature enacted the statute, and there was no indication that the legislature sought to expand bad faith liability by enacting the statute. [126] Third, reading into the statute a private right of action because it applies to "all persons" would be inconsistent with the legislature's intent because such an overbroad reading would also allow lawsuits against insureds for bad faith. [127] The court concluded that the statutory section in question "does not create an implied cause of action for insurance bad faith" [128] against adjusters personally.

Four justices dissented. [129] However, the dissenters agreed "with the majority that the legislature did not intend for RCW 48.01.030 to imply a statutory cause of action." [130] The dissent asserted instead that the adjuster could be sued personally for bad faith under the common law. [131] While acknowledging that allowing such personal lawsuits is a "minority" position, the dissent argued that Washington common law "more closely aligns with these minority positions." [132] Although the majority did not address this alternate argument, its decision to reverse despite the argument's presence in the case suggests it was not persuaded.

The Colorado experience and *Skillett*. After suffering significant setbacks in Oklahoma, Iowa, and Washington, plaintiffs obtained some initial traction in Colorado in the effort to sue adjusters personally. Colorado has become a favored jurisdiction for insurance plaintiffs, owing to its pro-policyholder statutes allowing in effect treble recovery and fees for unreasonable delays or denials of first-party covered benefits. [133] In *Lodholtz v. York Risk Services Group, Inc.*, the Seventh Circuit grouped Colorado with the jurisdictions that "have been more willing to hold that an insurance adjuster may be liable to the insured under alternative theories." [134]

Although Colorado may be "more willing" than jurisdictions like Iowa that draw a "bright line" against adjuster liability, its willingness is not great. The common law of Colorado, like the law in Oklahoma, does contemplate direct liability of independent claim administrators when a "special relationship" arises between them and insureds. [135] But Colorado narrowly defines such relationships. As the Colorado Supreme Court explained in *Cary v. United of Omaha Life Insurance Co.*, in "the typical insurance case, only the insurer owes the duty of good faith to its insured; agents of the insurance company--even agents involved in claims processing--do not owe a duty, since they do not have the requisite special relationship with the insured." [136] To show sufficient evidence of a special relationship, the plaintiff must demonstrate that the adjuster (1) had "primary control over benefit determinations"; (2) assumed "some of the insurance risk of loss"; (3) undertook "many of the obligations and risks of an insurer"; and (4) had "the power, motive, and opportunity to act unscrupulously in the investigation and servicing of insurance claims." [137]

These factors are nearly impossible to meet in typical cases. They are so difficult to satisfy that the U.S. District Court for the District of Colorado routinely agrees that adjusters have been fraudulently joined and dismisses them out of removed cases as a matter of course. [138] And Colorado courts have routinely dismissed under the *Cary* test other types of participants in the insurance process, such as physicians performing independent medical examinations and insurance agents. [139] Indeed, this writer is not aware of any case in which an adjuster was held liable personally in Colorado. Although Colorado has been characterized as a friendlier jurisdiction for theories of personal liability of adjusters, that is true only relative to other jurisdictions with bright lines against it. Personal liability of adjusters under Colorado common law exists in theory, not as an everyday reality.

Colorado remained infertile ground for claims against adjusters even after the state enacted its treble-benefits statutes. The legislature added the statutes to the part of Colorado's insurance code containing its version of the Model Act and created a private right of action for unreasonable delay or denial of first-party insurance benefits. [140] The statutes had one superficial similarity to the versions of the Model Act analyzed in *O'Fallon*, *Garrison Contractors*, and *Taylor* in that the statutes applied to "a person engaged in the business of insurance" and the Colorado insurance code defined "person" to include "adjusters." [141] Nevertheless, the Colorado Court of Appeals did not adopt the *O'Fallon* approach due to distinct qualities of the treble-benefits statutes.

In *Riccatone v. Colorado Choice Health Plans*, the court ruled that, "for the purposes of a claim under [the treble-benefits statutes], 'a person engaged in the business of insurance' includes only those individuals or entities against whom a common law claim of bad faith breach of insurance contract would lie." [142] *Riccatone* seemed to rule out adjuster liability. The *Cary*-*Riccatone* special-relationship test presented what appeared to be an insurmountable obstacle to suing persons or entities that did not insure the plaintiff. [143]

***18** But plaintiffs continued strategizing and pressing to acquire the power to sue adjusters personally. They initially reached the brink of success in 2020 in *Seiwald v. Allstate Property & Casualty Insurance Co.* [144] There, the plaintiff joined a local claim adjuster as a codefendant of the insurer in a state court case brought under the treble-benefits statutes. The insurer removed the case to federal court and argued fraudulent joinder based on *Riccatone*. Following removal, the U.S District Court for the District of Colorado declined to apply *Riccatone* because it was a court of appeals decision, not a state supreme court decision. [145] The court reasoned:

> Given that § 10-3-1116(1) does not define who is liable, there is at least a reasonable plain language reading of the statutes that an insurance adjuster, who is defined as a "person" in § 10-3-1102(3), could be a "person engaged in the business of insurance" who may not delay or deny the payment of claims. [146]

The court remanded the case to state court and held that the adjuster was not fraudulently joined.

Seiwald opened the floodgates. Plaintiffs' lawyers began joining local adjusters as codefendants with their insurer-employers in many state court lawsuits brought under the treble-benefits statutes. [147] To the best of this writer's knowledge, no such lawsuits were brought against adjusters who were citizens of states other than Colorado. Some adjusters were sued multiple times, sued in far-flung counties where they did not live, and even sued multiple times in different lawsuits arising from a single underlying accident. [148] In light of *Seiwald*, some defense lawyers and insurers hesitated to remove cases from state court.

For a time, it seemed that the plaintiffs' bar in Colorado had finally captured the white whale. One highly competent executive adjuster who lived in Colorado told this writer that he considered quitting his job and finding a new industry rather than endure repeated personal lawsuits whose purpose was to keep litigation in state court. Many adjusters found it necessary to obtain their own separate defense counsel. The personal toll on adjusters was significant.

The industry responded by removing test cases to federal court and seeking certification of the legal issue of personal adjuster liability to the Colorado Supreme Court. In *Skillett v. Allstate Fire & Casualty Insurance Co.*, [149] Magistrate Judge Michael

E. Hegarty granted a motion to certify the following question of law to the state supreme court: "Whether an employee of an insurance company who adjusts an insured's claim in the course of employment may for that reason be liable personally for statutory bad faith under Colorado Revised Statutes Sections 10-3-1115 and -1116." [150]

The Colorado Supreme Court accepted the question and answered it in the negative in 2022 in *Skillett*. [151] *Skillett* tested the vitality of the successful but older arguments from *O'Fallon*, *Garrison Contractors*, and *Taylor*. In *Skillett*, a species of those arguments failed. Their failure in *Skillett* sends a signal that the current judicial environment is not likely to broadly recognize personal adjuster liability.

In *Skillett*, the plaintiff made the same argument for personal adjuster liability that prevailed in *Seiwald*. She "points out that section 10-3-1115(1)(a)" from the treble-benefits statutes "refers to '[a] *person* engaged in the business of insurance.' (Emphasis added.) She then looks to section 10-3-1102(3), C.R.S. (2021), which defines 'person' in part 11 of Title 10 to include 'adjusters.'" [152]

The court declined to apply in a mechanistic fashion the definition of "person" from Colorado's insurance code to the more recently enacted treble-benefits statutes. [153] The definition of "person" was not "absolute" but rather applied "unless the context otherwise requires." [154] The court found much additional context requiring otherwise. [155] For instance, the statutes defined "unreasonable conduct" as "an insurer's delay or denial." [156] And the prohibited conduct consists of "delayed or denied authorizing payment of a covered benefit." [157] Echoing a theme of many cases that came before *Skillett*, the court noted, "Because the insurer--not any individual employee--authorizes payment, this language indicates that an action for unreasonable delay or denial of insurance benefits is triggered by a decision of the insurer, not the adjuster." [158] The court also noted that the policy terms determined the measure of damages under the statutes. Again echoing the rationales from prior cases, the court noted, "Insurers and insureds--not adjusters--are the parties to an insurance policy. They are the ones who undertake obligations under such policies, and it is the insurer--not the adjuster--who may be obligated to pay insurance benefits." [159] The court identified still other Colorado-specific points that weighed against extending the statutes to adjusters personally. [160] *Skillett* concluded that "individual adjusters are not personally subject to suit under the Statutes," a bright line against such liability. [161]

***19** *Skillett* shows that it cannot be assumed that courts will mechanistically or automatically extend personal liability based on statutory definitions related to a model act. It also shows that the judicial winds are blowing against theories of personal liability of adjusters.

Public Policy Supports the Conclusion That Adjusters Should Not Be Personally Liable

The decisions of the state supreme courts of Oklahoma, Iowa, Washington, and Colorado send an unmistakable message that there is no emerging or evolving trend toward personal liability of adjusters in insurance bad faith litigation. Moreover, as the issue has been litigated repeatedly for decades, plaintiffs over time have been unable to articulate any good practical or policy reasons for imposing bad faith liability on adjusters personally.

The reasons proffered in public court filings are invariably weak and unpersuasive. That is likely because it is an open secret in this area of litigation that the true reasons for the half-century quest to sue adjusters personally have little to do with the publicly presented justifications for it. Such lawsuits are brought to weaponize procedural and tactical advantages against the insurer. They are meant to inflict personal pain and institutional difficulty, both of which can be "cashed out" as settlement and trial value.

First, subjecting adjusters to personal liability "from insureds could create conflicting loyalties with respect to the adjusters' contractual obligations." [162] The separate duty owed to insureds weakens insurers' ability to control their own employees, whom the law would force to think about their personal legal interests. The *in terrorem* threat of bad faith liability necessarily would incent adjusters to overpay claims out of personal self-interest as a means of reducing their own risk of personal legal exposure. This is particularly likely in the context of claim adjusting, in which the adjusters spend an employer's money, not their own. An adjuster has every reason to overpay significantly to avoid even a modest personal risk of a bad faith suit because the adjuster does not bear the cost of the overpayment. Disincentivizing adjusters to act as a bulwark against claim overpayments in this

manner undermines the public policy of many states, expressed in their insurance codes, to provide insurance to the public at the most reasonable cost possible. [163] A savvy plaintiff can "cash out" the settlement value of these problems.

Second, subjecting individual insurer employees to bad faith personal liability has no clear logical stopping point. In Colorado, for example, the treble-benefits statutes "are not limited to claims handling" and also reach underwriting. [164] Subjecting every claim department employee and every underwriting department employee to personal bad faith exposure would multiply the number of potential internal conflicts to an unmanageable level, severely undermining insurers' efforts to control their employees. Plaintiffs can extract higher settlements with the threat of pushing the envelope further.

Third, permitting bad faith lawsuits against insurer employees personally would burden insurers and the public with substantial new costs in the form of an entirely new category of satellite litigation focused on whether any number of employees committed misconduct. Courts acknowledge the "large litigation or transactional costs, and considerable uncertainty," flowing from personal adjuster liability. [165] "The nature and extent of insurer duties to insureds has been a prolific source of litigation," and "[a]djuster liability would be an empty slate, upon which the courts would have to write a whole new body of 'adjuster liability' law." [166]

The number of additional lawsuits, parties, and complications to case law will be limited only by the creativity of lawyers and the number of claim and underwriting employees involved with a given policy or claim. For instance, a claim involving four claim department employees, three underwriting department employees, and the insurance company could easily result in eight sets of defense lawyers to represent each defendant, eight separate lawsuits, eight defendants in one lawsuit, or any combination of lawsuits, lawyers, or defendants in between. Giving such broad discretion and power to insureds welcomes gamesmanship and invites abuse. Unleashing this power would reward the worst actors most willing to drive up costs by joining more employees as settlement leverage. And the rents extracted by such tactics must come at the expense of honest policyholders who choose not to game the system or who lack the sophistication and resources to do so. Plaintiffs can cash out some of the value of these additional costs and stresses on the insurance system in the form of higher settlement or trial values.

Fourth, the onerous cost of creating an entirely new branch of law would offer no legitimate benefit--not even to insureds. Courts have recognized this point. From "a policy standpoint it makes little sense to hold that the adjuster has an independent duty when the insurer itself is subject to liability for the adjuster's mishandling of claims in actions alleging breach of contract and bad faith." [167] Imposing personal liability on adjusters creates "a redundancy unjustified by the inevitable costs that eventually would be passed on to insureds." [168] The public would "end up paying more for insurance without obtaining more value because ... adjuster liability would provide only a redundant source of the recovery usually available from the insurer." [169] Public policy weighs against a rule that imposes substantial costs for no legitimate benefit.

Fifth, perhaps worst of all, imposing personal liability on adjusters gives repeat-playing law firms a special power to disrupt adjusters' personal lives and finances as a means of influencing their payment decisions across claims. A repeat-playing law firm can threaten or file a personal lawsuit as a means of intimidating an adjuster to increase claim payments. Or such a firm can "make an example" of an adjuster for colleagues to see by suing the adjuster in far-flung counties. High-volume, repeat-playing firms can also reward adjusters who pay them ***20** more by refraining from disrupting their personal lives and finances.

A rule that gives high-volume, repeat-playing law firms such an unfair advantage comes at the expense of insureds who are not represented by lawyers or who are represented by law firms that handle fewer insurance claims. It builds into the insurance system inequities among insureds.

Finally, the only benefit to insureds or plaintiffs' lawyers from imposing personal adjuster liability appears sufficiently unseemly that they do not mention it in their briefs filed in court. The primary benefit is forum shopping. In Colorado, following the *Seiwald* ruling, plaintiffs exclusively joined local adjusters in state court lawsuits, with the apparent goal of preventing removal to federal court. In one instance, this writer was able to obtain an agreement to dismiss an adjuster, but only if the insurer would agree not to keep the case in federal court--thus revealing the motivation behind the tactic.

The only real benefits to such liability are unseemly and apparently unspeakable, even by plaintiffs. Moreover, no court or commentator has demonstrated that holding adjusters liable personally has any greater deterrent effect against bad faith misconduct than the existing regime that holds insurers responsible for what adjusters do. Courts appear to have widely reached

the conclusion that imposing personal adjuster liability is bad law and policy. There are plenty of meritorious lawsuits to bring and money for plaintiffs' lawyers to make in the current system without resorting to this tactic. In this instance, they should give up the spear.

TIP: First principles of statutory construction, contract, and agency, as well as core public policies governing insurance, carried the day in the four state supreme court decisions.

Footnotes

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1 HERMAN MELVILLE, MOBY-DICK; OR, THE WHALE 468 (New York, Harper & Bros. 1851) (1851).

2 *E.g.*, Chad G. Marzen, *The Personal Liability of Insurance Claims Adjusters for Insurance Bad Faith*, 118 W. VA. L. REV. 411 (2015); Jeffrey W. Stempel, *The "Other" Intermediaries: The Increasingly Anachronistic Immunity of Managing General Agents and Independent Claims Adjusters*, 15 CONN. INS. L.J. 599 (2009).

3 Steven Plitt & Ryan Sandstrom, *Evaluating the Relationship between Independent Insurance Adjusters and Insureds: The Case against Imposing an Independent Duty of Care*, 48 CREIGHTON L. REV. 245, 245 (2015).

4 Lodholtz v. York Risk Servs. Grp., Inc., 778 F.3d 635, 642 (7th Cir. 2015).

5 RESTATEMENT (SECOND) OF AGENCY § 352 (1958).

6 *Id.* § 357.

7 3 AM. JUR. 2D *Agency* § 273 (Aug. 2022 Update); Yellow Book Sales & Distrib. Co. v. Mantini, 925 N.Y.S.2d 646, 648 (App. Div. 2011).

8 798 N.E.2d 171, 173 (Ind. 2003); *see also* 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 198:17, at 198-38 to 198-39 (3d ed. 2018 Update) ("This duty [of good faith and fair dealing of insurers], however, only runs so far. While an insurer's agent may be subject to the insurer's duty of good faith, the agent does not also incur personal liability to the insured. The lack of contractual privity prevents courts from finding such liability, even in cases where the agent in question is a reinsuring subsidiary.").

9 RESTATEMENT (THIRD) OF AGENCY § 7.02 (2006) (emphasis added); *see also* 67 AM. JUR. 2D *Sales* § 98 (Aug. 2022 Update) ("While the principal will be liable, an agent of the seller is not personally liable for damages resulting from a misrepresentation of the qualities of the subject matter of the sale."); 31 ANNE M. PAYNE & JOSEPH WILSON, NEW YORK PRACTICE SERIES § 31:38 (2014-2015 ed.) ("The insurance adjuster owes its duties to the insurance company, as its agent or employee .... Generally, insurance adjusters, as agents and employees of the insurer, do not owe the insured any independent duty that could cause the adjuster to be personally liable to the insured for bad faith.").

10 Steven J. Harman, *An Insurer's Liability for the Tort of Bad Faith*, 42 MONT. L. REV. 67, 68 (1981) ("In the not too distant past, if the insured could establish a breach by the company, the insured's damages were determined by what the

contract obligated the company to do. Recovery for the insured's anxiety or economic losses could not, under traditional contract principles, be recovered.").

11 STEVEN PLITT, THE CLAIM ADJUSTER'S AUTOMOBILE LIABILITY HANDBOOK § 7:1, at 7-2 (2009).

12 Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 84 (1994).

13 *Id.*

14 Farmers Grp., Inc. v. Trimble, 691 P.2d 1138, 1141 (Colo. 1984).

15 Richmond, *supra* note 12, at 78.

16 *Id.* (quoting Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 578 (9th Cir. 1992)).

17 Bibeault v. Hanover Ins. Co., 417 A.2d 313, 318 (R.I. 1980).

18 Plitt, *supra* note 11, § 7:1, at 7-4; *see also* Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 201 (1958) ("There is an important difference between the liability of an insurer who performs its obligations and that of an insurer who breaches its contract. The policy limits restrict only the amount the insurer may have to pay in the performance of the contract as compensation to a third person for personal injuries caused by the insured; they do not restrict the damages recoverable by the insured for a breach of contract by the insurer.").

19 Richmond, *supra* note 12, at 77.

20 264 A.2d 668, 672 (Pa. 1970).

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 510 P.2d 1032, 1039 (Cal. 1973).

26 127 Cal. Rptr. 49, 51 (Ct. App. 1976).

27 *Id.*

28 620 P.2d 141, 149 (Cal. 1979) ("Segal and McEachen acted as Mutual's agents. As such, they are not parties to the insurance contract and not subject to the implied covenant. Because the only ground for imposing liability on either Segal or McEachen is breach of that promise, the judgments against them as individuals cannot stand.").

29 Swanson v. Am. Hardware Mut. Ins. Co., 359 N.W.2d 705, 708 (Minn. Ct. App. 1984).

30 Griffin v. Ware, 457 So. 2d 936, 940 (Miss. 1984) ("We therefore hold that adjusters employed by an insurer, who were not parties to the agreement for insurance, are not subject to an implied duty of good faith and fair dealing to the insured."). Aspects of *Griffin* were subsequently called into question in *Bass v. California Life Insurance Co.*, 581 So. 2d 1087 (Miss. 1991).

31 Larkin v. First of Ga. Underwriters, 466 So. 2d 655, 657 (La. Ct. App. 1985).

32 Velastequi v. Exch. Ins. Co., 505 N.Y.S.2d 779, 781 (Civ. Ct. 1986).

33 King v. Nat'l Sec. Fire & Cas. Co., 656 So. 2d 1338, 1339 (Fla. Dist. Ct. App. 1995).

34 Cont'l Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281, 287-88, 288 n.10 (Alaska 1980) (stating that the adjuster "could not be held liable for a breach of the fiduciary duty of good faith arising out of the insurance contract, but he could be held liable for negligence arising out of a breach of the general tort duty of ordinary care"); Morvay v. Hanover Ins. Cos., 506 A.2d 333, 335 (N.H. 1986) (holding that claim adjusters owe a duty to the insured to conduct a fair and reasonable investigation of an insurance claim).

35 Chad G. Marzen, *The Personal Liability of Insurance Claims Adjusters for Insurance Bad Faith*, 118 W. VA. L. REV. 411, 418-19 (2015); *see also, e.g.*, Vargas v. Cal. State Auto. Ass'n Inter-Ins. Bureau, 788 F. Supp. 462 (D. Nev. 1992); *Velastequi*, 505 N.Y.S.2d 779.

36 RESTATEMENT (THIRD) OF AGENCY § 7.02 reporter's note d (2006).

37 Richmond, *supra* note 12, at 75.

38 *Id.* at 76.

39 Plitt & Sandstrom, *supra* note 3, at 246.

40 *Id.*

41 *Id.*

42 *Id.* at 249.

43 *Id.* at 249 & n.12.

44 *Id.* at 249 & n.13.

45 859 P.2d 1008 (Mont. 1993).

46 *Id.* at 1014.

47 *Id.*

48 *Id.*

49 *Id.* at 1014-15.

50 *Id.* at 1014.

51 *Id.*

52 *Id.* at 1015.

53 *Id.*

54 966 S.W.2d 482, 486 (Tex. 1998).

55 *Id.* at 484.

56 *Id.* at 487.

57 589 S.E.2d 55 (W. Va. 2003).

58 *Id.* at 60.

59 *Id.* at 60-61.

60 *Id.* at 61.

61 *Id.*

62 Marzen, *supra* note 2, at 422.

63 Stempel, *supra* note 2, at 599.

64 Brown v. State Farm Fire & Cas. Co., 58 P.3d 217 (Okla. Civ. App. 2002).

65 Wiseman v. Universal Underwriters Ins. Co., 412 F. Supp. 2d 801, 802 (S.D. Ohio 2005).

66 *Id.* at 806. *But see* William Powell Co. v. Nat'l Indem. Co., 141 F. Supp. 3d 773, 782-83 (S.D. Ohio 2015) ("Ohio law most strongly points to the conclusion that, absent privity, an insured may not sue a third-party claims administrator for adjusting its claim in bad faith.").

67 Marzen, *supra* note 2, at 428-32.

68 Pohto v. Allstate Ins. Co., No. 6:10-cv-02654-JMC, 2011 WL 2670000, at *2-3 (D.S.C. July 7, 2011). This decision appears to conflict with a South Carolina Supreme Court decision eight years prior. *See* Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 586 S.E.2d 586, 588-89 (S.C. 2003). *Pohto* never discussed *Charleston Dry Cleaners*.

69 Stempel, *supra* note 2, at 653.

70 778 F.3d 635, 641 n.11 (7th Cir. 2015).

71 *Id.* For reasons that are unclear, *Lodholtz* counted Texas among these jurisdictions without discussing *Garrison Contractors*. The Seventh Circuit cited and parenthetically described certain of the relevant decisions as follows: Akpan v. Farmers Ins. Exch., Inc., 961 So. 2d 865, 874 (Ala. Civ. App. 2007) (holding that an independent adjuster owes no duty to the insured); Meineke v. GAB Bus. Servs., Inc., 991 P.2d 267, 271 (Ariz. Ct. App. 1999) (same); Sanchez v. Lindsey Morden Claims Servs., Inc., 84 Cal. Rptr. 2d 799, 803 (Ct. App. 1999) (same); Grossman v. Homesite Ins. Co., No. FSTCV075004413S, 2009 WL 2357978, at *4-5 (Conn. Super. Ct. July 6, 2009) (same); King v. Nat'l Sec. Fire & Cas. Co., 656 So. 2d 1338, 1339 (Fla. Dist. Ct. App. 1995) (per curiam) (holding that "Florida law does not recognize a cause of action by an insured against an independent insurance adjuster in simple negligence"); Baugh v. Par. Gov't Risk Mgmt. Agency, 715 So. 2d 645, 647 (La. Ct. App. 1998) (holding that an independent adjuster owes no duty to the insured); Haney v. Fire Ins. Exch., 277 S.W.3d 789, 792-93 (Mo. Ct. App. 2009) (same); Columbia Energy Grp. v. Fisher, 851 N.Y.S.2d 12, 13 (App. Div. 2008); Koch v. Bell, Lewis & Assocs., Inc., 627 S.E.2d 636, 638 (N.C. Ct. App. 2006) (citing with approval the majority rule and holding that an adjuster did not owe a duty to claimants that were not the insured); Trinity Baptist Church v. Brotherhood Mut. Ins. Servs., LLC, 341 P.3d 75, 84-86 (Okla. 2014) (holding that an independent adjuster owes no duty to the insured); *Charleston Dry Cleaners*, 586 S.E.2d at 588-89 (same); Dear v. Scottsdale Ins. Co., 947 S.W.2d 908, 917 (Tex. App. 1997) (same); Hamill v. Pawtucket Mut. Ins. Co., 892 A.2d 226, 230 (Vt. 2005) (same); Robertson Stephens, Inc. v. Chubb Corp., 473 F. Supp. 2d 265, 280 (D.R.I. 2007) (holding that claim adjuster did not owe a duty of reasonable care to insured under Rhode Island law). Although not cited in *Lodholtz*, the District of Nevada held the same in 2009. Silon v. Am. Home Assurance Co., No. 2:08-cv-1798-RCJ-LRL, 2009 WL 1090700, at *3 (D. Nev. Apr. 21, 2009).

72 341 P.3d 75 (Okla. 2014).

73 Brown v. State Farm Fire & Cas. Co., 58 P.3d 217 (Okla. Civ. App. 2002).

74 *Trinity Baptist*, 341 P.3d at 83.

75 *Id.* at 77.

76 *Id.* at 87.

77 *Id.* at 77.

78 *Id.* at 78.

79 *Id.* at 79.

80 *Id.* at 79-87.

81 *Id.* at 79.

82 *Id.* at 80-81.

83 *Id.* at 80.

84 *Id.* at 81-82.

85 *Id.*

86 *Id.*

87 *Id.* at 82-86.

88 *Id.*

89 *Id.* at 82-83.

90 *Id.* at 85.

91 *Id.*

92 *Id.* at 86.

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.* at 87.

97 927 N.W.2d 611 (Iowa 2019).

98 *Id.* at 613.

99 *Id.* at 616-24.

100 *Id.* at 616 (quoting Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988)).

101 *Id.* at 620-21.

102 *Id.* at 620.

103 *Id.*

104 *Id.* at 621.

105 Cary v. United of Omaha Life Ins. Co., 68 P.3d 462, 469 (Colo. 2003).

106 *De Dios*, 927 N.W.2d at 623.

107 *Id.* at 623-24.

108 *Id.* at 624-35 (Appel, J., dissenting).

109 *Id.*

110 *Id.* at 624.

111 *Id.*

112 *Id.* at 624-25.

113 *Id.* at 633.

114 Lodholtz v. York Risk Servs. Grp., Inc., 778 F.3d 635, 641 n.11 (7th Cir. 2015) (listing Oklahoma as a jurisdiction that recognizes no duty owed by independent adjusters to insureds).

115 449 P.3d 1040 (Wash. 2019).

116 *Id.* at 1043.

117 *Id.* at 1043-44.

118 *Id.* at 1044.

119 *Id.* at 1045 (quoting WASH. REV. CODE § 48.01.030).

120 *Id.*

121 *Id.* at 1048.

122 *Id.* at 1046-48.

123 *Id.* at 1045.

124 *Id.*

125 *Id.* at 1046 ("In our view, the presence of such specific provisions for enforcement of the insurance code suggests that the legislature's omission of a provision creating a private cause of action for violations of RCW 48.01.030's duty of good faith was intentional.").

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.* at 1048-54 (Yu, J., dissenting).

130 *Id.* at 1048.

131 *Id.* at 1048-54.

132 *Id.* at 1052.

133 COLO. REV. STAT. §§ 10-3-1115, -1116.

134 778 F.3d 635, 642 n.11 (7th Cir. 2015).

135 Cary v. United of Omaha Life Ins. Co., 68 P.3d 462, 466-68 (Colo. 2003).

136 *Id.* at 466.

137 *Id.* at 463.

138 *E.g.*, Nunn v. St. Paul Travelers, No. 05-cv-01246-WDM, 2006 WL 827403, at *1-2 (D. Colo. Mar. 28, 2006); Torres v. Am. Fam. Mut. Ins. Co., No. 07-cv-01330-MSK-MJW, 2008 WL 762278, at *5-6 (D. Colo. Mar. 19, 2008).

139 *See* Martinez v. Lewis, 969 P.2d 213, 214 (Colo. 1998) (applying *Cary* to an independent medical evaluation physician); Gorab v. Equity Gen. Agents, Inc., 661 P.2d 1196, 1198 (Colo. App. 1983) (same, applied to an insurance agent).

140 COLO. REV. STAT. §§ 10-3-1115, -1116.

141 Riccatone v. Colo. Choice Health Plans, 315 P.3d 203, 208-09 (Colo. App. 2013).

142 *Id.* at 210-11.

143 *See, e.g.*, Slavin v. USAA Cas. Ins. Co., No. 14-cv-01839-LTB-CBS, 2015 WL 514936, at *3-4 (D. Colo. Feb. 6, 2015) (dismissing on the pleadings extracontractual claims against corporate defendants that did not insure the plaintiff, because the plaintiff did "not make any allegations in his complaint suggesting a special relationship existed between him and" those entities).

144 No. 20-cv-00464-PAB, 2020 WL 6946563 (D. Colo. Nov. 24, 2020).

145 *Id.* at *3.

146 *Id.* at *2.

147 *E.g.*, Kissinger v. Martin, No. 2020-CV-34106 (Colo. Dist. Ct. Denver Cnty.); Rivera v. State Farm Mut. Auto. Ins. Co., No. 2020-cv-32398 (Colo. Dist. Ct. Arapahoe Cnty.); Smith v. State Farm Fire & Cas. Co., No. 2021-cv-30016 (Colo. Dist. Ct. Weld Cnty.); Contreras v. State Farm Mut. Auto. Ins. Co., No. 2020-cv-32397 (Colo. Dist. Ct. Arapahoe Cnty.); Frerichs v. State Farm Mut. Auto. Ins. Co., No. 2021-cv-30134 (Colo. Dist. Ct. Adams Cnty.); Regalado v. Am. Fam. Mut. Ins. Co., No. 2021-cv-30138 (Colo. Dist. Ct. Denver Cnty.); Naves v. Allstate Fire & Cas. Co., No. 2021-CV-30924 (Colo. Dist. Ct. Denver Cnty.); Herbers v. Draine, No. 2021-CV-30211 (Colo. Dist. Ct. Adams Cnty.); Williams v. Draine, No. 2021-CV-30995 (Colo. Dist. Ct. Denver Cnty.); Denson v. Am. Fam. Mut. Ins. Co., No. 2021-CV-31445 (Colo. Dist. Ct. Denver Cnty.); Skillett v. Allstate Fire & Cas. Ins. Co., No. 2021-CV-030598 (Colo. Dist. Ct. Denver Cnty.); Dejongh v. Allstate Fire & Cas. Ins., No. 2020-CV-30545 (Colo. Dist. Ct. Pueblo Cnty.); Ludwig v. Draine, No. 2021-CV-030060 (Colo. Dist. Ct. Pueblo Cnty.); Ray v. Ratzell, No. 2021-CV-30270 (Colo. Dist. Ct. Arapahoe Cnty.).

148 See cases cited *supra* note 147.

149 No. 21-cv-00956-MEH (D. Colo. June 9, 2021).

150 *Skillett*, 505 P.3d 664, 665 (Colo. 2022).

151 *Id.*

152 *Id.* at 667.

153 *Id.*

154 *Id.*

155 *Id.* at 667-68.

156 *Id.* at 667.

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.* at 667-68.

161 *Id.* at 668.

162 Trinity Baptist Church v. Brotherhood Mut. Ins. Servs., LLC, 341 P.3d 75, 85 (Okla. 2014).

163 *E.g.*, COLO. REV. STAT. § 10-1-101.

164 Home Loan Inv. Co. v. St. Paul Mercury Ins. Co., 827 F.3d 1256, 1262 (10th Cir. 2016) (quoting heading).

165 Sanchez v. Lindsey Morden Claims Servs., Inc., 84 Cal. Rptr. 2d 799, 803 (Ct. App. 1999).

166 *Id.*

167 *Trinity Baptist*, 341 P.3d at 86.

168 *Id.*

169 *Sanchez*, 84 Cal. Rptr. 2d at 802.

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