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BAD FAITH SET-UPS OF INSURANCE COMPANIES

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I. Introduction

In light of the substantial damage awards attendant to bad faith claims, plaintiffs' attorneys have great incentive to try to maneuver insurance companies into committing acts that may constitute bad faith. Plaintiffs' counsel may, for example, attempt such "set-ups" by creating a situation where the insurer refuses to settle a tort claim within policy limits within a limited period of time. The endgame, of course, is to recover substantial extra-contractual damages, including attorneys' fees, where permitted. A bad faith verdict can be vastly more lucrative than simply collecting on a "within policy limits" claim, and that incentive is often at the heart of the set-up case.

The bad-faith set-up is not a new tactic. In 1985, Justice Kaus of the California Supreme Court observed: "It seems to me that attorneys who handle policy claims against insurance companies are no longer interested in collecting on those claims, but spend their wits and energies trying to maneuver the insurers into committing acts which the insured can later trot out as bad faith." *White v. Western Title Ins. Co.*, 710 P.2d 309, 328 n.2 (Cal. 1985) (Kaus, J., concurring and dissenting); *see also* Steven Plitt and Jordan Ross Plitt, *Practical Tools for Handling Insurance Cases*, § 7:9, "Bad faith setup" (2014). This paper identifies the common ways in which plaintiffs attempt to trap an insurer in a bad faith case, suggests some ways to defend the set-up case, and touches on some of the more notable bad faith cases in the area.

II. Background

A. Bad Faith Generally

Many states hold that in the third-party context, when an insurer controls the defense of the insured, it does so as a fiduciary or quasi-

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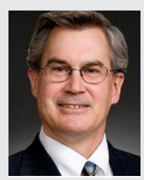

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fiduciary of the insured. *See Ki Sin Kim v. Allstate Ins. Co., Inc.*, 223 P.3d 1180, 1192 (Wash.Ct.App. 2009) (stating that when an insurer defends its insured under a "reservation of rights," the insurer is nearly a fiduciary of the insured); *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1274 (Colo. 1985) (stating that, when dealing with claims of third persons against the insured that arise under an insurance policy, a quasi-fiduciary relationship exists between the insurer and the insured by virtue of the insurance contract). While "the insurer does not have to place the insured's interests above its own interests, the insurer must give 'equal consideration' to the insured's interests." *Ki Sin Kim*, 223 P.3d at 1192 (citations omitted). This obligation mandates the insurance company to "(1) thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries, (2) retain competent defense counsel, recognizing that only the insured is the client, and (3) fully inform the insured not only of the reservation of rights defense itself, but [also] of all developments relevant to his or her policy coverage and the progress of the lawsuit." *Id.*

> The most common form of a bad faith set-up is to make a settlement demand – typically policy limits – with an unreasonable time demand.

To prevail on a bad faith claim, the policyholder typically must prove that the insurer's breach of the insurance contract was unreasonable, reckless, frivolous, or unfounded. *See Smith v. Safeco Ins. Co.*, 78 P.3d 1274, 1277 (Wash. 2003). For example, the United States District Court for the District of Colorado recently stated that to succeed on a common law bad faith claim, a plaintiff is required to establish the following:

> …(1) the insurer's conduct was unreasonable and (2) the insurer had knowledge that the conduct was unreasonable or a reckless disregard for the fact that the conduct was unreasonable. Because of the quasi-fiduciary nature of the insurance relationship in a third-party context, the standard of conduct required of the insurer is characterized by general principles of negligence... [T]he insured must show that a reasonable insurer under the circumstances would have paid or otherwise settled the third-party claim. The reasonableness of an insurer's conduct is thus judged objectively based on industry standards.

Larson v. One Beacon Ins. Co., No. 12-CV-03150-MSK-KLM, 2013 WL 5366401 at *11 (D. Colo. Sept. 25, 2013) (internal quotations and citations omitted).

B. Bad Faith Set-Ups Generally

Bad faith set-ups most frequently originate in the third-party context, i.e., where the insurer is defending an insured against a tort claim. In this context, the set-up "involve[s] attempts to cause an insurance company to reject a policy limits settlement offer." Stephen S. Ashley, *Bad Faith Actions: Liability & Damages*, § 10:3, "The ethics of setting up insurance companies." Third-party claimants and their counsel have come up with various ways to present their offers to reduce the chance that the insurer will actually accept the offer within the stated time period. *Id.*

The goal, of course, is to obtain a sizeable excess verdict. *Id.*; *see also* Steven Plitt and John K. Wittwer, *A Critical Review of the Practice of Setting Up Insurance Companies for Bad Faith*, 32 No. 10 Ins. Litig. Rep. 299 (2010). If successful, the next step in the set-up strategy is for the third party claimant's counsel to enter into an agreement with the insured whereby claimant gives a covenant not to execute on the judgment in exchange for an assignment of the claim based on bad faith failure to settle. *Id.; see also Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116 (Colo. 2011).

The most common form of a bad faith set-up is to make a settlement demand – typically policy limits – with an unreasonable time demand. Steven Plitt and Jordan Ross Plitt, *Practical Tools for Handling Insurance Cases*, § 7:9, "Bad faith setup" (2014). For example, a claimant may make a settlement demand with an unrealistic time limitation before the insurance company has full access to the information bearing on liability and damages. *Id.* The insurance company often declines to meet the demand, explaining that it needs further information. The insurer's position is then portrayed as a failure to settle and used against the insurance company as evidence of unreasonable conduct in the settlement of the case. Fortunately, when courts and juries see through this conduct as a set-up – as an orchestrated plan by the claimant or her counsel –they are more hesitant to find the insurance company liable for bad faith. *Id.*

1. Red Flags

There are various "red flags" that may indicate a bad faith set-up is in the works. These red flags serve as indicators that the goal of claimant and her counsel is not to reach a reasonable resolution of the claim within policy limits, but rather to create substantial extra-contractual liability. Some of the more common red flags include the following:

(a) The claimant makes a policy limits settlement demand quickly after an accident, thereby depriving the insurer of the ability to conduct a full investigation. Such quick demands are combined with a limited amount of time for the insurer to accept. Again, the limited time frame is imposed with the hope that records cannot be obtained and the investigation cannot be completed within that time period.

(b) The claimant makes a settlement demand with one or more unusual acceptance conditions.

(c) The involvement of the claimant's counsel pre-dates certain medical or psychiatric care (e.g., testing and treatment for alleged mild traumatic brain injury).

In other words, the justification for bad faith jurisprudence is as a shield for insureds—not as a sword for claimants.

(d) The claimant seeks treatment from doctors with whom claimant's counsel has a pre-existing relationship.

(e) The level of pain or disability reported "post-lawyer involvement" is greater than the level of pain or disability reported in the medical records that exist "pre-lawyer involvement."

(f) Adequate proof of lost income is not forthcoming.

(g) The correspondence from the claimant's counsel is peppered with self-serving rhetoric, designed to impress the jury and establish themes for use in the anticipated bad faith lawsuit.

The sooner these red flags are recognized, the sooner the insurer can begin to take steps to counter the set-up activity.

2. The Judiciary's Concern Over "Manufactured Litigation"

The emergence of the bad faith set-up has not gone unnoticed by the courts. One of the lead opinions articulating concerns about the conduct of claimant's counsel in the context of the set-up case is *Wade v. EMASCO Ins. Co.*, 483 F.3d 657 (10th Cir. 2007) (applying Kansas law). After reviewing some of the central historical decisions, the Tenth Circuit summarized its concern over what it referred to as "manufactured" litigation:

> In light of these decisions, we agree with the district court's observation that courts should exercise caution "when the gravamen of the complaint is not that the insurer has *refused* a settlement offer, but that it has *delayed* in accepting one." This caution "arises from the desire to avoid creating the incentive to manufacture bad faith claims by shortening the length of the settlement offer, while starving the insurer of the information needed to make a fair appraisal of the case." *Id*. at 15. As the First Circuit commented in *Peckham v. Continental Casualty Insurance Co.*, 895 F.2d 830, 835 (1st Cir. 1990):
>
>> [T]he doctrinal impetus for insurance bad faith claims derives from the idea that the insured must be treated fairly and his legitimate interests protected... In other words, the justification for bad faith jurisprudence is as a shield for insureds—not as a sword for claimants. Courts should not permit bad faith in the insurance milieu to become a game of cat-and-mouse between claimants and insurer, letting claimants induce damages that they then seek to recover, whilst relegating the insured to the sidelines as if only a mildly curious spectator.
>
> *Id.* at 669-70 (internal citations omitted).

Awareness of such cases as *Wade* and *White, supra.*, provides a useful roadmap to both a discovery plan as well as potential trial themes.

3. First-Party Cases

Although set-ups typically emerge in the third party context, set-ups can also occur in the first-party context (e.g., claims involving property, no-fault automobile, or underinsured motorist policies). In the context of the insurance contract, the insurer's responsibility to act fairly and in good faith with respect to the handling of the insured's claim "is not the requirement mandated by the terms of the policy itself – to defend, settle, or pay." It is the obligation . . . under which the insurer must act fairly and in good faith in discharging its contractual responsibilities." *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co*., 90 Cal. App. 4th 335, 346 (Cal.Ct.App. 2001), *as modified on denial of reh'g* (July 30, 2001) (citing *California Shoppers, Inc. v. Royal Globe Ins. Co*., 175 Cal.App.3d 1, 54 (Cal.Ct.App. 1985)); *see also Sanderson v. American Family Mut'l Ins. Co.*, 251 P.3d 1213, 1217 (Colo. App. 2010) (In a bad faith case against an underinsured motorist insurer, the Court stated: "This duty of faith and fair dealing continues unabated during the life of an insurer-insured relationship, including through a lawsuit or arbitration between the insured and the insurer, although the adversarial nature of such proceeding may suspend the insurer's obligation to negotiate as a reflection of good faith.")

In some states, the duty of good faith and fair dealing in first party cases may not stop when a lawsuit between the insurer and insured is commenced, because the claim is still in play. Steven Plitt and John K. Wittwer, *A Critical Review of the Practice of Setting Up Insurance Companies for Bad Faith*, 32 No. 10 Ins. Litig. Rep. 299 (2010). The "plaintiff insured's attorney has fewer opportunities for creative set-up strategies, but the general approach is the same." *Id.* "Though the insurer's acceptance of a settlement demand does not automatically extinguish the possibility of a later bad faith claim, as it does in third-party cases, . . . settlement remains an outcome devoutly to be avoided." *Id.*

As in third-party cases, a common set-up tactic in the first-party context "is to barrage the insurer with unsupported or inflated monetary demands, coupled with a short time deadline to pay." *Id.* In making these requests, the insured's attorney often threatens that delay in resolving the claim (on claimant's terms) will result in serious financial difficulties for the insured, including the inability to repair damaged property or obtain important medical treatments. A common first-party scenario involves complicated property claims, especially where there is reason to suspect claim inflation or even fraud. *Id.* In these situations, the property owner is represented by a public adjuster and is seeking recovery for substantial damages due to hail, wind, or fire loss. The estimators for each side use Xactimate software, yet come up with materially different repair estimates. The property owner then demands an appraisal in the hope that the umpire will award the higher amount or even "split the baby" in large claims where the estimates are wildly different. As evidenced by a recent decision of the Florida Court of Appeals, the property appraisal process can give rise to bad faith litigation. *Cammarata v. State Farm Florida Ins. Co.*, 152 So.3d 606 (Fla.Dist.Ct.App. 2014) *reh'g denied* (Jan. 12, 2015). (The Court held that the parties' settlement through the appraisal process, which determined the existence of the insurer's liability to provide coverage and the extent of the insured's damages, established the conditions precedent for stating a bad faith claim.)

> "[I]n light of the purposes of the bad faith cause of action, courts cannot presume that any failure to reach a settlement when the insurer did not meet a deadline unilaterally imposed by the third-party plaintiff['s counsel] . . . may reasonably be blamed on the insurer."

C. Responding To a Bad Faith Set-Up

An insurer that receives a "short-fused" time sensitive settlement demand for a claim which requires substantial time and information to evaluate can attempt to extend the offer in a reasonable manner provided there are no prohibitive state statutes, regulations or case law. *See Roberts v. Printup*, 595 F.3d 1181 (10th Cir. 2010) (applying Kansas law and stating that a ten day deadline was reasonable under circumstances presented and standard in the industry). In response to the claimant's initial demand, an insurer can, depending on the circumstances, cite the fact that it has a duty to its insured to investigate the claim fully, itemize the information it will need before it can respond to the offer, and, in cases involving more than one injured party, explain that a settlement of one claim may expose the insured to a greater risk of excess judgment from other plaintiffs. Stephen S. Ashley, *Bad Faith Actions: Liability & Damages*, § 10:5, "Common mistakes in prosecuting bad faith claims." In response, claimant's lawyers will often ask for an estimate of how long it will take for the insurance company to collect the necessary information and add that to the time limit for accepting a response to the settlement demand. If the insurer allows the additional time to elapse without a response, this can make the insurer appear unreasonable or indifferent to the insured. *Id.* Therefore, it is best for insurers to accurately estimate the amount of time required for gathering the necessary records and information that they need to investigate and assess a claim.

1. Role of Plaintiff's Counsel

"[I]n light of the purposes of the bad faith cause of action, courts cannot presume that any failure to reach a settlement when the insurer did not meet a deadline unilaterally imposed by the third-party plaintiff['s counsel] . . . may reasonably be blamed on the insurer." *Wade v. EMASCO Ins. Co.,* 483 F.3d 657, 670 (10th Cir. 2007). In defending bad faith claims, exposing the motive or ill intent of the designer of the scheme can be a highly effective manner for prevailing in such suits. However, not all courts agree that evidence of the underlying motive or intent in pursuing a bad faith claim is relevant. Some courts take the following position:

> Generally, [w]herever and whenever the standard of conduct is "reasonableness," such as concerning the liability insurer's settlement conduct regarding the underlying claim against the policyholder, whether or not the *injured claimant's attorney wants or intends* to "set up" the liability insurer for bad faith is generally immaterial or irrelevant or both. Typically, it is the insurer's burden of proof to show that realistically the injured claimant would not have accepted the settlement offer. Any doubt as to the existence of an opportunity to settle within the face amount of the coverage or as to the ability and willingness of the insured to pay any excess required for settlement must be resolved in favor of the insured unless the insurer, by some affirmative evidence, demonstrates that there was not only no realistic possibility of settlement within policy limits, but also that the insured would not have contributed to whatever settlement figure above that sum might have been available.

Steven Plitt and John K. Wittwer, *A Critical Review of the Practice of Setting Up Insurance Companies for Bad Faith*, 32 No. 10 Ins. Litig. Rep. 299 (2010) (internal quotations and citations omitted); *see also Miller v. Byrne*, 916 P.2d 566, 576 (Colo.Ct.App. 1995), *as modified on denial of reh'g* (Oct. 5, 1995) (noting that the motivation or intent of the claimant's attorney to set up the insurer for a bad faith claim does not appear to meet the tests of legal materiality or logical relevance).

On the other hand, some courts have found that the motive or intent of plaintiff's counsel is relevant. For example, in *Wade, supra.,* the court explicitly acknowledged that it was "an admitted fact that Plaintiff's motive in refusing [the insurer's] settlement offer . . . was to set up a bad faith claim against the insurer." *Wade*, 483 F.3d at 673. Also, in *Miel v. State Farm Mut. Auto. Ins. Co.*, 912 P.2d 1333 (Ariz.Ct.App. 1995), the plaintiff issued a time-limited settlement demand to a tortfeasor's insurer and then refused the insurer's acceptance when it was only twelve days late. The Court held that testimony regarding the motives of both the plaintiff and her attorney were relevant to the issue of whether the insurer acted unreasonably and/or in bad faith when it failed to accept the settlement demand by the specified deadline. *Id.* at 1339-40; *see also Glenn v. Fleming*, 799 P.2d 79 (Kan. 1990) (Court held that the insurer did not act in bad faith when it rejected an unreasonable and premature settlement offer that had conditions attached to it and was only open for two weeks); *King v. Allstate Ins. Co.*, No. 11-CV-00103-WJM-BNB, 2013 WL 4461593 at *3-4 (D. Colo. Aug. 20, 2013) (ruling that the intent of plaintiff's counsel was admissible because plaintiff has burden of proving that all damages were caused by the insurer's decision not to settle and insurer showed that the claimants were not permitted to settle without their counsel's consent).

The person in charge of the claim must remember at all times that if the insurer denies the claim, the most eloquent witness for or against the insurer will be the claims file.

If a claimant's lawyer has injected himself into the claims process, as is often the case, the insurer should consider whether that lawyer is a necessary witness in the subsequent bad faith trial. A dual role by counsel as witness and lawyer will disqualify the lawyer from participating as an attorney in the bad faith trial. *Id.*; *see also Model Rules of Professional Conduct,* Rule 3.7(a) "Lawyer as Witness" ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless . . . ."). Even if an attorney is allowed to both testify and advocate, this dual role is likely to give the jury doubts as to the attorney's credibility and bias. Stephen S. Ashley, *Bad Faith Actions: Liability & Damages*, § 10:5 "Common mistakes in prosecuting bad faith claims." In defending the bad faith set-up, counsel for the insurer should consider issuing a subpoena to the plaintiff's lawyer from the underlying action and be sure to ask for the fee agreement. Such agreements may indicate the set-up intent from the very beginning of the tort case.

2. Role of Experts

Once it becomes clear that a bad faith case is inevitable -- that the underlying case is really about the ancillary set-up case, rather than simply resolving the original claim -- insurers should consider retaining bad faith defense counsel, as well as appropriate experts. In making decisions regarding the retention of expert witnesses, insurers should consider an expert who possesses expertise not only in insurance claims handling standards, but also in the various underlying disciplines at issue with the claim. (e.g., traumatic brain injury, accident reconstruction, accounting, life care).

3. Settlement

Occasionally insurers respond to a bad faith claim by attempting to pay the policy proceeds in exchange for the release of the bad faith claim. *See National Ins. Ass'n v. Sockwell*, 829 So. 2d 111 (Ala. 2002); *see also* Steven Plitt, *Are UM/UIM Insurers Obligated to Advance to Their Insureds Undisputed Partial Payments Before Total Claim Value is Determined?*, 36 No. 2 Ins. Litig. Rep. 49 (2014). While the issue has not been addressed in all jurisdictions, settlement of a bad faith claim as a condition to settlement of the policy claim where the tort liability is clear can itself constitute bad faith or violate state unfair claim settlement practices. Stephen S. Ashley, *Bad Faith Actions: Liability & Damages*, § 10:7, "The decision to sue." To avoid bad faith liability, insurers should consider the following:

> In the adjustment of any claim, and especially in those identified as potential bad faith cases, the insurer's agents have the job of processing the claim without committing a specific act that the plaintiff's attorney can point [out] to persuade the jury that the insurance company acted in bad faith. This means treating the insured with the utmost courtesy, even though the adjuster believes that the insured is trying to defraud the insurer. The insurer must remain receptive to the insured's every offer of evidence to support his claim and must follow up every lead to its logical conclusion. The person in charge of the claim must remember at all times that if the insurer denies the claim, the most eloquent witness for or against the insurer will be the claims file. The adjuster must exercise great care to avoid any appearance of unreasonableness in the file. The adjuster must act promptly in carrying out his investigation, arranging the insured's examination under oath, deciding whether to pay or deny the claim, and communicating the decision to the insured. The lawyers and claims agents responsible for adjusting a claim must know the local unfair claim settlement practices statute inside and out and make sure to adhere to it.

Stephen S. Ashley, *Bad Faith Actions: Liability & Damages*, § 10:37 "Avoiding bad faith liability."

4. "Comfort Letters"

When confronted with policy limits demands that appear unjustified based on the circumstances, some insurers issue a comfort letter, some-times referred to as a "blue sky" letter, to the insured. This type of letter generally assures the insured that, in the event of an excess verdict, the insurer will indemnify the insured for the excess. The admissibility of the presence and/or absence of "comfort" or "blue sky" letters at trial is not well settled. In a case where there was no "comfort" letter but the claimant sought to offer general testimony of "comfort letters" to show what an insurer could or should have done, one federal trial court held that all such testimony would do is "enumerate a list of things that [an insurer] hypothetically 'could have' or 'should have done.'" *King v. Allstate Ins. Co.*, No. 11-CV-00103-WJM-BNB, 2013 WL 4461593 at *6 (D. Colo. Aug. 20, 2013). The trial judge in *King* reasoned that "comfort" letters were not required under applicable state law. Accordingly, the court did not permit the plaintiff to introduce testimony related to the absence of a "comfort letter," citing Rule 403 of the *Federal Rules of Evidence* and ruling that such testimony would unfairly prejudice the insurer, could confuse the jury as to the relevant issues in the case, and would be a waste of time. *Id.*

> But if a claimant arbitrarily withdraws an initial settlement offer and later rejects an identical proposal from the insurer, the claimant's conduct is the legal cause of the failure to settle.

III. Relevant Case Law

Wade, *supra.*, which has been mentioned several times above, is worthy of fuller treatment and discussion here. In *Wade,* the Tenth Circuit Court of Appeals affirmed the lower court's decision granting summary judgment in favor of the insurer on plaintiff's bad faith claims. The plaintiff brought a bad faith claim stating that the insurer failed to promptly investigate and settle the underlying lawsuit which resulted in a judgment against the insured in excess of coverage limits. The plaintiff brought a "tort suit against the insured[,] demand[ing] a policy-limits settlement shortly after an automobile accident where liability and causation were vigorously disputed…." *Id.* at 660. The plaintiff offered "but did not provide relevant medical records, [and then] withdrew the settlement offer before giving the insurance company the medical records or providing medical releases." *Id.* One day after the insurance company received the medical records, it made a policy limits settlement offer, but the plaintiff refused the offer because he hoped for a much larger award based on his bad faith claim. *Id.* The court held that making the "insurance company liable for the excess judgment against the insured under these circumstances would be inconsistent with the cause of action for bad faith or negligent refusal to settle." *Id.* at 674. The court noted that "[b]ecause the duty of good faith is an obligation arising from the contract itself, general principles of contract law apply, including the required elements of causation and damages." *Id.* at 673 (citations omitted). More specifically, "there must be a causal link between the insurer's conduct and the excess judgment against the insured." *Id.* at 674 (*quoting Hawkins v. Dennis*, 905 P.2d 678, 690 (Kan. 1995)). The court further explained:

> There are a number of reasons why an insurer's delay in attempting to settle a claim might set up a natural and continuous sequence of events that causes a claimant to reject a policy-limits settlement offer that he would have accepted earlier. For example, a claimant who has invested time and resources preparing for trial might want the settlement agreement to reflect those added expenses.... But if a claimant arbitrarily withdraws an initial settlement offer and later rejects an identical proposal from the insurer, the claimant's conduct is the legal cause of the failure to settle.

Id. (internal citations omitted). It is worth noting that the *Wade* opinion was written by former Tenth Circuit Judge Michael W. McConnell, a highly respected jurist, constitutional law scholar, and current Director of the Constitutional Law Center at Stanford Law School. Of course, *Wade* is no panacea, but it is worth knowing well for practitioners in the area. *Compare, Roberts v. Printup, supra.*

In *Porter v. Oklahoma. Farm Bureau Mut. Ins. Co.*, 330 P.3d 511 (Okla. 2014), the Supreme Court of Oklahoma upheld the lower court's dismissal of the plaintiffs' bad faith claims. In this case, sewage caused damage to the plaintiffs' home. *Id.* at 512. Plaintiffs argued that the insurer committed bad faith by refusing to follow the rationale forwarded in an unpublished opinion of the Oklahoma Court of Appeals. *Id.* at 518. The Court held that "[f]ailure to follow [an unpublished opinion that was] persuasive authority that did not constitute the law at the time of an insurer's resistance to payment does not constitute an act of bad faith." *Id.* (citations omitted).

In *Lloyd v. Allstate Ins. Co.*, 275 P.3d 323 (Wash.Ct.App. 2012), the Washington Court of Appeals upheld summary judgment finding that the insurer had not acted in bad faith. The plaintiff owned a vehicle that was involved in an accident. The terms and provisions of the plaintiff's automobile insurance policy allowed him to collect the "Actual Cash Value" of his vehicle, subject to the applicable deductible. The plaintiff was dissatisfied with the amount of two separate settlement offers that the insurer offered him for his car and sued the insurer for bad faith. *Id.* at 324 -26. The plaintiff claimed that the insurer had acted in bad faith when it extended two unreasonably low settlement offers and when the claims adjuster neglected to call him or his attorney to tender a higher offer. *Id.* at 327. The court found this argument unpersuasive. There was evidence in the record that the insurer had offered the plaintiff $6,654.63 for his car and that, in response, the plaintiff told the insurer to expect a call from his attorney and hung up the phone. The court held that it was reasonable "for [the insurer] to await contact from the as yet unidentified attorney, rather than to call [the plaintiff] back to try and settle the claim." The court further found that the insurer properly pursued the appraisal process pursuant to an express written request from the plaintiff's attorney and retained an appraiser the same day that the attorney requested an additional appraisal. *Id.*

> ... a swift and well-documented response to an insured's claims will greatly aid the insurer in defending a bad faith claim.

In *Glacier Const. Co. v. Travelers Prop. Cas. Co. of America*, 569 Fed. Appx. 582, 584 (10th Cir. 2014), the Tenth Circuit upheld the lower court decision dismissing plaintiff's bad faith claims. In this case, the plaintiff claimed that the insurer had acted unreasonably in several different aspects, including that the insurer took four months to deny the claim, allegedly failed to inspect the job site that was the nexus of the claim, and refused to pay the claim even after the lower court found that the policy afforded coverage for the alleged damages. *Id.* at 589. Despite plaintiff's claims, the Tenth Circuit held that the insurer acted reasonably under the circumstances. Evidence in the record established that the insurer conducted an investigation during the four months between the plaintiff's submission of the claim and the insurer's decision to deny the claims with regular contact with the plaintiff; had, in fact, inspected the job site; and damages were in dispute throughout the trial of the case. *Id.* at 590.

In *Shields v. Enterprise Leasing Co.*, 161 P.3d 1068, 1074-75 (Wash. Ct.App. 2007), the Washington Court of Appeals held that the insurer did not act in bad faith or violate the applicable state consumer protection act. The renter of a car claimed that Enterprise was required to provide third-party liability coverage, even though the renter had not purchased the coverage in the rental agreement. *Id.* at 1075. The insurer responded to the renter's claim for third-party liability coverage by contacting the renter four days after the demand for coverage and informing him that the company was denying coverage because the renter had failed to purchase supplemental third-party liability protection. *Id.* Enterprise also sent a letter confirming the denial of coverage the following day. *Id.* Based on the insurer's prompt actions, the court held that the insurer had not violated the state consumer protection act or acted in bad faith. *Id.* This case illustrates that a swift and well-documented response to an insured's claims will greatly aid the insurer in defending a bad faith claim.

In *Williams v. American Family Mut. Ins. Co.*, 101 F.Supp.2d 1337, 1342 (D. Kan. 2000), the Kansas District Court granted summary judgment in favor of the insurance company in a bad faith action, despite refusal of a settlement offer and an attendant excess judgment, where the insurer made a reasonable request for additional documentation and the plaintiff's attorney failed to supply it. *See also Smith v. Blackwell*, 791 P.2d 1343, 1347–49 (Kan.Ct.App. 1990) (upholding a bad faith claim where plaintiff's counsel made a pre-suit policy limits demand, "furnished all requested medical reports, agreed to extend time if significant progress toward settlement was being made, and did not file suit 'precipitously,'" but the insurer did not offer to settle until after the suit was filed).

In *Schuessler v. Wolter*, 310 P.3d 151 (Colo.Ct. App. 2012), the Colorado Court of Appeals upheld a jury verdict finding an insurer had acted in bad faith in the context of a first-party workers' compensation claim. The plaintiff, "a property maintenance worker, was injured on the job while installing a swamp cooler." *Id.* at 157. The workers' compensation carrier initially denied the claim, asserting that the injury was not caused by the accident and that the plaintiff was not working for the insured company at the time of the accident. *Id.* A jury found that the insurer had improperly denied the claim and awarded the plaintiff $375,000 in damages on his bad faith claim. *Id.* The insurer moved for a directed verdict or judgment notwithstanding the verdict, claiming that it acted reasonably in denying the claim on a "fairly debatable" defense. *Id.* at 161. The Court held that the fact that coverage is "fairly debatable" defeats a bad faith claim as a matter of law "only if the evidence of the reasonableness of [the insurer's] conduct were undisputed, and only if a reasonable person could not reach the same conclusion as the jury, when viewing the evidence in the light most favorable to [the insured]." *Id.* at 162. The court held that the "fairly debatable" standard is the correct test for bad faith in denial of coverage in the first-party context but found that, in this case, a reasonable person could disagree as to whether the coverage was "fairly debatable." *Id.* The court based its finding on the fact that "three . . . physicians . . . [had] stated that [the plaintiff] had suffered a work injury, and [the insurer's] own claims representative initially confirmed that there was a valid claim." *Id.* at 162. It is noteworthy that securing a "fairly debatable" or equivalent jury instruction, where allowed, can be central to the defense of a set-up case.

IV. Conclusion

The stakes in bad faith litigation are high for the insurance industry. The allure of a lucrative bad faith verdict can create an incentive to orchestrate a bad faith set-up. The signs of a set-up must be recognized early so that the insurer can take all reasonable steps to defend the set-up. If litigation ensues, defense counsel should be positioned to present evidence of the set-up and argue that litigation created by lawyers, for the benefit of lawyers, should not be tolerated.