



2015 CLM Annual Conference

Palm Desert

Punitive & Extra-Contractual Damages on the Frontier

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The Tenth Circuit is the Frontier of Claims for Bad Faith and Punitive Damages, Extra-Contractual Remedies, Aggressive Discovery, Aided by an Organized Plaintiffs' Bar and a Willing Judiciary

1. Available Statutory and Common Law Recoveries

A. Bad Faith and Punitive Damages are Generally Recoverable Where Intentional or Reckless Conduct is Found

In our experience, plaintiffs have access to both common law and statutory claims for bad faith and punitive damages in these jurisdictions. While the bad faith remedies are only applicable to insurer defendants, the punitive damage remedies may be available against corporate defendants.

Colorado

- **Authority:** COLO. REV. STAT. § 13-21-102. Punitive damages awardable only pursuant to statute for “conduct that creates a substantial risk of harm to another and is purposefully performed with an awareness of the risk in disregard of the consequence.” *Palmer v. A. H. Robins Co.*, 684 P.2d 187, 215 (Colo. 1984). In the insurance context, punitive damages are recoverable if the insured establishes that the insurer’s breach was accompanied by circumstances of fraud, malice, or willful and wanton conduct. *Lira v. Shelter Ins. Co.*, 913 P.2d 514, 517 (Colo. 1996).
- **Standard of Proof:** COLO. REV. STAT. §13-25-127(2); proof of punitive damages must be beyond a reasonable doubt.
- **Insurable?:** No. The public policy of Colorado prohibits an insurance carrier from providing insurance coverage for punitive damages. *Lira v. Shelter Ins. Co.*, 913 P.2d 514 (Colo. 1996).
- **Limitations:** COLO. REV. STAT. §13-21-102; a punitive damages award ordinarily cannot exceed the amount of actual damages. However, treble damages are allowed where the court finds continued willful and wanton behavior. COLO. REV. STAT. § 13-21-102(3).

Kansas

- **Authority:** To warrant an award of punitive damages, a party must prove to the trier of fact willful or wanton conduct, fraud or malice. *Reeves v. Carlson*, 969 P.2d 252 (Kan. 1988). An insurer’s duty to act in good faith and without negligence arises under the

contract. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65 (Kan. 1997). Thus, while punitive damages are typically not allowed, an insurer who wrongfully declines to defend, and who refuses to accept reasonable settlement within policy limits in violation of its duty to consider in good-faith interest of insured in settlement, is liable for entire judgment against insured, even if the judgment exceeds policy limits. *Snodgrass v. State Farm Mut. Auto. Ins. Co.*, 804 P.2d 1012 (Kan. 1991).

- Standard of Proof: Clear and convincing evidence is required to sustain an award of punitive damages. *Id.*
- Insurable?: No, unless for vicarious liability. Permitting insurance coverage of punitive damages assessed against insureds would violate public policy. *Hartford Acc. & Indem. Co. v. Am. Red Ball Transit Co., Inc.*, 938 P.2d 1281, 1293 (Kan. 1997). However, it is not against public policy to obtain insurance to cover liability for punitive damages or exemplary damages assessed against an insured as a result of the acts of employees, agents, servants or any other person for whom the insured is vicariously liable. KAN. STAT. ANN. § 40-2,115; *see also Hartford*, 938 P.2d at 1290.
- Limitations: An award of exemplary or punitive damages is limited to the lesser of: (1) the annual gross income earned by the defendant as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately preceding the act for which such damages are awarded; or (2) \$5 million. KAN. STAT. ANN. § 60-3701(e).

New Mexico

- Authority: Punitive damages may be awarded only when the wrongdoer's conduct may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiff's rights. *Gonzalez v. Surgidev Corp.*, 899 P.2d 594 (N.M. 1995). Gross negligence may also serve as a basis for punitive damages. *Jessen v. Nat'l Excess Ins. Co.*, 776 P.2d 1244 (N.M. 1989). In an insurance coverage case, punitive damages may only be awarded when the insurer's conduct was in reckless disregard for the interests of the plaintiff, or was based on a dishonest judgment, or was otherwise malicious, willful, or wanton. *Sloan v. State Farm Mut. Auto. Ins. Co. (In re Sloan)*, 85 P.3d 230 (N.M. 2004).
- Statutory: Undecided whether punitive damages can be awarded under both the common law and for violations of the Insurance Code. *See Hovet v. Allstate Ins. Co.*, 89 P.3d 69, 77-78 (N.M. 2004) (“[A]lthough plaintiffs and their amicus curiae ask us to conclude that punitive damages can be recovered for violations of the unfair claims practices section, we leave that question undecided at this time because of the lack of an opportunity for full briefing on this subject. We emphasize that in this opinion we are recognizing a statutory, not a common-law, cause of action. Therefore, in order to find a remedy for third-party claimants, we would have to look to the Insurance Code, which does not expressly provide for punitive damages).
- Standard of Proof: Preponderance of the evidence. *Gallegos v. Citizens Ins. Agency*, 779 P.2d 99 (N.M. 1989).
- Insurable?: Yes. Insurance policies that covered “all sums” for which the insured became liable included awards of punitive damages unless the contract contained language excluding such coverage. *Rummel v. St. Paul Surplus Lines Ins. Co.*, 945 P.2d 985 (N.M. 1997).

- Limitations: None.

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Oklahoma

- Authority: For punitive damages to be allowed there must be evidence, at a minimum, of reckless disregard toward another's rights. *Payne v. DeWitt*, 1995 P.2d 1088 (Okla. 1999); *see also Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080 (Okla. 2005) (discussing 2002 statutory amendments). Awardable for the breach of noncontractual obligations. OKL. STAT. tit. 23 § 9.1; *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 821 (10th Cir. 1993). Conduct that would cause punitive damages awards includes a wanton or reckless disregard for the rights of others, reckless disregard of a duty to deal fairly and act in good faith with the insured (for an insurer), or acting with actual malice, fraud or oppression. Reckless disregard and gross negligence may be used to infer malice. *Stroud v. Arthur Anderson & Co.*, 37 P.3d 783, 793 (Okla. 2001); OKL. STAT. tit. 23, § 9.1.
- Statutory: OKLA. STAT. tit. 23, § 9.1 describes three levels of conduct that will justify recovery of punitive damages in bad faith cases:
 1. When the jury finds by clear and convincing evidence that an insurer acts with reckless disregard, the jury may award punitive damages not to exceed the greater of actual damages or \$100,000 (§ 9.1(B)(2));
 2. When the jury finds by clear and convincing evidence that an insurer acts intentionally and with malice, the jury may award punitive damages not to exceed the greater of twice actual damages or \$500,000 (§ 9.1(C)(2));
 3. When the jury finds beyond a reasonable doubt that an insurer acts intentionally and with malice and engaged in life-threatening conduct, the jury may award punitive damages in any amount it deems appropriate (§ 9.1(D)(2)).
- Standard of Proof: A "competent evidence standard" is used to award damages that are capped. In order to lift the cap and award punitive damages, a clear and convincing evidence standard must be met. *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080 (Okla. 2005).
- Insurable?: No, unless for vicarious liability. It is against public policy to allow a wrongdoer to escape punishment by insuring himself against a punitive damages award. *Magnum Foods Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491 (10th Cir. 1994). However, it does not violate public policy to allow one who is vicariously liable to insure against punitive damages, so long as his negligence is no more than ordinary and the employee commits an intentional tort or willful act. *Sides v. John Cordes, Inc.*, 981 P.2d 301, 306 n.16 (Okla. 1999).
- Limitations: OKL. STAT. tit. 23, § 9.1(B), (C), (D) set certain limits on punitive damages recoveries, depending on the magnitude of the culpable behavior. For Category I, the award may not exceed \$100,000 or the actual damages awarded (whichever is greater); for Category II, the award may not exceed \$500,000, twice the amount of actual damages, or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff; for Category III, if the judge finds evidence beyond a reasonable doubt that the defendant committed the act intentionally and with malice and engaged in conduct that threatened the life of others, then punitive damages can be awarded in any amount.

Utah

- Authority: Punitive damages are available under Utah law. UTAH CODE ANN. § 78-18-1(1)(a). In order to justify an award of punitive damages, a defendant's acts must be the result of "willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others." *Id.* Punitive damages may be awarded in actions against an insurer who intentionally caused severe emotional distress or whose conduct constituted fraud. *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801 n.3 (Utah 1985).
- Standard of Proof: Proof by "clear and convincing" evidence is required to sustain a punitive damages award. *Id.*
- Insurable?: No. No insurer may insure or attempt to insure against punitive damages. UTAH CODE ANN. § 31A-20-101(4).
- Limitations: Punitive damages should be assessed in light of the ratio between punitive and actual damages. Where a punitive damages award exceeds a 3-to-1 ratio of punitive to actual damages, the award is presumptively excessive. *See Hall v. Wal-Mart, Inc.*, 959 P.2d 109, 112 (Utah 1998); *but see Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004) (applying 9:1 punitive to compensatory damages ratio following remand from US Supreme Court).

Wyoming

- Authority: An insurer's breach of duty of good faith and fair dealing may entitle a plaintiff to an award for punitive damages. However, to award punitive damages for the intentional tort, willful and wanton misconduct must be proven. *State Farm Mut. Auto Ins. Co. v. Shrader*, 882 P.2d 813 (Wyo. 1994); *Cathcart v. State Farm Mut. Ins. Co.*, 123 P.3d 579 (Wyo. 2005). Punitive damages may be imposed to further the state's legitimate interests in punishing unlawful conduct and deterring repetition. *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040 (Wyo. 1998). Outrageous conduct, malice and willful and wanton misconduct have been found to be sufficient to warrant punitive damages. *Veschoor v. Mountain West Farm Bureau Mut. Ins. Co.*, 907 P.2d 1293 (Wyo. 1995).
- Standard of Proof: There is no clear standard for proving punitive damages in Wyoming. The history of punitive damages in Wyoming demonstrates that juries are given very general instructions with respect to their determination of punitive damages. *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1044-45 (Wyo. 1998).
- Insurable?: Yes. Insurance coverage of punitive damages is permitted under Wyoming law. *See Sinclair Oil Corp. v. Columbia Cas.*, 682 P.2d 975 (Wyo. 1984).
- Limitations: Although there is no statutory cap, an award of punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct, as well as to the harm actually caused. *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1044 (Wyo. 1998).

B. Other Extra-Contractual Remedies Are Also Available by Statute

These jurisdictions also have many extra-contractual remedies available by statute, some of which allow for private causes of actions, recovery of attorneys' fees, high pre-judgment interest rates, and a doubling of compensatory damages.

Colorado: COLO. REV. STAT. §§ 10-3-1115 and -1116; “First-party claimants” can recover attorneys’ fees and twice the “covered benefit” when an insurer unreasonably delays or denies benefits.

Kansas: The Kansas Uniform Trade Practices Act, KAN. STAT. ANN. §§ 40-2401 to 40-2414, does not create a private cause of action. *Bonnell v. Bank of America*, 284 F.Supp.2d 1284 (D. Kan. 2003). However, KAN. STAT. ANN. §§ 40-256 and 40-908 allow an award of attorneys’ fees to a private plaintiff who receives a judgment against an insurance company.

New Mexico: N.M. STAT. ANN. § 59A-16-30 (under the Insurance Code, persons injured by unfair claims practices are entitled to recover “actual damages,” supplemented when appropriate by costs and attorneys’ fees).

Utah: Awardable only for torts. *See* UTAH CODE ANN. § 78-18-1(1)(a). The Utah Unfair Claim Settlement Practices Act does not create a private cause of action. *See* UTAH CODE ANN. § 31A-26-303(5).

Wyoming: WYO. STAT. § 26-15-124(c) (in an action where it is determined that an insurer unreasonably refuses to pay, claimant can recover attorneys’ fees and 10% interest). The Wyoming Unfair Trade Practices Act, WYO. STAT. §§ 26-13-101 to 26-13-124, does not create a private cause of action. *Julian v. New Hampshire Ins. Co.*, 694 F. Supp. 1530 (D. Wyo. 1988).

2. Target Defendants, Allegations, and Discovery Requests

A. Any individual or corporation with assets, property, or multiple locations is deemed a worthy target. Jurors are also more likely to assess punitive damages against defendants with perceived or visible corporate wealth. Other common targets for punitive damage claims are nursing homes, big box retailers, and insurance companies.

B. The policyholder bars are well organized and have developed template allegations and petitions for extra-contractual and punitive damages claims.

C. There is a sharing of discovery requests, motions to compel, and briefs among the plaintiffs’ and policyholders’ bars. The discovery requests are likely to attract the attention of the defendants’ chief executives as the plaintiff will seek detailed information on prior claims, suits, settlements, consumer complaints, Department of Insurance inquiries, complaints, investigations, penalties, disciplinary complaints, and licensing actions against professionals and nursing homes.

D. Claim Files and Other Litigation: The insured’s claim file is discoverable. This includes the paper file, if any, but any electronic claim notes and e-mails. In the Tenth Circuit, there is a continuing duty to investigate and evaluate the claim, even if suit is filed. However, once the suit goes into litigation, the claim file is going to contain privileged information from defense counsel (and possibly in-house counsel). Initially, the production of any post-suit claim material should be resisted, but, if ordered, care must be taken to redact the privileged information. The production of other claim files is not as clear. Plaintiffs want other claim files to help establish a claim for institutional bad faith, but these should not be discoverable.

E. Personnel Files: Plaintiffs look for the personnel files for anyone involved in handling the claim as well as his/her supervisor(s). They are looking for managerial criticisms of the subject claim but also evidence that the claim handler has made the same

errors in other files as on the plaintiff's case. If the personnel file does not contain reference to the subject claim, it should not be discoverable. However, courts routinely allow for the production of those portions of the file dealing with the handler's training, experience, and job performance, allowing for the redaction of the names of other policy holders. See, e.g., *Christensen v. Am. Family Mut. Ins. Co.*, 2011 WL 3841293 (D. Utah 2011); *Waters v. Continental General Ins. Co., No 07-282-TCK-FHM, 2008 WL 2510039, *1 (N.D. Okla. 2008)*; *AKH Co., Inc. v Universal Underwriters Ins. Co.*, 300 F.R.D. 684 (D. Kansas 2014).

F. Financial Information: This includes financial goals, loss ratios, bonus programs, expense and indemnity tracking (including programs aimed at reducing expense and indemnity payments), claim valuation software, and annual statements. Again, this information has no relationship to whether the plaintiff's claim was properly handled. It clouds the issue for the jury and pulls focus from the actual claim. Generally, the insurance company's financial worth is a relevant factor for the imposition of punitive damages, and nothing more. However, in Colorado, Kansas, and Oklahoma, the courts do not want a break in trial for the discovery of such information, so its discovery is permitted early in the case.

G. Policy and procedures manuals: Almost universally, the Courts are going to require the production of any policies and procedures manuals, best practices, training guidelines, or on-line tools that are available to claim handlers, even if not used or referenced for the specific claim. For proprietary reasons, these can be produced subject to a Protective Order, but they will form the guide that plaintiffs will use to measure the company's conduct. For example, if the claim manual says that the initial contact with the insured must be made within 24 hours and it was 39 hours before contact was made, the plaintiff will argue that delay was bad faith.

All of the foregoing types of discovery requests contribute to a contentious litigation dynamic as the defendant is continually fighting over-reaching discovery requests and attempts to depose key and high level executives. These factors also can inflate the value of the case if not anticipated and managed.

3. Litigation Dynamics

Punitive damages claims have a pervasive effect which often inflates the settlement value of the case. From the executive who does not want to "air dirty laundry" from prior claims, to the corporation who does not want to disclose financial records, to the insurance company who does not want to compile negative data which may hurt its reputation on a broader scale, litigation with these claims are difficult to work through to a fair resolution. In the Tenth Circuit, punitive damages are not insurable as a matter of law (subject to very few exceptions).

Plaintiffs recognize that the way to big damages (and thus a higher recovery for the plaintiff's bar) is to make the case about more than just one claim. Plaintiffs want to show the jury that the insurance company is evil and that there is "institutional bad faith" or a "pattern and practice" of unfair claim handling. Thus, the discovery requests received in bad faith cases seeks information about all levels of how the company works, including claims handling, underwriting, human resources, and financial or regulatory compliance. Obviously, insurers want to limit outsider views into their interworkings, particularly because it rarely has any relevance to the plaintiff's claims. However, it is also helpful to realize how the courts tend to rule on such issues so the insurer and counsel can focus discovery efforts and resources.

Tenth Circuit discovery rulings in bad faith cases tend to be overbroad, are burdensome to the insurers, and result in the production of scores of information that does not relate to how the insurer handled the plaintiff's claim. However, the Federal Rules of Civil Procedure (substantially adopted by most states) permit the discovery of any matter, not privileged, that is relevant or may lead to the discovery of admissible evidence. Fed. R. Civ. Proc. Rule 26. To gain access to the information, plaintiff argues that broad discovery into the company's policies, procedures, and handling of other claims is necessary to discover the information it needs to prove its claim of institutional bad faith. While the focus should remain on the plaintiff's claim, and the plaintiff's claim alone, courts tend to reason that as long as the appropriate protective order is in place, there is no harm in the discovery and admissibility issues will be ruled upon on the eve of or during trial.

A motion to compel the production of personnel files can be met with different arguments for relief. Although there are no Tenth Circuit reported cases on the success of this argument, the Fourth Circuit has ruled that courts may protect employee files on the theory that the insurers will improve claim handling if they can open evaluate employee performance without fear of disclosure. *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir. 1977) Since rulings on discovery orders are not generally reviewable until the end of the case, there is no penalty for being creative in responding to motions to compel with objections that appeal to public policies like the self-evaluation privilege.

Every claim is different and unique and every state has different standards for what constitutes bad faith. In Oklahoma, that standard "is more than simple negligence, but less than the reckless conduct necessary" for punitive damages. *Badillo v. Mid Century Ins. Co.*, 2005 OK 48, 121 P.3d 1080. Some states make bad faith a strict liability tort, some apply a negligence standard, others impose intentional or reckless conduct, and some states do not have a clearly defined standard. In Wyoming, the courts look for "oppressive and intimidating claims practices."

Sinclair Oil Corp. v. Republic Ins. Co., 967 F. Supp. 462, 465 (D. Wyo. 1997) See, *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 73 (Tex. 1997) for analysis of different standards of bad faith across the country. This analysis does not even consider whether from the time the claim was opened until the time of trial that some states have altered or amended their standards for insurers through statutory or judicial tort reform.

State Farm Mut. Auto Inc. Co. v. Campbell, 538 U.S. 408 (2003) and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) stand for the proposition that conduct or practices that are dissimilar to the conduct or practices that allegedly caused the plaintiff's injury and conduct that occurs entirely outside the forum state and has no impact on the plaintiff or anyone else in the forum state, irrespective of whether it is similar to or different from the conduct alleged to have injured the plaintiff should not be presented to the jury.

Specifically, in *State Farm* the United States Supreme Court held that:

A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *.

Id. at 1523. In *Moody v. Ford Motor Co.*, 506 F. Supp. 2d 823 (N.D. Okla. 2007), the court granted a motion for a new trial finding that the defendant did not receive a fair trial, in part, because plaintiffs' counsel continually referred to acts not at issue in the case and harm to others

not a party in the case. *Id.* at 835. Judge Eagan stated, “[w]hen considering the pervasive nature of the alleged misconduct, the Court finds that Ford was likely prejudiced by plaintiffs’ counsel’s constant references to other accidents and his misrepresentation of the facts.” *Id.* The Court went on to state that “‘a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge’ by raising possible defenses to those claims.”

4. How to Respond and Manage These Claims

Claims for bad faith, punitive damages and extra-contractual penalties pervasively impact discovery and planning for trial. Moreover, the courts in the Tenth Circuit broadly accept punitive damages claims and are reluctant to dismiss or limit discovery on them prior to Motions in Limine and Voir Dire. Courts on the frontier commonly let these types of damages claims go to the jury for a determination.

Federal court access is impeded by adding local defendants and fraudulent joinder motions are rarely successful. If the case is in federal court, there may be more control on discovery, but unlike in the past, when Defendants frequently sought to remove cases, there is no longer such general rule, as the federal court may not always offer a more even playing field in trial. Federal courts also tend to push much harder for settlements, requiring a completely defensible claim to settle.

Preparing the Defendant: Defendants, whether large companies or insurers, need to be prepared for the long discovery road that lies ahead. Defendants should expect the overly broad and irrelevant discovery requests noted above, Motions to Compel, Judges with liberal discovery views, and frustration as discovery veers farther and farther from the issues at case.

Personal counsel typically have limited involvement, if at all. If the defendant corporation has personal counsel (or national coordinating counsel for insurers), he/she can be helpful for coordinating document production and arranging witness interviews. Personal counsel also should send any demand letters (such as policy limits settlement on suit that includes punitive damages) on behalf of the insured. However, where there is no personal counsel, such letters are defense counsel’s responsibility.

Bifurcation: Most bad faith cases include a claim for both bad faith and breach of contract damages. Courts on the frontier allow a plaintiff to pursue a claim for bad faith even if there is no breach of contract.

Colorado, Kansas, and Oklahoma generally do not bifurcate trials for breach of contract and bad faith. Since the claims will be tried together (or at least back to back), the discovery is also not bifurcated. Thus, a corporate defendant may be required to produce information about other accidents in response to discovery requests in support of punitive damages, only for the court to later hold such evidence is not relevant to the claim at issue. Similarly, it is not unusual for an insurer to go through protracted bad faith discovery and production of hundreds of pages of confidential information only to have the court or jury find that there was no breach of contract.

Consent Judgments and Reservation of Rights: To avoid uncovered liability and/or when faced with the expense and uncertainty of defending against a potentially uninsured punitive damages claim through trial, the Insured may enter into a lump sum consent judgment to avoid uncovered damages. These types of settlement are usually inflated to include punitive damages, but are difficult to contest because they are presumed reasonable. If a consent judgment is entered without the insurers’ consent or knowledge, there will likely be a question of who is responsible for satisfying the judgment, although even a breach of the voluntary payments condition does not always completely insulate the insurer from liability. The Plaintiff usually will try to garnish the insurance policy, and the extent to which the policy should satisfy the judgment needs to be

determined through a declaratory judgment action, or in the garnishment action itself should the garnishment law of the state in which the case is proceeding so allow.

In Oklahoma, for example, there is no right to independent counsel paid for by the insurer where uncovered allegations are part of an otherwise covered claim (the insured can always retain personal counsel at his own expense). The Defendant can also seek independent advice at key points in the case such as responding to discovery and participating in mediations or other formal settlement conference, and it is a good practice to advise the Defendant of this right.

The general view on the frontier is that claim files do not need to be split when punitive or non-covered damages are alleged, but it may make sense to assign an examiner to the defense of the case who is not involved in the coverage issues. Similarly, there are conflicting views on whether defense counsel should receive a copy of any reservation of rights letter.

Hope for Defendants: The best strategy to defend cases on the frontier is aggressive and proactive discovery and motion practices. Petitions should be scrutinized for any claims to extinguish in a Motion for Partial Dismissal. For example, in some states, the Unfair Claims Settlement Practices Act does not give rise to a private cause of action, so such claims should be dismissed early in those states. Because the Plaintiff's bar shares so many pleadings, those unfamiliar with bad faith or complex litigation will often "borrow" another attorney's pleadings without really knowing the elements and complexities of the allegations. Showing the Judge early that the pleadings are not well thought will help control discovery issues. Care should be taken that Plaintiff's counsel does not see too early that he/she is out of his league such that he associates with someone who is skilled in the complex litigation, but there is nothing wrong with an early showing that this case is not an easy payday.

If claims are not streamlined through early Motion practice, then the cookie-cutter complaints should be exposed through Plaintiff's depositions and the lack of facts to support the claims. A Plaintiff who is unable to articulate the facts supporting the allegations expressed in the Petition or recycled brief not only loses faith in his/her counsel but will also be more reasonable in settlement to avoid a similar experience on the stand at trial.

Discovery battles should be waged only when necessary with the larger goal of winning the war on reasonableness and efficiency. Recognizing that the Courts will impose few discovery limitations means that time is better spent preparing for depositions than losing on every Motion to Compel. Some battles may be necessary to preserve an issue on appeal, but often, with the understanding of how discovery is treated in the Tenth Circuit, the best practice is to turn over the documents with a Protective Order and address the issue through a Motion in Limine.

Deposition preparation is crucial to controlling discovery on the frontier. Defense witnesses should be thoroughly prepared, including using prior depositions of opposing counsel to prepare each witness for the nature and type of questions to expect. Insurers need to be prepared for responding to questions that might support an institutional bad faith argument. Witnesses should know the details of their file, and that detail is only gained through extensive, in person, review with defense counsel.

A case may not be won or lost on a deposition, but it does provide the testimony and evidence needed for Pretrial Motions such as Motions for Summary Judgment and Motions in Limine, as well as information for the mediator. In a litigation environment where 99% of cases settle, deposition testimony is the greatest asset to obtaining a favorable result without the expense and unpredictability of a jury.

Interrogatories

1. If any employee, agent or representative of Insurance Company who had any involvement with Plaintiff's claim has received any negative job evaluation during the last five (5) years, please identify the employee, agent, or representative who received the negative evaluation, the employee, agent or representative who preformed the evaluation and describe the reason for the negative evaluation and substance of the evaluation.
2. List each complaint filed against Company with the State Insurance Commissioner's office during the last ten (10) years.
3. Regarding each "expert witness" Company may rely upon in defending this lawsuit, please state their name, address and telephone number, attach a copy of their curriculum vitae, state each question which Company requested the expert witness to answer, and the date said witness wad first contacted.

Requests for Production

1. Company's complete claims file relating to the claim at issue in this action, whether maintained in Company's field office, regional office, home office, or any other office, including without limitation:
 - a. All letters, memoranda, email, text messages, instant messages and other forms of written or computerized communication to or from any employee of Company or between an employee, agent or adjuster or any third party or entity hired by Company to perform work of any sort relating in any way to the processing of the claim at issue in this action;
 - b. All written and/or electronic or taped or computerized records of any oral, electronic or written communication, whether in person, on a computer or smart phone or by telephone, to or from any employee or agent of Company or any third party hired by or acting on behalf of Company regarding in any way the claim of Plaintiff, or the adjustment or valuation of the claim of Plaintiff;
 - c. All documents relating to, written, taped, computerized or electronic communications and written or computerized records of oral communications, whether in person or by telephone, including text or instant messages, between any employee or agent of Company and any representative of Plaintiff relating in any way to the claim at issue in this action;
 - d. All written, taped or computerized communications and written or computerized records of oral communications, whether in person or by telephone, between any employee or agent of Company and any third party relating in any way to the claim at issue in this action;
 - e. All documents or computerized records of any investigation or work performed or conducted in connection with the claim at issue in this action, including text or instant messages;
 - f. All written, taped or computerized communications, including instant or text messages, and written or computerized records of oral communications, whether in person or by telephone, to or from any employee of Company relating in any way to the failure to pay Plaintiff's claims or relating to the processing of Plaintiff's claims;
 - g. All documents or written or computerized communications, including text messages and written or computerized records of oral communications, whether in person or by telephone, between Plaintiff and any employee of Company relating in any way to the decision to deny Plaintiff's claim;

- h. All documents or written or computerized communications, including text message and written or computerized records of oral communications, whether in person or by telephone, between any employee of Company or Company's agents or adjusters or third-party contractors and any third party relating in any way to the decision to deny Plaintiff's claim or relating to how much to pay on Plaintiff's claim;
 - i. All other documents or written or computerized documents pertaining to the claim at issue in this litigation;
 - j. The file folders in which the preceding documents are kept;
 - k. All internal communications between employees of Company regarding the Plaintiff's claims, adjustment of Plaintiff's claims and also regarding the payment or nonpayment of Plaintiff's claims;
 - l. All notes of any meetings or oral communications between employees of Company or employees of Company and any third parties or independent contractors or agents regarding the Plaintiff's claims and also regarding the payment or nonpayment of Plaintiff's claim.
2. Company's complete underwriting files referring to or relating in any way to the policy at issue in this action, including without limitation:
- a. All letters, memoranda, email, text messages, instant messages and other forms of written or computerized communication and written or computerized records of oral communications, whether in person or by telephone, referring to or relating in any way to the issuance of the policy in this action; and
 - b. The file folders in which the preceding documents are kept.
3. All claims manuals, memoranda, directives, letters, text or instant messages and other forms of written or computerized communication directed to claims personnel, claims managers, claims supervisors, or any other person acting on behalf of Company in the handling of claims, that state how to handle or set forth Company's procedures for handling and processing building property loss claims generally, loss of business income claims or contents or equipment loss claims or to the handling of commercial claims of like character to the claim at issue in this action, including without limitation:
- a. The documents reflecting Company's claim settlement policies regarding such claims as they existed at the time Plaintiff made the claim at issue in this action; and
 - b. The documents reflecting any subsequent changes of policy.
4. All promotional materials distributed by or broadcast by Company in print, radio, television or on its website, including without limitation advertisements and sales brochures, during the twelve (12) months preceding the issuance of the policy at issue in this action, which refer or relate in any way either to insurance policies like the policy at issue in this litigation or to Company's settlement of claims or to the fairness in which Company resolves claims.
5. All documents that reflect and set forth any policies or procedures for bonus or performance based incentives for those who handle claims such as or similar to Plaintiff's to include both the adjusters, supervisors and management personnel for the time period of 2011 and 2012 to date.
6. If any of the individuals involved in the handling of Plaintiff's claim that are the subject of this action will or are or were entitled to receive a bonus or incentive payment for 2011 or 2012, please produce:

- a. Documents that reflect the calculation of the bonus or incentive; and
 - b. Documents that set forth the policy or policies that created that bonus or incentive.
7. Produce any filings made with the State Insurance Department for the years 2006 to 2011, inclusive, without limitation to any and all annual filings and any and all quarterly filings.
8. Produce any annual reports, annual financial statements, and income tax returns for the Company from 2006 to 2011, inclusive, including all filings made with the appropriate agencies in the State any federal agencies relating to the same.
9. Produce any and all advertisements or advertising circulars or communications sent to policyholders in the State for the years 2006 to 2011, inclusive.
10. A copy of any and all material or documents or portions of any manuals or guidelines that any adjuster adjusting this claim referred to while adjusting this claim;
11. For any third party used by Company in the adjusting or processing of Plaintiff's claim, please provide all documentation of Company's contract with each legal entity doing such work.
12. For any third party used by Company in the adjusting or processing of Plaintiff's claim, for any incentive or bonus program with said individual or entity, please provide all documentation concerning the incentive or bonus system, to include any incentive or bonus received by the individual or entity from Company in the last five (5) years and documentation showing how that bonus or incentive was calculated.
13. For the years 2006 to 2011 all awards or financial bonus programs for which claims personnel in the Company adjusting or denying fire insurance claims could qualify and the criteria to qualify for any such award or incentive bonus.
14. Produce full and complete certified and color copies of Plaintiff's homeowner's insurance policy, and any and all billing statements, policy endorsements and declarations pages related thereto from the time the subject policy was issued until the present.
15. Produce laser copies of all versions of all claims files for any homeowners' claims made by Plaintiffs since their policy was inception. Your response shall include but is not limited to production of the following:
 - a. The original claims file;
 - b. Field file;
 - c. Scope notes;
 - d. Supervisor's file; and
 - e. Electronic claims file.
16. Produce copies of the personnel file for the following employees. This request is in relation to Plaintiff's homeowner's claims arising from the incident at issue. You may redact any personal health information.
 - a. The person(s) involved in the adjustment of Plaintiff's claims;
 - b. The person(s) involved in the supervision of Plaintiff's claims;
 - c. The person(s) involved in the management of Plaintiff's claims; and
 - d. The person(s) involved in the payment of Plaintiff's claims.
17. Produce all deposition transcripts, court transcripts and affidavits concerning testimony by any corporate representative of Company designated pursuant to Rule

30(b)(6), relating to the adjustment, and/or supervision, and/or management, of homeowners' claims in the State from 2009 to present.

18. Produce a copy of Company's current organizational charts for its entire organization, its claims department, and underwriting department.