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A Tarnished Golden Rule — Why *Badillo v. Mid Century Insurance Co.* Demands Further Clarification from the Oklahoma Supreme Court Regarding the Tort of Bad Faith[1]

I. Introduction

For at least three quarters of a century, insurance companies have battled the legal monster of bad faith.[2] Simply stated, society demands insurers to be on their best behavior when dealing with customers who have faithfully paid their premiums, developed expectations of being cared for, and are now suffering some degree of misfortune. As generally understood, when insurers play the bully instead of the loving parent or friend, the law should empower their policyholders to recover in tort for the relevant bad actions.[3] Nevertheless, the quest for the appropriate legal standard by which to judge an insurer's behavior has been fraught with confusion and dissent.[4] Oklahoma's jurisprudence in this area is no exception.

On June 22, 2005, the Oklahoma Supreme Court wrote the final chapter in the saga of *Badillo v. Mid Century Insurance Co.*,[5] issuing an opinion on rehearing that withdrew the court's one-year-old ruling in the same case.[6] The turnaround was dramatic. Where *Badillo I* offered a groundbreaking perspective on bad faith that insulated insurance companies, *Badillo II* performed an ostensible "about-face," bestowing on insurers increased duties to meet to avoid liability. Most importantly, in its final form,[7] *Badillo*

1. A prior version of this note that analyzed the Oklahoma Supreme Court's withdrawn 2004 *Badillo* opinion, and from which this current note was adapted, won the 2004-2005 Gene and Jo Ann Sharp Award for Outstanding Case Note.

2. *See* Jeffrey E. Thomas, Crisci v. Security Insurance Co.*: The Dawn of the Modern Era of Insurance: Bad Faith and Emotional Distress Damages*, 2 NEV. L.J. 415, 420 (2002) (noting that 1930 marks one of the earliest insurance bad faith cases on record).

3. Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 112 (1994).

4. *See infra* Part II (discussing three decades of Oklahoma bad faith cases that have failed to solidify a lasting legal standard).

5. Badillo v. Mid Century Ins. Co., 2005 OK 48, 121 P.3d 1080 (per curiam).

6. Badillo v. Mid Century Ins. Co., 2004 OK 42, *withdrawn*, 2005 OK 48, 121 P.3d 1080. The Oklahoma Supreme Court originally decided the case in favor of the insurance company in a five-four decision. Interestingly, the year between the issuance of this first opinion and the current opinion saw the retirement of two justices who dissented in the original opinion — Justices Hodges and Boudreau — and the appointment of Justices Taylor and Colbert. Nevertheless, this change in personnel did not seem to affect the final outcome. *Badillo II*'s majority garnered a six-three vote, including those of both new Justices as well as two votes from *Badillo I*'s majority — Justices Lavender and Summers.

7. Any future references to "*Badillo*" in this note refer to the final, 2005 opinion —

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appeared to seriously depart from the analytical framework of past opinions, infusing unfamiliar variables into the bad faith debate. Specifically, the majority described bad faith in terms of the insurer violating a fiduciary duty to its insured — a duty the court further defined by a "Golden Rule"[8] analysis that asked only whether the insurance company treated the insured as if it was standing in the insured's position.[9] Further, the Supreme Court added the unhelpful guidance that a bad faith violation of this fiduciary duty occurs when the insurer's behavior amounts to something more than negligence but less than reckless disregard of the insured's interest.[10]

This note suggests that *Badillo* ultimately produced a fair result, yet one established through flawed and potentially harmful reasoning. First, Part II offers a brief overview of the tort of bad faith and discusses the principal Oklahoma cases leading to *Badillo*, focusing specifically on the Supreme Court's interpretation of the requisite culpability for bad faith. Second, Part III explains the case itself, highlighting the relevant facts and rationale from the majority and concurring opinions. Finally, Part IV asserts that *Badillo* inappropriately handled the issue of bad faith in three critical and distinct ways — by failing to address and distinguish clear precedent concerning the elements of bad faith, by establishing an inapplicable standard for identifying bad faith centered on the abstract principles of the "Golden Rule" while neglecting to define the requisite mental culpability, and by undermining the predictability of written contracts between insurers and their insureds.

II. Toward Badillo*: A Journey Through Ambiguity*

A. Historical Origins

The tort of bad faith originates in the contract law principle that every contract imposes on the parties an implied duty to deal fairly and in good faith.[11] In interpreting this legal principle, courts have described good faith as "refrain[ing] from doing anything that would injure the right of the other party to receive the benefits of the agreement."[12] With the growth of automobile sales in the 1900s — and with it the explosion of injury-causing accidents —

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denoted as "*Badillo II*" in this portion of the text only to distinguish the subsequent opinion from the opinion released in 2004 and later withdrawn.

8. This term refers to the universal maxim of treating others as you want to be treated, stemming from sources such as Jesus Christ's exhortation to "[d]o for others what you would like them to do for you." *Matthew* 7:12 (New Living Translation).

9. *Badillo*, ¶ 26, 121 P.3d at 1092.

10. *Id.* ¶ 28, 121 P.3d at 1094.

11. STEPHEN S. ASHLEY, BAD FAITH ACTIONS: LIABILITY AND DAMAGES 1-3 (1997).

12. *Id.*

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the relationship between insurer and insured became a focal point for the application of good faith principles.[13] Inarguably, the insurance contract remains unique. Although the parties may appear to be equal bargainers at the time of contract formation, the insured becomes unequally dependent upon the insurer to "make good" when tragedy strikes.[14] Faced with the contract law limitations that restrict recovery to the value of the contract, most state courts have recognized a remedy in tort for an insured that suffers distress and financial strain from an insurer's unjustified denial of a policy claim.[15]

In 1935, Oklahoma first recognized the insurer's duty to act in good faith, along with the potential liability to the insurer beyond the provisions of the contract. In *Boling v. New Amsterdam Casualty Co.*,[16] the Oklahoma Supreme Court held that a lower court's dismissal of the plaintiff-insured's claim of bad faith constituted error where evidence existed that the insurer failed to act according to "honest judgment and discretion" in denying payment of a claim.[17] The court framed the debate concerning the mental culpability required for bad faith by unequivocally stating that the tort is "a thing apart from self-interest, and renders unnecessary consideration of the [facts] based on negligence."[18] Thus, bad faith in Oklahoma began as a remedy not to punish negligent, unreasonable behavior, but to punish behavior that included at least some level of subjective intent.

B. Christian *and Modern Bad Faith in Oklahoma*

Relying on *Boling* and its early companion cases, the Oklahoma Supreme Court established the modern bad faith standard in 1977 with *Christian v. American Home Assurance Co.*[19] Cited as the analytical starting place for bad faith in nearly every Oklahoma judicial opinion over the last twenty-five years, *Christian* extended the already recognized tort of bad faith in third-party situations into the context of first-party claims, seemingly providing a uniform standard for bad faith claims of all types.[20]

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13. *Id.* at 1-2.
14. *Id.* at 1-3.
15. *Id.* at 1-4.
16. 1935 OK 587, 46 P.2d 916.
17. *Id.* ¶ 20, 46 P.2d at 919.
18. *Id.* ¶ 12, 46 P.2d at 918.
19. 1977 OK 141, 577 P.2d 899.
20. The distinction between first- and third-party bad faith is an important one in most states. A third-party claim generally arises out of two situations: either the insurer is accused of not defending its insured in a lawsuit where the insured has injured a third party, or the insurer fails to settle with the third party on the insured's behalf. Dominick C. Capozzola, *First-Party Bad Faith: The Search for a Uniform Standard of Culpability*, 52 HASTINGS L.J. 181, 184 (2000). A first-party claim, however, involves an insured's claim that its insurer unjustifiably

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Christian involved a disability insurer's refusal to pay a claim and the disabled-insured's attempt to recover damages in excess of the policy limits for emotional distress and punitive damages.[21] In explaining the tort of bad faith, the Oklahoma Supreme Court issued its famous holding that:

> [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. We approve and adopt the rule that an insurer has an implied duty to deal fairly and act in good faith with its insured and that the violation of this duty gives rise to an action in tort for which consequential and, in a proper case, punitive, damages may be sought.[22]

The court's dual requirements of unreasonableness and bad faith suggested to the legal community that bad faith was something wholly separate from reasonableness in the negligence context. Interestingly, the court began discussing possible recovery under the bad faith theory with the question of "whether under Oklahoma law an insurance company may be subjected to liability in tort for a *willful, malicious and bad faith* refusal to pay a valid insurance claim."[23] This characterization was supported by the fact that, throughout the entire trial and appellate process, the defendant-insurer offered zero explanation for its denial of the insured's claim.[24] Emboldened by these facts, the court went on to adopt the language of the plaintiff-insured's brief, again identifying the tort as "willful and malicious."[25] When the court later stated that "[t]he essence of the cause of action is bad faith,"[26] this description arguably included a strong component of sinister motive — or at least reckless disregard, as demonstrated by the insurance company's lack of any rational explanation for its actions.

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withheld payment of a policy where no third party is involved, that is, where injury occurs due to fire or other natural hazard. *Id.* at 185. Most states have long recognized bad faith in the third-party context, viewing the insurer as the insured's fiduciary, who maintains a heightened responsibility to protect the insured's expectations. *Id.* To establish bad faith in the first-party context, most states require the insured to prove a higher level of mental culpability because no issues of agency exist. *Id.* at 196-205 (discussing the different standards applied by states such as Wisconsin, Arkansas, Mississippi, and New Mexico).

21. *Christian*, ¶ 4, 577 P.2d at 900.
22. *Id.* ¶¶ 24-25, 577 P.2d at 904 (internal quotation omitted).
23. *Id.* ¶ 1, 577 P.2d at 900 (emphasis added).
24. *Id.* ¶ 3, 577 P.2d at 900.
25. *Id.* ¶ 4, 577 P.2d at 900.
26. *Id.* ¶ 6, 577 P.2d at 901.

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In 1981, two years after *Christian*, the Oklahoma Supreme Court considered *McCorkle v. Great Atlantic Insurance Co.*,[27] stating that "the intentional tort of bad faith . . . is the insurer's unreasonable, bad faith conduct . . . ."[28] After first implying the presence of an intentional, subjective component in its bad faith analysis, the court appeared to confuse the issue, stating that "if there is conflicting evidence from which different inferences may be drawn regarding the *reasonableness* of insurer's conduct, then what is *reasonable* is always a question to be determined by the trier of fact . . . ."[29] Assuming that the court intended the legal community to take these terms at face value, one rational explanation for the apparent conflict in simultaneously applying a subjective and objective standard could be that the terms "intentional" and "reasonable" are not mutually inconsistent. Rather, the court potentially recognized a hybrid between negligence and intent that some have called "subjective unreasonableness."[30]

C. Timmons *and the Growing Confusion*

In the 1982 decision of *Timmons v. Royal Globe Insurance Co.*,[31] the Oklahoma Supreme Court continued to grapple with the *Christian* dual-requirement standard.[32] Although the earlier case of *McCorkle* appeared to infuse components of motive into bad faith, the *Timmons* court expressly rejected this view, choosing instead to focus on the objective unreasonableness of the insurer's actions.[33] The *Timmons* court addressed the insurer's complaint that the trial court erred in refusing to charge the jury with an instruction that defined the term bad faith as "an actual existing evil intent to mislead or deceive [that] does not include a misstatement made through inadvertence or carelessness."[34] Without further explanation, the court replied that "[t]he trial court did not err in refusing the requested instruction because to limit recovery for *Christian*-type actions to 'an actual existing evil intent to mislead or deceive' limits recovery substantially beyond that required for proof of failure to deal fairly and in good faith."[35]

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27. 1981 OK 128, 637 P.2d 583.
28. *Id.* ¶ 21, 637 P.2d at 587.
29. *Id.* (emphasis added).
30. Richard J. Harris, *The Subjective Elements of Insurer Bad Faith Claims*, 75 OKLA. B.J. 2317, 2326 (2004).
31. 1982 OK 97, 653 P.2d 907.
32. *Id.* ¶ 25, 653 P.2d at 914.
33. *Id.*
34. *Id.* ¶ 23, 653 P.2d at 914.
35. *Id.* ¶ 25, 653 P.2d at 914-15.

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With this one statement, the court ended its analysis. Notably, the holding stopped short of expressly defining bad faith by the "inadvertence or carelessness" language mentioned in the insurer's proposed instruction.[36] Nevertheless, by closing the door to the "purposefully malicious or evil" concept, the *Timmons* court moved the frame of reference for bad faith further toward negligence and its accompanying standard of reasonableness.

This apparent departure from the early *Boling* pronouncement that bad faith required more than neglignce, a concept *Christian* reiterated, was most clearly shown in the adoption of *Timmons* as the "leading case" explaining Oklahoma's current jury instruction.[37] Assuming the typical contractual relationship between an insured and insurer, Oklahoma Uniform Jury Instruction (OUJI) 22.3 requires the plaintiff to prove three elements of bad faith by a greater weight of the evidence: (1) that the insurer's actions were unreasonable, (2) that the insurer did not deal fairly and in good faith, and (3) that the insurer's failure to deal in good faith resulted in harm to the insured.[38] Following these three requirements, the uniform instruction offers "Notes on Use" and "Comment" sections, the latter citing *Timmons* as the primary interpretation of the good faith standard.[39] Consequently, the Oklahoma legal community has at least in part been forced to recognize *Timmons* and its objective view of bad faith because of its place of preeminence in the court's default jury instruction — a document assumed to most clearly represent the law.[40]

Nevertheless, in the years following *Timmons*, it became clear that bad faith had yet to find a home among any conventional definitions. In the 1984 case of *Manis v. Hartford Fire Insurance Co.*,[41] the court identified bad faith as the "intentional tort" recognized in *McCorkle*, yet dismissed the plaintiff-insured's claim because "the insurer's conduct in withholding payment of the claim was reasonable."[42] Five years later in *Conti v. Republic Underwriters Insurance Co.*,[43] the court once again identified *McCorkle* as the governing law, but made no mention of bad faith as an "intentional tort," stating instead that "[t]he essence of the tort . . . is the *unreasonableness* of the insurer's actions."[44] By

36. *Id.* ¶ 23, 653 P.2d at 914.

37. Oklahoma Uniform Jury Instructions-Civil, Instruction 22.3, *in* VERNON'S OKLAHOMA FORMS (2d ed. West 2003) [hereinafter OUJI 22.3].

38. *Id.*

39. *Id.*

40. Jan Bissett & Margi Heinen, *What Is the Law? - Finding Jury Instructions*, Nov. 15, 2000, http://www.llrx.com/columns/reference19.htm.

41. 1984 OK 25, 681 P.2d 760.

42. *Id.* ¶ 8, 681 P.2d at 761.

43. 1989 OK 128, 782 P.2d 1357.

44. *Id.* ¶ 8, 782 P.2d at 1360.

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1991, however, in *Buzzard v. Farmers Insurance Co.*[45] the court was back to describing bad faith as "intentional," declaring that "[t]he knowledge and belief of the insurer . . . is the focus of a bad faith claim."[46] Yet, in a final twist, the court held that the insurer's belief in a "general industry policy"[47] to justify its actions was not "reasonable" and therefore was formed in bad faith.[48]

The language in this line of cases fails to maintain any continuity. By including references to both intent and reasonableness while arbitrarily alternating between a subjective and objective test, the court left attorneys on both sides of the argument with room to maneuver — and itself with further questions to answer.

D. Peters*: Resurrection of Intent in Bad Faith?*

Although the 2000 Oklahoma Court of Civil Appeals case of *Peters v. American Income Life Insurance Co.*[49] failed to reach the Oklahoma Supreme Court, the case presented an analysis that strongly contradicted the leanings of *Timmons* and its progeny. In *Peters*, the Court of Civil Appeals ruled that the issue of bad faith should not have proceeded to the jury, finding that mere negligence by an insurance company's employee did not suffice to establish a prima facie case for the tort.[50] Rather, the majority opinion made clear that "[b]ad faith and negligence are not synonymous."[51] Perhaps more importantly, after citing both *Christian* and *McCorkle* for the basic proposition that liability is predicated upon "unreasonable bad faith conduct,"[52] the court highlighted what it believed to be the crucial facts of these prior cases, noting that "[t]here, elements of wilfulness, malice, and oppression entered into the circumstances. The acts of the insurer were directed specifically toward the insured in an effort to avoid responsibility and conceal facts."[53] Thus, the lingering effects of *Timmons* and its rejection of a subjective, intent-focused version of bad faith clearly failed to sway the Court of Civil Appeals.

Thus, the apparent trend leading up to the *Badillo* opinion was for the courts to preserve at least some element of motive, purpose, or knowledge in the requirements for bad faith. Further, as shown in *Peters*, even where the court continued to describe bad faith in terms of the "unreasonableness of the

45. 1991 OK 127, 824 P.2d 1105.
46. *Id.* ¶ 14, 824 P.2d at 1109.
47. *Id.* ¶ 5, 824 P.2d at 1108.
48. *Id.* ¶ 30, 824 P.2d at 1112.
49. 2003 OK CIV APP 62, 77 P.3d 1090.
50. *Id.* ¶ 45, 77 P.3d at 1099.
51. *Id.* ¶ 38, 77 P.3d at 1098.
52. *Id.* ¶ 40, 77 P.3d at 1099.
53. *Id.* ¶ 39, 77 P.3d at 1098.

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insurer's actions,"[54] the explanation provided in factual context suggested that "reasonable" truly meant devoid of culpable intent.[55]

E. A Final Ingredient: Skinner*'s Threshold Question*

As the preceding cases demonstrate, a primary legal issue in Oklahoma bad faith involves interpreting *Christian*'s holding with respect to the mental culpability required for bad faith liability — whether negligence, specific intent, or something in between. Nevertheless, with its analysis in the 2000 opinion of *Skinner v. John Deere Insurance Co.*,[56] the Oklahoma Supreme Court cited *Christian* for the proposition that, before it would even consider the presence of bad faith conduct, there must be evidence that the accused insurer withheld payment of the insured's claim.[57]

Skinner involved a bad faith claim against an insurer for failing to render payment under an uninsured motorist (UM) and liability policy.[58] When an underinsured motorist hit the vehicle in which Kristie Skinner was a passenger, Skinner sustained severe injuries, as did two other passengers.[59] The complicated facts giving rise to Skinner's claim involved John Deere Insurance's eleven month delay in making payment while it sought both to resolve a genuine legal question regarding the amount of the UM policy and decide how to divide the claim among the disputing co-plaintiffs.[60] Nevertheless, at least one component of Skinner's bad faith claim consisted of John Deere's refusal to grant Skinner discovery of internal documents created after a settlement offer was made and rejected.[61] In response to Skinner's claim, the Oklahoma Supreme Court applied *Christian*'s holding that liability arises only if the insurer withheld payment under the policy.[62] Consequently,

54. *Id.* ¶ 28, 77 P.3d at 1097.

55. Explaining the reasonable standard in light of the facts, the court emphasized that "*no evidence was presented tending to show that AIL delayed payment, tried to extort some unfair advantage . . . or even just ignored the claim.*" *Id.* ¶ 36, 77 P.3d at 1098.

56. 2000 OK 18, 998 P.2d 1219.

57. *Id.* ¶ 16, 998 P.2d at 1223. Here, the court cited *Christian*'s holding that "tort liability arises only 'where there is a clear showing that the insurer unreasonably, and in bad faith, *withholds payment of the claim* of its insured.'" *Id.* (emphasis added) (quoting Christian v. Am. Home Assurance Co., 1977 OK 141, ¶ 26, 577 P.2d 899, 905).

58. *Skinner*, ¶¶ 8, 13, 998 P.2d at 1221-22. These passages demonstrate that Skinner first filed a bad faith claim for John Deere's unreasonable delay in making payment — and then sought to amend this complaint to include Deere's denial of a discovery request after Skinner filed the petition as further evidence of bad faith.

59. *Id.* ¶ 2, 998 P.2d at 1220.

60. *Id.* ¶¶ 4, 5, 998 P.2d at 1221.

61. *Id.* ¶¶ 6, 11, 998 P.2d at 1221-22.

62. *See supra* note 56 and accompanying text.

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the *Skinner* court ruled, John Deere's refusal to allow discovery was irrelevant to the question of bad faith because this occurred *after* offering payment. In other words, because John Deere offered payment up front, bad faith became a legal impossibility. In the Supreme Court's words, "the actions of an insurer after payment is made cannot be the basis of the bad faith claim."[63]

Perhaps because *Christian* itself, along with the benchmark cases of *McCorkle*[64] and *Timmons*[65] and recent decisions such as *Peters*,[66] all involved situations where the insured's complaint centered on the insurer's failure to pay,[67] this issue has remained largely unaddressed outside of *Skinner*. As the following Parts III and IV demonstrate, however, *Badillo* once again raised the relevance of the insurer's willingness to offer policy proceeds as a bad faith requirement. *Skinner*, therefore, represents a final, critical consideration in the bad faith analysis.

III. Badillo v. Mid Century Insurance Co.

A. Introductory Facts

Badillo made its way to the Oklahoma Supreme Court on appeal from the Oklahoma County district court.[68] After the district court judge denied Mid Century's request for summary judgment on the issue of whether it had acted in bad faith, a jury entered a verdict in favor of the plaintiff, Mario Badillo.[69] The particular grievance giving rise to Badillo's claim against his insurer, Mid Century, surrounded Mid Century's failure to complete a settlement with a third party who Badillo injured when he struck her with his vehicle.[70] While this third party, Loretta Smith, was bedridden, her sister and representative hired counsel.[71] Smith's counsel contacted Mid Century, who in turn conceded liability and tendered a check for the entire $10,000 limit of Badillo's liability policy.[72] Nevertheless, whisperings from witnesses at the

63. *Id.*

64. McCorkle v. Great Atl. Ins. Co., 1981 OK 128, 637 P.2d 583.

65. Timmons v. Royal Globe Ins. Co., 1982 OK 97, 653 P.2d 907.

66. Peters v. Am. Income Life Ins. Co., 2003 OK CIV APP 62, 77 P.3d 1090.

67. *See Timmons*, ¶ 8, 653 P.2d at 910 (discussing the various reasons the insurer presented for not covering insured's accident); *McCorkle*, ¶ 6, 637 P.2d at 584 (discussing the insurer's irrational lowering of the settlement offer); *Christian*, ¶ 3, 998 P.2d at 1220-21 (discussing the insurer's unjustified refusal to pay); *Peters*, ¶ 2, 77 P.3d at 1093 (reciting that the basis of the claim was failure to render insurance proceeds).

68. Badillo v. Mid Century Ins. Co., 2005 OK 48, 121 P.3d 1080 (per curiam).

69. *Id.* ¶ 22, 121 P.3d at 1092.

70. *Id.* ¶ 4, 121 P.3d at 1088.

71. *Id.*

72. *Id.* ¶ 8, 121 P.3d at 1089.

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scene of the accident that Badillo was driving erratically immediately prior to striking Smith suggested to both sides that alcohol might have been involved — potentially giving rise to a local tavern's vicarious liability.[73] This scenario, coupled with the possibility of employer liability if Badillo happened to be on the job when the accident occurred, led Smith's attorneys to refuse Mid Century's offer and the accompanying release until Mid Century allowed them to speak with Badillo.[74]

Claiming that it was concerned with exposing Badillo to possible criminal charges associated with driving under the influence, Mid Century refused to produce Badillo for a statement, without ever discussing with him either the alcohol and employment issues or the final decision to refuse Smith's request.[75] This refusal proved catastrophic for Badillo, leading to a breakdown of Smith's negotiations with Mid Century, a personal lawsuit against Badillo, and an adverse judgment of over $600,000.[76] Seeking to avoid bankruptcy, and encouraged by Smith's attorneys,[77] Badillo filed suit against Mid Century, claiming that it had acted in bad faith by needlessly preempting a settlement within policy limits.[78] The Oklahoma Supreme Court ultimately agreed.

B. Majority Reasoning

Undoubtedly striving for a decisive closure to a case that had already suffered two reversals,[79] the Oklahoma Supreme Court issued its opinion per curiam. The majority first noted that the starting place for bad faith liability was OUJI 22.3 and its requirement that the insurer's behavior be both unreasonable under the circumstances and in violation of the duty to deal fairly and in good faith.[80] In determining the critical question of what behavior amounts to a breach of this good faith duty, the court initially bypassed recent caselaw for older, less familiar precedent.

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73. *Id.* ¶ 10, 121 P.3d at 1089.

74. *Id.* ¶ 6, 121 P.3d at 1089.

75. *Id.* ¶ 12, 121 P.3d at 1090.

76. *Id.* ¶ 19, 121 P.3d 1091.

77. The court's recital of the facts stated that following the judgment and a hearing on Badillo's assets, Smith's attorney suggested to Badillo and his attorney that they sue Mid Century. In return, Smith agreed to postpone her attempts to collect on the judgment until after this second stage of litigation. *Id.* ¶ 21, 121 P.3d 1092.

78. *Id.* ¶ 20, 121 P.3d 1092.

79. The first of these reversals occurred with the Supreme Court's first opinion, *Badillo v. Mid Century Ins. Co.*, 2004 OK 42, *withdrawn*, 2005 OK 48, 121 P.3d 1080, that reversed the trial court's ruling in favor of Badillo. In addition, the court subsequently withdrew this opinion on grant of rehearing and replaced it with the current opinion that effectively reinstated the jury verdict and judgment against Mid Century.

80. OUJI 22.3, *supra* note 36; *Badillo*, ¶ 25, 121 P.3d at 1093.

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Citing Oklahoma cases from 1949 and 1957, an era decades before *Christian* and its familiar framework, the court declared that the insurer must behave as the insured's "agent,"[81] consistent with a "fiduciary capacity" toward the insured.[82] Consequently, the court deduced, the crux of bad faith behavior in the context of an insurer dealing with a third party claimant is the insurer's failure to conduct settlement negotiations as if no policy limit existed.[83] Otherwise stated, to have avoided liability, Mid Century must have dealt with Smith's attorneys as if Badillo had an unlimited policy, or as if Smith had sued Mid Century directly for the entirety of her injuries.

Nevertheless, one paragraph later the majority appeared to return to the analysis of more recent bad faith cases, citing *McCorkle* for the proposition that the essence of bad faith is the insurer's "unreasonable, bad-faith conduct."[84] The court continued by referencing *Buzzard* and its instruction that "[a] central issue . . . is gauging whether the insurer had a good faith belief in some justifiable reason for the actions it took or omitted . . . ."[85] Grappling with the same questions posed by *Christian* and its progeny regarding the requisite culpability for bad faith, the court skirted the issue, defining it only as "more than simple negligence, but less than the reckless conduct necessary to sanction a punitive damage award . . . ."[86]

More importantly, the majority seemed to embrace a new concept of bad faith centered on the "Golden Rule" of treating others as one would treat themselves in the other's position, adapted to the insurance context under the notion that an insurer is the insured's fiduciary and therefore must treat the insured's financial interests as synonymous with its own.[87] Although Mid Century argued that compliance with its express contractual duty to tender the entire $10,000 policy insulated it against bad faith liability[88] — undoubtedly pursuant to *Skinner*'s holding that an offer to pay preempts bad faith[89] — the court refused to allow any one particular act or omission to dictate liability.

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81. *Badillo*, ¶ 27, 121 P.3d at 1093 (citing Am. Fid. & Cas. Co. v. L.C. Jones Trucking Co., 1957 OK 287, ¶ 2, 321 P.2d 685, 687).

82. *Id.* (citing Am. Fid. & Cas. Co. v. G.A. Nichols Co., 173 F.2d 830, 832 (10th Cir. 1949)).

83. *Id.*

84. *Id.* ¶ 28 (quoting McCorkle v. Great Atl. Ins. Co., 1981 OK 128, ¶ 21, 637 P.2d 583, 587).

85. *Id.* ¶ 28, 121 P.3d at 1093-94 (citing Buzzard v. McDanel, 1987 OK 28, ¶ 7, 736 P.2d 157, 159).

86. *Id.*

87. Rhetorically, the court questioned, "[W]ould someone whose own financial health or life was at stake have acted in the manner that insurers did?" *Id.* ¶ 30, 121 P.3d at 1094.

88. *Id.* ¶ 29, 121 P.3d at 1094.

89. *See supra* note 56 and accompanying text.

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Instead, the court endorsed a more holistic approach by stating that an insurer's ostensibly good actions will never dispose of a bad faith claim "*irrespective of other salient circumstances or considerations*"[90] that suggest an insurer's violation of the Golden Rule of treating the insured's interest as it would treat its own.[91]

Moreover, and perhaps most troubling to insurers, the majority borrowed rules from such obscure sources as a 1963 and 1976 Wisconsin case to emphasize that fulfilling the Golden Rule of meeting the "fiduciary" duty of good faith included (1) the duty to inform the insured regarding settlement offers, requests, and its implications,[92] and (2) the duty to "seize a reasonable opportunity" to settle when faced with "the potential for excess liability."[93] Clearly, the court was attempting to broaden the insurer's responsibilities not only beyond standards of past bad faith cases, but arguably beyond the sanctity of the insurance contract itself.

C. Taylor's Concurrence

Greatly extending the majority's liberal perspective of bad faith, Justice Taylor wrote separately to express his view that the implied promises, reassuring slogans, and even the "soothing and comforting music" from insurance advertisements "*are part of the insurance contract*" and implicate corresponding performance in good faith.[94] Further, the concurrence noted that individuals purchase liability insurance for more than a check when trouble strikes; they are purchasing the peace of mind that comes from being assured, primarily through advertising, that the insurer will defend an adverse lawsuit and negotiate its settlement on their behalf.[95] Accordingly, the duty of good faith should encompass the entire gamut of interaction with a hostile third party who threatens the financial life of the insured.[96] Garnering two supporting votes that included the Chief Justice,[97] Taylor's concurrence

90. *Badillo*, ¶ 29, 121 P.3d at 1094.

91. *Id.* ¶ 30, 121 P.3d at 1094. The court explained that the key inquiry is whether the insurer approached the third-party claim "as if [it] alone were liable for the entire amount of the claim." *Id.* ¶ 26, 121 P.3d at 1093 (internal quotation marks omitted).

92. *Id.* ¶¶ 31, 35, 121 P.3d at 1094-96 (citing Baker v. Nw. Nat'l Cas. Co., 125 N.W.2d 370, 373 (Wis. 1963)).

93. *Id.* ¶ 34, 121 P.3d at 1095 (citing Alt v. Am. Family Mut. Ins. Co., 237 N.W.2d 706, 709 (Wis. 1976)).

94. *Id.* ¶¶ 2-3, 121 P.3d at 1110 (Taylor, J., concurring) (emphasis added).

95. *Id.* ¶ 4, 121 P.3d at 1110.

96. *Id.* ¶ 10, 121 P.3d at 1111.

97. *See generally id.* ¶ 4, 121 P.3d at 1110. Justice Taylor was joined by Chief Justice Watt and Justice Colbert.

indicates a strongly supported view of the insurer's duty that could dramatically influence future bad faith cases.

IV. Groundbreaking or Ungrounded? Badillo*'s Contribution to Uncertainty*

From an emotional standpoint, Mario Badillo's complaint against his insurer for exposing him to an enormous judgment and years of litigation by a failure to communicate arguably deserved the Supreme Court's finding of insurer liability. Moreover, this result appears to comport with the trend line of the court's precedent that suggested bad faith liability was appropriate where the insurer's actions were "subjectively unreasonable," or demonstrating a gross negligence that approached intentional wrongdoing.[98] Despite the end result, however, the *Badillo* court mishandled the issue of bad faith in three specific ways. First, the majority failed to directly address and distinguish precedent that, if applied, could have arguably produced a different result. Second, instead of presenting a clear, articulable standard to reflect its new perspective on bad faith, the *Badillo* court offered an amorphous "Golden Rule" for insurers to follow that requires them to figuratively place themselves in the shoes of their policyholders during third party negotiations. Although perhaps morally laudable, this rule lacks a much needed explanation of the specific mental culpability required for bad faith upon which previous Oklahoma cases failed to agree. Third, *Badillo*'s three-justice concurrence suggested that future courts should abandon established rules of contract interpretation and hold insurers contractually responsible for historically irrelevant marketing enticements. At a minimum, the concurrence's approach would jeopardize the predictability of how courts enforce the terms of insurance policies. The following three sub-parts address these shortcomings separately.

A. The Elephant in the Room: Skinner v. John Deere[99]

The first flaw in the majority opinion was its failure to address and distinguish *Skinner*, a case Justice Winchester of the dissent argued would have unequivocally disposed of Badillo's bad faith claim against Mid Century.[100] As noted above in Part II.E, *Skinner* appeared to establish a threshold requirement for bad faith consisting of an insurer's failure to offer payment. In the dissent's view, this requirement was non-negotiable and directly applicable to *Badillo*'s factual scenario.[101] Accordingly, where Mid

98. *See supra* note 28 and accompanying text.
99. 2000 OK 18, 998 P.2d 1219.
100. *Badillo*, ¶ 1, 121 P.3d at 1111-12 (Winchester, V.C.J., dissenting).
101. *Id.*

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Century upheld its end of the contractual bargain and tendered Badillo's entire policy amount to Loretta Smith, the trial court should have directed a verdict for Mid Century. In contrast to the dissent's assertions, however, *Skinner* is easily distinguishable from *Badillo* — raising the question as to why the majority did not address the case more squarely.

The *Badillo* majority, after briefly acknowledging the dissent's insistence that failure to pay is a dispositive element of bad faith, and without addressing *Skinner* by name, simply stated that no Oklahoma case suggested that an insurer's offer to pay, "irrespective of other salient circumstances or considerations," precluded bad faith liability.[102] However accurate this conclusion might have been, the court nevertheless abdicated its responsibility to specifically address *Skinner*, distinguish it from the *Badillo* scenario, and provide the bad faith landscape some desperately needed clarification. The majority could have accomplished this in two ways.

First, the court could have limited *Skinner* to its facts because of *Skinner*'s possible misinterpretation of *Christian*. Specifically, *Christian*'s statement that liability arises only where the insurer withholds payment in bad faith[103] could simply mean that, *when a failure to pay is the main component of the insured's claim*, only a "bad faith" withholding gives rise to tort damages. Such an interpretation of *Christian*'s reference to a failure to pay would be logical because this constituted the insured's principal complaint.[104] This failure, therefore, would naturally be the court's primary focus when explaining bad faith in the context of those particular facts. By contrast, had *Christian* dealt with a different scenario, the court might very well have described liability in terms of a "bad faith" failure to negotiate, investigate, or any other contractually required duty.[105] Consequently, *Skinner*'s adoption of the *Christian* language as the basis for its rule could arguably represent a misguided holding with limited precedential value.

Second, even if *Skinner* rightfully interpreted *Christian* to have confined bad faith to a failure to pay, *Badillo* contained facts that made the rule

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102. *Id.* ¶ 29, 121 P.3d at 1094 (per curiam) (emphasis omitted).

103. Christian v. Am. Home Assurance Co., 1977 OK 141, ¶ 26, 577 P.2d 899, 905.

104. *Id.* ¶ 3, 577 P.2d at 900. Here, the insured was injured on the job while covered by his company's group health insurance plan. In response to the injury and claim, and after the insured submitted proof of his disability, the insurer simply refused to pay for no articulable reason. *Id.*

105. The later U.S. Court of Appeals for the Tenth Circuit case of *McCarty v. First of Georgia Insurance Co.*, on appeal from the U.S. District Court for the Northern District of Oklahoma, reached a similar conclusion. Specifically, the court noted that *Christian*'s requirement of withholding a payment in bad faith was "simply emphasizing the obvious: if the insured were not entitled to payment, a cause of action for wrongful denial of a claim could not arise." 713 F.2d 609, 612 (10th Cir. 1983).

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inapplicable. In particular, Mid Century's refusal to allow Smith's attorneys to interview Badillo effectively turned the original offer for $10,000 into a non-offer.[106] Because the facts indicated that Smith's attorneys faced a possible malpractice claim if they chose to accept the offer without questioning Badillo and exploring further possible sources of liability — namely an alcohol vendor or employer[107] — Mid Century's "take it or leave it" approach to settlement made acceptance by Smith's attorneys at least impractical if not unethical. As such, the *Badillo* majority could have determined that payment was effectively "withheld" according to *Skinner*'s interpretation of *Christian* that such withholding must accompany bad faith liability, allowing the court to freely condemn Mid Century's behavior without appearing to sidestep controlling precedent. Instead, the court bypassed a rare opportunity to add structure to a highly amorphous body of law.

B. Deciphering the Badillo *Standard for Bad Faith*

1. Reading Badillo *as a Three-part Holding*

Another troubling aspect of the court's decision in *Badillo* is its choice to define the already ambiguous term of bad faith with language that seems equally uncertain. Thirty years of prior case law focused on shifting bad faith up and down the continuum between negligence and malice.[108] Although this debate proved contentious enough, *Badillo* inserted the idea that an insurer must behave in a "fiduciary capacity" toward its insured[109] — a term that historically requires one to act solely in another's best interest.[110] Despite its adoption of this new "Golden Rule," sprinkled throughout the court's opinion are apparent attempts to maintain continuity with past opinions that evaluated the insurer's behavior against the traditional standards of negligence, recklessness, and intent.[111] With its puzzling mix of legal standards, *Badillo* is arguably too confusing for practical use. Nevertheless, the potential to reconcile the court's "Golden Rule" with the familiar, mental culpability rubric does exist.

In assembling *Badillo* into a cohesive and functional analytical framework, some independent analysis of the court's references to fiduciary duties and mental states is necessary. First, courts use the term "fiduciary" in a myriad of legal contexts, carrying with it various implications. Generally, fiduciary

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106. *See supra* notes 67-71 and accompanying text.
107. *Badillo*, ¶¶ 10-11, 121 P.3d at 1089-90.
108. *See* discussion *supra* Part II.
109. *Badillo*, ¶ 27, 121 P.3d at 1093.
110. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).
111. *See supra* notes 78-79 and accompanying text.

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duties arise out of two kinds of relationships: informal relationships, which depend on confidence and trust, and formal agency relationships, where a principal expressly authorizes an agent to act on its behalf.[112] The typical liability insurance contract illustrates this second relationship. As a condition of the insurer's promise to cover damages caused by the insured, the insured must grant the insurer the sole right to represent and defend the insured's interest in the event of a lawsuit.[113] However formed, a fiduciary relationship imposes on the fiduciary, at a minimum, the duty to give the beneficiary's interest at least as much weight as its own.[114] Nevertheless, the question of *how* a fiduciary breaches this duty in a manner *that gives rise to tort liability* has multiple answers. For example, a recent opinion has held that an attorney's breach of fiduciary duty is synonymous with attorney negligence.[115] By contrast, in the corporate law setting involving an officer's fiduciary duty to the corporation's shareholders, a breach can occur when the officer appropriates corporate funds for personal use, even when the officer performs the action in good faith.[116] Still further, courts considering a real estate broker's fiduciary duty to its client have required behavior that amounts to fraudulent or intentional conduct as a predicate to liability.[117]

These examples provide an important insight for evaluating *Badillo* — namely, that courts routinely use the traditional measures of culpability when analyzing a breach of a fiduciary duty. Perhaps more accurately, courts view the presence of a fiduciary duty as a notional umbrella, under which the varying standards of culpability operate to determine liability. Although the *Badillo* court may have connected the proverbial dots poorly, one could read the court's various instructions as constituting a three-part holding:

(1) In the third party context, an insurer owes its insured a fiduciary duty to act in the insured's best interest, as if the insurer was standing in the insured's position.[118]

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112. Chapman Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 439 (Tex. App. 2000).

113. 22 ERIC MILLS HOLMES, APPLEMAN ON INSURANCE § 136.1, at 4 (2d ed. 2002).

114. Rawlings v. Apodaca, 726 P.2d 565, 571 (Ariz. 1986). Interestingly, this Arizona court, considering an insurer's duty of good faith toward its insured, concluded that the insurer was not a true fiduciary — in that the insurer had to act *solely* in the insured's interest. Rather, this court stated that the insurer had some duties of a "fiduciary nature," to include "[e]qual consideration, fairness[,] and honesty." *Id.*

115. Aller v. Law Office of Schriefer, No. 04CA0003, 2005 WL 1773878, at *3-4 (Colo. Ct. App. July 28, 2005).

116. Rifkin v. Steele Platt, 824 P.2d 32, 35 (Colo. Ct. App. 1991).

117. Crabtree Inv., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 577 F. Supp. 1466, 1469 (M.D. La. 1984).

118. Badillo v. Mid Century Ins. Co., 2005 OK 48, ¶ 27, 121 P.3d 1080, 1093 (per curiam).

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(2) Acting in the insured's best interest encompasses (a) diligently investigating the relevant facts to facilitate accurate negotiation with the third party[119] and (b) timely communication and consultation with the insured regarding material communication from the third party, including settlement offers.[120]

(3) A breach of this fiduciary duty that gives rise to liability requires behavior from the insurer that (a) is not in the insured's best interest and (b) amounts to more than simple negligence but less than the reckless disregard necessary for punitive damages.[121]

2. Interpreting Badillo*'s Holding: A Return to the Mental Culpability Debate*

Even assuming the accuracy of the above interpretation of the court's ruling, *Badillo*'s biggest mystery remains unsolved. Although its classification of the insurer-insured relationship as a fiduciary relationship provides important context, the court's failure to narrow the requisite mental culpability to a definable standard effectively renders the opinion unhelpful. Practically, what does "more than simple negligence, but less than the reckless conduct [necessary for punitive damages]"[122] mean?

Historically, culpability follows a four-step progression, increasing from negligence through reckless disregard and intent to malice.[123] Consequently, the range in which *Badillo* places bad faith appears non-existent by conventional understanding. The court, however, noted that the reckless disregard of which it spoke is limited to that giving rise to punitive damages — that "from which malice and evil intent may be inferred."[124] By making this distinction, the court arguably communicated its intent to leave traditional recklessness available for defining bad faith. According to the *Restatement Second of Torts*, reckless disregard requires behavior that a reasonable person should know would subject another to a *risk of harm* that is "substantially greater than that which is necessary to make his conduct negligent."[125]

119. *Id.* ¶ 35, 121 P.3d at 1095-96.

120. *Id.* ¶ 36, 121 P.3d at 1096 (quoting Berges v. Infinity Ins. Co., 896 So. 2d 665, 680 (Fla. 2004)).

121. *Id.* ¶ 28, 121 P.3d at 1094.

122. *Id.* With its reference to the recklessness required for a punitive damages award, the court appeared to carve out a distinction between normal recklessness and a punitive damage version of recklessness — that "from which malice and evil intent may be inferred." *Id.* ¶ 64, 121 P.3d at 1106.

123. WAYNE R. LAFAVE, CRIMINAL LAW §3.4(c) (3d ed. 2000) (describing the four basic types of mental states).

124. *Badillo*, ¶ 64, 121 P.3d at 1106.

125. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

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Importantly, the phrase "risk of harm" has two components. First, recklessness is riskier than negligence. It requires a danger that is "easily perceptible"[126] or has a "strong probability"[127] to the reasonable person standing in the tortfeasor's shoes. Second, recklessness is more harmful than negligence, meaning that the potential consequences are of a greater magnitude. For example, where negligence might describe swinging a plastic baseball bat, pointing a loaded gun implies reckless disregard — death or serious injury being substantially more harmful than a stinging slap.

Notably, the particular facts emphasized by the *Badillo* majority suggest its condemnation of Mid Century under a reckless disregard standard. Above all, the court appeared most troubled by the *obviousness* of the entire case. According to testimony at trial, Mid Century had overwhelming reason to know that its client's case was a "code blue situation . . . involving probable liability, catastrophic injuries and minimum coverage. . . . [It was a situation] where insured's financial life was at stake."[128] Moreover, the attorneys for Smith, the injured third party, had expressly informed Mid Century that unless Mid Century allowed them to speak with Badillo, they would reject any future attempt by Mid Century to settle and would seek a judgment against Badillo for the maximum amount possible.[129] Consequently, when it refused this request, Mid Century was in a position to know two critical facts that illustrate the "risk" and "harm" components of recklessness: that its refusal created a grave risk of an imminent lawsuit, and that this lawsuit would probably result in tremendous harm to its insured in the form of a life-ruining judgment.

Simply stated, the *Badillo* majority failed to end the bad faith guessing game. What began as a novel, perhaps refreshing approach to bad faith with an emphasis on the moralistic qualities of the "Golden Rule" and its implication of fiduciary duties, concluded as merely feel-good language — a result stemming from the court's failure to anchor its abstract convictions to the concrete practicalities of the mental culpability framework. Nevertheless, as explained above, careful parsing of the court's language and an application of legal inferences strongly suggests the following: that an insurer in the third party context owes a fiduciary duty to its insured to refrain from acting in reckless disregard of the insured's financial interests. However legally grounded such an interpretation, only a future Oklahoma Supreme Court case can affirmatively clarify *Badillo*'s ambiguities.

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126. *Id.* § 500 cmt. a.
127. *Id.* §500 cmt. f.
128. *Badillo*, ¶ 18, 121 P.3d at 1091.
129. *Id.* ¶ 14, 121 P.3d at 1091.

C. Like a Good Neighbor, the Supreme Court Is There

In addition to its miscues regarding *Skinner* and its standard for bad faith, *Badillo* contains language that threatens the predictability of written contracts between insurers and insureds. Moreover, Justice Taylor's special concurrence, which departs from traditional standards for evaluating the terms of insurance contracts, has frightening *evidentiary* implications for insurance defense attorneys attempting to preserve jury objectivity.

Importantly, early courts classified bad faith as a tort claim in order to facilitate the punishment of behavior that did not necessarily amount to a breach of contract.[130] In addition, while commentators hail contracts as ensuring predictable outcomes, torts deal in a more abstract realm.[131] Assuming a case with undisputed facts, a breach of contract claim simply turns on whether a defendant's behavior amounted to a violation of the express terms of a mutual agreement.[132] By contrast, a tort claim in the same case might engender rounds of debate over inherently ambiguous and shifting concepts like "reasonableness," granting that same defendant more room to advocate and win the jury's favor.[133]

This distinction proves absolutely critical in cases of insurance bad faith or breach of a fiduciary duty. So long as these wrongs remain confined to the tort realm, insurers remain free to attack the claim from various angles, including the often ambiguous standard for culpability and other elements such as proximate cause.[134] Nevertheless, once parties memorialize the principles of fairness, honesty, and loyalty that comprise the duties of good faith into a mutually agreed upon, expressly defined contract, an insurer's attempt to defend questionable behavior before a jury becomes a much more delicate and difficult task.[135] In other words, the fact that an insurer would *sign a contract*

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130. LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 198:10, at n.43 (3d ed. 2005) (citing cases from multiple jurisdictions, including Oklahoma, that recognized bad faith as an independent tort action apart from the contract).

131. John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 994-95 (1984) (discussing how the inherent uncertainty in torts might be mitigated by promoting greater damages for breach of contract — where the standard of conduct is more certain).

132. 1 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 2:5, at 2-7 & n.14 (2d ed. 2003) (noting that contract liability arises from self-imposed duties under the contract, while tort liability stems from violation of duties imposed by law).

133. *Id.* § 3:10, at 3-26 (discussing how "reasonableness" is a constantly changing concept that evolves with the norms of society).

134. *Id.* § 4:7, at 4-19 (stating that proximate cause is "not capable of being reduced to absolute rules and must rest with the sound discretion of the court").

135. *See generally* Jean H. Toal & W. Bratton Riley, *Fiduciary Duties of Partners and*

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expressly admitting to these good faith obligations — rather than leave them outside the contract and therefore, subject to dispute — would leave the average juror with zero sympathy toward an allegedly disloyal or self-serving insurer.

Effectively, Justice Taylor's concurrence would impose this very scenario on insurance companies who make "reassurances" through advertising[136] — treating an insurance company's decision to advertise *as if it had chosen to pick up a pen and insert the substance of those advertisements into its contracts as additional binding terms*. Specifically, Justice Taylor considered the advertising slogan of Mid Century's contemporary, State Farm Insurance, which assures customers that "[l]ike a good neighbor, State Farm is there."[137] Consequently, the opinion suggested, insurers who advertise such promises carry a *contractual* obligation to treat their insured's "with car[e] and neighborly concern."[138] As a further consequence, defense attorneys would no longer be able to argue that television commercials were unduly prejudicial and irrelevant to the question of bad faith.[139] On the contrary, under Justice Taylor's rule, courts would admit such commercials as evidence that is equally as sacred and consequential as any other term within the four corners of the written insurance contract.

For any reader having survived a first year law course on contracts and the parol evidence rule,[140] Justice Taylor's proposition may seem intuitively

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Limited Liability Company Members Under South Carolina Law: A Perspective from the Bench, 56 S.C. L. REV. 275 (2004). Here, Chief Justice Toal of the South Carolina Supreme Court distinguished between fiduciary duties that the court imputes to a party and those expressly stated in a contractual agreement between partners.

136. Badillo v. Mid Century Ins. Co., 2005 OK 48, ¶ 3, 121 P.3d 1080, 1110 (Taylor, J., concurring).

137. *Id.* ¶ 2, 121 P.3d at 1110; *see* State Farm Mutual Automobile Insurance Co.'s homepage and registered trademark slogan, http://www.statefarm.com/about/about.htm (last visited Jan. 29, 2006).

138. *Badillo*, ¶ 2, 121 P.3d at 1110 (Taylor, J., concurring). Although the concurrence never made the *direct* connection between State Farm's slogan and its standard of "caring and neighborly concern," the inference seems obvious, especially in light of Justice Taylor making a separate reference to "good hands," calling to mind Allstate Insurance Co.'s slogan of "You're in good hands with Allstate." Allstate Insurance Co.'s homepage, http://www.allstate.com (last visited Jan. 29, 2006).

139. *See* Hatch v. State Farm Fire & Cas. Co., 930 P.2d 382, 389 (Wyo. 1997). In *Hatch*, the plaintiff-insureds argued that they should have been able to admit their application for insurance because it contained suggestive language relevant to their expectations under the contract. In evaluating the insurer's potential bad faith, the court rejected such a notion, affirming the trial court's decision to exclude the evidence as irrelevant and emphasizing the sanctity of the written contract's four corners. *Id.*

140. *See* RESTATEMENT (SECOND) OF CONTRACTS §213 cmt. a (1981) (describing the parol evidence rule as "render[ing] inoperative prior written agreements as well as prior oral

ungrounded.[141] Nevertheless, Oklahoma legislation and decades of contract case law make intuition unnecessary. In particular, title 15, section 137 of the Oklahoma Statutes expressly forbids the consideration of all "oral negotiations or stipulations" outside a written contract when construing its terms.[142] Moreover, sections 155 and 151 emphasize that the "writing *alone*"[143] determines the parties' intent and that "*[a]ll* contracts"[144] — even those for insurance — are subject to these evidentiary rules of exclusion. Notably, even the Oklahoma Supreme Court has pledged never to "rewrite terms" of insurance contracts based on assumptions that the parties never reduced to writing.[145] In short, Justice Taylor's concurrence ignored the time-honored and legislatively mandated principles that preserve contracts as tools of efficiency and certainty. Absent a future, more historically rooted justification, including advertising as terms of the insurance contract represents a novel suggestion at best, but judicial lawmaking at worst.

V. Conclusion

In a field of law where the stakes are high and the legal fees higher,[146] *Badillo v. Mid Century Insurance Co.* provided the firestorm of debate surrounding bad faith with plenty of fuel. Holding that insurers must follow the "Golden Rule" of meeting a fiduciary duty to place themselves in the shoes of their insureds when negotiating with third parties to the insurance contract, *Badillo* created a new bad faith standard that will arguably cast future litigants

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agreements").

141. Otherwise stated, because the parol evidence rule excludes any evidence about the parties' intent and expectations that lies outside the contract's four corners, considering advertising would represent a clear violation of historical contract interpretation. *See* Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-Contractual Misrepresentations*, 33 VAL. U. L. REV. 485, 489-90 (1999) (describing how un-memorialized expectations are not considered).

142. 15 OKLA. STAT. § 137 (2001).

143. *Id.* § 155 (emphasis added).

144. *Id.* § 151 (emphasis added).

145. Dodson v. St. Paul Ins. Co., 1991 OK 24, ¶ 11, 812 P.2d 372, 376 (quoting Wiley v. Travelers Ins. Co., 1974 OK 147, ¶ 16, 534 P.2d 1293, 1295). Here, the Oklahoma Supreme Court considered a builder's claim against his insurer for refusing to cover defective workmanship completed by the builder's subcontractor. Even where the district court below ruled in the builder's favor because the contract was "misleading," the Supreme Court held steadfastly to Oklahoma's parol evidence rule. *Id.* ¶ 10, 812 P.2d at 373.

146. Altman Weil, Inc., *Median Annual Billable Hours by Specialty*, http://www.altmanweil.com/dir_docs/resource/4944a332-cd95-4b56-8309-e9c94b8623a3_document.pdf (showing insurance defense litigation as the leading source of billable hours amongst all major specialty categories, which include securities, real estate, banking, employment, and health care).

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into disarray for its lack of guidance on practical application. Moreover, *Badillo* invited additional criticism by both its majority opinion's failure to address and distinguish apparently governing caselaw, and by a three-judge concurrence that foreshadowed a future intent to break with traditional contract rules and hold insurance companies contractually liable for advertising assurances.

Despite these shortcomings, however, *Badillo*'s core ruling — that an insurer acts in bad faith when its unjustifiable failure to communicate with its insured during third party settlement negotiations results in a failed settlement and unnecessary lawsuit — is a ruling that both reflects sound policy and is consistent with Oklahoma bad faith law that has historically associated bad faith liability with an insurer's grossly negligent or reckless behavior. Consequently, *Badillo* represents that peculiar breed of cases that simultaneously represent judicial successes in light of their fact-specific outcomes, and judicial failures because of their analytical flaws that make for puzzling precedent. Far from certain, *Badillo* likely represents only the beginning of a new quest to capture the true meaning of Oklahoma bad faith.

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