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In 1977, the Oklahoma Supreme Court imposed tort liability upon an insurance company which did not pay policy proceeds promptly to its insured. The court held that the insurer breached not only the contract, but also the "implied duty to deal fairly and act in good faith." In a subsequent case, the court held that insurers are subject to this tort liability in all contracts with their insureds. However, the court held recently in *Rodgers v. Tecumseh Bank* that commercial lenders will not be subject to tort liability for breach of this duty in their lending contracts.

This note begins with a brief history of tort liability for breach of the duty of good faith as it developed in the insurance context. Next, it analyzes *Rodgers* and shows that there is no logical reason for imposing the possibility of this tort liability upon all insurers while not similarly imposing it upon commercial lenders. Finally, this note considers possible ways to protect the freedom of contract while protecting each contracting party from egregious conduct by the other.

*Creation of a Tort from the Duty of Good Faith*

The duty of good faith envelops a contract. It permeates every aspect of the contract: both the common law and Uniform Commercial Code assume that anyone who enters into a contract does so in good faith with the intent to deal fairly with the other party.

The origins of tort liability for breach of this duty are firmly rooted in insurance case law. At first, tort liability was imposed when the insurer breached its duty of good faith to the insured by refusing, as the insured's agent, to settle a third-party liability claim within the policy limits. Tort liability for breach of the insurer's duty to promptly pay the contract benefits to the insured himself evolved from this duty.

2. Id. at 904.
5. Id. at 1226.
6. Every contract contains an implied covenant that neither party shall do anything which will destroy or injure other party's right to receive the fruits of contract. Wright v. Fidelity & Deposit Co. of Md., 176 Okla. 274, 277, 54 P.2d 1084, 1087 (1935) (citing Kirke LaShelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933)).
7. 12A Okla. Stat. § 1-203 (1981) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). Contracting parties may not disclaim the duty of good faith, although they may set reasonable standards by which it can be measured. 12A Okla. Stat. § 1-102(3) (1981).
The Original Tort: Bad-Faith Refusal to Settle a Third-Party Claim

Oklahoma's recognition of the tort for breach of the duty of good faith evolved from a 1914 New York Court of Appeals case, Brassil v. Maryland Casualty Co.¹ Brassil had a $1500 liability insurance policy, in which the insurer agreed to defend him against third parties that he injured. After an accident, the injured party offered to settle with Brassil for $1500. Brassil's insurer refused to settle, choosing instead to litigate the claim. When judgment was rendered against Brassil for $6000, his insurer refused to appeal. Instead, the insurer offered to fulfill the contract by paying Brassil the $1500 contract benefits, but only if Brassil himself paid the $6000 judgment first. Instead of paying the judgment, Brassil filed his own appeal, which he won. He then sued his insurer for the cost of the appeal.²

The court held the insurer liable for the cost of the appeal.³ The cost of the appeal was not a contract remedy—the court created a tort remedy for the insurer's refusal to protect the insured's interest. The court recognized there was no precedent for its holding, possibly because the insurer's attitude was so unusually inequitable. The court noted that Brassil's success on appeal indicated the strength of his original bargaining position. That strength, in turn, made the insurer's refusal to settle appear even more onerous. The court held that the contract was an adhesion contract, that the insurer had inherent power over Brassil and that freedom from liability was the essence of the bargain.⁴

The court reasoned that it would be a "reproach to the law" not to provide a remedy for so obvious a wrong.⁵ If the remedy could not be found in the letter of the contract, it could surely be found in the contractual obligation which underlies all written agreements—the obligation to carry out in good faith what is written.⁶ Therefore, while acknowledging that the duty of good faith was a contractual obligation, the court created a tort for its breach.

Douglas v. United States Fidelity & Guaranty Co.⁷ established this new tort in New Hampshire and extended the insurer's potential liability to include the full cost of the judgment against the insured. Douglas carried a $5000 liability insurance policy to protect himself from claims by his employees. After an employee was injured, the employee offered to settle for $1500, but the insurer refused to settle. At trial, the employee was awarded $13,500. Thereafter, Douglas sued his insurer.⁸

The New Hampshire supreme court held the insurer liable to Douglas for

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2. Id., 104 N.E. at 622-23.
3. Id. at 624.
4. Id. at 623-24.
5. Id. at 624.
6. Id.
8. Id., 127 A. at 709.
the full amount of the award, even though the award exceeded the policy limit.\textsuperscript{16} Contract damages would have been limited to the $5000 contracted by the parties, no matter what the actual judgment award to the injured third party. The court re-emphasized the power of the insurer over the insured by noting that the insurer acted not only as the agent of the insured but also on behalf of its own potentially adverse interest in negotiations with other parties.\textsuperscript{17} Because of this potential conflict of interest, the insurer was held to a standard of closer scrutiny than that of an ordinary agent.\textsuperscript{18} The court cited Brassil for its reasoning that the insurer had breached the duty of good faith which underlay the contract.\textsuperscript{19}

Most courts, including those in Oklahoma, hold the insurer liable for the full cost of the settlement if the insurer refuses in bad faith to settle within the policy limits.\textsuperscript{20} Some courts extend the liability to include other tort damages.\textsuperscript{21} However, the courts frequently do not fully distinguish between tort and contract. Instead they often consider the duty breached to be both a contract duty and a duty of agency which exists outside the contract.\textsuperscript{22}

\textit{The Modern Tort: Bad-Faith Refusal to Pay Benefits to the Insured}

In 1970, a California appellate court extended tort liability to breach of a contract duty which did not involve the agency responsibility—the duty to pay policy proceeds promptly to the insured. In \textit{Fletcher v. Western National Life Insurance Co.},\textsuperscript{23} Fletcher, a father of eight, bought disability insurance to protect his family. After an injury left Fletcher disabled, the insurer withheld his policy benefits without good cause, but finally paid them. Because of the delay, Fletcher and his family suffered both emotionally and financially.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id. at 711.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id. at 712.
\item \textsuperscript{21} Damages beyond the full cost of settlement were first awarded in Crisci v. Security Ins. Co. of New Haven, Conn., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). In \textit{Crisci}, the plaintiff attempted to pay the judgment herself before she sued the insurer. In the process she became indigent and suffered physically and mentally. In addition to the full amount of the judgment against her, the court awarded an additional amount for her own suffering. In doing so, the court overruled prior case law to the contrary. \textit{Id.}, 426 P.2d at 178.
\item \textsuperscript{22} In Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958), the court allowed the plaintiff to recover tort damages, but allowed the action to proceed under the more lenient statute of limitations which applied to actions "founded upon an instrument in writing." \textit{Id.}, 328 P.2d at 203.
\item \textsuperscript{23} 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).
\item \textsuperscript{24} Id., 89 Cal. Rptr. at 83-88.
\end{itemize}
Fletcher brought an action in tort for intentional infliction of severe emotional distress because of the insurer's threatened and actual withholding of disability benefits. The court found that the insurer's failure to pay did indeed cause severe emotional distress, but acknowledged that damages for emotional distress are not recoverable in contract because they are too speculative.\(^2\)

The court then noted that if the action were in tort, damages for emotional distress, and even punitive damages, could be awarded. It reasoned that the duty of good faith imposed upon an insurer not only a duty to settle fairly with a third party, but also a duty to promptly pay the policy proceeds to the insured.\(^2\) The court held, therefore, that refusal to promptly pay policy benefits could support an action in tort for breach of the duty of good faith.\(^2\) The court allowed damages not only for emotional distress, but also for "interference with a protected property interest of its insured."\(^2\)

In justifying an award of tort damages, including punitive damages, the court observed the "quasi-public" nature of insurance companies and the need to protect the public from them.\(^2\) The court recognized an implied-in-law duty of the insurer toward the public, similar to that of public utilities. The court considered this duty to be separate from the contract.\(^2\)

The *Fletcher* court also compared this tort to the tort of intentional interference with a contract.\(^2\) The court reasoned that the insured's interests should be protected from interference by the insurer in the same way they are protected from interference by a stranger to the contract. The insurer, having a special duty of good faith, should be held to at least the same standard of conduct as a stranger.\(^2\)

*Fletcher* represented a significant departure from the holdings of earlier cases. Here, there was no duty to represent the insured in dealings with third parties—no duty of "agency" upon which to base the tort.\(^2\) Instead, the contracting parties had no more than the adversarial relationship common in contract situations.\(^2\) For the first time, the full range of tort remedies, including punitive damages, was available for simple failure to perform in contract. This new tort liability approached a form of strict liability. If the benefits

\(^{25}\) *Id.* at 92.

\(^{26}\) *Id.* at 93.

\(^{27}\) *Id.*

\(^{28}\) *Id.*

\(^{29}\) *Id.* at 95. The court held that punitive damages could be awarded if the breach of contract was malicious, without cause and for the purpose of depriving the insured of his benefits. But see *Restatement (Second) of Contracts* § 353 (1981).

\(^{30}\) *Fletcher*, 10 Cal. App. 3d 376, 89 Cal. Rptr. at 95. But see *infra* text accompanying notes 85-90.

\(^{31}\) *Id.*, 89 Cal. Rptr. at 94.

\(^{32}\) *Id.* at 94-95. The court's reasoning ignores a basic tenet of the tort-contract distinction: the contracting parties can use the contract to protect themselves from each other, but it cannot protect them from strangers to the contract.

\(^{33}\) See the reasoning of *Douglas, supra* text accompanying notes 14-19.

were not paid promptly, the insurer had the burden of proving that it had good reason to delay.\textsuperscript{35}

In 1977, presented with facts similar to those of Fletcher, Oklahoma accepted without question the reasoning of the Fletcher decision. In Christian v. American Home Assurance Co.,\textsuperscript{36} Christian became permanently and totally disabled in an accident covered by his disability insurance policy. When he presented proof of the accident to the insurer, the insurer refused payment, offering no reason why benefits were denied. Christian sued the insurer for breach of contract and sought the maximum disability benefits, plus interest. Although the insurer defended its conduct vigorously, its lack of a valid defense became obvious during the trial.\textsuperscript{37} The trial court held for Christian.\textsuperscript{38}

Christian then filed a second action, this one in tort for breach of the duty of good faith. He sought compensatory damages, damages for mental suffering and distress, punitive damages, and all attorney fees and litigation costs of the prior action. In the second action, the trial court sustained the insurer's motion for summary judgment. The Oklahoma Supreme Court reversed, holding that a tort action for breach of the duty of good faith exists in Oklahoma.\textsuperscript{39}

The supreme court's reasoning closely followed that of Fletcher.\textsuperscript{40} The court reasoned that the insurer was a quasi-public company in a special relationship with its insured. The court did not respond to the insurer's argument that the insurer did not have the agency relationship created by an insurer's

\textsuperscript{35} A discussion of the definitions of tortious behavior in this context is beyond the scope of this note. Briefly, resort to judicial forum does not itself impute bad faith to the insurer. Punitive damages are usually awarded only if the insurer has blatantly disregarded the insured's rights. See, e.g., Buzzard v. McDanel, 736 P.2d 157, 160 (Okla. 1987) (the gravamen of the claim is unreasonable, bad-faith conduct); Manis v. Hartford Fire Ins. Co., 681 P.2d 760, 762 (Okla. 1984) (a Christian cause of action will not lie where there is a legitimate dispute; the jury should view all facts); Timmons v. Royal Globe Ins. Co., 653 P.2d 907, 914 (Okla. 1982) (evil intent to mislead or deceive is not necessary). See generally Note, The Insurer's Exploding Bottle: Moving from Good Faith to Strict Liability in Third and First Party Actions, 46 Ohio St. L.J. 157 (1985) (defining the duty).

\textsuperscript{36} 577 P.2d 899 (Okla. 1977) (amended 1978).
\textsuperscript{37} Id. at 900.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 904.
\textsuperscript{40} Id. at 901-902. The court also quoted from Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973), in which the California Supreme Court established the official precedent for California. Gruenberg is generally recognized as the origin of the tort in the United States. However, Fletcher appears to have been the first to impose tort liability in the first-party context. Fletcher and Gruenberg are in complete accord.

Neither Fletcher nor Gruenberg addressed the fact that the duty breached was a simple contract duty. Some states have refused to recognize the tort because it effectively allows tort damages in contract. See, e.g., Spencer v. Aetna Life & Cas. Ins. Co., 227 Kan. 914, 611 P.2d 149, 155 (Kan. 1980) (no agency relationship upon which to base a tort); Beck v. Farmers Ins. Exch., 701 P.2d 795, 799 (Utah 1985) (tort approach requires analytical straining and poses potential unforeseen consequences to the law of contracts). Others, including Oklahoma, have glossed over the flaw, as the reasoning of Christian illustrates. See infra note 95.
control of litigation against the insured. The court rejected the insurer’s argument that, according to Oklahoma statute, the remedy for breach of an obligation to pay “money only” is the amount due with interest. The court rejected two federal court decisions which represented Oklahoma’s prior consistent rejection of tort damages in contract as being barred by 23 O.S. 1971 §§ 9 and 22. Instead, the court observed that the insurer had a statutory duty to pay benefits promptly.

The tort established by Christian has become an established part of Oklahoma case law. The Oklahoma Supreme Court now appears to be focusing on how best to control the application of Christian.

43. Christian, 577 P.2d at 903.
46. Christian, 577 P.2d at 903. 36 Okla. Stat. § 4405(A)(8) (Supp. 1984) requires that all individual accident and health policies contain a standard clause stating that indemnities will be paid as soon as the insurer receives written proof of the loss, while 36 Okla. Stat. § 4505 (1981), extends this protection to beneficiaries of group policies.

The Christian court’s observation that the insurer had a statutory duty to pay benefits promptly was in error. The referenced statutes required only that the insurer promise to pay the proceeds promptly. To require by statute that the insurer promise to pay the contracted benefit may have indeed imposed a duty outside the contract upon which to base tort liability, but that duty was to make the promise, not to pay the benefits. But see 36 Okla. Stat. § 1222 (1986), which requires an insurer to settle claims in good faith. This statute is part of the Unfair Claims Settlement Practices Act (hereinafter “Act”), which does not provide a private cause of action. Instead, the Act is enforceable by the Insurance Commissioner. 36 Okla. Stat. § 1219 (1986) now provides recovery in contract for failure to pay policy proceeds promptly. See infra notes 98-104 and accompanying text.

NOTES

Rogers v. Tecumseh Bank: 48
A Confusing Attempt to Limit Tort Liability in Contract

Oklahoma's application of Christian shows that the link between contract and breach of the duty of good faith remains strong. Tort damages for breach of the duty have been denied when no contract duty was owed to the complaining party. For example, a plaintiff could not recover in tort because her accident occurred before the effective date of her insurance policy, even though the insurer unreasonably delayed acceptance of her application.49 Third parties could not recover in tort for the insurer's refusal to settle with them.50 Plaintiffs could not recover in tort from the agent who sold them their policy, because the agent was not a party to the insurance contract.51

The remaining question, then, has been whether the Christian tort liability for breach of the duty of good faith should apply to all contracts or only to certain ones. Although the tort liability has been extended to all insurance companies,52 it has been limited to insurance companies, with two exceptions.53 In Rogers v. Tecumseh Bank,54 the Oklahoma Supreme Court considered whether to impose this new tort liability upon lenders.55

Rogers was an educated real estate investor whose company sought to purchase Oklahoma County real estate.56 After shopping interest rates at several

49. See Scivally v. Time Ins. Co., 724 F.2d 101, 104 (10th Cir. 1983) (without a contract, there is no implied duty upon which to base the cause of action). But see Djowharzadeh v. City Nat'l Bank & Trust Co. of Norman, 646 P.2d 616, 620 (Okla. Ct. App. 1982), cert. denied (1982) (bank has the duty of good faith and fair dealing to not reveal the details of loan applicant's plans).
51. See Timmons v. Royal Globe Ins. Co., 653 P.2d 907, 912 (Okla. 1982) (duty to execute the contract fairly and in good faith cannot be imposed upon a third party who is not a party to the contract).
52. McCorkle v. Great Atl. Ins. Co., 637 P.2d 583, 588 (Okla. 1981). The court said explicitly, "We affirm our position in Christian and hold that it applies to all types of insurance companies." Id. Commentators have debated the constitutionality of this holding. See Woodard, Punitive Damages for Bad Faith Breach of an Insurance Contract: It's Unconstitutional, 54 Okla. B.J. 1125 (1983) (questioning the constitutionality of singling out insurance companies for this liability); Koss, The Constitutionality of Awarding Punitive Damages Against an Insurance Company for Bad Faith: A Reply, 54 Okla. B.J. 1999 (defending the court's action). For further interpretation of this holding, see infra note 78.
54. 756 P.2d 1223 (Okla. 1988).
55. Id. at 1226.
56. The facts as stated here were compiled from conversations with the opposing attorneys and from studying Rodgers' deposition and the briefs before the supreme court. The only published opinion in the case was that of the supreme court; only minimal facts were given in that opinion.
savings and loans, he approached the newly-established Tecumseh Bank for a short-term loan. He arranged the financing about six weeks before closing, assuming that the loan and mortgage would be for two years. However, at closing, he found that the mortgage was for one year. To placate Rodgers, the bank president inserted the following phrase into the contract: "Final payment may be refinanced at any time it is due without penalty and at terms no less favorable than original terms."\(^5\)

Nine months later, the bank had a new president. The new president notified Rodgers that because the loan did not meet credit standards in its loan policy, the bank could not extend or renew the mortgage.\(^6\) The president claimed that the inserted phrase was added not to ensure extension of the loan, but to persuade the borrowers to make their payments promptly so they might get a renewal.\(^7\)

Rodgers found money elsewhere, paid off the loan to Tecumseh Bank, then sued the bank for breach of contract and "tortious breach of contract," based on a breach of the duty of good faith.\(^8\) As damages for breach of contract, he asked for the $1650 increase in interest on the second loan plus costs. In addition, he asked for $50,000 as punitive damages for breach of the duty of good faith. The trial court granted summary judgment for the bank and the court of appeals affirmed.\(^9\)

By unanimous decision, the supreme court reversed and held that summary judgment should be entered for Rodgers on the breach-of-contract action. However, the court upheld summary judgment in favor of the bank on the issue of tort liability.\(^10\) The court stated simply that the "borrowers ask us to extend Christian to commercial loan agreements. We decline to do so because of the inherent differences between insurance policies and commercial loan agreements."\(^11\)

The court first summarized the prior applications of Christian.\(^12\) The court noted that although the implied-in-law duty of good faith extended to all insurance contracts, the duty did not extend to strangers to the contract.\(^13\)

57. Rodgers, 756 P.2d at 1224 (emphasis by the court).
58. The bank claimed that it could not extend or renew the mortgage because both the land and Rodgers' residence were outside the bank's prescribed loan trade territory. This complication was known, but not addressed, at the time the loan was made.
59. Rodgers, 756 P.2d at 1224.
60. Id.
61. Summary judgment was granted during a pretrial hearing the borrowers did not attend. There was a serious question as to whether Rodgers' attorney had proper notice of the hearing. Rodgers' petition for certiorari concentrated not on the tort/contract issues, but on whether the summary judgment had been properly granted and on whether the court of appeals, by addressing facts which had not been argued below, had functioned as a trial court. See supra note 56.
62. Rodgers, 756 P.2d at 1227.
63. Id. at 1226.
64. Id.
court then stated that "Christian and its progeny, thus far, only apply against insurers." 66

The court’s policy arguments were apparently straightforward comparisons of this contract to insurance contracts. First, the court noted that, by its very nature, an insurance policy is an adhesion contract. 67 In contrast, Rodgers shopped for favorable interest rates and successfully negotiated a "favorable" term into the bank’s form contract. 68 The court described the Rodgers contract as "arms-length negotiating, a relatively equal bargaining capacity and no snares or traps for the unwary." 69 The court considered that an insured buys insurance to minimize risk, while the purpose of a commercial loan is to facilitate risk-taking in business. 70 The court concluded that when no special relationship exists between the parties, the parties should be able to contract as they wish. "To impose tort liability on a bank for every breach of contract would only serve to chill commercial transactions." 71

The court then pointed out that limiting the application of Christian did not leave contracting parties without remedy. The court noted that the duty of good faith and fair dealing still existed in every contract under the common law and under the U.C.C. 72 The court also pointed out the common law option to forego the contract and sue in tort when there had been "gross recklessness or wanton negligence" by a contracting party. 73

In summary, while the Rodgers court affirmed the validity of imposing tort liability upon insurers for breach of the duty of good faith, it limited the possibility that all contracting parties might become similarly vulnerable. However, although the court held unequivocally that commercial lenders are free from tort liability for breach of the duty of good faith, the holding was not extended, as it logically could have been, to all lenders.

66. Rodgers, 756 P.2d at 1226. Because several lower courts had already extended the theory to non-insurance contracts, the court was probably referring only to those cases which it had reviewed. See supra note 53 for lower court decisions which have extended the tort liability beyond the insurance context.
67. Rodgers, 756 P.2d at 1226.
68. Id.
69. Id.
70. Id.
71. Id. at 1227.
72. Id. (citing Hall v. Farmers Ins. Exch., 713 P.2d 1027 (Okla. 1985)). In Hall, a terminated employee sued his former employer for breach of the duty of good faith, claiming that he had been fired so that the employer would not have to pay him. Id. at 1028-30. Rodgers cited Hall as an example of using common-law breach of the duty of good faith to get contract damages (compensation for work completed), but not tort damages. Id. at 1227. Before Rodgers was decided, however, the application of Hall was severely restricted by Hinson v. Cameron, 742 P.2d 549 (Okla. 1987). Hinson allowed no recovery, bolstering Oklahoma’s termination-at-will tradition. Id. at 554. See infra notes 128-33 and accompanying text.
73. Rodgers, 756 P.2d at 1227.
Analysis

The Rodgers decision is consistent with both the common law and the Uniform Commercial Code definitions of good faith as a contract duty.74 It is also consistent with Oklahoma statutes which expressly forbid tort damages in contract.75 The significance of this decision lies in the court's unsuccessful attempt to distinguish it from the court's prior decision in Christian v. American Home Assurance Co. to allow tort damages for breach of an insurance contract.

At first glance, Rodgers and Christian may seem easily distinguished. The policy arguments expressed in Christian appear to be absent in Rodgers: (1) insurance companies are quasi-public institutions, (2) because the insurance contract is an adhesion contract, the insurer has inherent power over the insured, and (3) freedom from liability is the essence of the bargain.76 Even if this distinction were valid, a third supreme court case, McCorkle v. Great Atlantic Insurance Co.,77 would complicate the comparison. In McCorkle, the court held that all Oklahoma insurers are subject to tort damages for breach of the duty of good faith.78 Thus, McCorkle extended the tort liability to contracts which no more fit the policy arguments of Christian than did the contract in Rodgers.

Therefore, Christian, McCorkle, and Rodgers must be considered together. Christian focuses on unequal bargaining power.79 McCorkle focuses on insurance contracts in general.80 Rodgers focuses on the commercial lending contract.81 Two bases for possible distinction among these cases are evident. First, are insurance contracts different from other types of contracts? Second, are consumer contracts different from commercial contracts?

Insurance Contracts as a Separate Category

There are several reasons the Oklahoma courts may have wanted to limit Christian to insurance contracts. Perhaps the courts distinguished insurance

74. See supra notes 6 & 7.
75. 23 OKLA. STAT. § 21 (1981).
76. Christian, 577 P.2d at 902.
78. Id. at 588. The question before the McCorkle court was whether Christian should apply to a fire insurance contract in which the benefit amount to be paid was uncertain. Id. at 587. Possibly the court intended only to extend Christian to all types of personal insurance, whether or not the benefit amount was a fixed sum. Nevertheless, the Rodgers court affirmed that McCorkle extended Christian to include "all types of insurance contracts," lending credence to the assumption that the holding of McCorkle is indeed to be taken literally. Rodgers, 756 P.2d at 1226. Commentators have debated the constitutionality of the McCorkle holding. See Woodard, Punitive Damages for Bad Faith Breach of an Insurance Contract: It's Unconstitutional, 54 OKLA. B.J. 1125 (1983) (questioning the constitutionality of singling out insurance companies for this liability); Koss, The Constitutionality of Awarding Punitive Damages Against an Insurance Company for Bad Faith: A Reply, 54 OKLA. B.J. 1999 (1983) (defending the court's action).
80. McCorkle, 637 P.2d at 588.
81. Rodgers, 756 P.2d at 1226.
contracts because insurers are assumed to have a fiduciary duty to their insureds. If fiduciary duty was the distinguishing factor, the courts stopped short of such an explicit holding. The word “fiduciary” does not appear in Christian, McCorkle or Rodgers. Nor does it appear in Fletcher v. Western National Life Insurance Co. or its antecedents. Also, the agency duty to settle discussed by the New Hampshire court in Douglas v. United States Fidelity Guaranty Co. is not present in the duty to promptly pay a claim. As one court stated, except for the duty to settle with third parties, the relationship between insurer and insured is adversary, not fiduciary.

Another possibility may be that the courts were emphasizing the quasi-public nature of insurers. Public utilities and private companies performing public service duties have long been held to a higher duty than the average contracting party. However, the duty of a public utility to the citizenry generally adheres even in the absence of a contract and extends beyond a contract. In contrast, an insurance company has no general obligation to provide benefits to the public and no duty to the insured other than that for which it has contracted. Banks, on the other hand, have been found to have a duty to the public that extends beyond contracts with their customers. In Djowharzadeh v. City National Bank & Trust Co., a bank was held to have a quasi-public duty even though there was no contract and no fiduciary relationship. The supreme court denied certiorari, leaving to question whether the court would find this duty in all banking relationships.

Furthermore, the concepts of fiduciary duty and quasi-public duty must be distorted considerably if they are to apply to commercial insurance contracts. Large commercial entities may contract with their insurers in the same types of arm’s length transactions they have with their banks. The essence of the bargain is protection from accidental loss, but the protection from accidental loss is itself a commercial advantage. In addition, the statutes which require the insurer’s promise to pay promptly do not apply to these commercial insurance transactions.

**Personal Contracts Versus Commercial Contracts**

Perhaps the court, through Rodgers, is now saying, “caveat emptor” to the individual bank customer. However, by restricting the Rodgers holding

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82. See supra text accompanying notes 23-32.
86. See Oklahoma Natural Gas Co., 97 P.2d at 770.
88. See Scivally v. Time Ins. Co., 724 F.2d 101 (10th Cir. 1983) (duty of good faith not breached even when insurer negligently delayed processing of application).
to commercial loan agreements, the supreme court has left the door open to imposing liability for breach of the duty of good faith in the personal banking contract and in other kinds of consumer contracts.

The policy concerns of Christian may be present in the relationship between individual customers and their banks.\textsuperscript{92} Although credit customers may shop for the best deals, just as they might shop for an insurance company, they may also be dealing with the bank specifically to avoid the risk. Loan contracts, particularly mortgage contracts drawn up by the bank, can be filled with fine print. Whatever negotiating power customers may have with their banks, many customers may not realize that they have it.

However, Rodgers is an example of how even a sophisticated commercial customer can be caught unaware. The court noted that Rodgers had a “favorable term inserted into the printed form” contract.\textsuperscript{93} The court did not mention that this “favorable” term was the subject of the controversy. The term was favorable to the borrowers only after litigation. The bank did not intend that it be as favorable as it turned out to be.\textsuperscript{94}

Furthermore, even the distinction between commercial and consumer contracts is not always clear. The purpose for which a contract is made does not define the relative bargaining positions of the contracting parties. For example, individuals who regularly enter contracts in the context of their work will have the advantage of greater knowledge in their personal contracts. Rodgers would have been no less sophisticated if his loan had been for a car. On the other hand, the small business owner who must make commercial loan contracts may be just as vulnerable as individual insured are with their insurers.

The result of this analysis is that if Rodgers was intended to clarify the application of Christian, it failed to do so. Neither the distinction between insurance and non-insurance contracts nor the distinction between personal and commercial contracts provides a clear or comfortable resolution of the issues raised by Christian, McCorkle and Rodgers. This analysis does suggest, however, that the Christian decision should be reviewed in light of the confusion it has caused.\textsuperscript{95}

\textsuperscript{92} See supra text accompanying note 89.

\textsuperscript{93} Rodgers, 756 P.2d at 1226.

\textsuperscript{94} The bank president admitted that the term was never intended to assure that Rodgers would get the two-year note that he thought he was getting. See supra note 56.

\textsuperscript{95} In Allis-Chalmers v. Lueck, 471 U.S. 202 (1985), the United States Supreme Court considered facts similar in all essential aspects to those of Christian. In question was Wisconsin’s tort for breach of good faith, which has the same roots as, and appears identical to, Oklahoma’s tort. The Court held unanimously that breach of the duty of good faith is no more than a contract duty and that there is no duty outside the contract upon which to base tort liability. Id. at 216-18.

The ultimate question before the Allis-Chalmers court was whether the action for breach of the duty of good faith could be heard as a state tort action, or whether it was preempted by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1982), as a contract action arising out of a collective bargaining agreement. Id. at 203. The court emphasized the
Alternative Remedies

If the policy concerns of *Christian* are valid, logically the same remedy should be available whenever these concerns are present in a contract. On the one hand, whether the contract is for insurance or whether it is for commercial gain should be of no consequence. In either case, the contract should not be used as a shield from liability. On the other hand, if the policy concerns of *Rodgers* are valid, the freedom to contract at arms length should also be protected.

It appears uncontroverted that ordinary consumers tend to be disadvantaged in contracts with their insurers. Most states, including Oklahoma, recognize a tort action for breach of the duty of good faith in this context. Some states have refused to do so because they are reluctant to interfere with the established distinction between tort and contract. There are, however, other

narrow preemptory effect of section 301: the action would be preempted only if it had no basis outside the contract. Id. at 213, 220.

*Christian* and *Allis-Chalmers* cannot be reconciled. The normal tendency would be to reject *Allis-Chalmers* because it is a labor law case. Because policy concerns of a particular context can influence a court's reasoning, it can be dangerous to apply the holding or the reasoning of a case out of context. However, in this situation, any skewing that the Supreme Court may have done in *Allis-Chalmers* favors the validity of applying its holding to the present context.


The conflict between *Christian* and *Allis-Chalmers* is beyond the scope of this but is examined critically in *Allis-Chalmers* v. Lueck: Exposing the Fatal Flaw in the "Christian Principle" of Tort Liability for Breach of Good Faith, 42 Okla. L. Rev. (winter issue in press) (1989). It is unlikely that the Supreme Court would be willing to decide the tort/contract issue in the present context. The Court admitted that the nature of a state's tort is a matter of state law. *Allis-Chalmers*, 471 U.S. at 214. Nonetheless, the fact that Oklahoma courts have devised a fiction to circumvent state statutes forbidding tort recovery in contract should be a matter of some concern. In fact, that circumvention is the root of the problems addressed by this note.


ways to protect the insured. One solution is to provide an exclusive statutory remedy for an insurer's bad faith. A second solution is to consider breach of the duty of good faith a contract action, but be generous in the definition of contract damages. Each of these approaches is discussed below. In addition, California's continuing attempt to define the tort is discussed.

Statutory Remedies

Although there was no equivalent statute in effect in 1977 when Christian was decided, the Oklahoma Legislature provided in 1986 several statutory remedies for an insurer's failure to pay policy proceeds promptly to its insured. Oklahoma's Unfair Claim Settlement Practices Act98 and Claims Resolution Act99 are part of the Insurance Code. These statutes are enforceable by the Insurance Commissioner.100 An insurer may be subject to a fine of $100 to $1000 for violation of the Claims Resolution Act101 and risk losing its certificate of authority for violation of the Unfair Claim Settlement Practices Act102.

In addition, a private cause of action is created when an insurer does not pay a valid claim within sixty days of proof of loss.103 If litigation is necessary, the insurer must pay interest at two points above the average Treasury Bill rate until the claim is paid. Attorney's fees shall be awarded to the prevailing party.104 This remedy is clearly a contract remedy.

Several states have concluded that it is appropriate to limit the remedy to that allowed by statute.105 For example, Kansas has statutory relief for insureds similar to Oklahoma's.106 In Spencer v. Aetna Life & Casualty Insurance Co.,107 the Kansas Supreme Court held that because the legislature had provided such detailed relief in recognition of the need to protect insureds, the judiciary should not expand that relief.108 By accepting the legislature's remedy,
the Kansas court avoided a conflict such as that between Christian and Rodgers.109

If the Oklahoma Supreme Court does intend to limit special protection to the insurance context, the legislative remedy should be used. Particularly if coupled with the contract remedies described below, the legislative remedy could adequately protect Oklahoma's insureds while leaving other contracts free from uncertainty.110

Contract Remedies

Instead of expanding the definition of a tort, some states seek to protect insureds by generously defining contract damages.111 In Beck v. Farmers Insurance Exchange,112 the Utah Supreme Court noted that while the policy limits define the amount payable for performance of the contract, they do not define liability for breach.113 The court recognized that the loss of a home or business or even bankruptcy could be a foreseeable consequence of failure to pay proceeds promptly.114 Damages for mental distress might be awarded in the unusual case.115

This remedy addresses the concern that if an insurer is liable only for the policy benefits, it has no incentive to pay those benefits promptly.116 The remedy is also consistent with Oklahoma statutes. One Oklahoma statute allows contract damages "for all the detriment proximately caused" by a breach or which would be likely to result from a breach.117 Damages must be "clearly ascertainable in both their nature and origin."118 A second statute may appear to limit contract damages to the policy proceeds: "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount

110. A California Supreme Court justice remarked that in the almost thirty years California has had an unfair practices act in its Insurance Code, not a single case in which the insurance commission enforced the Act has been reported in California Appellate Reports or the California Reporter. Moradi-Shalal, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116, 135 (1988) (Mack, J., dissenting). Although one would not expect to find administrative actions in these reporters, his point is well taken—for a statutory remedy to be effective, it must be aggressively enforced.
112. 701 P.2d 795 (Utah 1985).
113. Id. at 801.
114. Id. at 802.
115. Id. Ordinary disappointment, frustration or anxiety would not be sufficient. Id. at 802 n.6.
118. Id.
due by the terms of the obligation, with interest thereon." However, it is more straightforward to reconcile this statute with expanded contract remedies than with tort remedies. The contract duty to perform in good faith is indeed separate from the contract duty to pay money. Either duty may be breached independently of the other, or they may be breached together. However, this remedy does not allow punitive damages because Oklahoma forbids punitive damages in contract.

California's Refinement of the Tort Remedy

California's tort for breach of the duty of good faith is in a state of flux. As the analysis of Rodgers illustrates, it is not easy to define when this tort should and should not be applied. California has extended the tort to contracts with "similar characteristics" to those of insurance contracts. A California appellate court defined those similar characteristics:

1. the contract must be such that the parties are in inherently unequal bargaining positions;
2. the motivation for entering the contract must be a non-profit motivation, i.e., to secure peace of mind, security, future protection;
3. ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party "whole";
4. one party is especially vulnerable because of the type of harm it may suffer and of necessity, places trust in the other party to perform; and
5. the other party is aware of this vulnerability.

However, this apparently simple solution is not without flaw. The freedom to breach a contract without risk of tort liability is a cornerstone of contract law which should not be casually overturned. For example, there could be

120. The Christian court rejected the insurer's argument that only the obligation to pay money had been violated. Christian, 577 P.2d at 903.
121. Consider bad-faith delayed payment (breach of good faith, but not breach of the duty to pay money), good-faith withholding of benefits (breach of the duty to pay money, but not breach of good faith), and bad-faith refusal to pay money (breach of both duties).
serious drawbacks to widespread use of these criteria for two other types of contracts which also might be especially vulnerable to tort liability: employment contracts and consumer lending contracts.

Concern has been expressed that if tort liability were imposed for breach of an employment contract, the duty of good faith could create a duty not to terminate employment, thereby effectively eliminating termination-at-will.\textsuperscript{126} An additional concern is that every decision to fire an employee, normally a relatively simple business decision, could subject the employer to a jury trial.\textsuperscript{127} A recent Oklahoma Supreme Court case, \textit{Hinson v. Cameron},\textsuperscript{128} appears to be Rodgers' counterpart in the employment context, similarly limiting application of the duty of good faith in employment contracts. That court noted that to do otherwise would "subject each discharge to judicial incursions into the amorphous concept of bad faith."\textsuperscript{129} Even California, which started the trend,\textsuperscript{130} has recently held that a terminated employee may only recover in contract.\textsuperscript{131}

Furthermore, lenders are similarly concerned not only about the potential tort liability, but also about the possibility that what are now simple actions for judgment for debts could routinely become jury trials if the debtors counterclaimed for breach of the duty of good faith.\textsuperscript{132}

\begin{footnotes}
\footnotetext{127}{A better understanding of the nature of the duty of good faith should make this fear groundless. The duty of good faith attaches only to contract provisions. If there is no duty to retain an employee, there can be no duty to retain the employee in good faith.}
\footnotetext{128}{742 P.2d 549 (Okla. 1987). Hinson held that an employer does not have a legal duty not to terminate an at-will employee in bad faith, even if there is an implied duty of good faith. \textit{Id.} at 554. More recently, in Burk v. K-Mart, 60 OKLA. B.J. 305, 306 (1989), the court's emphatic answer to certified questions was that there is no duty of good faith in employment-at-will contracts. If this holding were taken literally, at-will employees could find themselves at the mercy of their employers in all areas of their employment. The holding emphasizes again that the court does not understand the tort it has created.}
\footnotetext{129}{\textit{Hinson}, 742 P.2d at 554.}
\footnotetext{130}{See Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).}
\footnotetext{131}{See Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) (no tort for bad-faith breach of termination-at-will clause in employment contract).}
\end{footnotes}
Conclusion

Oklahoma courts have created a tangled web by attempting to address policy concerns in a piecemeal fashion. Traditional distinctions between tort and contract have been rejected. This approach leaves the majority of contracting parties in a state of uncertainty. Rodgers, instead of clarifying the situation, may have made it worse. Some contracting parties are subject to tort liability for breach of their contracts, while other contracting parties with similar policy concerns are not. At this point, the relevant distinctions are not clear.

Only insurers and commercial lenders now know their vulnerability to this tort liability. Insurers know that all their contracts are vulnerable, whether individual or commercial. Lenders know that their commercial loan transactions are free from tort liability, whether with a sophisticated or an unsophisticated customer. Lenders may speculate about their individual customer relationships: on one hand, the policy concerns of Christian should apply; on the other hand, Rodgers implies that Christian may be limited to insurance contracts.

The supreme court created this confusion in its attempt to protect insureds who lack bargaining power in contracts with their insurers. However, the legislature has now spoken to that same concern and provided statutory remedies. If the court were to bow to the legislature’s remedies, a contract could again be a contract.

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