PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CIVIL
PROPOSAL 2023-018

March 24, 2023

The Uniform Jury Instructions - Civil Committee has recommended new Uniform Jury Instruction 13-1703A NMRA, to amend and recompile Uniform Jury Instruction 13-1703 NMRA as Uniform Jury Instruction 13-1703B NMRA, amendments to the Introduction of Chapter 17 of the Uniform Jury Instructions – Civil, and Uniform Jury Instructions 13-1701, 13-1702, 13-1704, 13-1705, 13-1706, 13-1707, 13-1708, 13-1709, 13-1710, 13-1711, 13-1712, 13-1713, 13-1714, 13-1715, 13-1716, and 13-1718 NMRA, and the withdrawal of Uniform Jury Instruction 13-1717 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://supremecourt.nmcourts.gov/open-for-comment.aspx or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
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505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 24, 2023, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

Introduction.

[~~The last two decades have seen a steady development by New Mexico appellate courts of the common law action for bad faith by an insured against the insured's insurance company. The legislature has enacted statutes addressing the remedies available to an insured and comprehensive codes of behavior which create private causes of action. Quite naturally this judicial and statutory development of substantive law has increased the volume of civil actions and justified the drafting of pattern instructions for this lawsuit.~~

~~This new chapter of Uniform Jury Instructions - Civil is devoted exclusively to the bad faith claim against an insurance company. It includes the common law cause of action, UJI 13-1701 to 13-1704 NMRA as well as private actions under the Insurance Practices Act, UJI 13-1706 NMRA, and the Unfair Practices Act, UJI 13-1707 NMRA. The Chapter is self-contained with instructions on causation, affirmative defenses and damages. With the addition of instructions for Statement of Issues, Burden of Proof, Duties of Jurors and Verdict Forms, jury instructions for this case should be complete.~~

~~The Committee recognizes that the obligation of good faith may create causes of action for bad faith in contexts other than the relationship between an insurer and the policyholder; this chapter, however, is limited to the insurance contract relationship.~~

~~An insured's lawsuit against an insurer will generally give rise to a cause of action for breach of contract. Chapter 17 provides instructions only for the tort of bad faith and related private statutory actions. Instructions for breach of contract actions brought either by the insured or the insurer are to be drawn from Chapter 8, Contracts and UCC Sales. The absence of an instruction from this Chapter or Chapter 8 does not imply the unavailability of a claim or defense, merely that New Mexico case law is not sufficiently developed to justify the instruction.~~]

Chapter 17 of the Uniform Jury Instructions – Civil has been revised to reflect developments in the law since the chapter originated in 1991. The chapter is devoted exclusively to claims of bad faith against an insurer. The Committee recognizes that the obligation of good faith may create causes of action for bad faith in contexts other than the relationship between an insurer, the insured, and anyone to whom an insurer may have a duty of good faith. This chapter, however, is limited to the insurance contract relationship.

Chapter 17 includes instructions for common-law causes of action, UJI 13-1701 to 13-1704 NMRA, as well as private actions under the Insurance Practices Act, UJI 13-1706 NMRA. See NMSA 1978, § 59A-16-30 (1984, as amended through 1990). The chapter is self-contained with instructions on causation, affirmative defenses, and damages. With the addition of instructions for the statement of issues, burden of proof, duties of jurors, and verdict forms, jury instructions for the bad faith claim in the typical case should be complete.

A lawsuit against an insurer may also include causes of action for breach of contract or violation of the Unfair Practices Act. See NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019). Chapter 17 provides instructions only for common law and statutory claims for insurance bad faith. Instructions for any claims for breach of contract or violation of the Unfair Practices Act are to be drawn from Chapter 8, Contracts and UCC Sales, or Chapter 25, Unfair Practices Act, respectively. The absence of an instruction in this chapter does not imply the unavailability of a claim or defense, merely that New Mexico case law is not sufficiently developed to justify the instruction.

[As amended, effective March 1, 2005; as amended by Supreme Court Order No. _____, effective _____.]

13-1701. Duty of the insurance company.

[~~A policy of insurance is a contract. There is implied in every insurance policy a duty on the part of the insurance company to deal fairly with the policyholder.~~

~~Fair dealing means to act honestly and in good faith in the performance of the contract. [The insurance company must give equal consideration to its own interests and the interests of the policyholder.]~~]

An insurance policy is a contract that creates a special relationship between an insurer and insured which requires an insurer to deal fairly, reasonably, honestly, and in good faith with its insureds in all aspects of the insurance contract. These requirements protect the parties' reasonable expectations. The duty to act fairly, reasonably, honestly, and in good faith requires that an insurer must not place its own interests above those of an insured. This duty of good faith applies to the insurer and also to anyone acting on its behalf. The insurer cannot avoid its duty of good faith by delegating its responsibilities.

USE NOTES

This instruction must be given in every action for bad faith. [~~The bracketed final sentence is to be used in every case where the jury is instructed under UJI 13-1704, bad faith failure to settle and in any other case for which it is appropriate. *See* committee commentary.~~]
[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The cause of action for bad faith arises from a breach of the obligation of good faith. The duty to use good faith is founded in an implied covenant in every insurance policy to deal honestly and fairly. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984). [~~The breach of the implied obligation creates a cause of action. *State Farm General Insurance Co. v. Clifton*, 86 N.M. 757, 527 P.2d 798 (1974). Because the duty to use good faith derives from the contract of insurance, no cause of action exists in favor of a third party. *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976).~~] An insurer cannot evade its duty of good faith by delegating insurance functions to a third party. *Dellaira v. Farmers Ins. Exch.*, 2004-NMCA-132, ¶ 11, 136 N.M. 552, 102 P.3d 111.

Breach of the implied obligation of good faith creates a cause of action. State Farm General Insurance Co. v. Clifton, 86 N.M. 757, 527 P.2d 798 (1974). Because the duty to use good faith derives from the contract of insurance, no common law cause of action exists in favor of a third party. Chavez v. Chenoweth, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976). However, third parties may bring statutory claims of unfair claims practices under NMSA 59A-16-1 thru 30 in certain circumstances. Hovet v. Allstate Ins. Co., 2004-NMSC-010, ¶ 18, 135 N.M. 397.

In *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, supra, and *Jessen v. National Excess Insurance Company*, 108 N.M. 625, 776 P.2d 1244 (1989), the Supreme Court stated that consideration of the interests of the insured is an element of the insurer's obligation. When performing aspects of the insurance contract that are within the insurers exclusive control, the duty to the insured is akin to a fiduciary duty. Azar v. Prudential Ins. Co. of Am., 2003-NMCA-062, ¶ 54, 133 N.M. 669, 68 P.3d 909. An insurer's duty require more than an at least equal consideration when fiduciary duty is involved. See 13-1708 Committee Commentary. The Directions for Use provide that the insurer's obligation to consider the interests of the insured is applicable in every action for bad faith failure to settle. The obligation may apply in other contexts. For example, in [~~Jessen~~]*Jessen* the insured brought a first party claim against the insurer for failure to either pay or deny the claim within a reasonable period of time. In affirming a jury's verdict for the insured the Supreme Court stated: [~~". ~~]"the evidence shows the insurer utterly failed to exercise the care for the interests of the insured in denying or delaying payment on an insurance policy". [~~Id. 108 N.M. at 628~~] *Jessen* 1989-NMSC-040. [~~Thus, the trial judge and counsel must consider in each case the availability of the bracketed final sentence of this instruction. The Committee determined that this decision should be made on a case to case basis to avoid implying that when determining the existence of coverage in first party claims an insurer must pay the claim regardless of the merit of the insured's argument under the terms of the policy. When a claim is promptly investigated, reasonably evaluated and insured timely notified of a denial for reasons which are not frivolous or unfounded, consideration of the "interests of the insured" does not require payment of the claim.~~]
[As amended by Supreme Court Order No. _____, effective _____.]

13-1702. Bad faith [~~failure to pay a first party claim.~~] conduct in first-party claims.

When deciding whether to pay a claim, an insurer must act fairly, reasonably, honestly, and in good faith under the circumstances. An [~~insurance company~~]insurer acts in bad faith when it does [one or more of] the following:

[fails to deal fairly with its insured, giving the interests of its insured at least the same weight as its own interests;]

[fails to act promptly to [evaluate] [investigate] [pay] the claim;]

[unreasonably delays notification whether the claim will be paid or denied;]

[[~~when it~~]refuses to pay [~~a~~] the claim [~~of the policyholder~~] for reasons [~~which~~] that are frivolous or unfounded and are not reasonable under the terms of the policy;] [or]

(Other grounds for the claim that are supported by law and the evidence may be inserted here.)

[An insurer may act in bad faith in its handling of a claim even if the policy provides no coverage for that claim.]

[~~An insurance company does not act in bad faith by denying a claim for reasons which are reasonable under the terms of the policy.~~

~~[In deciding whether to pay a claim, the insurance company must act reasonably under the circumstances to conduct a timely and fair [investigation] [evaluation] of the claim.]~~

~~[It may not unreasonably delay its notification to the policyholder that the claim will be paid or denied.]~~

~~[A failure to timely [investigate] [evaluate] [pay] a claim is a bad faith breach of the duty to act honestly and in good faith in the performance of the insurance contract.]~~]

USE NOTES

[~~The first paragraph of this~~]This instruction must be given in every first-party claim. The bracketed [~~second, third and fourth~~] paragraphs are to be given [~~where the plaintiff's cause of action and the evidence would justify a jury verdict on the basis of unreasonable delay in investigation or payment of a first-party claim.~~]to reflect the nature of the plaintiff's claims. Other grounds may be inserted as stated in the instruction should the court determine they are warranted by law and the evidence.

[Adopted, effective November 1, 1991; amended by Supreme Court Order _____, effective for cases pending or filed on or after _____.]

Committee commentary. — A first-party claim for insurance bad faith may proceed on several different theories, some of which are outlined in *O'Neel v. USAA Ins. Co*., 2002-NMCA-028, ¶ 11, 131 N.M. 630, 41 P.3d 356: refusing to pay for reasons that were unfounded or frivolous, failing to act reasonably to conduct a fair investigation, or failing to act reasonably to conduct a fair evaluation of the claim. *See also Haygood v. United Services Auto. Ass'n*, 2019-NMCA-074, ¶ 19, 453 P.3d 1235. "Where an insurer fails to make an adequate investigation, its coverage position is unfounded, and it thus may be liable for bad faith denial of a claim." *Id.* (internal citations omitted).

The Supreme Court acknowledged additional bases in *Progressive Cas. Ins. Co. v. Vigil*, 2018-NMSC-014, ¶ 24, 413 P.3d 850, including an insurer's failure to "deal fairly with" its insured or "to act honestly and in good faith in the performance of the insurance contract." Delay in

payment is also a basis for finding bad faith. See *Jessen v. Nat'l Excess Ins. Co*., 1989-NMSC-040, 108 N.M. 625, 776 P.2d 1244 n.5; *Travelers Ins. Co. v. Montoya*, 1977-NMCA-062, ¶ 5, 90 N.M. 556, 566 P.2d 105.

The instruction reflects that "a bad faith claim need not depend on the existence of coverage." *Haygood*, 2019-NMCA-074, ¶ 22. Several theories to which the instruction applies, including "fail[ure] to deal fairly in handling the claim, fail[ure] to conduct a fair investigation, or fail[ure] to fairly evaluate coverage, among other possibilities," do not hinge on coverage. *Id.* ¶ 23. A court may not foreclose bad faith claims entirely based on the absence of coverage. *Id.* ¶ 24.

[~~Bad faith exists in the denial of an insured's first-party claim where the denial is "frivolous or unfounded." *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976). The insurer's action in denying coverage must rest upon a reasonable basis. Where payment of policy proceeds depends on an issue of law or fact that is "fairly debatable" the insurer is entitled to debate that issue. *United Nuclear Corp. v. Allendale Mutual Insurance Co.*, 103 N.M. 480, 709 P.2d 649 (1985).~~

~~An insurer may not simply refuse to investigate the claim of the insured using a failure to verify the claim as a justification for denial of coverage. *Jessen v. National Excess Insurance Company*, 108 N.M. 625, 776 P.2d 1244 (1989). Unreasonable delay in payment of a just claim is, itself, bad faith. *Travelers Ins. Co. v. Montoya*, 90 N.M. 556, 566 P.2d 105 (Ct. App. 1977).~~]

[As amended by Supreme Court Order No. _____, effective for cases pending or filed on or after _____.]

[NEW MATERIAL]

13-1703A. Existence of duty to defend.

A liability insurance company is under a duty to defend a claim [against its insured] if the facts alleged in the claim [and any other facts known to the insurer regarding the claim] [and any additional facts that the insurer could have discovered if it conducted a reasonable investigation of the claim] [bring the claim within the coverage terms of the insurance policy] [or] [give rise to a legitimate question regarding whether coverage exists under the policy terms]. In determining whether the claim potentially falls within the policy coverage, the facts and policy terms are to be considered from the viewpoint of a reasonable insured.

[For an insurer that is under a duty to defend a claim against its insured, the duty arises [when the insured makes a demand for a defense of the claim] [or] [when the insurer obtains actual notice of the claim] [,whichever occurs first]. The duty continues to exist until the insurer receives a determination by a court that the claim against the insured is outside the scope of coverage of the insurance policy.]

[An insurer is under no duty to defend if the insured affirmatively declines a defense.]

USE NOTES

This instruction is to be used in cases involving alleged bad faith conduct by a liability insurer in refusing to defend against a third-party claim, when the existence of a duty to defend on the insurer's part is disputed and presents questions for resolution by the jury. It should be given in conjunction with UJI 13-1703B, which describes when a breach of the duty to defend constitutes bad faith.

The bracketed language in the instruction should be used as appropriate, depending on the basis of the claim against the insurer and the issues raised by the evidence. The bracketed second paragraph should be used, in whole or in part, if factual issues are raised by the plaintiff's claim or the insurer's defense and sufficient evidence is offered at trial to give rise to a jury question regarding when the insurer's duty to defend arose and/or when that duty ceased to exist. The bracketed third paragraph should be used if the insurer's defense and the evidence raise a jury issue regarding whether the insured "affirmatively declined" a defense by the insurer.

The brackets around the phrase "against its insured" in the first paragraph of the instruction indicate that the phrase ordinarily should be given, but the phrase is intended to refer to the plaintiff claiming benefits under the insurance policy and should be modified, along with other references in the instruction to the "insured," if the use of "insured" would not be appropriate in the circumstances of the case. If the case presents a question whether the plaintiff is an "insured" or is otherwise eligible to claim a defense under the policy, this instruction may require supplementation with instructions framing that issue.

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. —

New Mexico law has taken an expansive approach in determining when an insurer has a duty to defend a third-party claim against an insured. Early cases focused on the allegations of the third party's complaint in comparison with the coverage terms of the policy and held that a duty to defend exists "[i]f the allegations of the . . . complaint show that an accident or occurrence comes within the coverage of the policy" or, if the facts are not stated with sufficient clarity to determine the question of coverage, if "the alleged facts tend to show an occurrence within the coverage." *Am. Emp'rs' Ins. Co. v. Continental Cas. Co.*, 1973-NMSC-073, ¶ 4, 85 N.M. 346 (internal quotation marks & citation omitted). Subsequent cases took a broader view, holding that a duty to defend "arises from the allegations on the face of the complaint or from the known but unpleaded factual basis of the claim that brings it arguably within the scope of coverage." *Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co.*, 1990-NMSC-094, ¶ 11, 110 N.M. 741.

More recently, New Mexico courts have held that an insurer, in determining whether it has a duty to defend, may be charged with knowledge beyond the allegations of the complaint and facts otherwise known to it. "[A]n insurance company is required to conduct such an investigation into the facts and circumstances underlying the complaint against its insured as is reasonable given the factual information provided by the insured or provided by the circumstances surrounding the claim in order to determine whether it has a duty to defend." *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, 128 N.M. 434. The insurance company's duty "is based on the facts which it knew or would have known if it had conducted a reasonable investigation." *Id.* ¶ 32. Thus, "[i]f the duty to defend does not arise from the complaint on its face, the duty may arise if the insurer is notified of factual contentions or if the insurer could have discovered facts, through reasonable investigation, implicating a duty to defend." *Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co.*, 2006-NMCA-151, ¶ 14, 140 N.M. 720.

New Mexico courts have variously described the standard by which to determine whether pleaded, known, or reasonably discoverable facts create a duty to defend in light of the language of the policy. A duty to defend has been said to arise if the facts "tend to" show policy coverage, *Am. Emp'rs' Ins. Co.*, 1973-NMSC-073, ¶ 4, or if they bring the claim against the insured "arguably," *Am. Gen.*, 1990-NMSC-094, ¶ 11, or "potentially," *State Farm Fire & Cas. Co. v.*

Price, 1984-NMCA-036, ¶ 18, 101 N.M. 438, *disapproved of on other grounds by Ellingwood v. N.N. Invs. Life Ins. Co.*, 1991-NMSC-006, ¶ 17, 111 N.M. 301, within the coverage of the policy, or if they give rise to a "legitimate question regarding . . . coverage," *Dove v. State Farm Fire & Cas. Co.*, 2017-NMCA-051, ¶ 22, 399 P.3d 400. *See id.* ¶¶ 20-21 (concluding that allegations of complaint "should have initially alerted [insurer] to the possibility" of coverage or "at the very least, have reasonably prompted [it] to investigate," and that facts revealed during discovery or that reasonable investigation would have revealed "further establish . . . potential coverage under the policy"). Only "[w]here there is no potential for coverage under a contract of insurance" is the insurer free of any duty to defend. *Marshall v. Providence Wash. Ins. Co.*, 1997-NMCA-121, ¶ 13, 124 N.M. 381; *see also Guar. Nat'l Ins. Co. v. C de Baca*, 1995-NMCA-130, ¶ 14, 120 N.M. 806 ("[T]he insurer has no duty to defend if the allegations in the complaint clearly fall outside the policy's provisions.").

In determining the existence of a duty to defend, whether the facts potentially or arguably fall within the policy coverage is to be considered from the viewpoint and reasonable expectations of a hypothetical reasonable insured. *See Dove*, 2017-NMCA-051, ¶¶ 19, 24; *see also Hinkle v. State Farm Fire & Cas. Co.*, 2013-NMCA-084, 308 P.3d 1009 (holding that, even considering insured's reasonable expectations based on policy language, claims asserted in third party's complaint against insured did not give rise to duty to defend). Any doubt about whether the claim is covered should be resolved in favor of the insured, *Price*, 1984-NMCA-036, ¶ 18, and any ambiguity in the policy language should be construed against the insurer, *Dove*, 2017-NMCA-051, ¶ 17.

An insurer's duty to defend is triggered by the insured's demand for a defense or by the insurer's actual notice of a claim against the insured, unless the insured knowingly and affirmatively declines a defense. *Garcia v. Underwriters at Lloyd's, London*, 2008-NMSC-018, ¶ 1, 143 N.M. 732. New Mexico courts appear to take a broad view of what may constitute a demand. *See Price*, 1984-NMCA-036, ¶¶ 26-27. The duty continues "unless and until [the insurer] receives a judicial ruling in its favor relieving it of any further obligations." *Dove*, 2017-NMCA-051, ¶ 12 (internal quotation marks & citation omitted). That fact-based determination generally is reserved for the court in the primary action by the third party against the insured. *See Mullenix*, 1982-NMSC-038, ¶¶ 11-12; *Dove*, 2017-NMCA-051, ¶ 12.

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

[13-1703 AMENDED AND RECOMPILED AS 13-1703B]

[~~13-1703~~] 13-1703B. Bad faith failure to defend.

A liability insurance company must act fairly, reasonably, honestly, and in good faith in determining whether it has a duty to defend a claim [against its insured]. An insurance company acts in bad faith in refusing to defend a claim if it

[fails to conduct an investigation of the claim that is timely and reasonable under the circumstances;]

[fails to conduct a fair and honest evaluation of its duty to defend, giving the interests of its insured at least the same weight as its own interests;] [or]

[unreasonably delays notifying the insured of its decision as to whether or not it will defend the claim.]

[~~A liability insurance company has a duty to defend its insured against all claims which fall within the coverage of the insurance policy. A liability insurance company must act reasonably under the circumstances to conduct a timely investigation and fair evaluation of its duty to defend.~~

~~An insurance company acts in bad faith in refusing to defend a claim if the terms of the insurance policy do not provide a reasonable basis for the refusal.~~]

USE NOTES

This instruction [~~must be given in every cause of action for bad faith refusal to defend a claim against the insured.~~] is to be used in cases involving alleged bad faith conduct by a liability insurer in refusing to defend against a third-party claim. If the insurer's duty to defend is disputed and involves questions for resolution by the jury, UJI 13-1703A should be given together with this instruction.

The bracketed language in the instruction describing bad faith conduct should be used as appropriate, depending on the basis of the claim against the insurer and the issues presented by the case. The brackets around the phrase "against its insured" indicate that the phrase ordinarily should be given, but the phrase is intended to refer to the plaintiff claiming benefits under the insurance policy and should be modified (along with other references in the instruction to the "insured") if the use of "insured" would not be appropriate in the circumstances of the case. If the case presents a question whether the plaintiff is an "insured" or is otherwise eligible to claim a defense under the policy, this instruction may require supplementation with instructions framing that issue.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. —

[~~A liability insurer's duty to defend is contractual and depends upon the nature of the claim against the insured and the terms of coverage under the liability insurance policy. If there is no obligation to pay the claim against the insured, there is no duty to defend. *American Employer's Insurance Co. v. Crawford*, 87 N.M. 375, 533 P.2d 1203 (1975). If there is coverage under the policy a good faith belief that there is no coverage is, in and of itself, not a defense to the bad faith claim. The jury's proper inquiry is whether the insurer used good faith - honesty and fair dealing - in resolving the company's duty to defend. The question, in each case is whether the company has a reasonable basis for its action under the terms of the policy. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984). Subjective belief in the company's position is relevant to a determination of the bad faith claim but the jury's decision turns upon whether a reasonable basis exists for the refusal to defend. *Lujan v. Gonzales*, 84 N.M. 229, 501 P.2d 673 (Ct. App. 1972), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972). While the trial court's determination of the coverage issue may be determinative of the bad faith claim, that claim is independent of coverage; it rests upon a failure to use good faith - honesty and fair dealing - in resolving the company's duty to defend. The question in each case is whether the company had a reasonable basis for its action under the terms of the policy. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984).~~]

An insurer may hold a subjective good faith belief that there is no coverage and still breach its duty to defend under the policy. *See Lujan v. Gonzales*, 1972-NMCA-098, ¶ 22, 84 N.M. 229. The insurer "is liable for its breach regardless of whether the breach was in good faith." *Id.* ¶ 42. To establish that an insurer acted in bad faith in failing to defend, more must be shown than the

breach itself. "[B]ad faith . . . mean[s] an absence of good faith by an insurer in its relations with its insured." *Id.* ¶ 38. Without attempting to define the term completely, the court in *Lujan* "use[d] the term 'good faith' . . . to mean an insurer cannot be partial to its own interests, but must give its interests and the interests of its insured equal consideration" – i.e., "there must be a fair balancing of these interests." *Id.* ¶¶ 39, 41. New Mexico courts have expressed a strong preference for insurers to obtain judicial determinations of their duty to defend, *see, e.g., Dove*, 2017-NMCA-051, ¶ 12, and have cautioned that an insurer that unilaterally refuses to defend a claim "do[es] so at its peril" and risks liability for breach of the insurance contract or bad faith, *id.* ¶ 14.

In *Lujan* the court held that substantial evidence supported the trial court's determination that the insurer acted in bad faith in refusing to defend or settle a claim where the court could find from the evidence that in evaluating its duty the insurer exhibited "almost total disregard for the interest of its insured" and failed to notify the insured of its decision not to defend until after a settlement offer had expired. 1972-NMCA-098, ¶¶ 46-51. *See also State Farm Fire & Cas. Co. v. Price*, 1984-NMCA-036, ¶ 41, 101 N.M. 438 (holding that insurer's bad faith failure to defend presented triable issue, where "there is evidence in this case which could support a finding that [insurer] closed its eyes to the facts" supporting duty to defend), *disapproved of on other grounds by Ellingwood v. N.N. Invs. Life Ins. Co.*, 1991-NMSC-006, ¶ 17, 111 N.M. 301.

Lujan rejected on the facts the insurer's argument that in determining its duty to the insured it justifiably relied on certain information available to it. 1972-NMCA-098, ¶ 46. In drafting UJI 13-1703B, the Committee has assumed that an insurer that reasonably evaluates factual information or reasonably interprets policy language in conformity with the general good-faith standard of equal consideration of interests has acted in good faith. In cases involving an insurer's alleged bad faith failure to pay a first-party claim, New Mexico courts have defined bad faith as a refusal to pay that is "frivolous or unfounded." *E.g., Jackson Nat'l Life Ins. Co. v. Receconi*, 1992-NMSC-019, ¶¶ 55-56, 113 N.M. 403 (internal quotation marks & citations omitted). Similarly, a prior version of this instruction stated that an insurer that refuses to defend acts in bad faith "if the terms of the insurance policy do not provide a reasonable basis for the refusal." UJI 13-1703 (2022). The Committee has not found these standards used in a published failure-to-defend case and therefore believes any defense of reasonableness advanced by an insurer in such a case should be considered by the jury in terms of whether the insurer conducted "a fair and honest evaluation of its duty to defend" and gave the insured's interest "at least the same weight as its own interests," as set forth in the instruction.

[As amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

13-1704. Bad faith failure to settle.

An insurer [or agent] has a duty to use honest judgment in evaluating claims against its insured, and to settle whenever practicable. The insurer [or agent] acts in bad faith when it fails to use honest judgment by [failing to investigate diligently, competently, or promptly;] [acting on inadequate information;] [or] [failing to fairly balance its own interests and the interests of the insured].

[Where there is a substantial likelihood that a claim will result in a recovery that exceeds policy limits, the insurer has a good-faith duty to minimize, if not eliminate, its insured's liability.] [The insurer has a duty [~~A liability insurance company has a duty to timely investigate and fairly~~

~~evaluate the claim against its insured, and~~] to accept reasonable settlement offers within policy limits.]

[~~An insurance company's failure to conduct a competent investigation of the claim and to honestly and fairly balance its own interests and the interests of the insured in rejecting a settlement offer within policy limits is bad faith. If the company gives equal consideration to its own interests and the interests of the insured and based on honest judgment and adequate information does not settle the claim and proceeds to trial, it has acted in good faith.~~]

USE NOTES

This instruction must be given in any cause of action based upon a bad faith failure to [~~investigate,~~] negotiate or settle a liability claim against the insured. The bracketed language regarding agents may be used in cases involving an adjuster, broker, or other person acting as or on behalf of an insurer. The bracketed language regarding claims that pose a substantial likelihood of a recovery exceeding policy limits shall be used in cases involving claims that meet that description. The bracketed language regarding reasonable settlement offers shall be used in cases where the claimant made an offer to settle within policy limits.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order _____, effective _____.]

Committee commentary. — "If the insurer, based on its honest judgment and acting on adequate information after competent investigation of the claim, does not settle and instead proceeds to trial, then it has acted in good faith and cannot be found liable for any excess caused by its failure to settle." *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 1984-NMSC-107, ¶ 18, 102 N.M. 28, 690 P.2d 1022. However, "good faith does impose upon the insurer the duty to settle whenever practicable." *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 13, 124 N.M. 624, 954 P.2d 56. In particular, "when damages are likely to exceed policy limits, the insurer risks exposing its insured to even greater liability by going to trial rather than settling. Should an insurer, in violation of its duty of good faith, refuse to accept a reasonable settlement offer within policy limits, it will be liable for the entire judgment against the insured, including the amount in excess of policy limits." *Id.* ¶ 15.

An insurer's "honest judgment" is necessarily based on "its diligent, competent investigation of the claim," *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 22, 135 N.M. 106, 85 P.3d 230. It is also based on its honesty in balancing its interests with its insured's. *See id.* ¶ 20 ("By 'dishonest judgment,' we mean that an insurer has failed to honestly and fairly balance its own interests and the interests of the insured. An insurer cannot be partial to its own interests, but rather must give the interests of its insured at least the same consideration or greater."). [~~There is no cause of action in New Mexico for the negligent failure to settle a claim of liability against the insured. Liability is based upon a breach of the obligation of good faith implied in the insurance contract. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984). In consideration of settlement, the insurer must honestly weigh the probabilities of an adverse judgment and give equal consideration to the interests of the insured. "To fulfill the duty of giving equal consideration of the interests of the insured and the insurer there must be a fair balancing of these interests." *Lujan v. Gonzales*, 84 N.M. 229, 234, 501 P.2d 673 (Ct. App. 1972), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972). Good faith consideration of~~

~~settlement offers requires an adequate investigation of the claim against the insured. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, supra.~~]
[As amended by Supreme Court Order No. _____, effective _____.]

13-1705. [~~Evidence~~] Industry customs and standards.

Under the [~~"bad faith"~~]bad faith claim, what is customarily done by those engaged in the insurance industry is evidence of whether the insurance company acted in good faith. [~~However, the good faith of the insurance company is determined by the reasonableness of its conduct, whether such conduct is customary in the industry or not.~~] Industry [customs] [and] [standards] are evidence of good or bad faith, but they are not conclusive.

USE NOTES

This instruction should be given when the trial court allows evidence of industry custom or standards on the issue of the defendant's bad faith. The appropriate parenthetical is used depending on the nature of the evidence.
[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~While the honesty and subjective intentions of the insurer are an element of the jury's assessment of the bad faith claim, *see* UJI 13-1701, the ultimate determination depends upon an assessment of whether the company had a reasonable ground to believe the merit of its defense to the first party claim or the merit of its refusal to defend or settle a liability claim. This is an objective standard. *Clifton v. State Farm Ins. Co.*, 86 N.M. 757, 527 P.2d 798 (1974) and *Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244 (1989).~~] Evidence of industry custom and practice may be helpful to a determination of [~~this issue~~] whether the insurer acted in good or bad faith, but it is not controlling. *Brooks v. Beech Aircraft Corp.*, 1995-NMSC-043, ¶ 40, 120 N.M. 372, 902 P.2d 54 (citing *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932), *cert. denied*, 287 U.S. 662 (1932)); *see generally Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶¶ 14-16, 135 N.M. 106, 85 P.3d 230; *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 1999-NMSC-006, ¶¶ 44-45, 127 N.M. 1, 976 P.2d 1; *Jessen v. Nat'l Excess Ins. Co.*, 1989-NMSC-040, ¶¶ 7-14, 108 N.M. 625, 776 P.2d 1244; *State Farm Ins. Co. v. Clifton*, 1974-NMSC-081, ¶¶ 1-9, 86 N.M. 757, 527 P.2d 798.
[As amended by Supreme Court Order No. _____, effective _____.]

13-1706. Violation of Insurance Practices Act.

There was in force in this state, at the time of the [claim handling] [transaction] in this case, a law prohibiting certain practices by insurers. [~~insurance companies.~~]_____ (plaintiff) [~~Plaintiff~~] contends that _____ (defendant) engaged in the following prohibited practice[s]:

(Insert the applicable portion[s] of Article 16 of the Insurance Code.)

If _____ (defendant) engaged in [any one of these] [this] practice[s], it is liable to _____ (plaintiff) for damages [~~proximately~~] caused by its conduct if it acted knowingly or engaged in the practice[s] with such frequency as to indicate that such conduct was its general business practice.

USE NOTES

Unfair insurance practices supported by substantial evidence are to be numbered and listed using the statutory language.

The definition of "insurer" in the TPFA includes agents, brokers, solicitors, adjusters, providers of service contracts, and all other persons engaged in any business subject to supervision under the Insurance Code. *Martinez v. Cornejo*, 2009-NMCA-011, ¶ 18, 146 N.M. 223, 208 P.3d 443. The trial court has the discretion to modify the language of this instruction accordingly.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — Article 16 of the Insurance Code, the Trade Practices and Frauds Article ("TPFA"), creates a private cause of action against an insurer or agent for violations of the Code. NMSA 1978, § 59A-16-30 (1984, as amended through 1990) ("Any person covered by Chapter 59A, Article 16 NMSA 1978 who has suffered damages as a result of a violation of that article by an insurer or agent is granted a right to bring an action in district court to recover actual damages."). "The private right of action under the TPFA is not founded on or related to any common law liability or contractual obligation." *Martinez*, 2009-NMCA-011, ¶ 40. "In creating a separate statutory action, the Legislature had a remedial purpose in mind: to encourage ethical claims practices within the insurance industry." *Hovet*, 2004-NMSC-010, ¶ 14.

A third party, who can demonstrate a special beneficiary status, may sue for unfair claims practices under Section 59A-16-30. *Hovet*, 2004-NMSC-010, ¶ 17 ("A private right of action for third parties who are victims of automobile accidents is consistent with a statutory scheme that was intended to benefit both insureds and third-party claimants. . . [and] enforces the policy of the Insurance Code, which is to promote ethical settlement practices within the insurance industry."); *see also Russell v. Protective Ins. Co.*, 1988-NMSC-025, ¶ 15, 107 N.M. 9, 751 P.2d 693 ("[N]on-contractual liability of a promisor to a third party is valid when it is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.") (quoting Restatement (Second) of Contracts § 313(2)(b) (1981)), *superseded by statute*, NMSA 1978, §§ 52–1–28.1(A) (1990), 59A–16–30. The New Mexico Supreme Court "has recognized that a third-party plaintiff who is an intended beneficiary of statutorily mandated insurance has a private right of action under Section 59A–16–30 to remedy an insurer's breach of the duty of fair settlement practices established by Article 16." *Jolley v. Associated Elec. & Gas Ins. Servs. Ltd. (AEGIS)*, 2010-NMSC-029, ¶ 10, 148 N.M. 237 P.3d 738.

[~~*Russell v. Protective Ins. Co.*, 107 N.M. 9, 751 P.2d 693 (1988). The Code section most directly relevant to "bad faith" claims is Section 59A-16-20 defining unfair and deceptive claims practices. The statute allows recovery of "actual damages". Litigation costs must be awarded the prevailing party, plaintiff or defendant, unless the trial court otherwise directs. The trial court (not the jury) may also award attorney's fees to the prevailing party upon a finding that the claim was known to be groundless or the party charged with the violation has willfully engaged in the prohibited practice.~~

~~Current state decisions do not address the meaning of "general business practice". *See Barboa v. Monumental General Ins. Co.*, No. CIV-87-0365-JB slip op. (D. N.M. Mar. 25, 1988).~~]

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

13-1707. Violation of Unfair Practices Act.

Instruction withdrawn.

[~~There was in force in this state, at the time of the [dealings] [transaction] in this case, a law prohibiting a person selling insurance from engaging in unfair or deceptive trade practices. An unfair or deceptive trade practice is any false or misleading oral or written statement, visual description or other representation which tends to or does deceive or mislead the policyholder. A person who is deceived by an unfair or deceptive trade practice may recover damages proximately caused by the deception. Plaintiff contends that defendant engaged in the following prohibited practice[s]:~~

~~(*Insert the unfair or deceptive trade practice*.)~~

~~If defendant engaged in [any one of these] [this] practice[s], it is liable to plaintiff for damages proximately caused by its conduct.~~

~~USE NOTES~~

~~Unfair or deceptive trade practices are illustrated by Section 57-12-2, NMSA 1978; however, the practices listed are not exclusive. Where applicable, it is recommended that the statutory language be used.~~]

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — In 2022, the Supreme Court adopted UJI 13-2501 through -2506 NMRA for use in claims brought under the Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019). These instructions should be used as appropriate in claims brought under the UPA.

Where applicable, a plaintiff may pursue both the remedies under the Unfair Insurance Practices Act and the [] UPA. The Unfair Insurance Practices Act is not an exclusive statutory remedy for unfair insurance practices. *State ex rel. Stratton v. Gurley Motor Co.*, [~~105 N.M. 803, 806, 737 P.2d 1180 (Ct. App.), cert. denied, 105 N.M. 781, 737 P.2d 893 (1987).~~] 1987-NMCA-063, ¶ 17, 105 N.M. 803, 737 P.2d 1180.

[~~The two statutes provide different remedies. Under both, the plaintiff may recover actual damages. However, the Unfair Practices Act also authorizes a treble award of damages upon a determination by the trier of fact that the defendant willfully engaged in the trade practice. The Committee has drafted no instruction for the treble damages remedy. Where the evidence would permit a finding of willful conduct, UJI 13-302E should be used to frame the contention of willful conduct as a related issue and special interrogatories or the special verdict form, Chapter 22, should be submitted to the jury on this issue. It remains in the discretion of the Court, as a matter of law, to impose treble damages justified by a finding of willful conduct. Section 57-12-10(B), NMSA 1978.~~]

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

13-1708. Breach of fiduciary duty

No instruction drafted.

Committee commentary. — Normally, the Court should decide whether the issues in the case involve fiduciary duties. *GCM, Inc. v. Ky. Cent Life Ins. Co.*, 1997-NMSC-052, ¶ 23, 124 N.M. 186, 947 P.2d 143 ("[T]he scope of a tort duty is a matter of law."). "A fiduciary is obliged to act primarily for another's benefit in matters connected with such undertaking." *Kueffer v.*

Kueffer, 1990-NMSC-045, ¶ 12, 110 N.M. 10, 791 P.2d 461 (internal quotation marks and citation omitted). "In the insurance context, New Mexico courts have recognized a fiduciary duty because of the fiduciary obligations inhering in insurance relationships and because of concerns arising from the bargaining position typically occupied by the insured and insurer." *Azar v. Prudential Ins. Co. of Am.*, 2004-NMCA-062, ¶ 54, 133 N.M. 669, 68 P.3d 909 (internal quotation marks and citation omitted). New Mexico has not yet expressly recognized a separate cause of action for breach of a fiduciary duty in the insurance bad faith context. Primarily, that is because a fiduciary duty has significant overlap with the duty of good faith and fair dealing. *See Chavez v. Chenoweth*, 1976-NMCA-076, ¶ 44, 89 N.M. 423, 553 P.2d 703.

Though there is overlap between these two duties, the duty of good faith and fair dealing requires insurers to give the insured's interests *at least* equal consideration to its own interests. *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 12, 124 N.M. 624, 954 P.2d 56 (explaining that under the duty of good faith and fair dealing, "an insurer cannot be partial to its own interests, but must give its interests and the interests of its insured *equal* consideration" (emphasis added)). In contrast, a fiduciary relationship requires the insurer to place the insured's interests *above* that of its own.

[~~While the relationship between insurer and insured imposes a fiduciary obligation on the insurer to deal with the insured in good faith in matters pertaining to performance of an insurance contract, no cause of action, apart from the action for bad faith, exists for the breach of this duty. *Chavez v. Chenoweth*, 1976-NMCA-076, 89 N.M. 423, 553 P.2d 703 [(Ct. App. 1976)~~] The insurance contract on its own "is not enough to give rise to a fiduciary relationship". *Azar*, 2003-NMCA-062, ¶ 54. So far, courts have recognized the following three situations where a fiduciary relationship was found in the insurance context: "(1) where the insurer, by the terms of the policy, had the power to decide whether to accept or reject offers of compromise; (2) where the insurer acted on behalf of the insured in settlement or litigation of claims; and (3) where the insurer gave advice to insured not to hire counsel and to instead communicate with insurer." *Id.* (citing *Chavez*, 1976-NMCA-076). These three situation are not exhaustive, and the fiduciary duty applies when the insurer has "exclusive control and obligations in matters pertaining to the performance of the insurance contract." *Id.* If the court finds the case involves a fiduciary duty, the instructions describing the insurer giving equal weight may be modified to reflect the insurer's obligation to give its insured's interest greater weight. The fiduciary obligation allows the award of punitive damages in insurance cases under a more relaxed standard. *See* UJI 13-1718; *Romero v. Mervyn's*, 1989-NSMC-081, ¶ 23, n.3, 109 N.M. 249, [~~255,~~] 784 P.2d 992[~~, 998 footnote 3 (1989)~~].

A non-exclusive list of fiduciary duties would include the following:

Duty of Loyalty- An insurer and its agents have a duty of loyalty to its insured. An insurer or its agent breaches the duty of loyalty by putting the insurer's interests, or the interests of another, before those of the insured. *Cf* UJI 13-2406.

Duty of Candor- Fiduciaries must disclose any and all relevant information that could have an impact on their ability to carry out their duties as a fiduciary and/or the well-being of a beneficiary's interests. *See Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 19, 127 N.M. 1, 976 P.2d 1 for example of duty to disclose.

[As amended by Supreme Court Order No. _____, effective _____.]

13-1709. Causation.

A cause of a [~~loss~~][injury][harm] is a factor which contributes to the [~~loss~~][injury][harm] to the plaintiff and without which the [~~loss~~][injury][harm] would not have occurred. It need not be the only [~~cause~~] factor contributing to the [injury][harm].

USE NOTES

This instruction must be given in every cause of action under Chapter 17.
[As amended, effective March 1, 2005; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — At common law and under the statutory remedies of the Unfair Insurance Practices Act and the Unfair Practices Act, compensation is for the injury to the inured caused by the prohibited conduct [~~monetary losses actually caused by the prohibited conduct~~]. For instance, "[s]hould an insurer, in violation of its duty of good faith, refuse to accept a reasonable settlement offer within policy limits, it will be liable for the entire judgment against the insured, including the amount in excess of policy limits." Dairyland Ins. Co. v. Herman, 1998-NMSC-005, ¶ 15, 124 N.M. 624, 954 P.2d 56. For reasons of public policy, the insured is viewed as having suffered injury from entry of the excess judgment even if the insured would be shielded from monetary liability on the judgment by, e.g., a covenant not to execute on the excess judgment or a discharge in bankruptcy. "Underlying this rule is the notion that it is the judgment against the insured, not the amount of his personal exposure to it, that damages the insured." Dydek v. Dydek, 2012-NMCA-088, ¶ 67, 288 P.3d 872. This instruction addresses the causal link that must be established between the insurer's bad faith conduct and the resulting injury.

An insurance bad faith claim may implicate the coverage provisions of the insurance policy. Policy coverage may be limited to losses caused by particular risks, or coverage may be excluded for losses caused by certain risks or by certain conduct of the insured. The determination of causation as it relates to policy coverage is not necessarily governed by this instruction. New Mexico law remains unsettled on this question.

The Court of Appeals in Healthsouth Rehabilitation Hospital of New Mexico, Ltd. v. Brawley, 2016-NMCA-037, 369 P.3d 27, addressed causation in the coverage context, but it ultimately determined the issue was not preserved for appellate review. Although the case discussed the issue in dicta, it explained a key difference between how causation operates in tort/negligence-based cases and how causation may apply in determining coverage. Healthsouth observes that

> causation principles in tort law are different from causation principles in insurance law because "the two systems examine the causation question for fundamentally different purposes. In tort, it is to assess fault for wrongdoing. In insurance, it is to determine when the operative terms of a contractual bargain come into play." Erik S. Knutsen, Confusion About Causation in Insurance: Solutions for Catastrophic Losses, 61 Ala. L. Rev. 957, 968 (2010); Knutsen, supra, at 969-70 (stating that "[i]nsurance causation therefore bears little resemblance to the policy-laden proximate cause analysis of tort law"); see also Standard Oil Co. of N.J. v. United States, 340 U.S. 54, 66 (1950) (Frankfurter, J., dissenting) ("[T]he subtleties and sophistries of tort liability for negligence are not to be applied in construing the covenants of [an insurance] policy."); Allstate Ins. Co. v. Smiley, 659 N.E.2d 1345,

> 1354 (Ill. App. Ct. 1995) (declining to follow a case because its holding "introduc[ed] . . . tort principles into the interpretation of an insurance policy"); Robert H. Jerry II, Understanding Insurance Law, 502 (2d ed. 1996) (stating that "many courts have explicitly stated that the proximate cause test is not the same in tort law and insurance law").
>
> Healthsouth, 2016-NMCA-037, ¶18.

In bad faith cases that require consideration of both causation of the plaintiff's injury and causation as a factor affecting policy coverage, this instruction addressing the former may need to be supplemented with an instruction dealing with the latter, with the distinction being carefully drawn to assist the jury.

Legal scholars offer some thoughts to help attorneys understand the complexity of the task. Professor Peter Nash Swisher wrote "Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation 'Riddles,'" 43 Tort Trial & Ins.Prac.L.J. 1 (2007-2008), in which he advised on tort and insurance causation law:

> American courts and juries have struggled mightily to analyze and resolve various insurance causation issues from a number of different perspectives. Some courts determine coverage by applying an immediate cause rationale, while other courts employ an efficient proximate cause chain of events doctrine similar to tort law or utilize a hybrid approach combining both of these rules. The courts likewise have employed no less than three different insurance law approaches to address multiple concurrent causation issues, and they have disagreed on whether an efficient proximate cause approach requires a substantial causal nexus or only a sufficient causal nexus.
>
> 43 Tort Trial & Ins.Prac.L.J. at 34.

Professor Swisher's article focused on the relationship between tort and insurance law causation principles; he did not specifically focus on bad faith insurance cases. In cases requiring a supplemental instruction on causation in insurance law, counsel will need to consider these alternative causation approaches as a starting point for any such instruction.

Conduct of the policyholder which violates the policyholder's obligation of honesty becomes a cause of the loss if the insurer acted in reliance upon such conduct.

[Revised, effective March 1, 2005; as amended by Supreme Court Order No. _____, effective _____.]

13-1710. Affirmative defense; policyholder's dishonesty – *Instruction Withdrawn.*

~~[It is a duty of the holder of an insurance policy to deal honestly and fairly with the insurance company. Defendant contends that in [applying for insurance] [submitting a claim for insurance proceeds] [answering the insurance company's request for information] the plaintiff acted dishonestly and with the intention to deceive the defendant.~~

~~The Plaintiff may not recover under the "bad faith" claim if, with intent to deceive, [he] [she] dealt with the defendant dishonestly about a material fact. A material fact is one which a reasonably prudent insurer would regard as important in [issuing the policy] [evaluating the claim].~~]

Instruction withdrawn.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~The action for bad faith arises from breach of the implied covenant to deal honestly and fairly. UJI 13-1701. It is not an action grounded in negligence. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984). The affirmative defense available to the insurer who has acted in bad faith or in violation of statutory obligations is the defense that the policyholder has acted dishonestly and unfairly in dealing with the company. The duty to deal fairly and honestly rests equally upon the insurer and the insured. *Modisette v. Foundation Reserve Ins. Co.*, 77 N.M. 661, 427 P.2d 21 (1967). This is a defense completely barring any recovery of compensatory and punitive damages. Such conduct vitiates the insurance policy. *Jessen v. National Excess Insurance Co.*, 108 N.M. 625, 776 P.2d 1244 (1989).~~

~~The New Mexico Supreme Court has not determined whether actual reliance by the insurer upon the fraud or dishonesty of the insured is a required element of this affirmative defense. Thus, the Committee has taken no position on this issue. Relying upon the standard contractual language that concealment of fraud voids the policy, some courts have held that in defense of a breach of contract action proof of reliance is not required. *See American Diver's Supply & Mfg. Corp. v. Boltz*, 482 F.2d 795 (10th Cir. 1973). In the absence of a New Mexico appellate decision, the trial judge and counsel must predict whether reliance is a necessary element of the "dishonesty" defense raised by an insurer defending a bad faith cause of action.~~]

The common-law duty to deal fairly and honestly rests equally upon the insurer and the insured. *See Modisette v. Found. Reserve Ins. Co.*, 1967-NMSC-094, ¶ 16, 77 N.M. 661, 427 P.2d 21. The Court of Appeals has since clarified that this duty is "related to but distinct from the implied covenant of good faith and fair dealing," which "protects against only bad faith or wrongful and intentional conduct that injures the other party's rights under the contract." *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 58, 133 N.M. 669, 68 P.3d 909. Under either duty, merely negligent conduct by an insured "will be excused" in cases of bad faith by the insurer, because the insurer may not escape the consequences of its own agents' dishonesty based on its insured's negligence. *Griego v. New York Life Ins. Co.*, 1940-NMSC-029, ¶¶ 43-48, 44 N.M. 330, 102 P.2d 31. An affirmative defense based on an insured's dishonesty must therefore be limited to representations made with intent to deceive, whether they occurred before or after the formation of the insurance contract.

An affirmative defense to bad faith claims is distinct from the contractual defense of fraud or deceit. *Cf. Eldin v. Farmers All. Mut. Ins. Co.*, 1994-NMCA-172, ¶ 10, 119 N.M. 370, 890 P.2d 823 (describing the contractual defense). The 1991 version of this instruction arose from the New Mexico Supreme Court's opinion in *Jessen v. Nat'l Excess Ins. Co.*, which noted that an insured's "misrepresentation or fraud" in his application, if proven, "would have vitiated the insurance policy." 1989-NMSC-040, ¶ 22, 108 N.M. 625, 776 P.2d 1244. The appellate courts have since confirmed that bad-faith claims do not necessarily depend on coverage under the policy, nor on the insurer's breach of contractual terms. *See, e.g.*, *Haygood v. United Services Auto. Ass'n*, 2019-NMCA-074, ¶ 22, 453 P.3d 1235. In *O'Neel v. USAA Ins. Co.*, 2002-NMCA-028, ¶ 9, 131 N.M. 630, 41 P.3d 356, the Court of Appeals allowed that bad faith claims "based on conduct separate from [the insurer's] refusal to pay" could survive despite the insured's misrepresentations. Specifically, where the insurer's "investigation was excessive and unnecessarily invasive," the jury "could have found that [the insurer] set up [its insured] in anticipation of a claim of fraud

which it would then use, and did use, to attempt to totally void any obligation under the policy." *Id.* The Court rejected the insurer's argument that "a claim of bad faith must fail as a matter of law when the insured engages in material misrepresentations during the claims process." *Id.* ¶ 7. It noted both that "the jury could reasonably and properly conclude that [the plaintiff] did not engage in *intentional* misrepresentations," *id.* (emphasis added), and that "the record contains evidence to support a finding of bad faith against [the insurer] based on conduct separate from" its refusal to pay out fully on the original claim, *id.* ¶ 9.

In the absence of further guidance from the appellate courts as to the scope of applicability of the affirmative defense of fraud or deceit (including whether it applies to bad-faith claims arising from conduct other than failure to pay), the 1991 instruction is withdrawn.

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

13-1711. Affirmative defense; comparative fault – *No instruction drafted.*

No instruction drafted.

[Approved, effective November 1, 1991.]

Committee commentary. — [~~A material misrepresentation or dishonest conduct which is intended to deceive the insurance company will completely bar the insured's bad faith claim. UJI 13-1710. The action for bad faith arises from the equitable principles which give rise to the implied covenant of good faith and fair dealing. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984).~~

~~Where an insured has negligently failed to cooperate with an insurer's investigation or otherwise acted in a manner to support a defense of comparative fault, the New Mexico Supreme Court has not decided if a comparative fault instruction would be appropriate as a defense to a bad faith claim. *See Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244, 1249 (1989).~~]

The New Mexico courts have not decided whether to recognize an insured's comparative fault as a defense to insurance bad-faith claims, although the question has been presented to both the New Mexico Supreme Court and the Court of Appeals. In *Jessen v. Nat'l Excess Ins. Co*., 1989-NMSC-040, ¶ 22, 108 N.M. 625, 776 P.2d 1244, the Supreme Court held that there was no error in the district court's decision not to instruct on comparative fault, but declined to "decide whether such an instruction necessarily would be inappropriate in another case." The Supreme Court acknowledged that a California case cited by the defendant insurer, *Cali. Cas. Gen. Ins. Co. v. Superior Court*, 218 Cal. Rptr. 817, 818 (Ct. App. 1985), stood for the proposition that "comparative fault applies in bad faith claims," 1989-NMSC-040, ¶ 22; however, that case has since been overturned by the California Supreme Court, which held that "the *California Casualty* court's holding is grounded on the faulty premise that the obligations of insurer and insured—and thus their bad faith—are comparable. They are not." *Kransco v. Am. Empire Surplus Lines Ins. Co*., 2 P.3d 1, 11 (Cal. 2000). After that reversal, in *O'Neel v. USAA Ins. Co*., 2002-NMCA-028, ¶¶ 31-32, 131 N.M. 630, 41 P.3d 356, the Court of Appeals declined to recognize a proposed comparative-fault defense because the arguments had not been preserved.

The affirmative comparative-fault defense, if available, would require an insurer to prove that it had a "special relationship" with its insured that created a heightened duty for the insured, and that its defense is not "inconsistent with public policy," *Reichert v. Atler*, 1994-NMSC-056, ¶ 8, 117 N.M. 623, 875 P.2d 379. There is a "special relationship" between an insurer and its insured, as noted in *Dellaira v. Farmers Ins. Exch*., 2004-NMCA-132, ¶ 14, 136 N.M. 552, 102 P.3d 111

("The reasons why courts have recognized the special and unique relationship between insurer and insured include the inherent lack of balance in and adhesive nature of the relationship, as well as the quasi-public nature of insurance and the potential for the insurer to unscrupulously exert its unequal bargaining power at a time when the insured is particularly vulnerable." (internal citations omitted)). Historically, our courts have interpreted this relationship to create a "duty *of the insurer* to deal in good faith with its insured." *Chavez v. Chenoweth*, 1976-NMCA-076, ¶ 44, 89 N.M. 423, 553 P.2d 703 (emphasis added). Until the courts address whether the insured's obligations to its insurer are sufficiently high to warrant a comparative-fault defense, no instruction is submitted.
[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

13-1712. Compensatory damages; general.

If you should decide in favor of [~~the plaintiff~~]_____ (*name of plaintiff*) on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate _____ (*name of plaintiff*) [~~him~~] [~~her~~]] for any of the following elements of damages proved by _____ (*name of plaintiff*) [~~the plaintiff~~] to have resulted from the wrongful conduct of _____ (*name of defendant*) [~~been proximately caused by the defendant's wrongful conduct as claimed~~]:

(NOTE: Here insert the proper elements of damages using the instructions which immediately follow and any other proper elements applicable under the evidence.)

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based upon proof and not upon speculation, guess, or conjecture.

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

USE NOTES

This instruction should be used in all causes [~~any cause~~] of action for insurance bad faith [~~under Chapter 17~~]. The instructions which follow must be inserted where applicable under the evidence.
[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

[~~**Committee commentary.** The nature of the bad faith action determines the nature of the damages. Thus, where the action is for failure to pay policy proceeds, the primary loss is the amount recoverable under the policy, UJI 13-1713. Where the action is for failure to defend, the reasonable and necessary expenses incurred by the insured in conducting the defense are recoverable. UJI 13-1714. *Lujan v. Gonzales*, 84 N.M. 220, 501 P.2d 673 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972).~~]
[Approved, effective November 1, 1991; as withdrawn by Supreme Court Order No. _____, effective _____.]

13-1713. Policy proceeds.

The amount payable by the [~~insurance company~~]insurer under the terms of the policy. [~~_____ (identify the particular policy or policy provision).~~]

USE NOTES

This element of damages must be included under UJI 13-1712 NMRA in every case where the plaintiff's claim is for bad faith failure to pay a first party claim, UJI 13-1702 NMRA. [~~The specific policy or policy provision at issue should be identified for the jury.~~]
[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

13-1714. Cost of [~~defense~~]separate litigation.

The reasonable and necessary expenses of _____ (*name of plaintiff*), including attorney fees, for [defending against the lawsuit [~~against [him] [her]~~]] [litigating _____ (*identify separate litigation*)].

USE NOTES

In the case of bad faith failure to defend in an underlying lawsuit, the parties should use the first bracketed language provided. Otherwise, any separate litigation in which expenses, costs, or fees were incurred as a result of the insurer's bad faith conduct should be briefly described using the second brackets. ~~This element of damages must be included under UJI 13-1712 in every case where the plaintiff's claim is for bad faith failure to defend a liability claim, UJI 13-1703.~~]
[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — A plaintiff may recover "attorney's fees as damages from separate litigation that would remedy the injury giving rise to the action," which are actual damages distinguished from the attorneys' fees incurred in the instant action. *Principal Mut. Life Ins. Co. v. Straus*, 1993-NMSC-058, ¶ 10, 116 N.M. 412, 863 P.2d 447. As a pertinent example, where an insurance company has acted in bad faith in refusing to defend a claim against its insured, the [~~plaintiff~~]insured is entitled to recover all reasonable and necessary costs of defense. [~~*Lujan v. Gonzales*, 84 N.M. 229, 501 P.2d 673 (Ct.App.1972), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972).~~]*See Lujan v. Gonzales*, 1972-NMCA-098, ¶ 55, 84 N.M. 229, 501 P.2d 673.
[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

13-1715. [~~Indemnification.~~]Underlying judgment.

The amount of any judgment [~~against _____ (*plaintiff in this action*) in favor of _____ (*plaintiff in the other action*)~~] obtained by _____ (*plaintiff in the underlying action*) against _____ (*defendant in the underlying action*) in _____ (*identify the underlying action*).

USE NOTES

This element of damages must be included under UJI 13-1712 in every case where an insurer's bad faith conduct resulted in the entry of a judgment in an underlying action against its insured. [~~the plaintiff's claim is for bad faith failure to defend or settle a liability claim against the insured and the defendant's conduct has proximately caused a judgment to be returned against the~~

~~plaintiff.~~] The name<u>s</u> of the [~~plaintiff and the plaintiff~~]<u>parties</u> in the [~~other~~] <u>underlying</u> action should be inserted in the blank<u>s</u> to assist the jury's recognition of this damage element. <u>As used here, an "underlying action" may include prior events in the same lawsuit if they resulted in a judgment.</u>

[Adopted, effective November 1, 1991<u>; as amended by Supreme Court Order No. _____, effective _____</u>.]

Committee commentary. — [~~The primary damage caused by the bad faith failure to settle a liability claim is the excess judgment rendered against the insured. An adverse judgment may also be the result of a bad faith failure to defend a liability claim. The damages are in the nature of indemnification for the insured's exposure and, under this element, are limited to the sum which the insured is obligated to pay individually over and above the recognized policy limits.~~] <u>"Our cases have made it clear that the measure of damages in a bad faith action is the amount of the excess judgment [against the insured]." *Dydek v. Dydek*, 2012-NMCA-088, ¶ 64, 288 P.3d 872. The amount of the judgment is recoverable even if the plaintiff in the underlying action has agreed not to enforce the judgment against the insured personally, or if the insured is "otherwise judgment proof." *Id.* ¶ 66.</u>

[~~The plaintiff's recovery is for the amount of the judgment for which there is no insurance coverage agreed to by the defendant.~~]

[Approved, effective November 1, 1991<u>; as amended by Supreme Court Order No. _____, effective _____</u>.]

13-1716. Incidental and consequential loss.

The amount of any incidental or consequential loss to the plaintiff<u>, including _____ (*list losses claimed*). An "incidental loss" is a cost incurred in a reasonable effort to avoid losses caused by the insurer's conduct. A "consequential loss" is a loss that arises from the results of an insurer's conduct rather from the conduct itself.</u>

Any [~~damages found by you for this loss~~]<u>losses you find were caused by the insurer's breach of the terms of the insurance policy are limited to losses that the insurer and the insured</u> [~~must be damages which the insurance company and the policyholder~~] could reasonably have expected to be a consequence of the [~~company's~~]<u>insurer's</u> failure to perform its obligations under the [~~insurance~~] policy.

[Adopted, effective November 1, 1991<u>; as amended by Supreme Court Order No. _____, effective _____</u>.]

Committee commentary. — <u>"New Mexico normally allows recovery of consequential or incidental damages which can be reasonably related to the defendant's breach." *Hubbard v. Albuquerque Truck Ctr. Ltd.*, 1998-NMCA-058, ¶ 28, 125 N.M. 153, 958 P.2d 111; *see also, e.g., Primetime Hosp., Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 25, 146 N.M. 1, 206 P.3d 112 (quoting *Consequential Loss*, BLACK'S LAW DICTIONARY (11th ed. 2019)); *R.A. Mackie & Co., L.P. v. Petrocorp Inc.,* 329 F. Supp. 2d 477, 510 (S.D.N.Y. 2004) (defining "incidental" losses); *Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "incidental damages" as "[l]osses reasonably associated with or related to actual damages.").</u>

<u>To the extent a claim arises from the breach of an implied contractual obligation, [</u>~~The action for bad faith is in tort for the breach of an implied contractual obligation. The nature of the tort, arising from breach of contract, renders appropriate the limitation of~~]<u>recoverable damages are limited to those [</u>~~reasonably~~] <u>"contemplated by the parties at the time of making the contract."</u>

[~~State Farm General Insurance Co. v. Clifton, 86 N.M. 757, 758, 527 P.2d 798, 799 (1974).~~]*State Farm Gen. Ins. Co. v. Clifton*, 1974-NMSC-081, ¶ 5, 86 N.M. 757, 527 P.2d 798.
[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

[WITHDRAWN]
[~~13-1717. First party coverage; attorney fees – *No instruction drafted.*~~
~~*No instruction drafted.*~~
~~**Committee commentary.** – In an action where the policyholder recovers on any type of first party coverage, the policyholder may be awarded reasonable attorney's fees. Section 39-2-1 NMSA 1978. This award is made by the trial court, not the jury, following the jury's verdict. To award attorney fees the trial judge, from the evidence presented at trial, must find that the insurer acted unreasonably in failing to pay the claim. *See United Nuclear Corp. v. Allendale Mutual Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985).~~]
[Approved, effective November 1, 1991; as withdrawn by Supreme Court Order No. _____, effective _____.]

13-1718. Punitive damages.
If you find that _____ (plaintiff)[~~plaintiff~~] should recover compensatory damages for the bad faith actions of the [~~insurance company~~]insurer, and you find that the conduct of the [~~insurance company~~]insurer was [in reckless disregard for the interests of _____(plaintiff)][~~the plaintiff~~], [~~or was~~][based on a dishonest judgment], [or] [~~was otherwise~~] [malicious, willful or wanton], then you may award punitive damages.
[["]"Reckless [~~conduct~~]disregard"["] is an insurer's [frivolous or unfounded refusal to pay] [or] [dishonest or unfair balancing of its own interests and the interests of the insured][~~is the intentional doing of an act with utter indifference to the consequences~~].]
[["]"Dishonest judgment"["] is a failure by the insurer to honestly and fairly balance its own interests and the interests of the insured.]
[["]"Malicious conduct"["] is the intentional doing of a wrongful act with knowledge that the act was wrongful.]
[["]"Willful conduct"["] is the intentional doing of a wrongful act with knowledge that harm may result.]
[["]"Wanton conduct"["] is the doing of an act with utter indifference to or conscious disregard for a person's rights.]
Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.
The amount of punitive damages must be based on reason and justice, taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The property of wealth of the defendant is a legitimate factor for your consideration. The amount awarded, if any, must be reasonably related to the [~~compensatory damages and injury~~] injury and to any damages given as compensation and not disproportionate to the circumstances.
[_____ (plaintiff) has introduced evidence of [harm to others] [risk of harm to others] as a result of _____ (defendant)'s conduct. You may consider this evidence in determining the nature and enormity of _____ (defendant)'s wrongful conduct toward _____

(plaintiff). You may not, however, include in your award of punitive damages any award that punishes _____ (defendant) for harm to others not before this court.]

USE NOTES

This instruction must ordinarily be given in every action for insurance bad faith[~~under UJI 13-1702, 13-1703 and 13-1704 NMRA~~]. The trial court may omit this instruction only in those circumstances in which the plaintiff fails to make a *prima facie* showing that the insurer's conduct exhibited a culpable mental state. Because this instruction is complete on the availability of punitive damages in insurance bad faith actions, UJI 13-1827 NMRA is unnecessary and should not be given in such cases.

The final bracketed paragraph of this instruction must be given where evidence of harm or injury to non-parties to the litigation has been admitted into evidence during the trial. It is not intended to limit the jury's consideration of evidence of harm to the first-party insured in third party cases.

[As amended, effective March 21, 2005; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The substance of this instruction derives, in part, directly from *Sloan v. State Farm Mutual Automobile Insurance Co.*, 2004-NMSC-004, ¶¶ 2, 23, 135 N.M. 106, 85 P.3d 230. *Sloan* overruled prior case law that required a plaintiff to establish bad faith plus "an additional culpable mental state" before the jury could be instructed on punitive damages. *Id.* ¶ 6 (overruling *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, ¶ 72, 127 N.M. 603, 985 P.2d 1183). "[U]nder New Mexico law, bad-faith conduct by an insurer typically involves a culpable mental state, and therefore the determination whether the bad faith evinced by a particular defendant warrants punitive damages is ordinarily a question for the jury to resolve." *Id.* "[B]ad faith supports punitive damages upon a finding of entitlement to compensatory damages." *Id.* But the trial court still has the discretion "to withhold a punitive-damages instruction in those rare instances in which the plaintiff has failed to advance any evidence tending to support an award of punitive damages." *Id.*

The New Mexico Supreme Court has "allowed the award of punitive damages in insurance cases under a more relaxed standard [than that for contracts not involving insurance] in part because of the fiduciary obligations inhering in insurance relationships and because of concerns arising from the bargaining position typically occupied by the insured and insurer." *Romero v. Mervyn's*, 1989-NMSC-081, ¶ 23, n.3, 109 N.M. 249, 784 P.2d 992 (citing *Chavez v. Chenoweth*, 1976-NMCA-076, ¶¶ 43-44, 89 N.M. 423, 553 P.2d 703).

In the event the insured also brings a cause of action for violation of the Unfair Practices Act and the fact finder finds the insurer willfully engaged in the trade practice based on the same conduct supporting the punitive damage award for bad faith, the insured must elect a remedy between treble damages under the UPA and punitive damages for the bad faith claim. See NMSA 1978, § 57-12-10(B) (1967, as amended through 2005); Hale v. Basin Motor Co., 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 ("[R]ecovery of both statutory treble damages and punitive damages based upon the same conduct would be improper.").

[~~Bad faith ordinarily will support an award of punitive damages. *See Sloan v. State Farm Mut. Automobile Ins. Co.*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230; *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 485, 709 P.2d 649, 654 (1985) and *Jessen v. National*~~

~~*Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244, 1246 (1989). Where the insured has a cause of action under UJI 13-1707 NMRA for violation of the Unfair Practices Act the trial judge, upon a finding of willful engagement in the trade practice, may treble the actual damages awarded. Section 57-12-10 NMSA 1978. In the same action the insured may have a common law action for bad faith which requires instructing the jury on punitive damages. In the event of a trebling of damages by the trial judge and a verdict for punitive damages based upon the same conduct, the insured must elect between the two awards. To allow both statutory treble damages and punitive damages based upon the same conduct would be improper under the rule against duplication or double recovery. *Hale v. Basin Motor Company,* 110 N.M. 314, 795 P.2d 1006 (1990).~~

~~In *Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244 (1989), the New Mexico Supreme Court considered whether an insurance company could be vicariously liable for the punitive damages recovered against an independent insurance adjuster which it had hired to investigate an accident. The court held that the independent contractor status of the adjuster did not relieve the insurer of liability. Id. 108 N.M. at 629, 776 P.2d at 1248. The court found the evidence in the case sufficient to support a finding of ratification, justifying an instruction under UJI 13-1826. The court further found sufficient evidence of an independent wrongful act by the insurer. However the court also considered that the duty of good faith dealing by parties to an insurance contract is a non-delegable duty, breach of which supports vicarious liability for punitive damages. The committee has not determined whether *Jessen* is a sufficient basis for instructing a jury that an insurer may be found vicariously liable for conduct of a third party justifying a recovery of punitive damages. Where an insurer has hired a third party to satisfy its contract obligations and the third party's conduct justifies an instruction on punitive damages, *Jessen* should be considered.~~]

[Revised, effective March 21, 2005; as amended by Supreme Court Order No. _____, effective _____.]

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[rules.supremecourt-grp] Rule Proposal Comment Form, 04/24/2023, 11:26 am

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov> Mon, Apr 24, 2023 at 11:26 AM
Reply-To: nmcourtswebforms@nmcourts.gov
To: rules.supremecourt@nmcourts.gov

Your Name:	Bad Faith/Coverage Defense Counsel (see comment)
Phone Number:	(505) 883-5030
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Proposal Number:	2023-018
Comment:	The attached comments and objections to Proposal 2023-018 are provided jointly by the following attorneys: Meena H. Allen, mallen@mallen-law.com Amy Headrick, aheadrick@tysonmendes.com Courtenay L. Keller, ckeller@rileynmlaw.com Taryn M. Kaselonis, tkaselonis@rileynmlaw.com Jennifer A. Noya, jnoya@modrall.com Sonya R. Burke, sburke@modrall.com Alicia Santos, asantos@obrienlawoffice.com
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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

April 24, 2023

To: Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov

Enclosed please find objections to Uniform Jury Instructions – Civil Committee ("Committee") proposed amendments and additions to Chapter 17 of the Uniform Jury Instructions – Civil, in Proposal 2023-018. These objections are provided by the undersigned attorneys, who worked collectively to assemble authority and comment in light of the importance of the proposed revisions.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BAD FAITH AND COVERAGE DEFENSE COUNSELS' OBJECTIONS TO PROPOSED REVISIONS TO UNIFORM JURY INSTRUCTIONS – CIVIL PROPOSAL 2023-018

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BAD FAITH AND COVERAGE DEFENSE COUNSELS' OBJECTIONS TO PROPOSED REVISIONS TO UNIFORM JURY INSTRUCTIONS – CIVIL PROPOSAL 2023-018

On March 24, 2023, the Uniform Jury Instructions – Civil Committee ("Committee") proposed amendments and additions to Chapter 17 of the Uniform Jury Instructions – Civil, in Proposal 2023-018. The proposed changes and additions ignore long-standing New Mexico precedent and are one-sided, such that they contradict the Concept of Jury Instructions. "The purpose of jury instructions is to communicate the issues and the law to the jury." N.M. R. CIV. Concept. The instructions must be "accurate [and] **unslanted**." *Id*. (emphasis added). "Whenever the court determines that the jury should be instructed on a subject, the instruction given on that subject shall be brief, **impartial** and free from hypothesized facts." Rule 1-051 NMRA (emphasis added). The undersigned counsel respond to each proposed amendment and addition and provide authority demonstrating why the proposed amendment or addition is incorrect under New Mexico law.

I. Introduction.

The Committee proposed the following changes to the Introduction:

Introduction.

[~~The last two decades have seen a steady development by New Mexico appellate courts of the common law action for bad faith by an insured against the insured's insurance company. The legislature has enacted statutes addressing the remedies available to an insured and comprehensive codes of behavior which create private causes of action. Quite naturally this judicial and statutory development of substantive law has increased the volume of civil actions and justified the drafting of pattern instructions for this lawsuit.~~

~~This new chapter of Uniform Jury Instructions – Civil is devoted exclusively to the bad faith claim against an insurance company. It includes the common law cause of action, UJI 13-1701 to 13-1704 NMRA as well as private actions under the Insurance Practices Act, UJI 13-1706 NMRA, and the Unfair Practices Act, UJI 13-1707 NMRA. The Chapter is self contained with instructions on causation, affirmative defenses and damages. With the addition of instructions for Statement of Issues, Burden of Proof, Duties of Jurors and Verdict Forms, jury instructions for this case should be complete.~~

~~The Committee recognizes that the obligation of good faith may create causes of action for bad faith in contexts other than the relationship between an insurer and the policyholder; this chapter, however, is limited to the insurance contract relationship.~~

~~An insured's lawsuit against an insurer will generally give rise to a cause of action for breach of contract. Chapter 17 provides instructions only for the tort of bad faith and related private statutory actions. Instructions for breach of contract actions brought either by the insured or the insurer are to be drawn from Chapter 8, Contracts and UCC Sales. The absence of an instruction from this Chapter or Chapter 8 does not imply the unavailability of a claim or defense, merely that New Mexico case law is not sufficiently developed to justify the instruction.~~]

Chapter 17 of the Uniform Jury Instructions – Civil has been revised to reflect developments in the law since the chapter originated in 1991. The chapter is devoted exclusively to claims of bad faith against an insurer. The Committee recognizes that the obligation of good faith may create causes of action for bad faith in contexts other than the relationship between an insurer, the insured, and anyone to whom an insurer may have a duty of good faith. This chapter, however, is limited to the insurance contract relationship.

Chapter 17 includes instructions for common-law causes of action, UJI 13-1701 to 13-1704 NMRA, as well as private actions under the Insurance Practices Act, UJI 13-1706 NMRA. See NMSA 1978, § 59A-16-30 (1984, as amended through 1990). The chapter is self-contained with instructions on causation, affirmative defenses, and damages. With the addition of instructions for the statement of issues, burden of proof, duties of jurors, and verdict forms, jury instructions for the bad faith claim in the typical case should be complete.

A lawsuit against an insurer may also include causes of action for breach of contract or violation of the Unfair Practices Act. See NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019). Chapter 17 provides instructions only for common law and statutory claims for insurance bad faith. Instructions for any claims for breach of contract or violation of the Unfair Practices Act are to be drawn from Chapter 8, Contracts and UCC Sales, or Chapter 25, Unfair Practices Act, respectively. The absence of an instruction in this chapter does not imply the unavailability of a claim or defense, merely that New Mexico case law is not sufficiently developed to justify the instruction.

[As amended, effective March 1, 2005; as amended by Supreme Court Order No. _____, effective _____.]

As illustrated under the objections to each specific jury instruction below, the Introductory paragraph is misleading and misconstrues New Mexico law. This Chapter attempts to conflate an insurance company's duties and obligations to both first and third parties. *See* for example:

> The chapter is devoted exclusively to claims of bad faith against an insurer" [proposed change] versus "… action for bad faith by an insured against the insured's insurance company." [current language].

The proposed change is contrary to *Hovet v. Allstate*, 2004-NMSC-010, 135 N.M. 397, 89 P.3d. 69 (injured third-party claimants who are the statutory beneficiaries of automobile liability insurance policies mandated by the MFRA "may sue the insurer for unfair settlement practices under the Insurance Code."); *King v. Allstate Ins. Co.*, 2007-NMCA-044, ¶ 5, 141 N.M. 612, 159 P.3d 261 ("[t]hird-party suits against insurers are not allowed at common law" and "[m]aintaining a third-party claim against an insurer for bad-faith failure to settle a claim requires an adjudication

of liability against the insured tortfeasor."); *Jolley v. Associated Electric & Gas Ins. Services Ltd. (AEGIS)*, (a third-party right of action "has been found only where specific legislation indicated that our Legislature contemplated classes of persons to be protected under the Insurance Code.")

Additionally, although the Introduction alleges that the Committee proposed these revisions to reflect developments in the law since 1991, they often disregard long-standing precedent that has neither been overturned nor abrogated. *See, e.g,* Obj. to Revisions to Instruction 13-1712. The Introduction does not reflect the changes that were made and the revisions should not be adopted.

Finally, the undersigned object to replacing the term "insurance company" with the term "insurer" throughout the instructions because that term is overly broad and its use as proposed by the Committee is not consistent with New Mexico law. *Compare* NMSA 1978, Section 59A-16-1, which identifies the parties against whom a private statutory cause of action can be brought for violation of Section 59A-16-20, and Section 59A-1-8, which is much broader.

II. Instruction 13-1701, Duty of the insurance company.

The Committee proposed the following changes to Instruction 13-1701:

13-1701. Duty of the insurance company.

~~[A policy of insurance is a contract. There is implied in every insurance policy a duty on the part of the insurance company to deal fairly with the policyholder.~~

~~Fair dealing means to act honestly and in good faith in the performance of the contract. [The insurance company must give equal consideration to its own interests and the interests of the policyholder.]~~]

An insurance policy is a contract that creates a special relationship between an insurer and insured which requires an insurer to deal fairly, reasonably, honestly, and in good faith with its insureds in all aspects of the insurance contract. These requirements protect the parties' reasonable expectations. The duty to act fairly, reasonably, honestly, and in good faith requires that an insurer must not place its own interests above those of an insured. This duty of good faith applies to the insurer and also to anyone acting on its behalf. The insurer cannot avoid its duty of good faith by delegating its responsibilities.

The proposed revisions are an inaccurate statement of New Mexico law for multiple reasons.

First, the proposed revision grants insurance contracts a special status in the law when New Mexico law has repeatedly declared that insurance contracts are to be construed by the same

principals which govern the interpretation of all contracts. As the Supreme Court explained in *Dairyland Ins. Co. v. Hermann*, 1998-NMSC-005, ¶ 12; 124 N.M. 624, 954 P.2d 56:

> "It is well settled that, absent a statute to the contrary, 'insurance contracts are construed by the same principles which govern the interpretation of all contracts.'" *Rummel v. Lexington Ins. Co.*, 1997 NMSC 041, ¶ 18, 123 N.M. 752, 758, 945 P.2d 970, 976 (quoting 2 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3D § 21:1 (1996)). Thus, with insurance contracts, as with every contract, there is an implied covenant of good faith and fair dealing that the insurer will not injure its policyholder's right to receive the full benefits of the contract. *See Ambassador Ins. Co. v. St. Paul Fire & **61 *629 Marine Ins. Co.*, 102 N.M. 28, 30, 690 P.2d 1022, 1024 (1984) ("New Mexico recognizes this duty of good faith between insurer and insured."); *Comunale v. Traders & Gen. Ins. Co.,* 50 Cal.2d 654, 328 P.2d 198, 200 (1958) (stating "[t]here is an implied covenant of good faith and fair dealing in every contract"). More specifically, this means that "an insurer cannot be partial to its own interests, but must give its interests and the interests of its insured equal consideration." *Lujan v. Gonzales*, 84 N.M. 229, 236, 501 P.2d 673, 680 (Ct.App.1972).

Second, the statement that "the requirements protect the parties' reasonable expectations" suggests that the doctrine of "reasonable expectations" somehow applies in all situations. It does not. The doctrine applies only under certain situations such as where the policy language is ambiguous, and is a doctrine that is applied only by Courts. As explained in *OR& L Construction, L.P. v. Mountain States Mutual Casualty Company*:

> First, we hold that the reasonable expectations doctrine is a judicial doctrine, and an insurer does not violate the implied covenant if it does not consider an insured's reasonable expectations of coverage when processing claims. Second, we hold that an insurer's good faith duty to investigate ends after it determines a claim is not covered under the terms of an insured's policy, and thus a failure to investigate beyond the terms of the policy does not violate the implied covenant.

2022-NMCA-035, ¶ 2, 514 P.3d 40; *see also Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 22, 123 N.M. 752, 945 P.2d 970 ("The court's construction of an insurance policy will be guided by the reasonable expectations of the insured") (emphasis added). Accordingly, the judicially-

applied doctrine of reasonable expectations has no bearing on the relationship between insurer and insured in all circumstances and is not properly contained in the duty instruction.

Third, the proposed instruction now includes the "interest of the insured" in all situations whereas the current instruction included bracketed language that was to be given only where appropriate. In other words, the proposed instruction adopts an inapplicable standard which could suggests the existence of coverage in a first party claim that does not exist under the policy. The equal interests of the insured issue generally arises in the context of a "failure to settle" case. *See generally Dairyland Ins. Co. v. Hermann*, 1998-NMSC-005, 124 N.M. 624, 954 P.2d 56; *see also Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co*., 102 N.M. 28, 690 P.2d 1022, 1025 (N.M.1984) (approving instruction that included charge regarding equal consideration in claim involving failure to settle). To require insertion of the "interest of the insured" in all claims, including those which there may be no coverage, or those involving a long-recognized adversarial relationship such as an uninsured motorist case, is not supported by existing New Mexico law. *See Hendren v. Allstate Ins. Co.,* 1983-NMCA-129, ¶ 20, 100 N.M. 506, 672 P.2d 1137 (recognizing the adversarial relationship between an insured and insurer in the UIM context); *see also Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co*., 102 N.M. 28, 690 P.2d 1022, 1025 (N.M.1984) (approving instruction that included charge regarding equal consideration in claim involving failure to settle).

Next, the instruction states that the duty of good faith applies to the insurer and anyone acting on its behalf, which is an expansion of existing New Mexico law. While New Mexico law recognizes that in certain circumstances an agent with authority may also be bound by the duty of good faith if they have sufficient decision-making control, *see Dellaria v. Farmers Ins. Exchange,* 2004-NMCA-132, 102 P.3d 11, there is simply no authority standing for the broad proposition that all third party participants in the claims process have an independent duty of good faith to the insured.

The Committee's changes to the Use Notes for Instruction 13-1701 provide:

USE NOTES

This instruction must be given in every action for bad faith. [~~The bracketed final sentence is to be used in every case where the jury is instructed under UJI 13-1704, bad faith failure to settle and in any other case for which it is appropriate. *See* committee commentary.~~]
[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The cause of action for bad faith arises from a breach of the obligation of good faith. The duty to use good faith is founded in an implied covenant in every insurance policy to deal honestly and fairly. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984). [~~The breach of the implied obligation creates a cause of action. *State Farm General Insurance Co. v. Clifton*, 86 N.M. 757, 527 P.2d 798 (1974). Because the duty to use good faith derives from the contract of insurance, no cause of action exists in favor of a third party. *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976).~~] An insurer cannot evade its duty of good faith by delegating insurance functions to a third party. *Dellaira v. Farmers Ins. Exch.*, 2004-NMCA-132, ¶ 11, 136 N.M. 552, 102 P.3d 111.

Breach of the implied obligation of good faith creates a cause of action. State Farm General Insurance Co. v. Clifton, 86 N.M. 757, 527 P.2d 798 (1974). Because the duty to use good faith derives from the contract of insurance, no common law cause of action exists in favor of a third party. Chavez v. Chenoweth, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976). However, third parties may bring statutory claims of unfair claims practices under NMSA 59A-16-1 thru 30 in certain circumstances. Hovet v. Allstate Ins. Co., 2004-NMSC-010, ¶ 18, 135 N.M. 397.

In *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, supra, and *Jessen v. National Excess Insurance Company*, 108 N.M. 625, 776 P.2d 1244 (1989), the Supreme Court stated that consideration of the interests of the insured is an element of the insurer's obligation. When performing aspects of the insurance contract that are within the insurers exclusive control, the duty to the insured is akin to a fiduciary duty. Azar v. Prudential Ins. Co. of Am., 2003-NMCA-062, ¶ 54, 133 N.M. 669, 68 P.3d 909. An insurer's duty require more than an at least equal consideration when fiduciary duty is involved. See 13-1708 Committee Commentary. The Directions for Use provide that the insurer's obligation to consider the interests of the insured is applicable in every action for bad faith failure to settle. The obligation may apply in other contexts. For example, in [~~Jessen~~]*Jessen* the insured brought a first party claim against the insurer for failure to either pay or deny the claim within a reasonable period of time. In affirming a jury's verdict for the insured the Supreme Court stated: [~~".~~] "the evidence shows the insurer utterly failed to exercise the care for the interests of the insured in denying or delaying payment on an insurance policy". [~~Id. 108 N.M. at 628~~] *Jessen* 1989-NMSC-040. [~~Thus, the trial judge and counsel must consider in each case the availability of the bracketed final sentence of this instruction. The Committee determined that this decision should be made on a case to case basis to avoid implying that when determining the existence of coverage in first party claims an insurer must pay the claim regardless of the merit of the insured's argument under the terms of the policy. When a claim is promptly investigated, reasonably evaluated and insured timely notified of a denial for reasons which are not frivolous or unfounded, consideration of the "interests of the insured" does not require payment of the claim.~~]

The proposed changes to the Use Notes are similarly flawed. The notes now include a statement about third parties bringing statutory claims under *Hovet* which is not relevant to the duty of the insurance company. It also includes an inaccurate statement that suggests that the insurance companies duty is akin to a fiduciary duty. The Committee relies on an inaccurate and overbroad citation to *Azar v. Prudential Ins. Co. of Am.,* 2003-NMCA-062, ¶ 54, 133 N.M. 669, 68 P.3d 909 to argue that insurance companies owe a fiduciary duty to insureds. Even the *Azar*

Court recognized that "an insurance relationship alone, however, is not enough to give rise to a fiduciary relationship." *Id*. ¶ 54 (*citing Chavez v. Chenoweth,* 89 N.M. 423, 430, 553 P.2d 703, 710 (Ct.App.1976)).

Finally, as set forth above, the Use Note also now requires instruction of "interests of insured" in all cases which wholly inappropriate under existing New Mexico law. The Committee fails to explain why they propose that the Court no longer has discretion to give certain portions of the instruction, but existing New Mexico law recognizes that the judges have discretion, and perhaps a duty, to give instructions that accurately convey the law and are warranted by the evidence. Rule 1-051 NMRA.

III. Instruction 13-1702, Bad faith failure to pay a first party claim.

The Committee proposed the following revision to Instruction 13-1702:

13-1702. Bad faith ~~[failure to pay a first party claim.]~~ conduct in first-party claims.

When deciding whether to pay a claim, an insurer must act fairly, reasonably, honestly, and in good faith under the circumstances. An [~~insurance company~~]insurer acts in bad faith when it does [one or more of] the following:

[fails to deal fairly with its insured, giving the interests of its insured at least the same weight as its own interests;]

[fails to act promptly to [evaluate] [investigate] [pay] the claim;]

[unreasonably delays notification whether the claim will be paid or denied;]

[[~~when it~~]refuses to pay [~~a~~] the claim [~~of the policyholder~~] for reasons [~~which~~] that are frivolous or unfounded and are not reasonable under the terms of the policy;] [or]

(Other grounds for the claim that are supported by law and the evidence may be inserted here.)

[An insurer may act in bad faith in its handling of a claim even if the policy provides no coverage for that claim.]

~~[An insurance company does not act in bad faith by denying a claim for reasons which are reasonable under the terms of the policy.~~

~~[In deciding whether to pay a claim, the insurance company must act reasonably under the circumstances to conduct a timely and fair [investigation] [evaluation] of the claim.]~~

~~[It may not unreasonably delay its notification to the policyholder that the claim will be paid or denied.]~~

~~[A failure to timely [investigate] [evaluate] [pay] a claim is a bad faith breach of the duty to act honestly and in good faith in the performance of the insurance contract.]]~~

USE NOTES

[~~The first paragraph of this~~]This instruction must be given in every first-party claim. The bracketed [~~second, third and fourth~~] paragraphs are to be given [~~where the plaintiff's cause of action and the evidence would justify a jury verdict on the basis of unreasonable delay in investigation or payment of a first-party claim.~~]to reflect the nature of the plaintiff's claims. Other grounds may be inserted as stated in the instruction should the court determine they are warranted by law and the evidence.

[Adopted, effective November 1, 1991; amended by Supreme Court Order _____, effective for cases pending or filed on or after _____.]

Committee commentary. — A first-party claim for insurance bad faith may proceed on several different theories, some of which are outlined in *O'Neel v. USAA Ins. Co.*, 2002-NMCA-028, ¶ 11, 131 N.M. 630, 41 P.3d 356: refusing to pay for reasons that were unfounded or frivolous, failing to act reasonably to conduct a fair investigation, or failing to act reasonably to conduct a fair evaluation of the claim. *See also Haygood v. United Services Auto. Ass'n*, 2019-NMCA-074, ¶ 19, 453 P.3d 1235. "Where an insurer fails to make an adequate investigation, its coverage position is unfounded, and it thus may be liable for bad faith denial of a claim." *Id.* (internal citations omitted).

The Supreme Court acknowledged additional bases in *Progressive Cas. Ins. Co. v. Vigil*, 2018-NMSC-014, ¶ 24, 413 P.3d 850, including an insurer's failure to "deal fairly with" its insured or "to act honestly and in good faith in the performance of the insurance contract." Delay in payment is also a basis for finding bad faith. See *Jessen v. Nat'l Excess Ins. Co.*, 1989-NMSC-040, 108 N.M. 625, 776 P.2d 1244 n.5; *Travelers Ins. Co. v. Montoya*, 1977-NMCA-062, ¶ 5, 90 N.M. 556, 566 P.2d 105.

The instruction reflects that "a bad faith claim need not depend on the existence of coverage." *Haygood*, 2019-NMCA-074, ¶ 22. Several theories to which the instruction applies, including "fail[ure] to deal fairly in handling the claim, fail[ure] to conduct a fair investigation, or fail[ure] to fairly evaluate coverage, among other possibilities," do not hinge on coverage. *Id.* ¶ 23. A court may not foreclose bad faith claims entirely based on the absence of coverage. *Id.* ¶ 24.

[~~Bad faith exists in the denial of an insured's first-party claim where the denial is "frivolous or unfounded." *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976). The insurer's action in denying coverage must rest upon a reasonable basis. Where payment of policy proceeds depends on an issue of law or fact that is "fairly debatable" the insurer is entitled to debate that issue. *United Nuclear Corp. v. Allendale Mutual Insurance Co.*, 103 N.M. 480, 709 P.2d 649 (1985).~~

~~An insurer may not simply refuse to investigate the claim of the insured using a failure to verify the claim as a justification for denial of coverage. *Jessen v. National Excess Insurance Company*, 108 N.M. 625, 776 P.2d 1244 (1989). Unreasonable delay in payment of a just claim is, itself, bad faith. *Travelers Ins. Co. v. Montoya*, 90 N.M. 556, 566 P.2d 105 (Ct. App. 1977).~~]

[As amended by Supreme Court Order No. _____, effective for cases pending or filed on or after _____.]

The Committee has cited authority that does not support the proposed changes and has not explained why the use notes should be modified. Many of the proposed revisions are contrary to well-settled New Mexico law and are not warranted by developments in New Mexico law since the current instruction was adopted. The cases cited in the Committee commentary have not modified New Mexico law or reversed cases that have been relied upon by practitioners for decades. The proposed revisions constitute a wholesale rewriting of established instructions without an appropriate legal basis.

The proposed instruction overreaches by including multiple additional bases on which bad faith can be found that have not been recognized under New Mexico law (stating an insurer "acts in bad faith when it does *one or more* of the following...") (emphasis added). In this way, the proposed instruction also improperly conflates the concepts of "reasonableness" and "frivolous or unfounded" thereby diluting a standard that was first adopted by New Mexico in 1974 and has not been overturned by any of the cases on which the Committee relies.

First, the proposed instruction improperly states an insurer can be found to have acted in bad faith solely based on a failure to give equal consideration to its own interests and the interests of the policyholder, which only applies in "duty to defend" cases or in other situations in which the insurer was acting in a fiduciary role. *See Chavez v. Chenoweth*, 1976-NMCA-076, ¶¶ 42-46, 89 N.M. 423, 430, 553 P.2d 703, 710 (recognizing "something more than the fact of the insurance relationship is required before a fiduciary relationship results"). "An insurance relationship alone . . . is not enough to give rise to a fiduciary relationship. Instead, an insurer assumes a fiduciary obligation toward an insured only in matters pertaining to the *performance* of obligations in the insurance contract." *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 54, 133 N.M. 669, 686, 68 P.3d 909, 926 (internal citations omitted) (emphasis in original). "[T]he fiduciary duty of an insurer is based on its exclusive control and obligations in matters pertaining to the performance of the insurance contract." *Id*. The *Chavez* and *Azar* Courts recognized three situations in which a fiduciary relationship was held to exist: (1) "[w]hen a liability insurance company, by the terms of its policy, obtains the power to determine whether an offer of compromise of a claim should be accepted or rejected, it creates a fiduciary relationship between it and its insured"; (2) "[w]hen an insurance company acts on behalf of the insured in the conduct of litigation and the settlement of claims, it assumes a fiduciary relationship"; and (3) "[w]hen an insurance company advises its insured that it is not necessary to employ counsel to collect the insurance or secure benefits under the policy and invites the insured to communicate with the company, it assumes a duty not to deceive its insured." *Chavez* ¶ 43; *Azar* ¶ 54. *See also* the bracketed language in the current version of UJI 17-1701 and its Directions for Use, which state "[t]he bracketed final sentence is to

be used in every case where the jury is instructed under UJI 13-1704, bad faith failure to settle and in any other case for which it is appropriate.

Second, the proposed instruction improperly broadens the scope to suggest an insurer can be found to have acted in bad faith states an insurer can be found to have acted in bad faith solely based on a failure to investigate and evaluate a claim "promptly" OR if it unreasonably delayed its notification to the policyholder that the claim will be paid or denied. This modification improperly disconnects the timing of the investigation and evaluation from "the circumstances" of the claim. The current version of the instruction properly keeps the concepts of reasonableness and timeliness of an insurer's investigation and evaluation of a first party claim and correctly notes that bracketed language is to be given only when warranted based on the cause of action and evidence and *is not to be given in every first party claim*. As recognized in *Sloan*, "[w]hile bad faith and unreasonableness are not always the same thing, there is a certain point, determined by the jury, where unreasonableness becomes bad faith and punitive damages may be awarded." 2004-NMSC-004, ¶ 16, 135 N.M. 106, 112, 85 P.3d 230, 236 (citing *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 1999–NMSC–006, ¶ 45, 127 N.M. 1, 976 P.2d 1 (emphasis added). "In other words, there comes a point at which the insurer's conduct progresses from mere unreasonableness to a culpable mental state. Because the resolution of precisely where this point lies in each case depends on an assessment of the complex factual determinations surrounding the insurer's conduct and corresponding motives, such a question must ordinarily be reserved for the factfinder to resolve." *Sloan* ¶ 16.

Third, the proposed instruction dilutes the "frivolous or unfounded" standard by eliminating the separate statement in the current version that states, "[a]n insurance company does not act in bad faith by denying a claim for reason which are reasonable under the terms of the policy." As written the proposed instruction is ambiguous and would be confusing to a jury because it conflates the concepts of "reasonableness" and "frivolous or unfounded".

It is well settled in New Mexico that "an insurer who fails to pay a first-party claim has acted in bad faith where its reasons for denying or delaying payment of the claim are frivolous or unfounded." *Sloan* ¶ 18 (citing *State Farm Gen. Ins. Co. v. Clifton*, 1974-NMSC-081, 86 N.M. 757, 759, 527 P.2d 798, 800. In *Clifton* the New Mexico Supreme Court first recognized a tort claim against an insurer for "unreasonable delay in paying the proceeds of an insurance contract" and adopted the frivolous or unfounded standard. *Clifton* ¶¶ 6 & 8.

In *Sloan*, the New Mexico Supreme Court recognized that recovery of punitive damages under a first party failure to pay claim, "there must be evidence of bad faith or a fraudulent scheme" and stated, "bad faith" means "any frivolous or unfounded refusal to pay." *Sloan* ¶ 18; *see also Jackson Nat'l Life Ins. Co. v. Receconi*, 1992-NMSC-019, ¶ 56, 113 N.M. 403, 419, 827 P.2d 118, 134 (stating "'[u]nfounded' in this context does not mean 'erroneous or 'incorrect'; it means essentially the same thing as 'reckless disregard,' in which the insurer 'utterly fail[s] to exercise care for the interests of the insured in denying or delaying payment on an insurance policy' . . . It means an utter or total lack of foundation for an assertion of nonliability—an arbitrary or baseless refusal to pay, lacking any arguable support in the wording of the insurance policy or the circumstances surrounding the claim. It is synonymous with the word with which it is coupled: "frivolous") (internal citations omitted). "By refusing or delaying payment on a claim for reasons that are frivolous or unfounded, the insurer has acted with reckless disregard for the interests of the insured; such reckless disregard supports a claim for punitive damages." *Sloan* ¶ 18.

The Committee relies heavily on *O'Neel v. USAA Ins. Co*. as authority warranting the addition of multiple alternative bases for a finding of bad faith. 2002-NMCA-028, ¶ 11, 131 N.M. 630, 41 P.3d 356. Importantly, *Sloan*, which was a Supreme Court opinion that considered the correctness of 13-1702, was decided after *O'Neel*. Moreover, *O'Neel* merely recognized that "to establish a claim for bad faith failure to pay a first party claim" the policyholder must prove the insurer failed to deal fairly with the policyholder. According to *O'Neel*, a policyholder could establish that the insurer failed to deal fairly with a policyholder by proving either that the insurer's "reasons for refusing to pay were frivolous or unfounded", that the insurer "did not act reasonably

under the circumstances to conduct a fair investigation" of the claim, or that the insurer "did not act reasonably under the circumstances to conduct a fair evaluation" of the claim. Each of these elements are included in the current version of 13-1702. The additional bases for bad faith proposed by the Committee are not supported by *O'Neel* or the other cases cited in the commentary. For example, no New Mexico case has ever held that a failure to give the interests of the insured at least the same weight as its own interests in the context of a first party failure to pay claim constitutes a failure to deal fairly with the insured or a breach of the covenant of good faith and fair dealing. Similarly, no New Mexico case has held that failure to act promptly to evaluate, investigate, or pay the claim alone constitutes a bad faith failure to pay a first party claim. Similarly, unreasonable delays in notifying a policyholder whether a claim will be paid or denied alone has never been held to constitute a bad faith failure to pay a first party claim.

Indeed, the trial court in *O'Neel* gave UJI 13-1702 "in its entirety" since it accurately stated New Mexico law because it did not require *O'Neel* to "prove both an unfair investigation and unfair evaluation to establish a claim of bad faith." ¶ 30. *O'Neel* does not support the addition of "other grounds" in the uniform instruction. *O'Neel* does not overrule *Clifton* and *Sloan*.

The current version of 13-1702 properly conveys the standard for finding of a culpable mental state sufficient to warrant imposition of punitive damages, that is, "a frivolous or unfounded refusal to pay". *Sloan* ¶ 17. In contrast, an insurer's "failure to honestly and fairly balance the interests of the insured and its own" is the standard for failure to settle a liability claim against the insured. *Sloan* ¶ 17. In *Sloan* the New Mexico Supreme Court

> [a]cknowledge[d] the instructions as written might be interpreted, in some circumstances, as permitting merely unreasonable conduct to support a finding of bad faith sufficient for an award of punitive damages. This is because these instructions, particularly UJI 13–1702, include concepts of reasonableness along with concepts which may evince a culpable mental state. Because punitive damages are imposed for the limited purposes of punishment and deterrence, a culpable mental state is a prerequisite to punitive damages. *While the unreasonable conduct described in these instructions may support an award of compensatory damages, such conduct does not*

> *support an award of punitive damages*. Thus, there may be cases in which a plaintiff, despite having advanced evidence sufficient to submit his or her bad-faith failure-to-pay claim to the jury, nevertheless fails to make a prima facie showing that the insurer's conduct exhibited a culpable mental state.

Sloan ¶ 17 (internal citations omitted) (emphasis added).

The point is, there is a substantial difference between unreasonable conduct and conduct that rises to the level of frivolous or unfounded. The proposed revisions to 13-1702 improperly blurs the line between the type of conduct a plaintiff must prove to warrant compensatory damages and what must be proven to warrant punitive damages.

Finally, the *Haygood* opinion does not warrant the proposed changes. *Haygood v. United Services Auto. Ass'n*, 2019-NMCA-074, ¶ 19, 453 P.3d 1235, 1241. *Haygood* recognized, "[a]s a general rule, an insurer may deny coverage without exposure to a claim of bad faith failure to pay as long as it has reasonable grounds for the denial." *Haygood* ¶ 19 (citing *Am. Nat'l Prop. & Cas. Co. v. Cleveland*, 2013-NMCA-013, ¶ 13, 293 P.3d 954). "Reasonable grounds will generally follow from reasonable investigation, and we have explained that an insurer is justified in taking reasonable time and measures to investigate before determining whether coverage is to be extended." *Haygood* ¶ 19. An insurer's investigation does not have to be perfect but must be "reasonably appropriate under the circumstances." *Id*. (internal quotation marks and citation omitted). "Where an insurer fails to make an adequate investigation, its coverage position is unfounded, and it thus may be liable for bad faith denial of a claim." *Id*.; see also UJI 13-1702 NMRA (providing that denial for frivolous or unfounded reasons is bad faith).

Haygood recognized only that it is possible that bad faith may be "based on conduct separate from the insurer's refusal to pay" even in the absence of coverage. ¶ 20. Indeed, Haygood reiterated that same three bases recognized by *O'Neel*, that is, bad faith may be based on proof that the insurer's "reasons for refusing to pay were unfounded or frivolous," the insurer "did not act reasonably . . . to conduct a fair investigation," or the insurer "did not act reasonably . . . to conduct a fair evaluation of [the] claim." *Haygood* ¶ 20 (citing *O'Neel* at ¶ 11).

The gist of *Haygood* is simply that bad faith in a first party failure to pay claim may stem from the manner in which the investigation and evaluation was handled regardless of whether the claim was actually covered. Nothing in Haygood stated or implied that the standards for imposition of compensatory or punitive damages have changed. Therefore, the proposed revisions to 13-1702 should not be adopted by this Court.

In *Haygood*, the plaintiff advanced two distinct theories of bad faith. The first was that the insurer acted in bad faith in failing to pay a covered claim. Haygood recognized a bad faith *failure to pay* claim "cannot 'arise unless there is a contractual duty to pay under the policy." ¶ 21. In other words, absent coverage, there can be no bad faith *failure to pay* under this theory. ¶ 21. However, *Haygood*, which was decided by the New Mexico Court of Appeals and was not reviewed by the Supreme Court, held only that the district court erred by not considering Haygood's second theory of bad faith on the merits. Haygood's second theory was that the insurer "intentionally delayed the coverage decision, intentionally failed to fairly evaluate the claim, and dishonestly handled the claim to [their] advantage." *Haygood* did not declare a new basis for a bad faith cause of action, it merely reversed and remanded "for determination of whether Haygood had made a showing sufficient to overcome Defendants' summary judgment motion on his bad faith claim premised on Defendants' investigation and evaluation." ¶ 24. *Haygood* did not identify any other factual bases on which a bad faith claim can be premised. The *Haygood* case was remanded for determination of whether Haygood could identify a fact issue for the jury to resolve concerning the insurer's investigation and evaluation. If there was a fact issue, the jury in *Haygood* would have been given UJI 13-1702 *including some or all of the bracketed language*. That is all *Haygood* establishes, that a policyholder's bad faith claim may reach the jury even if there is no coverage.

Moreover, based on *Sloan*, "the reasonableness of the insurer's conduct is generally an element of the jury's inquiry in determining whether compensatory damages should be awarded. For this reason, the bracketed second sentence of [13-1702] reads, 'In deciding whether to pay a claim, the insurance company must act reasonably under the circumstances to conduct a timely

and fair [investigation or evaluation] of the claim.' In failure-to-pay claims, therefore, a plaintiff under these circumstances might make a proper showing that the insurer acted unreasonably in denying or delaying a claim, entitling the plaintiff to compensatory damages, without having made a prima facie showing that the refusal to pay was frivolous or unfounded. In such circumstances, it is proper for the trial court to submit the plaintiff's bad-faith claim to the jury for consideration of an award of compensatory damages but withhold the punitive-damages instruction." *Sloan* ¶ 19.

IV. New Material, Instruction 13-1703A, Existence of duty to defend.

The Committee suggest a drastic revision to UJI 13-1703, including drafting a separate instruction on the existence of the duty to defend that on its face is vastly more expansive than what New Mexico law provides. The Committee proposes the following changes to UJI 13-1703:

[NEW MATERIAL]
13-1703A. Existence of duty to defend.

A liability insurance company is under a duty to defend a claim [against its insured] if the facts alleged in the claim [and any other facts known to the insurer regarding the claim] [and any additional facts that the insurer could have discovered if it conducted a reasonable investigation of the claim] [bring the claim within the coverage terms of the insurance policy] [or] [give rise to a legitimate question regarding whether coverage exists under the policy terms]. In determining whether the claim potentially falls within the policy coverage, the facts and policy terms are to be considered from the viewpoint of a reasonable insured.

[For an insurer that is under a duty to defend a claim against its insured, the duty arises [when the insured makes a demand for a defense of the claim] [or] [when the insurer obtains actual notice of the claim] [,whichever occurs first]. The duty continues to exist until the insurer receives a determination by a court that the claim against the insured is outside the scope of coverage of the insurance policy.]

[An insurer is under no duty to defend if the insured affirmatively declines a defense.]

USE NOTES

This instruction is to be used in cases involving alleged bad faith conduct by a liability insurer in refusing to defend against a third-party claim, when the existence of a duty to defend on the insurer's part is disputed and presents questions for resolution by the jury. It should be given in conjunction with UJI 13–1703B, which describes when a breach of the duty to defend constitutes bad faith.

The bracketed language in the instruction should be used as appropriate, depending on the basis of the claim against the insurer and the issues raised by the evidence. The bracketed second paragraph should be used, in whole or in part, if factual issues are raised by the plaintiff's claim or the insurer's defense and sufficient evidence is offered at trial to give rise to a jury question regarding when the insurer's duty to defend arose and/or when that duty ceased to exist. The bracketed third paragraph should be used if the insurer's defense and the evidence raise a jury issue regarding whether the insured "affirmatively declined" a defense by the insurer.

The brackets around the phrase "against its insured" in the first paragraph of the instruction indicate that the phrase ordinarily should be given, but the phrase is intended to refer to the plaintiff claiming benefits under the insurance policy and should be modified, along with other references in the instruction to the "insured," if the use of "insured" would not be appropriate in the circumstances of the case. If the case presents a question whether the plaintiff is an "insured" or is otherwise eligible to claim a defense under the policy, this instruction may require supplementation with instructions framing that issue.

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. —

New Mexico law has taken an expansive approach in determining when an insurer has a duty to defend a third-party claim against an insured. Early cases focused on the allegations of the third party's complaint in comparison with the coverage terms of the policy and held that a duty to defend exists "[i]f the allegations of the . . . complaint show that an accident or occurrence comes within the coverage of the policy" or, if the facts are not stated with sufficient clarity to determine the question of coverage, if "the alleged facts tend to show an occurrence within the coverage." *Am. Emp'rs' Ins. Co. v. Continental Cas. Co.*, 1973-NMSC-073, ¶ 4, 85 N.M. 346 (internal quotation marks & citation omitted). Subsequent cases took a broader view, holding that a duty to defend "arises from the allegations on the face of the complaint or from the known but unpleaded factual basis of the claim that brings it arguably within the scope of coverage." *Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co.*, 1990-NMSC-094, ¶ 11, 110 N.M. 741.

More recently, New Mexico courts have held that an insurer, in determining whether it has a duty to defend, may be charged with knowledge beyond the allegations of the complaint and facts otherwise known to it. "[A]n insurance company is required to conduct such an investigation into the facts and circumstances underlying the complaint against its insured as is reasonable given the factual information provided by the insured or provided by the circumstances surrounding the claim in order to determine whether it has a duty to defend." *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, 128 N.M. 434. The insurance company's duty "is based on the facts which it knew or would have known if it had conducted a reasonable investigation." *Id.* ¶ 32. Thus, "[i]f the duty to defend does not arise from the complaint on its face, the duty may arise if the insurer is notified of factual contentions or if the insurer could have discovered facts, through reasonable investigation, implicating a duty to defend." *Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co.*, 2006-NMCA-151, ¶ 14, 140 N.M. 720.

New Mexico courts have variously described the standard by which to determine whether pleaded, known, or reasonably discoverable facts create a duty to defend in light of the language of the policy. A duty to defend has been said to arise if the facts "tend to" show policy coverage, *Am. Emp'rs' Ins. Co.*, 1973-NMSC-073, ¶ 4, or if they bring the claim against the insured "arguably," *Am. Gen.*, 1990-NMSC-094, ¶ 11, or "potentially," *State Farm Fire & Cas. Co. v. Price*, 1984-NMCA-036, ¶ 18, 101 N.M. 438, *disapproved of on other grounds by Ellingwood v. N.N. Invs. Life Ins. Co.*, 1991-NMSC-006, ¶ 17, 111 N.M. 301, within the coverage of the policy, or if they give rise to a "legitimate question regarding . . . coverage," *Dove v. State Farm Fire & Cas. Co.*, 2017-NMCA-051, ¶ 22, 399 P.3d 400. *See id.* ¶¶ 20-21 (concluding that allegations of complaint "should have initially alerted [insurer] to the possibility" of coverage or "at the very least, have reasonably prompted [it] to investigate," and that facts revealed during discovery or that reasonable investigation would have revealed "further establish . . . potential coverage under the policy"). Only "[w]here there is no potential for coverage under a contract of insurance" is the insurer free of any duty to defend. *Marshall v. Providence Wash. Ins. Co.*, 1997-NMCA-121, ¶ 13, 124 N.M. 381; *see also Guar. Nat'l Ins. Co. v. C de Baca*, 1995-NMCA-130, ¶ 14, 120 N.M. 806 ("[T]he insurer has no duty to defend if the allegations in the complaint clearly fall outside the policy's provisions.").

In determining the existence of a duty to defend, whether the facts potentially or arguably fall within the policy coverage is to be considered from the viewpoint and reasonable expectations of a hypothetical reasonable insured. *See Dove*, 2017-NMCA-051, ¶¶ 19, 24; *see also Hinkle v. State Farm Fire & Cas. Co.*, 2013-NMCA-084, 308 P.3d 1009 (holding that, even considering insured's reasonable expectations based on policy language, claims asserted in third party's complaint against insured did not give rise to duty to defend). Any doubt about whether the claim is covered should be resolved in favor of the insured, *Price*, 1984-NMCA-036, ¶ 18, and any ambiguity in the policy language should be construed against the insurer, *Dove*, 2017-NMCA-051, ¶ 17.

An insurer's duty to defend is triggered by the insured's demand for a defense or by the insurer's actual notice of a claim against the insured, unless the insured knowingly and affirmatively declines a defense. *Garcia v. Underwriters at Lloyd's, London*, 2008-NMSC-018, ¶ 1, 143 N.M. 732. New Mexico courts appear to take a broad view of what may constitute a demand. *See Price*, 1984-NMCA-036, ¶¶ 26-27. The duty continues "unless and until [the insurer] receives a judicial ruling in its favor relieving it of any further obligations." *Dove*, 2017-NMCA-051, ¶ 12 (internal quotation marks & citation omitted). That fact-based determination generally is reserved for the court in the primary action by the third party against the insured. *See Mullenix*, 1982-NMSC-038, ¶¶ 11-12; *Dove*, 2017-NMCA-051, ¶ 12.

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

The proposed instruction as written creates a near absolute duty to defend, which is not consistent with New Mexico law. At the outset, he proposed UJI uses the term "claim" where it

should refer to "complaint." New Mexico law is clear that the facts alleged in the "complaint" initially determine the existence of the duty to defend. *Found. Rsrv. Ins. Co. v. Mullenix*, 1982-NMSC-038, ¶ 6, 97 N.M. 618, 619–20, 642 P.2d 604, 605–06 ("If the allegations of the injured third party's complaint show that an accident or occurrence comes within the coverage of the policy, the insurer is obligated to defend…The question presented to the insurer in each case is whether the injured party's complaint states facts which bring the case within the coverage of the policy."). Using the word claim suggests that assertions outside of the complaint create a duty to defend.

The proposed changes to the UJI attempt to expand the scope of the duty to defend by requiring a defense where there is a "legitimate question regarding whether coverage exists under the policy terms." This language suggests that the insured's mere questioning of coverage creates a duty to defend. There is no New Mexico law supporting such a low bar to the duty to defend. Instead, the standard is whether there is any potential that the claim in the primary action was covered, or whether the claim clearly fell outside of the policy's coverage. *Dove v. State Farm Fire & Cas. Co.,* 2017-NMCA-051, ¶ 15, 399 P.3d 400, 406. The potential for coverage in light of the policy terms is a higher bar than a "legitimate question," as the insured could raise numerous "questions" as to coverage, none of which create a "potential" for coverage.

The proposed UJI fails to advise the jury that there are instances where the insurer has no duty to defend. Specifically, "when an insured is sued, the insurer has no duty to defend if the allegations in the complaint clearly fall outside the policy's provisions". *Guar. Nat'l Ins. Co. v. C de Baca*, 1995-NMCA-130, ¶ 14, 120 N.M. 806, 907 P.2d 210. The proposed new UJI does not present an even and accurate statement of the law and is slanted toward the finding of a duty to defend, even in situations where none exists. The duty to defend must be viewed through the lens of the policy language and is not based on a unsupported potentializes, as the proposed UJI suggests.

This disproportionate approach is further demonstrated in the Committee commentary, in which the Committee focuses on individual words pulled out of context to make the duty to defend appear much more expansive. For example, the Committee commentary states:

> A duty to defend has been said to arise if the facts "tend to" show policy coverage, Am. Emp'rs' Ins. Co., 1973-NMSC-073, ¶ 4, or if they bring the claim against the insured "arguably," Am. Gen., 1990-NMSC-094, ¶ 11, or "potentially," State Farm Fire & Cas. Co. v. Price, 1984-NMCA-036, ¶ 18, 101 N.M. 438, [disapproved of on other grounds by Ellingwood v. N.N. Invs. Life Ins. Co., 1991-NMSC-006, ¶ 17, 111 N.M. 301, within the coverage of the policy, or if they give rise to a "legitimate question regarding . . . coverage," Dove v. State Farm Fire & Cas. Co., 2017-NMCA-051, ¶ 22, 399 P.3d 400. See id. ¶¶ 20-21 (concluding that allegations of complaint "should have initially alerted [insurer] to the possibility" of coverage or "at the very least, have reasonably prompted [it] to investigate," and that facts revealed during discovery or that reasonable investigation would have revealed "further establish . . . potential coverage under the policy").

In context, the cited cases from which the Committee pulls singular words such as "tend to," "arguably" and "potentially," establish that where the allegations of the complaint and other known facts likely bring the allegations against the insured within the scope of coverage, the insurer should defend. See *Am. Emp. Ins. Co. v. Cont'l Cas. Co.*, 1973-NMSC-073, ¶ 4 ("the insurer must also fulfill its promise to defend even though the complaint fails to state facts with sufficient clarity so that it may be determined from its face whether or not the action is within the coverage of the policy, provided the alleged facts tend to show an occurrence within the coverage."); *Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co.*, 1990-NMSC-094, ¶ 11, 110 N.M. 741, 744, 799 P.2d 1113, 1116 ("The duty of an insurer to defend arises from the allegations on the face of the complaint or from the known but unpleaded factual basis of the claim that brings it arguably within the scope of coverage."); and *State Farm Fire & Cas. Co. v. Price*, 1984-NMCA-036, ¶ 18, 101 N.M. 438, 442, 684 P.2d 524, 528, disapproved of by *Ellingwood v. N.N. Invs. Life Ins. Co.*, 1991-NMSC-006, ¶ 18, 111 N.M. 301, 805 P.2d 70 ("The insurance company is obligated to defend when the complaint filed by the claimant alleges facts potentially within the coverage of

the policy. The test is not the ultimate liability of the insurance company but is based solely on the allegations of the complaint.) (internal citations omitted).

In addition to the biased language that suggests the finding of a duty to defend, the UJI plainly misstates that law. The proposed UJI state, "In determining whether the claim potentially falls within the policy coverage, the facts and policy terms are to be considered from the viewpoint of a reasonable insured." In other words, the "reasonable expectations" of the insured are to be considered when determining whether a defense is owed. New Mexico law is clear that the "reasonable expectations" doctrine applies only where the policy terms are ambiguous. See *United Nuclear Corp.*, 2012-NMSC-032, ¶ 11, 285 P.3d 644 ("**Where a term in an insurance policy is found to be ambiguous**, the court's construction of the policy will be guided by the reasonable expectations of the insured.") (emphasis added). The proposed UJI impermissibly expands the reasonable expectations doctrine to every instance in which there is a question regarding the duty to defend, even where the policy is clear and unambiguous. This standard would create a near absolute duty to defend since all an insured person would have to do is claim an expectation of a defense, regardless of the policy's clear and unambiguous terms.

To support the proposed addition of this "reasonable expectations" language the Committee cites *Dove v. State Farm Fire & Cas. Co.,* 2017-NMCA-051, ¶ 19, 399 P.3d 400, 408 in the Committee commentary. However, the quotation is pulled from a section of the case where the court is analyzing the specific term at issue, "real estate manager," after having first determined that it is an ambiguous term subject to multiple interpretations. Thereafter the court looks at the insured's "viewpoint" or "reasonable expectation" to determine that it would bring the tenant arguably within the policy's coverage. *Id*. However, where policy terms are clear and unambiguous the policy language as written need only be interpreted. *New Mexico Physicians Mut. Liab. Co. v. LaMure*, 1993-NMSC-048, ¶ 9, 116 N.M. 92 ("We interpret unambiguous insurance contracts in their usual and ordinary sense…"); *Berlangieri v. Running Elk Corp*., 2002-NMCA-046, ¶ 25, 132 N.M. 92, 98 (Under New Mexico law, an insurance policy's plain, clear, and unambiguous terms bind the insured.)

V. Instruction 13-1703 (Amended as 13-1703B), Bad faith failure to defend.

The Committee also proposes to completely rewrite the existing Bad Faith Failure to Defend (13-1703) instruction without any stated reason. The Committee's proposed changes are as follows:

[13-1703 AMENDED AND RECOMPILED AS 13-1703B]
~~[13-1703]~~ 13-1703B. Bad faith failure to defend.

A liability insurance company must act fairly, reasonably, honestly, and in good faith in determining whether it has a duty to defend a claim [against its insured]. An insurance company acts in bad faith in refusing to defend a claim if it

[fails to conduct an investigation of the claim that is timely and reasonable under the circumstances;]

[fails to conduct a fair and honest evaluation of its duty to defend, giving the interests of its insured at least the same weight as its own interests;] [or]

[unreasonably delays notifying the insured of its decision as to whether or not it will defend the claim.]

~~[A liability insurance company has a duty to defend its insured against all claims which fall within the coverage of the insurance policy. A liability insurance company must act reasonably under the circumstances to conduct a timely investigation and fair evaluation of its duty to defend.~~

~~An insurance company acts in bad faith in refusing to defend a claim if the terms of the insurance policy do not provide a reasonable basis for the refusal.~~]

USE NOTES

This instruction ~~[must be given in every cause of action for bad faith refusal to defend a claim against the insured.]~~ is to be used in cases involving alleged bad faith conduct by a liability insurer in refusing to defend against a third-party claim. If the insurer's duty to defend is disputed and involves questions for resolution by the jury, UJI 13-1703A should be given together with this instruction.

The bracketed language in the instruction describing bad faith conduct should be used as appropriate, depending on the basis of the claim against the insurer and the issues presented by the case. The brackets around the phrase "against its insured" indicate that the phrase ordinarily should be given, but the phrase is intended to refer to the plaintiff claiming benefits under the insurance policy and should be modified (along with other references in the instruction to the "insured") if the use of "insured" would not be appropriate in the circumstances of the case. If the case presents a question whether the plaintiff is an "insured" or is otherwise eligible to claim a defense under the policy, this instruction may require supplementation with instructions framing that issue.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. —

~~[A liability insurer's duty to defend is contractual and depends upon the nature of the claim against the insured and the terms of coverage under the liability insurance policy. If there is no obligation to pay the claim against the insured, there is no duty to defend. *American Employer's Insurance Co. v. Crawford*, 87 N.M. 375, 533 P.2d 1203 (1975). If there is coverage under the policy a good faith belief that there is no coverage is, in and of itself, not a defense to the bad faith claim. The jury's proper inquiry is whether the insurer used good faith - honesty and fair dealing - in resolving the company's duty to defend. The question, in each case is whether the company has a reasonable basis for its action under the terms of the policy. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984). Subjective belief in the company's position is relevant to a determination of the bad faith claim but the jury's decision turns upon whether a reasonable basis exists for the refusal to defend. *Lujan v. Gonzales*, 84 N.M. 229, 501 P.2d 673 (Ct. App. 1972), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972). While the trial court's determination of the coverage issue may be determinative of the bad faith claim, that claim is independent of coverage; it rests upon a failure to use good faith - honesty and fair dealing - in resolving the company's duty to defend. The question in each case is whether the company had a reasonable basis for its action under the terms of the policy. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984).~~]

An insurer may hold a subjective good faith belief that there is no coverage and still breach its duty to defend under the policy. *See Lujan v. Gonzales*, 1972-NMCA-098, ¶ 22, 84 N.M. 229. The insurer "is liable for its breach regardless of whether the breach was in good faith." *Id.* ¶ 42. To establish that an insurer acted in bad faith in failing to defend, more must be shown than the

breach itself. "[B]ad faith . . . mean[s] an absence of good faith by an insurer in its relations with its insured." *Id.* ¶ 38. Without attempting to define the term completely, the court in *Lujan* "use[d] the term 'good faith' . . . to mean an insurer cannot be partial to its own interests, but must give its interests and the interests of its insured equal consideration" – i.e., "there must be a fair balancing of these interests." *Id.* ¶¶ 39, 41. New Mexico courts have expressed a strong preference for insurers to obtain judicial determinations of their duty to defend, *see, e.g., Dove*, 2017-NMCA-051, ¶ 12, and have cautioned that an insurer that unilaterally refuses to defend a claim "do[es] so at its peril" and risks liability for breach of the insurance contract or bad faith, *id.* ¶ 14.

In *Lujan* the court held that substantial evidence supported the trial court's determination that the insurer acted in bad faith in refusing to defend or settle a claim where the court could find from the evidence that in evaluating its duty the insurer exhibited "almost total disregard for the interest of its insured" and failed to notify the insured of its decision not to defend until after a settlement offer had expired. 1972-NMCA-098, ¶¶ 46-51. *See also State Farm Fire & Cas. Co. v. Price*, 1984-NMCA-036, ¶ 41, 101 N.M. 438 (holding that insurer's bad faith failure to defend presented triable issue, where "there is evidence in this case which could support a finding that [insurer] closed its eyes to the facts" supporting duty to defend), *disapproved of on other grounds by Ellingwood v. N.N. Invs. Life Ins. Co.*, 1991-NMSC-006, ¶ 17, 111 N.M. 301.

Lujan rejected on the facts the insurer's argument that in determining its duty to the insured it justifiably relied on certain information available to it. 1972-NMCA-098, ¶ 46. In drafting UJI 13-1703B, the Committee has assumed that an insurer that reasonably evaluates factual information or reasonably interprets policy language in conformity with the general good-faith standard of equal consideration of interests has acted in good faith. In cases involving an insurer's alleged bad faith failure to pay a first-party claim, New Mexico courts have defined bad faith as a refusal to pay that is "frivolous or unfounded." *E.g., Jackson Nat'l Life Ins. Co. v. Receconi*, 1992-NMSC-019, ¶¶ 55-56, 113 N.M. 403 (internal quotation marks & citations omitted). Similarly, a prior version of this instruction stated that an insurer that refuses to defend acts in bad faith "if the terms of the insurance policy do not provide a reasonable basis for the refusal." UJI 13-1703 (2022). The Committee has not found these standards used in a published failure-to-defend case and therefore believes any defense of reasonableness advanced by an insurer in such a case should be considered by the jury in terms of whether the insurer conducted "a fair and honest evaluation of its duty to defend" and gave the insured's interest "at least the same weight as its own interests," as set forth in the instruction.

[As amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

As explained in the Use Note of the original UJI, bad faith failure to defend arises when an insurer ***refuses*** to defend the insured. See 13-1703, Use Note ("This instruction must be given in every cause of action for bad faith refusal to defend a claim against the insured.") The proposed changes to the bad failure to defend UJI expand this claim to situations way beyond the refusal to defend. The proposed UJI imputes liability for bad faith failure to defend where there is an investigation delay or delay in notifying the insured, presumably even where a defense is ultimately provided. While insurers have duties to conduct a timely and reasonable investigation and to timely communicate with the insured, the breach of those duties is encompassed in other claims and does not form the basis for a bad faith claim for the failure to defend.

The proposed UJI does not clearly separate the contractual claim for a breach of the duty to defend from the tort claim for a bad faith refusal to defend. Instead, it conflates the two claims such that it is likely a jury will find the mere breach of the duty to defend is bad faith without any additional culpable action on the part of the insurer. For example, the new proposed Committee commentary cites portions of *Dove*, 2017-NMCA051, ¶ 14, stating "that an insurer that unilaterally

refuses to defend a claim 'do[es] so at its peril' and risks liability for breach of the insurance contract or bad faith." However, *Dove* is not a bad faith case. *Dove* made no finding and provided no analysis regarding whether the insurer acted in back faith. *Dove* exclusively addressed the existence of the duty to defend and the breath of that duty. See generally, *Id*.

The Committee also seek to abandon the long held legal standard for bad faith, which requires a showing that the insurer's decisions were "arbitrary or baseless" and "and lacking any support in the wording of the insurance policy or the circumstances surrounding the claim." *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 18, 135 N.M. 106, 113; see also *Am. Nat. Prop. & Cas. Co. v. Cleveland*, 2013-NMCA-013, ¶ 11, 293 ("[I]n New Mexico, an insurer acts in bad faith when it denies a first party claim for reasons that are frivolous or unfounded.); *Progressive Cas. Ins. Co. v. Vigil*, 2018-NMSC-014, ¶ 17, 413 (Progressive's reasonableness in contesting coverage was material to whether Progressive acted in bad faith.); *Dydek v. Dydek*, 2012-NMCA-088, ¶ 30, ("[t]o be entitled to recover for bad-faith failure to settle, a plaintiff must show that the insurer's refusal to settle was based on a dishonest judgment." The Committee, in the Committee commentary, suggested that this standard does not apply to a failure to defend case. There is no New Mexico law supporting this position. The basis of the insurer's conduct is a factor generally considered by the court in analyzing bad faith claims against an insurer. See *supra*. The current language of the UJI, which provides that "An insurance company acts in bad faith in refusing to defend a claim if the terms of the insurance policy do not provide a reasonable basis for the refusal" is more consistent with New Mexico law than the new language proposed by Committee.

VI. Instruction 13-1704, Bad faith failure to settle.

The Committee proposed the following changes to Instruction 13-1704:

13-1704. Bad faith failure to settle.

An insurer [or agent] has a duty to use honest judgment in evaluating claims against its insured, and to settle whenever practicable. The insurer [or agent] acts in bad faith when it fails to use honest judgment by [failing to investigate diligently, competently, or promptly;] [acting on inadequate information;] [or] [failing to fairly balance its own interests and the interests of the insured].

[Where there is a substantial likelihood that a claim will result in a recovery that exceeds policy limits, the insurer has a good-faith duty to minimize, if not eliminate, its insured's liability.]

[The insurer has a duty [~~A liability insurance company has a duty to timely investigate and fairly~~

~~evaluate the claim against its insured, and~~] to accept reasonable settlement offers within policy limits.]

[~~An insurance company's failure to conduct a competent investigation of the claim and to honestly and fairly balance its own interests and the interests of the insured in rejecting a settlement offer within policy limits is bad faith. If the company gives equal consideration to its own interests and the interests of the insured and based on honest judgment and adequate information does not settle the claim and proceeds to trial, it has acted in good faith.~~]

USE NOTES

This instruction must be given in any cause of action based upon a bad faith failure to [~~investigate,~~] negotiate or settle a liability claim against the insured. The bracketed language regarding agents may be used in cases involving an adjuster, broker, or other person acting as or on behalf of an insurer. The bracketed language regarding claims that pose a substantial likelihood of a recovery exceeding policy limits shall be used in cases involving claims that meet that description. The bracketed language regarding reasonable settlement offers shall be used in cases where the claimant made an offer to settle within policy limits.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order _____, effective _____.]

Committee commentary. — "If the insurer, based on its honest judgment and acting on adequate information after competent investigation of the claim, does not settle and instead proceeds to trial, then it has acted in good faith and cannot be found liable for any excess caused by its failure to settle." *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 1984-NMSC-107, ¶ 18, 102 N.M. 28, 690 P.2d 1022. However, "good faith does impose upon the insurer the duty to settle whenever practicable." *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 13, 124 N.M. 624, 954 P.2d 56. In particular, "when damages are likely to exceed policy limits, the insurer risks exposing its insured to even greater liability by going to trial rather than settling. Should an insurer, in violation of its duty of good faith, refuse to accept a reasonable settlement offer within policy limits, it will be liable for the entire judgment against the insured, including the amount in excess of policy limits." *Id.* ¶ 15.

An insurer's "honest judgment" is necessarily based on "its diligent, competent investigation of the claim," *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 22, 135 N.M. 106, 85 P.3d 230. It is also based on its honesty in balancing its interests with its insured's. *See id.* ¶ 20 ("By 'dishonest judgment,' we mean that an insurer has failed to honestly and fairly balance its own interests and the interests of the insured. An insurer cannot be partial to its own interests, but rather must give the interests of its insured at least the same consideration or greater."). [~~There is no cause of action in New Mexico for the negligent failure to settle a claim of liability against the insured. Liability is based upon a breach of the obligation of good faith implied in the insurance contract. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984). In consideration of settlement, the insurer must honestly weigh the probabilities of an adverse judgment and give equal consideration to the interests of the insured. "To fulfill the duty of giving equal consideration of the interests of the insured and the insurer there must be a fair balancing of these interests." *Lujan v. Gonzales*, 84 N.M. 229, 234, 501 P.2d 673 (Ct. App. 1972), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972). Good faith consideration of settlement offers requires an adequate investigation of the claim against the insured. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, supra.~~]

[As amended by Supreme Court Order No. _____, effective _____.]

There is no basis for the proposed changes. The cases cited in the Committee commentary of the existing UJI remain good law and are cited by the Committee in the revised Committee commentary sections of this and other related UJIs.

The changes proposed by the Committee expand the insurer's duty to settle beyond the bounds of New Mexico law. The proposed change directs that the insurer must settle whenever "practicable." "Practicable" is defined as "capable of being put into practice or of being done or

accomplished"[1] Because an insurance company is financially capable of settling in nearly all instances, the Committee's proposed changes would require settlement of almost all claims, regardless of the claim's merit or the policy's terms. This is inconsistent with New Mexico law. *Am. Nat. Prop. & Cas. Co. v. Cleveland*, 2013-NMCA-013, ¶ 13, 293 P.3d 954, 958 (an insurer has a right to refuse a claim without exposure to a bad faith claim if it has reasonable grounds to deny coverage.); *Am. Emp. Ins. Co. v. Crawford*, 1975-NMSC-020, ¶ 21, 87 N.M. 375, 381 ("Since Crawford had no coverage, we fail to understand how the Company acted negligently, or displayed bad faith in refusing to pay $100,000 which it had no duty to pay."); *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶¶ 13 and 15, 124 N.M. 624, 629 ("Regarding a good-faith duty to settle, there is no presupposition that settlement is always the preferred means of protecting the policyholder's interests….an insurer's unwarranted refusal to settle is a breach of the implied covenant of good faith and fair dealing"). Instead, where an insurer acts honestly and in good faith on adequate information, it has no liability for failing to settle a claim. *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co*., 1984-NMSC-107, ¶ 12, 102 N.M. 28, 31, 690 P.2d 1022, 1025.

The proposed changes to the UJI set an inaccurate standard for when an insurer acts in bad faith by failing to settle a claim against the insured. The proposed UJI states, "The insurer [or agent] acts in bad faith when it fails to use honest judgment by [failing to investigate diligently, competently, or promptly;] [acting on inadequate information;]" This language is presumably taken from *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶¶ 21-22, 135 N.M. 106, 114. However, it misconstrues *Sloan* and when read in context is actually in direct contradiction to what *Sloan* held. In *Sloan* the New Mexico Supreme Court stated:

> Thus, if the insurer fails to meet "basic standards of competency" in investigating a claim or researching the applicable law, such conduct is "strong evidence" of bad faith, ***but is not in itself sufficient to support the plaintiff's bad-faith failure-to-settle claim***. In *Ambassador*, we predicated an insurer's honest judgment on its diligent, competent investigation of the claim:

[1] See Merriam-Webster, https://www.merriam-webster.com/dictionary/practicable?utm_campaign=sd&utm_medium=serp&utm_source=jsonld

> In order that [the insurer's decision whether to settle] be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained.
> This requires the insurance company to make a diligent effort to ascertain the facts upon which only an intelligent and good-faith judgment may be predicated.
> Id. (quoted authorities omitted). Our current uniform jury instruction reflects this standard of conduct when it states an insurer "has a duty to timely investigate and fairly evaluate the claim against its insured." UJI 13–1704 NMRA 2003. Nevertheless, we conclude the competence and timeliness of the insurer's investigation of the claim, while strong evidence of whether the insurer conducted itself fairly and in good faith, is not the dispositive element in a failure-to-settle claim. Even where the insurer's investigation was both competent and timely, the insurer is nevertheless liable for bad faith when its refusal to settle within policy limits is based on a dishonest judgment. In many respects, a dishonest judgment in these circumstances may be more reprehensible than where the insurer bases its decision not to settle on a negligent investigation. ***We conclude, therefore, in failure-to-settle cases, it is the insurer's failure to treat the insured honestly and in good faith, giving "equal consideration to its own interests and the interests of the insured," id., that renders the insurer liable for insurance bad faith…"***

Id. (emphasis added). Accordingly, it would be inappropriate and inconsistent with New Mexico law to instruct the jury that bad faith failure to settle can be based solely on the insurer's failure to investigate. Further, instructing the jury that "acting on inadequate information" is a basis for bad faith is vague, confusing and suggests a greater responsibility on the insurer than what is reasonable. An insurer's investigation does not have to be perfect, it is only required to be "reasonably appropriate under the circumstances." *Haygood v. United Servs. Auto. Ass'n*, 2019-NMCA-074, ¶ 19, 453 P.3d 1235, 1241

At the end of the second paragraph, the proposed UJI, as amended, would instruct the jury that "The insurer has a duty to accept reasonable settlement offers within policy limits." This is significant because acceptance of all "reasonable settlement offers within policy limits" is not required by New Mexico law. See *Supra*. Settlement is not required where "no duty to settle exists". *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co*., 1984-NMSC-107, ¶ 10, 102 N.M. 28, 30. "It is left to the judgment of the insurer whether to settle the case or not". *Id*. An insurer acts in bad faith only where its refusal to settle is unwarranted. *Herman*, 1998-NMSC-005, ¶ 15.

Without reason the Committee proposes to remove the following language from the UJI: "If the company gives equal consideration to its own interests and the interests of the insured and based on honest judgment and adequate information does not settle the claim and proceeds to trial, it has acted in good faith." The language in the current UJI is an accurate and fair statement of the law, *Herman*, 1998-NMSC-005, ¶ 14 ("[t]he insurer's good-faith evaluation of the costs and benefits of settlement is generally accorded deference), and there is no reason to remove it. The removal of this language slants the UJI in favor of finding that the insurance company acted in bad faith any time if does not settle a claim regardless of its basis.

The Committee proposed to remove from the Committee commentary the citation to *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984), stating that there is no cause of action in New Mexico for the negligent failure to settle a claim of liability against the insured. This is an accurate and important statement of law that should be included to provide guidance and clarification as to the bounds of an insurance company's liability for failing to settle. The UJI on bad faith failure to settle and the Committee commentary as currently written are even and accurate statements of law and should not be changed.

VII. Instruction 13-1705, Industry customs and standards.

The Committee suggested the following changes to Instruction 13-1705:

13-1705. [~~Evidence~~] Industry customs and standards.

Under the [~~"bad faith"~~]bad faith claim, what is customarily done by those engaged in the insurance industry is evidence of whether the insurance company acted in good faith. [~~However, the good faith of the insurance company is determined by the reasonableness of its conduct, whether such conduct is customary in the industry or not.~~] Industry [customs] [and] [standards] are evidence of good or bad faith, but they are not conclusive.

USE NOTES

This instruction should be given when the trial court allows evidence of industry custom or standards on the issue of the defendant's bad faith. The appropriate parenthetical is used depending on the nature of the evidence.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~While the honesty and subjective intentions of the insurer are an element of the jury's assessment of the bad faith claim, *see* UJI 13-1701, the ultimate determination depends upon an assessment of whether the company had a reasonable ground to believe the merit of its defense to the first party claim or the merit of its refusal to defend or settle a liability claim. This is an objective standard. *Clifton v. State Farm Ins. Co.*, 86 N.M. 757, 527 P.2d 798 (1974) and *Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244 (1989).~~] Evidence of industry custom and practice may be helpful to a determination of [~~this issue~~] whether the insurer acted in good or bad faith, but it is not controlling. *Brooks v. Beech Aircraft Corp.*, 1995-NMSC-043, ¶ 40, 120 N.M. 372, 902 P.2d 54 (citing *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932), *cert. denied*, 287 U.S. 662 (1932)); *see generally Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶¶ 14-16, 135 N.M. 106, 85 P.3d 230; *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 1999-NMSC-006, ¶¶ 44-45, 127 N.M. 1, 976 P.2d 1; *Jessen v. Nat'l Excess Ins. Co.*, 1989-NMSC-040, ¶¶ 7-14, 108 N.M. 625, 776 P.2d 1244; *State Farm Ins. Co. v. Clifton*, 1974-NMSC-081, ¶¶ 1-9, 86 N.M. 757, 527 P.2d 798.

[As amended by Supreme Court Order No. _____, effective _____.]

The Committee cited authority that fails to support the proposed changes and further, has failed to explain why the use notes should be modified. The proposed changes seek to:

1. Improperly remove "bad faith" in quotations; and
2. Improperly remove the reasonable conduct of an insurer standard.

Both attempts are contrary to New Mexico law.

Bad faith occurs in the first party context when there has been a "frivolous or unfounded refusal to pay." In order to establish "bad faith", there must be a showing that there was ***no reasonable basis*** for denying the claim. *See, e.g., State Farm Gen. Ins. Co. v. Clifton,* 86 N.M. 757, 527 P.2d 798, 800 (1974) (emphasis added). In *Clifton*, the Supreme Court concluded that in order to recover damages in tort under this claim, there must be evidence of bad faith or a fraudulent scheme. *Id.* The *Clifton* Court further announced that "bad faith" meant "any frivolous or unfounded refusal to pay" and defined "frivolous or unfounded" as meaning an arbitrary or baseless refusal to pay, lacking any support in the wording of the insurance policy or the circumstances surrounding the claim:

> "Unfounded" in this context does not mean "erroneous" or "incorrect"; it means essentially the same thing as "reckless

> disregard," in which the insurer "*utterly* fail[s] to exercise care for the interests of the insured in denying or delaying payment on an insurance policy." It means an utter or total lack of foundation for an assertion of nonliability—an arbitrary or baseless refusal to pay, lacking any arguable support in the wording of the insurance policy or the circumstances surrounding the claim. It is synonymous with the word with which it is coupled: "frivolous."

Id.

Citing to *Clifton*, the Supreme Court in *Sloan v. State Farm Mutual Auto. Ins. Co.*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230, acknowledged:

> ***The reasonableness of the insurer's conduct*** is generally an element of the jury's inquiry in determining whether compensatory damages should be awarded. For this reason, the bracketed second sentence of [13-1702] reads, 'In deciding whether to pay a claim, the insurance company ***must act reasonably*** under the circumstances to conduct a timely and fair [investigation or evaluation] of the claim.' In failure-to-pay claims, therefore, a plaintiff under these circumstances might make a proper showing that the insurer acted unreasonably in denying or delaying a claim, entitling the plaintiff to compensatory damages, without having made a prima facie showing that the refusal to pay was frivolous or unfounded. In such circumstances, it is proper for the trial court to submit the plaintiff's bad-faith claim to the jury for consideration of an award of compensatory damages but withhold the punitive-damages instruction.

Sloan 2004-NMSC-004, ¶ 19 (emphasis added).

The Court of Appeals made it clear in *Am. Nat'l Prop. & Cas. Co. v. Cleveland*, 2013-NMCA-013, ¶ 13, 293 P.3d 954, that "[a]s a general rule, an insurer may deny coverage without exposure to a claim of bad faith failure to pay as long as it has ***reasonable grounds*** for the denial. ***Reasonable grounds*** will generally follow from ***reasonable investigation***, and" the Court has "explained that an insurer is justified in taking ***reasonable time and measures*** to investigate before determining whether coverage is to be extended. The investigation need not be perfect, but it must be ***reasonably appropriate*** under the circumstances." *Id; see also Jackson Nat. Life Ins. Co. v. Receconi*, 1992-NMSC-019, ¶ 34, 113 N.M. 403, 421, 827 P2d. 118, 136 (the denial of the claim was both nonfrivolous and reasonable even though ultimately mistaken); *Progressive Cas. Ins. Co. Vigil*, 2018-NMSC-014, 413 P.3d 850 (Progressive's ***reasonableness in contesting coverage*** was

material to whether Progressive acted in bad faith …, and to establish the claim of bad faith, Vigils had the burden of proving … Progressive did not act ***reasonably*** under the circumstances to conduct a fair evaluation of coverage).

The good faith conduct of the insurance company is determined by the reasonableness of its conduct, whether such conduct is customary in the industry or not. Removing this important sentence from the jury instruction is not only contrary to New Mexico law but also fails to acknowledge that an insurer's reasonable [or unreasonable] conduct is the crux of a "bad faith" claim.

VIII. Instruction 13-1706, Violation of the Insurance Practices Act.

The Committee proposed the following revisions to Instruction 13-1706:

13-1706. Violation of Insurance Practices Act.

There was in force in this state, at the time of the [claim handling] [transaction] in this case, a law prohibiting certain practices by insurers. [~~insurance companies.~~]_____ (plaintiff) [~~Plaintiff~~] contends that _____ (defendant) engaged in the following prohibited practice[s]:

(Insert the applicable portion[s] of Article 16 of the Insurance Code.)

If _____ (defendant) engaged in [any one of these] [this] practice[s], it is liable to _____ (plaintiff) for damages [~~proximately~~] caused by its conduct if it acted knowingly or engaged in the practice[s] with such frequency as to indicate that such conduct was its general business practice.

The Committee proposes two changes to 13-1706:

1. Change "insurance companies" to "insurers;" and
2. Remove "[proximately]" from the instruction with respect to causation of damages under this section.

The Committee also proposes the following revisions to the use notes:

USE NOTES

Unfair insurance practices supported by substantial evidence are to be numbered and listed using the statutory language.

The definition of "insurer" in the TPFA includes agents, brokers, solicitors, adjusters, providers of service contracts, and all other persons engaged in any business subject to supervision under the Insurance Code. *Martinez v. Cornejo*, 2009-NMCA-011, ¶ 18, 146 N.M. 223, 208 P.3d 443. The trial court has the discretion to modify the language of this instruction accordingly.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — Article 16 of the Insurance Code, the Trade Practices and Frauds Article ("TPFA"), creates a private cause of action against an insurer or agent for violations of the Code. NMSA 1978, § 59A-16-30 (1984, as amended through 1990) ("Any person covered by Chapter 59A, Article 16 NMSA 1978 who has suffered damages as a result of a violation of that article by an insurer or agent is granted a right to bring an action in district court to recover actual damages."). "The private right of action under the TPFA is not founded on or related to any common law liability or contractual obligation." *Martinez*, 2009-NMCA-011, ¶ 40. "In creating a separate statutory action, the Legislature had a remedial purpose in mind: to encourage ethical claims practices within the insurance industry." *Hovet*, 2004-NMSC-010, ¶ 14.

A third party, who can demonstrate a special beneficiary status, may sue for unfair claims practices under Section 59A-16-30. *Hovet*, 2004-NMSC-010, ¶ 17 ("A private right of action for third parties who are victims of automobile accidents is consistent with a statutory scheme that was intended to benefit both insureds and third-party claimants. . . [and] enforces the policy of the Insurance Code, which is to promote ethical settlement practices within the insurance industry."); *see also Russell v. Protective Ins. Co.*, 1988-NMSC-025, ¶ 15, 107 N.M. 9, 751 P.2d 693 ("[N]on-contractual liability of a promisor to a third party is valid when it is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.") (quoting Restatement (Second) of Contracts § 313(2)(b) (1981)), *superseded by statute*, NMSA 1978, §§ 52–1–28.1(A) (1990), 59A–16–30. The New Mexico Supreme Court "has recognized that a third-party plaintiff who is an intended beneficiary of statutorily mandated insurance has a private right of action under Section 59A–16–30 to remedy an insurer's breach of the duty of fair settlement practices established by Article 16." *Jolley v. Associated Elec. & Gas Ins. Servs. Ltd. (AEGIS)*, 2010-NMSC-029, ¶ 10, 148 N.M. 237 P.3d 738.

~~[*Russell v. Protective Ins. Co.*, 107 N.M. 9, 751 P.2d 693 (1988). The Code section most directly relevant to "bad faith" claims is Section 59A-16-20 defining unfair and deceptive claims practices. The statute allows recovery of "actual damages". Litigation costs must be awarded the prevailing party, plaintiff or defendant, unless the trial court otherwise directs. The trial court (not the jury) may also award attorney's fees to the prevailing party upon a finding that the claim was known to be groundless or the party charged with the violation has willfully engaged in the prohibited practice.~~

~~Current state decisions do not address the meaning of "general business practice". *See Barboa v. Monumental General Ins. Co.*, No. CIV 87-0365 JB slip op. (D. N.M. Mar. 25, 1988).~~]

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

First, as noted in the Introduction of this paper, a wholesale substitution of the term "insurer" for the term "insurance company" in Chapter 17 is improper. Instruction 13-1706 specifically relates to claims handling and not to the sale of insurance policies. The Undersigned do not have an objection to the use of the term "insurers" in this section.

Section 13-1706 concerns claims brought under Section 59A-16-20, which defines prohibited claims practices. Section 59A-16-1 identifies the entities and persons to whom Chapter 59A applies. The Use Notes should direct the district court and practitioners to Section 59A-16-1, which provides the complete definition. The Undersigned do not object to using the term

"insurers" in 13-1706 because that term is specifically defined in Section 59A-16-1. However, the Undersigned do object to the proposed revisions to the use notes.

New Mexico has recognized that a private statutory cause of action can be brought by those persons identified in Section 59A-16-30 against those entities and persons identified in Section 59A-16-1. The proposed additional discussion and citations in the use notes are not necessary and could be confusing. Although citation is made to *Hovet v. Allstate*, the proposed discussion appears to be an argument for expanding *Hovet*, which has no place in Committee Commentary. The quote from *Jolley*, for example, is confusing because *Jolley* itself limited the application *Hovet*, also cited inappropriately here. As such, this additional discussion is inappropriate because it is irrelevant, confusing, prejudicial, misleading, and presenting a biased interpretation of New Mexico law.

Similarly, the committee has removed a still relevant citation from the jury instruction regarding the damages available under Section 59A-16-30. The statute expressly allows for recovery of "actual damages" and litigation costs to the prevailing party under certain circumstances. As such, the Undersigned object to removal of that language.

Second, the Committee has also quietly proposed removal of the term "proximately" from the causation portion of the instruction but failed to provide any support for the removal of the concept of proximate causation for recovery under this section. The Undersigned object to the removal of proximate causation for claims brought under the New Mexico Insurance Practices Act without a corresponding change in New Mexico law.

The instruction use note provides no justification or even mention of causation whatsoever. To the knowledge of the Undersigned, the New Mexico Supreme Court has never issued a decision eliminating the concept of proximate cause from claims brought under the Insurance Practices Act. The most support provided for this proposal is contained in quoted dicta from a case under UJI 13-1709. Presuming the Committee relies upon that dicta for this proposal, the Undersigned object for the reasons discussed below.

Committee Commentary "is not the law of New Mexico . . . and comments must stand on their own merit without implied endorsement of this Court." Nevertheless, Committee commentary must accurately state New Mexico law and cannot be misleading or one-sided. *Cress v. Scott*, 1994-NMSC-008, ¶ 6, 117 N.M. 3, 5–6, 868 P.2d 648, 650–51. Nor should it invite changes in the law. The objections presented regarding the Committee's commentary for this instruction, 13-1706, attempts to do all of that and should not be adopted by the Court.

IX. Instruction 13-1707, Violation of Unfair Practices Act.

The Committee proposed the following revisions to Instruction 13-1707:

13-1707. Violation of Unfair Practices Act.

Instruction withdrawn.

~~[There was in force in this state, at the time of the [dealings] [transaction] in this case, a law prohibiting a person selling insurance from engaging in unfair or deceptive trade practices. An unfair or deceptive trade practice is any false or misleading oral or written statement, visual description or other representation which tends to or does deceive or mislead the policyholder. A person who is deceived by an unfair or deceptive trade practice may recover damages proximately caused by the deception. Plaintiff contends that defendant engaged in the following prohibited practice[s]:~~

~~(*Insert the unfair or deceptive trade practice.*)~~

~~If defendant engaged in [any one of these] [this] practice[s], it is liable to plaintiff for damages proximately caused by its conduct.~~

~~USE NOTES~~

~~Unfair or deceptive trade practices are illustrated by Section 57-12-2, NMSA 1978; however, the practices listed are not exclusive. Where applicable, it is recommended that the statutory language be used.~~]

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — In 2022, the Supreme Court adopted UJI 13-2501 through -2506 NMRA for use in claims brought under the Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019). These instructions should be used as appropriate in claims brought under the UPA.

Where applicable, a plaintiff may pursue both the remedies under the Unfair Insurance Practices Act and the [] UPA. The Unfair Insurance Practices Act is not an exclusive statutory remedy for unfair insurance practices. *State ex rel. Stratton v. Gurley Motor Co.*, [~~105 N.M. 803, 806, 737 P.2d 1180 (Ct. App.), cert. denied, 105 N.M. 781, 737 P.2d 893 (1987).~~] 1987-NMCA-063, ¶ 17, 105 N.M. 803, 737 P.2d 1180.

~~[The two statutes provide different remedies. Under both, the plaintiff may recover actual damages. However, the Unfair Practices Act also authorizes a treble award of damages upon a determination by the trier of fact that the defendant willfully engaged in the trade practice. The Committee has drafted no instruction for the treble damages remedy. Where the evidence would permit a finding of willful conduct, UJI 13-302E should be used to frame the contention of willful conduct as a related issue and special interrogatories or the special verdict form, Chapter 22, should be submitted to the jury on this issue. It remains in the discretion of the Court, as a matter of law, to impose treble damages justified by a finding of willful conduct. Section 57-12-10(B), NMSA 1978.~~]

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

The undersigned object to removing this entire instruction. This instruction should be used in conjunction with Chapter 25 – the Civil Jury Instructions for claims brought under the UPA.

X. Instruction 13-1708, Breach of fiduciary duty.

The Committee proposed the following revisions to Instruction 13-1708, for which no instruction is drafted:

13-1708. Breach of fiduciary duty

No instruction drafted.

Committee commentary. — Normally, the Court should decide whether the issues in the case involve fiduciary duties. *GCM, Inc. v. Ky. Cent Life Ins. Co.*, 1997-NMSC-052, ¶ 23, 124 N.M. 186, 947 P.2d 143 ("[T]he scope of a tort duty is a matter of law."). "A fiduciary is obliged to act primarily for another's benefit in matters connected with such undertaking." *Kueffer v. Kueffer*, 1990-NMSC-045, ¶ 12, 110 N.M. 10, 791 P.2d 461 (internal quotation marks and citation omitted). "In the insurance context, New Mexico courts have recognized a fiduciary duty because of the fiduciary obligations inhering in insurance relationships and because of concerns arising from the bargaining position typically occupied by the insured and insurer." *Azar v. Prudential Ins. Co. of Am.*, 2004-NMCA-062, ¶ 54, 133 N.M. 669, 68 P.3d 909 (internal quotation marks and citation omitted). New Mexico has not yet expressly recognized a separate cause of action for breach of a fiduciary duty in the insurance bad faith context. Primarily, that is because a fiduciary duty has significant overlap with the duty of good faith and fair dealing. *See Chavez v. Chenoweth*, 1976-NMCA-076, ¶ 44, 89 N.M. 423, 553 P.2d 703.

Though there is overlap between these two duties, the duty of good faith and fair dealing requires insurers to give the insured's interests *at least* equal consideration to its own interests. *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 12, 124 N.M. 624, 954 P.2d 56 (explaining that under the duty of good faith and fair dealing, "an insurer cannot be partial to its own interests, but must give its interests and the interests of its insured *equal* consideration" (emphasis added)). In contrast, a fiduciary relationship requires the insurer to place the insured's interests *above* that of its own.

[~~While the relationship between insurer and insured imposes a fiduciary obligation on the insurer to deal with the insured in good faith in matters pertaining to performance of an insurance contract, no cause of action, apart from the action for bad faith, exists for the breach of this duty. *Chavez v. Chenoweth*, 1976 NMCA 076, 89 N.M. 423, 553 P.2d 703 [(Ct. App. 1976)]~~] The insurance contract on its own "is not enough to give rise to a fiduciary relationship". *Azar*, 2003-NMCA-062, ¶ 54. So far, courts have recognized the following three situations where a fiduciary relationship was found in the insurance context: "(1) where the insurer, by the terms of the policy, had the power to decide whether to accept or reject offers of compromise; (2) where the insurer acted on behalf of the insured in settlement or litigation of claims; and (3) where the insurer gave advice to insured not to hire counsel and to instead communicate with insurer." *Id.* (citing *Chavez*, 1976-NMCA-076). These three situation are not exhaustive, and the fiduciary duty applies when the insurer has "exclusive control and obligations in matters pertaining to the performance of the insurance contract." *Id.* If the court finds the case involves a fiduciary duty, the instructions describing the insurer giving equal weight may be modified to reflect the insurer's obligation to give its insured's interest greater weight. The fiduciary obligation allows the award of punitive damages in insurance cases under a more relaxed standard. *See* UJI 13-1718; *Romero v. Mervyn's*, 1989-NSMC-081, ¶ 23, n.3, 109 N.M. 249, [~~255,~~] 784 P.2d 992[~~, 998 footnote 3 (1989)~~].

A non-exclusive list of fiduciary duties would include the following:

Duty of Loyalty- An insurer and its agents have a duty of loyalty to its insured. An insurer or its agent breaches the duty of loyalty by putting the insurer's interests, or the interests of another, before those of the insured. *Cf* UJI 13-2406.

Duty of Candor- Fiduciaries must disclose any and all relevant information that could have an impact on their ability to carry out their duties as a fiduciary and/or the well-being of a beneficiary's interests. *See Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 19, 127 N.M. 1, 976 P.2d 1 for example of duty to disclose.

[As amended by Supreme Court Order No. , effective .]

First, the citation to *Azar v. Prudential Ins. Co. of Am*. is incorrect. It is ***2003***-NMCA-062, not ***2004***-NMCA-062.

Second, Committee Commentary "is not the law of New Mexico . . . and comments must stand on their own merit without implied endorsement of this Court." Nevertheless, Committee commentary must accurately state New Mexico law and cannot be misleading or one-sided. *Cress v. Scott*, 1994-NMSC-008, ¶ 6, 117 N.M. 3, 5–6, 868 P.2d 648, 650–51. Nor should it invite changes in the law. The existing Committee commentary accurately articulates the Court of Appeals decision in *Chavez v. Chenoweth*. It would be inappropriate to include language such as "New Mexico *has not yet* expressly recognized a separate cause of action for breach of fiduciary duty" and "*[s]o far*, courts have recognized the following three situations". Proposed Revisions to UJI 13-1708 NMRA (dated 03/24/23) (emphasis added). The Supreme Court of New Mexico, in *Chavez v. Chenoweth*, decided the precise question at issue here, that New Mexico *does not recognize* a separate cause of action for breach of fiduciary duty. A plain reading of *Chavez* supports the existing commentary. *Chavez* remains the law in New Mexico to this day and no subsequent cases have called its holding into question. No case since has undermined or expanded the law. The proposed Committee Commentary should be rejected because it misstates the law of New Mexico and is misleading.

Further, as written, the proposed Committee commentary suggests the trial court may decide whether a fiduciary duty was owed, which is misleading because New Mexico does not recognize a separate cause of action for breach of fiduciary duty. Moreover, the circumstances in which insurers act as fiduciaries are relatively narrow. Instead, the commentary should (1) state there is no separate cause of action for breach of fiduciary duty by an insurer even when such a duty is found to have been owed; (2) explain that the existence of an insurance contract alone is not enough to establish a fiduciary duty was owed by an insurer; and (3) identify the circumstances in which New Mexico has recognized an insurer is acting as a fiduciary.

The quotation from *Kueffer v. Kueffer* and the Committee commentary is improper and misleading because the quote is taken out of context and offered for a proposition it does not support. The quotation from *Kueffer* is a direct quote from Black's Law Dictionary ("A fiduciary is obliged 'to act primarily for another's benefit in matters connected with such undertaking'").

Kueffer ¶ 12. This proposition is much broader than New Mexico law in the insurance context. As stated in *Chavez* and reiterated in *Azar*, insurers act as fiduciaries only in matters pertaining to the *performance* of obligations in the insurance contract. The citation to *Kueffer* suggests a fiduciary's duty is much broader than it is. Moreover, the *Kueffer* case did not involve dealings between an insurer and its insured. Rather, it involved a husband and wife's dispute over the husband's alleged failure to protect his ex-wife's interests in the sale of community property pursuant to a written contract wherein the husband agreed to act as a fiduciary. The wife argued the trial court erred by not finding the husband breached his fiduciary duty, "even if he acted in good faith."

Similarly, the citation to *Dairyland Ins. Co. v. Herman* is misleading. *Herman* was a bad faith "failure to settle" case in which the insurer did not accept a settlement offer within the policy limits thereby exposing its insured to an excess judgment, which is one of the three situations in which New Mexico has recognized an insurer owes a fiduciary duty to its insured. *Herman* discusses only the duty of good faith and does not even mention the word "fiduciary". Importantly, the *Herman* opinion *does not* state the duty of good faith and fair dealing requires insurers to "give the insured's interests *at least* equal consideration to its own interests." Proposed Revisions to UJI 13-1708 NMRA (dated 03/24/23) (emphasis in original) (citing to *Herman* ¶ 12). Instead, the *Herman* Court stated, "an insurer cannot be partial to its own interests, but must give its interests and the interests of its insured *equal consideration*." *Herman* ¶ 12 (citing *Lujan v. Gonzales*, 1972-NMCA-098, ¶ 39, 84 N.M. 229, 236, 501 P.2d 673, 680) (emphasis added). Importantly, there is no citation for the proposition that "a fiduciary relationship requires the insurer to place the insureds' interests *above* that of its own." Proposed Revisions to UJI 13-1708 NMRA (dated 03/24/23) (emphasis in original).

The proposed Committee commentary also states the three situations in which New Mexico has recognized an insurer owes a fiduciary duty to its insured is *not exhaustive*. There is no citation to any authority calling either *Chavez* or *Azar* into question. Therefore, the suggestion that this is an unsettled area of the law is improper and confusing.

Finally, the Committee proposes, without any support, two additional situations in which insurers owe a fiduciary duty to insureds. There is no authority for the proposition that an insurer owes a "duty of loyalty" to its insureds. The citation to a legal malpractice jury instruction does not support this proposition. The relationship between an attorney and client is not sufficiently analogous to the relationship between an insurer and insured. The insurer's duty is to act in good faith in performing the insurance contract. Absent something more, such as having complete control over the decision to settle within policy limits, conducting the defense of its insured in litigation, or in advising an insured not to retain personal counsel, there is no fiduciary duty owed and the insurer's conduct is governed by the duty of good faith and fair dealing. Similarly, the duty of good faith and fair dealing requires insurers to "act honestly" in the performance of the contract. The citation to *Allsup's* does not support the conclusion that a "duty of candor" is the equivalent of a fiduciary duty. In fact, ¶ 19 of the Allsup's opinion does not discuss a "duty of candor" and the case nowhere mentions the term "candor". Therefore, this language should not be permitted. Moreover, the duty of disclosure recognized in *Salas v. Mountain States* is a separate duty owed by insurers. Salas did not conclude the duty of disclosure amounts to a *fiduciary* duty.

XI. Instruction 13-1709, Causation.

The Committee proposed the following revisions to Instruction 13-1709:

13-1709. Causation.

A cause of a [~~loss~~][injury][harm] is a factor which contributes to the [~~loss~~][injury][harm] to the plaintiff and without which the [~~loss~~][injury][harm] would not have occurred. It need not be the only [~~cause~~] factor contributing to the [injury][harm].

USE NOTES

This instruction must be given in every cause of action under Chapter 17.
[As amended, effective March 1, 2005; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — At common law and under the statutory remedies of the Unfair Insurance Practices Act and the Unfair Practices Act, compensation is for the injury to the inured caused by the prohibited conduct [~~monetary losses actually caused by the prohibited conduct~~]. For instance, "[s]hould an insurer, in violation of its duty of good faith, refuse to accept a reasonable settlement offer within policy limits, it will be liable for the entire judgment against the insured, including the amount in excess of policy limits." Dairyland Ins. Co. v. Herman, 1998-NMSC-005, ¶ 15, 124 N.M. 624, 954 P.2d 56. For reasons of public policy, the insured is viewed as having suffered injury from entry of the excess judgment even if the insured would be shielded from monetary liability on the judgment by, e.g., a covenant not to execute on the excess judgment or a discharge in bankruptcy. "Underlying this rule is the notion that it is the judgment against the insured, not the amount of his personal exposure to it, that damages the insured." Dydek v. Dydek, 2012-NMCA-088, ¶ 67, 288 P.3d 872. This instruction addresses the causal link that must be established between the insurer's bad faith conduct and the resulting injury.

An insurance bad faith claim may implicate the coverage provisions of the insurance policy. Policy coverage may be limited to losses caused by particular risks, or coverage may be excluded for losses caused by certain risks or by certain conduct of the insured. The determination of causation as it relates to policy coverage is not necessarily governed by this instruction. New Mexico law remains unsettled on this question.

The Court of Appeals in Healthsouth Rehabilitation Hospital of New Mexico, Ltd. v. Brawley, 2016-NMCA-037, 369 P.3d 27, addressed causation in the coverage context, but it ultimately determined the issue was not preserved for appellate review. Although the case discussed the issue in dicta, it explained a key difference between how causation operates in tort/negligence-based cases and how causation may apply in determining coverage. Healthsouth observes that

> causation principles in tort law are different from causation principles in insurance law because "the two systems examine the causation question for fundamentally different purposes. In tort, it is to assess fault for wrongdoing. In insurance, it is to determine when the operative terms of a contractual bargain come into play." Erik S. Knutsen, Confusion About Causation in Insurance: Solutions for Catastrophic Losses, 61 Ala. L. Rev. 957, 968 (2010); Knutsen, supra, at 969-70 (stating that "[i]nsurance causation therefore bears little resemblance to the policy-laden proximate cause analysis of tort law"); see also Standard Oil Co. of N.J. v. United States, 340 U.S. 54, 66 (1950) (Frankfurter, J., dissenting) ("[T]he subtleties and sophistries of tort liability for negligence are not to be applied in construing the covenants of [an insurance] policy."); Allstate Ins. Co. v. Smiley, 659 N.E.2d 1345, 1354 (Ill. App. Ct. 1995) (declining to follow a case because its holding "introduc[ed] . . . tort principles into the interpretation of an insurance policy"); Robert H. Jerry II, Understanding Insurance Law, 502 (2d ed. 1996) (stating that "many courts have explicitly stated that the proximate cause test is not the same in tort law and insurance law").

Healthsouth, 2016-NMCA-037, ¶18.

In bad faith cases that require consideration of both causation of the plaintiff's injury and causation as a factor affecting policy coverage, this instruction addressing the former may need to be supplemented with an instruction dealing with the latter, with the distinction being carefully drawn to assist the jury.

Legal scholars offer some thoughts to help attorneys understand the complexity of the task. Professor Peter Nash Swisher wrote "Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation 'Riddles,'" 43 Tort Trial & Ins.Prac.L.J. 1 (2007-2008), in which he advised on tort and insurance causation law:

> American courts and juries have struggled mightily to analyze and resolve various insurance causation issues from a number of different perspectives. Some courts determine coverage by applying an immediate cause rationale, while other courts employ an efficient proximate cause chain of events doctrine similar to tort law or utilize a hybrid approach combining both of these rules. The courts likewise have employed no less than three different insurance law approaches to address multiple concurrent causation issues, and they have disagreed on whether an efficient proximate cause approach requires a substantial causal nexus or only a sufficient causal nexus.

43 Tort Trial & Ins.Prac.L.J. at 34.

Professor Swisher's article focused on the relationship between tort and insurance law causation principles; he did not specifically focus on bad faith insurance cases. In cases requiring a supplemental instruction on causation in insurance law, counsel will need to consider these alternative causation approaches as a starting point for any such instruction.

Conduct of the policyholder which violates the policyholder's obligation of honesty becomes a cause of the loss if the insurer acted in reliance upon such conduct.

[Revised, effective March 1, 2005; as amended by Supreme Court Order No. _____, effective _____.]

First, the Committee, without any support or basis provided, removing the word "loss" and leaving only "injury or harm." In the insurance context, loss is a much more appropriate word, and is neutral, unlike injury or harm. However, should the Court believe "loss" requires changing for some reason, the Undersigned suggest using the term from NMSA 59A-16-30 which provides that any person covered by the act "who has suffered damages" may bring an action to recover "actual damages." NMSA 59A-16-30. The Undersigned object to the use of the word injury or harm, however, without loss or damages. Rather, the instruction should be reformed to be consistent with the language of the controlling statute and use only the term "damages" or "actual damages."

More importantly, however, the Committee has again attempted to change the causation standard for insurance claims in New Mexico without legislative or judicial support. This is a radical change to insurance law as it currently exists in New Mexico. The Committee has proposed the word "cause" from this instruction. Committee Commentary "is not the law of New Mexico . . . and comments must stand on their own merit without implied endorsement of this Court." Nevertheless, Committee commentary must accurately state New Mexico law and cannot be misleading or one-sided. *Cress v. Scott*, 1994-NMSC-008, ¶ 6, 117 N.M. 3, 5–6, 868 P.2d 648, 650–51. Nor should it invite changes in the law. That is exactly what this proposed change attempts to do.

The support provided by the Committee for removing causation from insurance claims is dicta discussing the issue from a New Mexico Court of Appeals case and a practitioner journal article. Neither are binding on the trial courts in New Mexico and have no place in the jury instructions. The Undersigned object to the Committee's attempt to change New Mexico and/or invite a change in the law in New Mexico through these jury instructions and use notes.

XII. Instruction 13-1710, Affirmative defense; policyholder's dishonesty.

Without any explanation whatsoever, the Committee has proposed deleting Instruction 13-1710, the affirmative defense of policyholder dishonesty. The Committee proposed the following changes to Instruction 13-1710:

13-1710. Affirmative defense; policyholder's dishonesty – *Instruction Withdrawn.*

~~[It is a duty of the holder of an insurance policy to deal honestly and fairly with the insurance company. Defendant contends that in [applying for insurance] [submitting a claim for insurance proceeds] [answering the insurance company's request for information] the plaintiff acted dishonestly and with the intention to deceive the defendant.~~

~~The Plaintiff may not recover under the "bad faith" claim if, with intent to deceive, [he] [she] dealt with the defendant dishonestly about a material fact. A material fact is one which a reasonably prudent insurer would regard as important in [issuing the policy] [evaluating the claim].]~~

Instruction withdrawn.

The Committee does not cite any change in New Mexico law which would warrant a withdrawal of the instruction. The Committee's desire to exclude affirmative defenses also ignores well established New Mexico Supreme Court authority recognizing that the obligation to deal fairly and honestly rests equally upon the insurer and the insured. *See Modisette v. Foundation Reserve Ins. Co.*, 1967-NMSC-094, ¶ 17, 77 N.M. 661, 427 P.2d 21. As explained in *Modisette*:

> The general rule, and the rule consistent with principles of contract and the duty of fair dealing, which is the duty imposed upon both the insurer and the insured, is that if misrepresentations be made, or information withheld, and such be material to the contract, then it makes no difference whether the party acted fraudulently, negligently, or innocently.

Id. Further the Supreme Court acknowledged the availability of the affirmative defense available in the existing instruction in *Medina v. Foundation Reserve Ins. Co, Inc.*, 1994-NMSC-016, 117 N.M. 163, 870 P.2d 125; *see also, O'Neel v. USAA Ins. Co.*, 2002-NMCA-028, 131 N.M. 630, 41 P.3d 356 (noting jury had been instructed on affirmative defense of policy holder dishonesty). The purpose of jury instructions is to communicate the law as applied to the case.

The deletion of affirmative defenses is anything but impartial and unslanted. N.M. R. CIV. Concept. Accordingly, the instruction should remain.

XIII. Instruction 13-1711, Affirmative defense; comparative fault.

Without any explanation whatsoever, the Committee has proposed modifying the commentary to Instruction 13-1711, for which no uniform instruction is drafted for the affirmative defense of comparative fault. Notably absent from the argumentative, one-side, and often misleading presentation of authority is *any* New Mexico authority from 1991 to present that states

comparative fault would not apply in the insurance context, which supposedly was the purpose of revising the Commentary. *See* Proposed Revisions, Introduction (stating the proposed revisions "reflect developments in the law since the chapter originated in 1991"). The proposed revisions to the Commentary are:

13-1711. Affirmative defense; comparative fault – *No instruction drafted.*

No instruction drafted.

[Approved, effective November 1, 1991.]

Committee commentary. — [~~A material misrepresentation or dishonest conduct which is intended to deceive the insurance company will completely bar the insured's bad faith claim. UJI 13-1710. The action for bad faith arises from the equitable principles which give rise to the implied covenant of good faith and fair dealing. *Ambassador Insurance Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984).~~

~~Where an insured has negligently failed to cooperate with an insurer's investigation or otherwise acted in a manner to support a defense of comparative fault, the New Mexico Supreme Court has not decided if a comparative fault instruction would be appropriate as a defense to a bad faith claim. *See Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244, 1249 (1989).~~]

The New Mexico courts have not decided whether to recognize an insured's comparative fault as a defense to insurance bad-faith claims, although the question has been presented to both the New Mexico Supreme Court and the Court of Appeals. In *Jessen v. Nat'l Excess Ins. Co.*, 1989-NMSC-040, ¶ 22, 108 N.M. 625, 776 P.2d 1244, the Supreme Court held that there was no error in the district court's decision not to instruct on comparative fault, but declined to "decide whether such an instruction necessarily would be inappropriate in another case." The Supreme Court acknowledged that a California case cited by the defendant insurer, *Cali. Cas. Gen. Ins. Co. v. Superior Court*, 218 Cal. Rptr. 817, 818 (Ct. App. 1985), stood for the proposition that "comparative fault applies in bad faith claims," 1989-NMSC-040, ¶ 22; however, that case has since been overturned by the California Supreme Court, which held that "the *California Casualty* court's holding is grounded on the faulty premise that the obligations of insurer and insured—and thus their bad faith—are comparable. They are not." *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 2 P.3d 1, 11 (Cal. 2000). After that reversal, in *O'Neel v. USAA Ins. Co.*, 2002-NMCA-028, ¶¶ 31-32, 131 N.M. 630, 41 P.3d 356, the Court of Appeals declined to recognize a proposed comparative-fault defense because the arguments had not been preserved.

The affirmative comparative-fault defense, if available, would require an insurer to prove that it had a "special relationship" with its insured that created a heightened duty for the insured, and that its defense is not "inconsistent with public policy," *Reichert v. Atler*, 1994-NMSC-056, ¶ 8, 117 N.M. 623, 875 P.2d 379. There is a "special relationship" between an insurer and its insured, as noted in *Dellaira v. Farmers Ins. Exch.*, 2004-NMCA-132, ¶ 14, 136 N.M. 552, 102 P.3d 111

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("The reasons why courts have recognized the special and unique relationship between insurer and insured include the inherent lack of balance in and adhesive nature of the relationship, as well as the quasi-public nature of insurance and the potential for the insurer to unscrupulously exert its unequal bargaining power at a time when the insured is particularly vulnerable." (internal citations omitted)). Historically, our courts have interpreted this relationship to create a "duty *of the insurer* to deal in good faith with its insured." *Chavez v. Chenoweth*, 1976-NMCA-076, ¶ 44, 89 N.M. 423, 553 P.2d 703 (emphasis added). Until the courts address whether the insured's obligations to its insurer are sufficiently high to warrant a comparative-fault defense, no instruction is submitted. [Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

The Committee somewhat puzzlingly cites *Reichert v. Atler,* 1994-NMSC-056, ¶ 8, 117 N.M. 623, 875 P.3d 379, for the proposition that an insurer must prove it has a special relationship to assert a comparative fault defense. That is incorrect. *Reichert* did not involve an insurer. *See generally, id.* The paragraph cited specifically recognizes that "in New Mexico, comparative-fault principles apply unless such application would be inconsistent with public policy." *Id.* ¶ 8. The Committee cites no authority holding that public policy requires a heightened standard to assert a comparative fault defense in the insurance context. The Committee further cites *O'Neel v. USAA Ins. Co.,* 2002-NMCA-028, 131 N.M. 630, 41 P.3d 356, for the proposition that comparative fault is unavailable in the insurance context, *while recognizing that the argument was not preserved.* Accordingly, *O'Neel* does not stand for a proposition not preserved; in fact, the Court noted in *O'Neel* that an affirmative defense of policyholder dishonesty was warranted, which would indicate support for the general notion that an insurer is entitled to affirmative defenses available in tort actions. Simply stated, the entire modification to the Committee Commentary fails to recognize the duties of good faith and fair dealing apply to the insured and the insurer.

XIV. Instruction 13-1712, Compensatory damages; general.

The Committee suggested the following changes to Instruction 13-1712:

13-1712. Compensatory damages; general.

If you should decide in favor of [~~the plaintiff~~]_____ (*name of plaintiff*) on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate _____ (*name of plaintiff*) [[~~him~~] [~~her~~]] for any of the following elements of damages proved by _____ (*name of plaintiff*) [~~the plaintiff~~] to have resulted from the wrongful conduct of _____ (*name of defendant*) [~~been proximately caused by the defendant's wrongful conduct as claimed~~]:

(NOTE: Here insert the proper elements of damages using the instructions which immediately follow and any other proper elements applicable under the evidence.)

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based upon proof and not upon speculation, guess, or conjecture.

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

USE NOTES

This instruction should be used in all causes [~~any cause~~] of action for insurance bad faith [~~under Chapter 17~~]. The instructions which follow must be inserted where applicable under the evidence.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

[~~**Committee commentary.** The nature of the bad faith action determines the nature of the damages. Thus, where the action is for failure to pay policy proceeds, the primary loss is the amount recoverable under the policy, UJI 13-1713. Where the action is for failure to defend, the reasonable and necessary expenses incurred by the insured in conducting the defense are recoverable. UJI 13-1714. *Lujan v. Gonzales*, 84 N.M. 220, 501 P.2d 673 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972).~~]

[Approved, effective November 1, 1991; as withdrawn by Supreme Court Order No. _____, effective .]

The Committee has cited no authority supporting the proposed changes nor has the Committee attempted to explain why the authority cited in the Use Notes should be omitted. Some of the proposed revisions appear to be an attempt to sync Instruction 13-1712 with the standard damages instructions:

> If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate [him] [her] for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] **as claimed**:

Rule 13-1802 NMRA (emphasis added). Even if that were the intent, the proposed instructions omit the bolded provision in 13-1802 ("as claimed") without any explanation.

The Committee also proposes omitting the Committee Commentary, which discusses that the nature of the bad faith action determines the nature of the damages. The Committee's proposal leaves no guidance as to what damages can be claimed, which is in stark contrast to the usage instructions of the general damages instruction. *See* Rule 13-1802, Committee Commentary

(citing eight cases and explaining how the implementation of the instruction can differ depending on the circumstances of the case). The structure of the damages instructions in Chapter 17 follows the same structure as that outlined in Chapter 18, insofar as Instruction 13-1712 is followed by Instructions 13-1713 (policy proceeds), 13-1714 (cost of defense), 13-1715 (indemnification), and 13-1716 (incidental and consequential loss), all of which specify the types of damages available in an insurance bad faith action. Omitting the Use Note and Committee Commentary would render the connection between these various instructions confusing and difficult to implement.

The existing Committee Commentary to Instruction 13-1712 cites *Lujan v. Gonzales,* 1972-NMCA-098, 84 N.M. 229, 501 P.2d 673.[2] The Court of Appeals in *Lujan* analyzed what damages were recoverable in an action for bad faith failure to defend the insured. *Id.* ¶¶ 53-77. The *Lujan* Court concluded that the damages recoverable in a bad faith action are limited to those that were caused by the bad faith. *Id.* The plaintiff sought attorney's fees incurred in suing for common law bad faith. *Id.* The Court concluded those fees were not properly awarded, and should have been limited to attorney's fees incurred in defending against the wrongful death lawsuit. *Id.* This holding has been reaffirmed by the Court of Appeals and the New Mexico Supreme Court. *Dairyland Ins. Co. v. Herman,* 1998-NMSC-005, ¶ 15, 124 N.M. 624, 954 P.2d 56; *Dydek v. Dydek,* 2012-NMCA-088, ¶ 64, 288 P.3d 872 ("The measure of damages in a bad faith action is the amount of the excess judgment").

The Committee claims in its introduction that the proposed revisions "reflect developments in the law since the chapter originated in 1991." Proposed Revisions, Introduction. However, *Lujan* has never been overturned and continues to be cited favorably by New Mexico state and federal courts. *Dairyland Ins. Co. v. Herman,* 1998-NMSC-005, ¶ 12, 124 N.M. 624, 954 P.2d 56; *Dydek v. Dydek,* 2012-NMCA-088, ¶ 64, 288 P.3d 872; *WXI/Z Southwest Malls v. Mueller,* 2005-NMCA-046, ¶ 26, 137 N.M. 343, 110 P.3d 1080; *Rodeo Inc. v. Columbia Cas. Ins. Co.,* 2009 WL 6567529, *4 (N.M. Ct. App. Aug. 20, 2009); *Young v. Hartford Cas. Ins. Co.,* 503 F.Supp.3d

[2] The Committee's proposed changes cite this case as 84 N.M. 220. That is incorrect. The correct citation is contained in Rule 13-1712.

1125, 1235 (D.N.M. 2020); *Hartford Cas. Ins. Co. v. Trinity Universal Ins. Co. of Kan.,* 153 F.Supp.3d 1323, 1346 (D.N.M. 2015); *State Farm Fire & Cas. Co. v. Ruiz,* 36 F.Supp.2d 1308, 1312 (D.N.M. 1999). Accordingly, there is no reason to omit the Use Notes' summary of *Lujan*'s holding, particularly in light of the fact that it has been relied upon by New Mexico Courts since 1975.

XV. Instruction 13-1713, Policy proceeds.

The Committee suggested the following changes to Instruction 13-1713:

13-1713. Policy proceeds.

The amount payable by the [~~insurance company~~]insurer under the terms of the policy. [~~_____ (identify the particular policy or policy provision).~~]

USE NOTES

This element of damages must be included under UJI 13-1712 NMRA in every case where the plaintiff's claim is for bad faith failure to pay a first party claim, UJI 13-1702 NMRA. [~~The specific policy or policy provision at issue should be identified for the jury.~~]

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

The Committee has cited no authority supporting the proposed changes nor has the Committee attempted to explain why it suggests omitting the specific policy or policy provision at issue. Insurance policies can be hundreds of pages long, often with provisions that are irrelevant to the litigation at hand. Requiring a jury to pore through the policy to determine which provisions are at issue is an unnecessary waste of juror time and judicial resources.

The suggestion that the specific policy or provision at issue need not be introduced to the jury fails to recognize that the policy provision at issue is inherently at the forefront of any insurance dispute. *See Salas v. Mountain States Mut. Cas. Co.,* 2009-NMSC-005, 145 N.M. 542, 202 P.3d 801 (analyzing whether consent-to-settle provision barred plaintiff's claims); *OR&L Construction, L.P. v. Mountain States Mut. Cas. Co.,* 2022-NMCA-035, 514 P.3d 40 (analyzing the enforceability of a torch-down exclusion in the policy); *Schwartz v. State Farm Mut. Auto. Ins. Co.,* 584 F.Supp.3d 1007, 1017 (D.N.M. 2022) (recognizing that federal pleading standards required the plaintiff to identify the specific contractual provision that is alleged to have been

breached); *Anderson Living Trust v. ConocoPhillips Co., LLC,* 952 F.Supp.2d 979, 1010 (D.N.M. 2013) (applying New Mexico law and recognizing that in order to state a claim for breach of contract the plaintiff must allege which contractual provisions were allegedly breached). Accordingly, it is only fitting that the judge explain to the jury at the conclusion of a case which policy provisions should be considered.

XVI. Instruction 13-1714, Cost of defense.

The Committee suggested the following changes to Instruction 13-1714:

13-1714. Cost of [~~defense~~]separate litigation.

The reasonable and necessary expenses of _____ (*name of plaintiff*), including attorney fees, for [defending against the lawsuit [~~against [him] [her]~~]] [litigating _____ (*identify separate litigation*)].

USE NOTES

In the case of bad faith failure to defend in an underlying lawsuit, the parties should use the first bracketed language provided. Otherwise, any separate litigation in which expenses, costs, or fees were incurred as a result of the insurer's bad faith conduct should be briefly described using the second brackets. ~~This element of damages must be included under UJI 13-1712 in every case where the plaintiff's claim is for bad faith failure to defend a liability claim, UJI 13-1703.~~]

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — A plaintiff may recover "attorney's fees as damages from separate litigation that would remedy the injury giving rise to the action," which are actual damages distinguished from the attorneys' fees incurred in the instant action. *Principal Mut. Life Ins. Co. v. Straus*, 1993-NMSC-058, ¶ 10, 116 N.M. 412, 863 P.2d 447. As a pertinent example, where an insurance company has acted in bad faith in refusing to defend a claim against its insured, the [~~plaintiff~~]insured is entitled to recover all reasonable and necessary costs of defense. [~~*Lujan v. Gonzales*, 84 N.M. 229, 501 P.2d 673 (Ct.App.1972), cert. denied, 84 N.M. 219, 501 P.2d 553 (1972).~~]*See Lujan v. Gonzales*, 1972-NMCA-098, ¶ 55, 84 N.M. 229, 501 P.2d 673.

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Based upon the title change alone, it appears that the Committee is suggesting that New Mexico has abrogated the long-standing American rule that litigants are responsible for their own attorney's fees in the absence of a statutory fee-shifting provision. *N.M. Right to Choose/NARAL v. Johnson,* 1999-NMSC-028, 127 N.M. 654, 986 P.2d 450. This is not so. "Fees for counsel representing the insured in disputes with the insurer are ordinarily not recoverable in the absence of statute or contract." *Lujan v. Gonzales,* 1972-NMCA-098, ¶ 57, 84 N.M. 229, 501 P.2d 673. It is unclear from the proposed revisions whether the Committee is taking the position that fees incurred in prosecuting a bad faith action are recoverable, or whether it is referring to some other

action – for example, when an insured hires a lawyer to prosecute a first-party action to recover benefits. Either way, there is simply no support in the law for such an instruction.

The Committee seeks to add Committee Commentary citing *Principal Mutual Life Insurance Company v. Straus*, 1993-NMSC-058, 116 N.M. 412, 863 P.2d 447 for the proposition that a plaintiff may recover attorney's fees in subsequent litigation filed for insurance bad faith. If that was not the intent of the Commentary, then it is vague and confusing. In any event, the reliance on *Straus* is misplaced. In the first paragraph of *Straus*'s decision, the New Mexico Supreme Court concluded "we do not have jurisdiction over this appeal." *Id*. ¶ 1. Further, the principle at work in *Straus* was not whether attorney's fees incurred in pursuing bad faith claims were recoverable damages, but whether attorney's fees incurred in defending litigation were recoverable damages in three actions that left the insured without proper coverage or defense. *Id*. ¶¶ 2-5 (describing three different lawsuits that resulted in awards of fees prior to the present action, all of which were premised upon the insurance agent's failure to procure proper coverage for the insured). In the first lawsuit, *Shores v. Charter Services,* Shores successfully sued her employer and received a statutory award of attorney's fees under the Workers Compensation Act. *Id*. ¶ 3. In the second action, Charter Services sued Principal Mutual, its insurance carrier, for failing to properly advise Charter Services of the need for workers' compensation insurance. *Id*. ¶ 4. The court awarded Charter Services its attorney's fees incurred as a result of having to defend itself in the *Shores* case. *Id*. In the third action, Principal Mutual sued Straus (the insurance agent) for indemnification of the damages it might be obligated to pay Charter Services, as well as for attorney's fees incurred in defending itself against Charter Services. *Id*. ¶ 5. In short, *Straus* does not stand for the proposition that recoverable damages in a bad faith action include those fees incurred in bringing the bad faith action. *See generally, id.* Instead, *Straus* repeats the lower court's holdings, consistent with the doctrine set forth in *Lujan v. Gonzales,* 1972-NMCA-098, 84 N.M. 229, 501 P.2d 673, that recoverable damages in an action arising out of bad faith failure to defend include attorney's fees incurred in defending the underlying lawsuit. These principles are entirely different, and the Committee cites no authority standing for the proposition that New

Mexico has abrogated the American rule. Accordingly, the proposed revisions to Instruction 13-1714 are confusing, misleading, and an incorrect statement of New Mexico law.

XVII. Instruction 13-1715, Indemnification.

The Committee suggested the following changes to Instruction 13-1715:

13-1715. [~~Indemnification.~~]Underlying judgment.

The amount of any judgment [~~against _____ (*plaintiff in this action*) in favor of _____ (*plaintiff in the other action*)~~] obtained by _____ (*plaintiff in the underlying action*) against _____ (*defendant in the underlying action*) in _____ (*identify the underlying action*).

USE NOTES

This element of damages must be included under UJI 13-1712 in every case where an insurer's bad faith conduct resulted in the entry of a judgment in an underlying action against its insured. [~~the plaintiff's claim is for bad faith failure to defend or settle a liability claim against the insured and the defendant's conduct has proximately caused a judgment to be returned against the plaintiff.~~] The names of the [~~plaintiff and the plaintiff~~]parties in the [~~other~~] underlying action should be inserted in the blanks to assist the jury's recognition of this damage element. As used here, an "underlying action" may include prior events in the same lawsuit if they resulted in a judgment.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~The primary damage caused by the bad faith failure to settle a liability claim is the excess judgment rendered against the insured. An adverse judgment may also be the result of a bad faith failure to defend a liability claim. The damages are in the nature of indemnification for the insured's exposure and, under this element, are limited to the sum which the insured is obligated to pay individually over and above the recognized policy limits.~~] "Our cases have made it clear that the measure of damages in a bad faith action is the amount of the excess judgment [against the insured]." *Dydek v. Dydek*, 2012-NMCA-088, ¶ 64, 288 P.3d 872. The amount of the judgment is recoverable even if the plaintiff in the underlying action has agreed not to enforce the judgment against the insured personally, or if the insured is "otherwise judgment proof." *Id.* ¶ 66.

[~~The plaintiff's recovery is for the amount of the judgment for which there is no insurance coverage agreed to by the defendant.~~]

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

The Committee has cited no authority supporting the proposed changes.

Within the use notes, the Committee proposes to add the following language, "an insurer's bad faith conduct resulted in the entry of a judgment in an underlying action against its insured." to when this element of damages must be included. This language presupposes and assumes that the insurer acted in bad faith simply because there was a judgment against its insured. A judgment

may be entered against a carrier's insured without the carrier having acted in bad faith. Removing the language in the use notes and adding this language removes the plaintiff's burden of proving that the carrier acted in bad faith.

The re-wording of the use notes also attempts to shift the burden of proof to the carrier from the plaintiff. The Committee proposes to remove "and the defendant's conduct has proximately caused a judgment to be returned against the plaintiff." The Committee cites to no case law in support of its position that a plaintiff no longer bears the burden of proving the insurer's conduct caused plaintiff's damages.

Moreover, the Committee provides no support for expanding the definition of "underlying action." ("As used here, 'underlying action' may include prior events in the same lawsuit if they resulted in a judgment."). This insertion does add anything or clarify anything within this UJI. UJI 13-1715 stands for the proposition that the measure of damages in a bad faith failure to settle case is the amount of the excess judgment.

Put another way, as included in the current Committee commentary within UJI 13-1715, "The damages…are limited to the sum which the insured is obligated to pay individually over and above the recognized policy limits." The Committee seeks to remove limitations on recovery to seemingly open the possibilities of recovery. "The plaintiff's recovery is for the amount of the judgment for which there is no insurance coverage agreed to by the defendant." *See* Committee Commentary, UJI 13-1715. Removal of these limitations is not supported by case law. There has been no change in the law to suggest that the limitations on recovery for failure to settle claims have been expanded.

XVIII. Instruction 13-1716, Incidental and consequential loss.

The Committee suggested the following changes to Instruction 13-1716:

13-1716. Incidental and consequential loss.

The amount of any incidental or consequential loss to the plaintiff, including _____ (*list losses claimed*). An "incidental loss" is a cost incurred in a reasonable effort to avoid losses caused by the insurer's conduct. A "consequential loss" is a loss that arises from the results of an insurer's conduct rather from the conduct itself.

Any [~~damages found by you for this loss~~]losses you find were caused by the insurer's breach of the terms of the insurance policy are limited to losses that the insurer and the insured [~~must be damages which the insurance company and the policyholder~~] could reasonably have expected to be a consequence of the [~~company's~~]insurer's failure to perform its obligations under the [~~insurance~~] policy.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — "New Mexico normally allows recovery of consequential or incidental damages which can be reasonably related to the defendant's breach." *Hubbard v. Albuquerque Truck Ctr. Ltd.*, 1998-NMCA-058, ¶ 28, 125 N.M. 153, 958 P.2d 111; *see also, e.g., Primetime Hosp., Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 25, 146 N.M. 1, 206 P.3d 112 (quoting *Consequential Loss*, BLACK'S LAW DICTIONARY (11th ed. 2019)); *R.A. Mackie & Co., L.P. v. Petrocorp Inc.*, 329 F. Supp. 2d 477, 510 (S.D.N.Y. 2004) (defining "incidental" losses); *Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "incidental damages" as "[l]osses reasonably associated with or related to actual damages.").

To the extent a claim arises from the breach of an implied contractual obligation, [~~The action for bad faith is in tort for the breach of an implied contractual obligation. The nature of the tort, arising from breach of contract, renders appropriate the limitation of~~]recoverable damages are limited to those [~~reasonably~~] "contemplated by the parties at the time of making the contract."

[~~State Farm General Insurance Co. v. Clifton, 86 N.M. 757, 758, 527 P.2d 798, 799 (1974).~~]*State Farm Gen. Ins. Co. v. Clifton*, 1974-NMSC-081, ¶ 5, 86 N.M. 757, 527 P.2d 798.

[Approved, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

There are numerous issues with the way the use notes and Committee commentary have been re-written.

There is no reason for the word "insurance" to be deleted from this UJI. The term "insurance policy" should remain as is. The Committee seeks to add definitions for incidental loss and consequential loss. The Committee provides no support or basis for including these definitions. Moreover, reliance on an out of state case to support a definition is inappropriate. It is not for the Committee to define terms. If the legislature or courts wanted these terms explicitly defined, they would have done so.

The addition of "To the extent" in the Committee commentary is inappropriate and implies there are other situations in which this could arise. The case law is clear that the action of bad faith is in tort for the breach of an implied contractual agreement.

XIX. Instruction 13-1717, First party coverage; attorney fees.

The Committee proposes to withdraw 13-1717 in its entirety and eliminate the current Committee Commentary:

[WITHDRAWN]
~~**[13-1717. First party coverage; attorney fees. *No instruction drafted.***~~
~~*No instruction drafted.*~~
~~**Committee commentary.** In an action where the policyholder recovers on any type of first party coverage, the policyholder may be awarded reasonable attorney's fees. Section 39-2-1 NMSA 1978. This award is made by the trial court, not the jury, following the jury's verdict. To award attorney fees the trial judge, from the evidence presented at trial, must find that the insurer acted unreasonably in failing to pay the claim. *See United Nuclear Corp. v. Allendale Mutual Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985).~~]
[Approved, effective November 1, 1991; as withdrawn by Supreme Court Order No. _____, effective _____.]

The undersigned counsel objects to this proposal as it leaves no guidance for the district courts or practitioners. The undersigned offer the following revised commentary, consistent with New Mexico law:

There is no jury instruction for attorneys' fees in the bad faith context because whether attorneys' fees will be awarded to either party is within the Court's discretion and is not a jury question.

"New Mexico adheres to the so-called American rule that, absent statutory or other authority, litigants are responsible for their own attorney's fees. The American rule recognizes the authority of statute, court rule, or contractual agreement. We have strictly adhered to this rule since our territorial days." *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶¶ 8-9, 127 N.M. 654, 657, 986 P.2d 450, 453 (internal citations omitted). In the bad faith context, there are three fee-shifting statutes that may apply. Importantly, under each statute, the decision to award attorneys' fees and the amount awarded is to be made by trial court based on the evidence presented at trial and any factual findings by the jury concerning the insurer's intent.

In an action where the policyholder recovers on any type of first party coverage, the policyholder *who prevails* against the insurer may be awarded reasonable attorney's fees. Section 39-2-1 NMSA 1978. This award is made by the trial court, not the jury, following the jury's verdict. To award attorney fees the trial judge, from the evidence presented at trial, must find that

the insurer "acted unreasonably in failing to pay the claim." *Id*; *see also United Nuclear Corp. v. Allendale Mut. Ins. Co*., 1985-NMSC-090, ¶ 18, 103 N.M. 480, 486, 709 P.2d 649, 655.

The second fee shifting statute that may be implicated in a bad faith case is the remedy available under the private right of action granted by the New Mexico Legislature in Section 59A-16-30 NMSA, which grants a private right of action against insurers who have allegedly violated Section 59A-16-20 (the Unfair Claims Practices Act) and permits recovery of attorney's fees upon a finding the insurer "willfully" violated section 59A-16-20. The question of willfulness is a factual question. *See State v. Masters*, 1982–NMCA–166, ¶¶ 8; *see also Valdez v. Cillessen & Son, Inc*., 1987-NMSC-015, ¶ 39; *see also* UJI 13-1718. Although an award of fees under Section 59A-16-30 hinges on a finding of willfulness by the jury, the decision to award fees and the amount is for the district court judge.

The third fee shifting statute that may be implicated in a bad faith case is the remedy available under the Unfair Practices Act (UPA) (New Mexico's consumer protection act). Under Section 57-12-10(C), "*[t]he court* shall award attorney fees and costs to the party complaining of an unfair or deceptive trade practice or unconscionable trade practice if the party prevails" and "to the party charged with an unfair or deceptive trade practice or an unconscionable trade practice if it finds that the party complaining of such trade practice brought an action that was groundless." *Id.* (emphasis added).

XX. Instruction 13-1718, Punitive damages.

The Committee proposed the following changes to Instruction 13-1718:

13-1718. Punitive damages.

If you find that _____(plaintiff)[~~plaintiff~~] should recover compensatory damages for the bad faith actions of the [~~insurance company~~]insurer, and you find that the conduct of the [~~insurance company~~]insurer was [in reckless disregard for the interests of _____(plaintiff)][~~the plaintiff~~], [~~or was~~][based on a dishonest judgment], [or] [~~was otherwise~~] [malicious, willful or wanton], then you may award punitive damages.

[["]"Reckless [~~conduct~~]disregard"["] is an insurer's [frivolous or unfounded refusal to pay] [or] [dishonest or unfair balancing of its own interests and the interests of the insured][~~is the intentional doing of an act with utter indifference to the consequences~~].]

[["]"Dishonest judgment"["] is a failure by the insurer to honestly and fairly balance its own interests and the interests of the insured.]

[["]"Malicious conduct"["] is the intentional doing of a wrongful act with knowledge that the act was wrongful.]

[["]"Willful conduct"["] is the intentional doing of a wrongful act with knowledge that harm may result.]

[["]"Wanton conduct"["] is the doing of an act with utter indifference to or conscious disregard for a person's rights.]

Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.

The amount of punitive damages must be based on reason and justice, taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The property of wealth of the defendant is a legitimate factor for your consideration. The amount awarded, if any, must be reasonably related to the [~~compensatory damages and injury~~] injury and to any damages given as compensation and not disproportionate to the circumstances.

[_____(plaintiff) has introduced evidence of [harm to others] [risk of harm to others] as a result of _____(defendant)'s conduct. You may consider this evidence in determining the nature and enormity of _____(defendant)'s wrongful conduct toward _____

(plaintiff). You may not, however, include in your award of punitive damages any award that punishes _____ (defendant) for harm to others not before this court.]

USE NOTES

This instruction must ordinarily be given in every action for insurance bad faith[~~under UJI 13-1702, 13-1703 and 13-1704 NMRA~~]. The trial court may omit this instruction only in those circumstances in which the plaintiff fails to make a *prima facie* showing that the insurer's conduct exhibited a culpable mental state. Because this instruction is complete on the availability of punitive damages in insurance bad faith actions, UJI 13-1827 NMRA is unnecessary and should not be given in such cases.

The final bracketed paragraph of this instruction must be given where evidence of harm or injury to non-parties to the litigation has been admitted into evidence during the trial. It is not intended to limit the jury's consideration of evidence of harm to the first-party insured in third party cases.

[As amended, effective March 21, 2005; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The substance of this instruction derives, in part, directly from *Sloan v. State Farm Mutual Automobile Insurance Co.*, 2004-NMSC-004, ¶¶ 2, 23, 135 N.M. 106, 85 P.3d 230. *Sloan* overruled prior case law that required a plaintiff to establish bad faith plus "an additional culpable mental state" before the jury could be instructed on punitive damages. *Id.* ¶ 6 (overruling *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, ¶ 72, 127 N.M. 603, 985 P.2d 1183). "[U]nder New Mexico law, bad-faith conduct by an insurer typically involves a culpable mental state, and therefore the determination whether the bad faith evinced by a particular defendant warrants punitive damages is ordinarily a question for the jury to resolve." *Id.* "[B]ad faith supports punitive damages upon a finding of entitlement to compensatory damages." *Id.* But the trial court still has the discretion "to withhold a punitive-damages instruction in those rare instances in which the plaintiff has failed to advance any evidence tending to support an award of punitive damages." *Id.*

The New Mexico Supreme Court has "allowed the award of punitive damages in insurance cases under a more relaxed standard [than that for contracts not involving insurance] in part because of the fiduciary obligations inhering in insurance relationships and because of concerns arising from the bargaining position typically occupied by the insured and insurer." *Romero v. Mervyn's*, 1989-NMSC-081, ¶ 23, n.3, 109 N.M. 249, 784 P.2d 992 (citing *Chavez v. Chenoweth*, 1976-NMCA-076, ¶¶ 43-44, 89 N.M. 423, 553 P.2d 703).

In the event the insured also brings a cause of action for violation of the Unfair Practices Act and the fact finder finds the insurer willfully engaged in the trade practice based on the same conduct supporting the punitive damage award for bad faith, the insured must elect a remedy between treble damages under the UPA and punitive damages for the bad faith claim. See NMSA 1978, § 57-12-10(B) (1967, as amended through 2005); Hale v. Basin Motor Co., 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 ("[R]ecovery of both statutory treble damages and punitive damages based upon the same conduct would be improper.").

[~~Bad faith ordinarily will support an award of punitive damages. *See Sloan v. State Farm Mut. Automobile Ins. Co.*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230; *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 485, 709 P.2d 649, 654 (1985) and *Jessen v. National*~~

~~*Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244, 1246 (1989). Where the insured has a cause of action under UJI 13-1707 NMRA for violation of the Unfair Practices Act the trial judge, upon a finding of willful engagement in the trade practice, may treble the actual damages awarded. Section 57-12-10 NMSA 1978. In the same action the insured may have a common law action for bad faith which requires instructing the jury on punitive damages. In the event of a trebling of damages by the trial judge and a verdict for punitive damages based upon the same conduct, the insured must elect between the two awards. To allow both statutory treble damages and punitive damages based upon the same conduct would be improper under the rule against duplication or double recovery. *Hale v. Basin Motor Company*, 110 N.M. 314, 795 P.2d 1006 (1990).~~

~~In *Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244 (1989), the New Mexico Supreme Court considered whether an insurance company could be vicariously liable for the punitive damages recovered against an independent insurance adjuster which it had hired to investigate an accident. The court held that the independent contractor status of the adjuster did not relieve the insurer of liability. Id. 108 N.M. at 629, 776 P.2d at 1248. The court found the evidence in the case sufficient to support a finding of ratification, justifying an instruction under UJI 13-1826. The court further found sufficient evidence of an independent wrongful act by the insurer. However the court also considered that the duty of good faith dealing by parties to an insurance contract is a non-delegable duty, breach of which supports vicarious liability for punitive damages. The committee has not determined whether *Jessen* is a sufficient basis for instructing a jury that an insurer may be found vicariously liable for conduct of a third party justifying a recovery of punitive damages. Where an insurer has hired a third party to satisfy its contract obligations and the third party's conduct justifies an instruction on punitive damages, *Jessen* should be considered.~~]

[Revised, effective March 21, 2005; as amended by Supreme Court Order No. _____, effective _____.]

The Committee has cited no authority supporting the proposed changes nor has the Committee attempted to explain why the term "reckless conduct" should be changed to "reckless disregard". Moreover, the Committee has cited to no authority for its proposed definition of "reckless disregard."

In the use notes, the Committee seeks to delete the limitations on actions in which this instruction must be given. Punitive damages are not recoverable under all causes of actions against an insurer. Importantly, punitive damages are not recoverable for violations of insurance practices act (UJI 13-1706). *See* NMSA § 59A-16-30 (limiting recovery to actual damages). Thus, it would be inappropriate to include this instruction if that is the only bad faith action pending against an insurer. The Committee seeks to expand when punitive damages are recoverable without any basis in law.

CONCLUSION

It is critical to the due process afforded by jury trials that instructions regarding the law as warranted by the evidence are impartial, unbiased, unslanted, and an accurate presentation of the

law. The Committee's proposed revisions run afoul of these important principles. The undersigned counsel respectfully request that the Supreme Court decline to adopt the proposed revisions.

Respectfully submitted,

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New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Correspondence regarding jury instructions

1 message

Jeffrey Mitchell <JMitchell@obrienlawoffice.com> Mon, Apr 24, 2023 at 11:51 AM
Reply-To: jmitchell@obrienlawoffice.com
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Ms. Garcia:

Please see attached correspondence regarding Proposed Revisions to the Uniform Jury Instructions.

Jeffrey Mitchell

O'Brien & Padilla, P.C.

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Phone: (505) 883-8181

e-mail: jmitchell@obrienlawoffice.com

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256K

O'BRIEN & PADILLA, P.C.

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Attorneys licensed in New Mexico, Minnesota, and Texas

OF COUNSEL:
William R. Anderson

ASSOCIATES:
Penelope M. Quintero
Sidney A. Kelley

April 24, 2023

Via Email: **nmsupremecourtclerk@nmcourts.gov**
Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Dear Ms. Garcia and others:

I have recently reviewed the Bad Faith and Coverage Defense Counsel's Objections to Proposed Revisions to Uniform Jury Instructions – Civil Proposal 2023-018. I believe that the Proposed Revisions do not accurately reflect the current state of New Mexico law. I agree with the authority cited and I ask that the Supreme Court decline to adopt the proposed revisions.

Very truly yours,

O'BRIEN & PADILLA, P.C.

By: _____
JEFFREY M. MITCHELL

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[rules.supremecourt-grp] Rule Proposal Comment Form, 04/24/2023, 12:50 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov> Mon, Apr 24, 2023 at 12:50 PM
Reply-To: nmcourtswebforms@nmcourts.gov
To: rules.supremecourt@nmcourts.gov

Your Name:	Mia Lardy
Phone Number:	5058481819
Email:	mia.lardy@modrall.com
Proposal Number:	2023-018
Comment:	To Whom it May Concern: I have reviewed the Bad Faith and Coverage Defense Counsel's Objections to Proposed Revisions to Uniform Jury Instructions – Civil Proposal 2023-018. I agree that the Proposed Revisions do not accurately reflect the current state of New Mexico law and I ask that the Supreme Court decline to adopt the proposed revisions. Sincerely, Mia Kern Lardy Attorney Modrall Sperling | www.modrall.com P.O. Box 2168 | Albuquerque, NM 87103-2168 500 4th St. NW, Ste. 1000 | Albuquerque, NM 87102 D: 505.848.1819 | O: 505.848.1800 | F: 505.449.2019

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Objections to Proposed Revisions to Uniform Jury Instructions - Civil Proposal 2023-018

1 message

William Anderson <wanderson@obrienlawoffice.com> Mon, Apr 24, 2023 at 1:28 PM
Reply-To: wanderson@obrienlawoffice.com
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Good afternoon Ms. Garcia. Attached please find my letter of today's date objecting to the Proposed Revisions to Uniform Jury Instructions - Civil Proposal 2023-018.

William R. Anderson

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WRA Obj Proposed Bad Faith UJIs.pdf
130K

O'BRIEN & PADILLA, P.C.

Attorneys at Law

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ASSOCIATES:
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April 21, 2023

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov

RE: Committee's Proposed Revisions to Uniform Jury Instructions – Civil Proposal 2023-018

To Whom it May Concern:

I have reviewed the Bad Faith and Coverage Defense Counsel's Objections to Proposed Revisions to Uniform Jury Instructions – Civil Proposal 2023-018. I agree that the Proposed Revisions do not accurately reflect the current state of New Mexico law and I ask that the Supreme Court decline to adopt the proposed revisions.

Very truly yours,

O'BRIEN & PADILLA, P.C.

By: */s/ William R. Anderson*
WILLIAM R. ANDERSON

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] NMSC Proposed Rule Changes - Comment re: Proposal 2023-018

1 message

Dominic A. Martinez <dam@modrall.com> Mon, Apr 24, 2023 at 2:45 PM
Reply-To: dam@modrall.com
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>
Cc: "Tim L. Fields" <tfields@modrall.com>, "Nathan T. Nieman" <ntn@modrall.com>

Good Afternoon:

Attached please find a Comment regarding Proposal 2023-018 – Bad Faith Duty to Defend.

Thank you,

MODRALL SPERLING

Dominic A. Martinez

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Comment Regarding UJI Proposal 2023-018 (W4701751x7A92D).pdf
83K

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Christopher P. Muirhead
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April 24, 2023

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nmsupremecourtclerk@nmcourts.gov

Re: Proposed Rule Changes, *Proposal 2023-018* (Insurance Bad Faith)

Ms. Garcia:

This letter concerns Proposal 2023-018, the proposed revisions to Chapter 17 of the New Mexico Uniform Jury Instructions regarding insurance bad faith. We have reviewed the objections regarding these proposed revisions prepared by Courtenay Keller, Taryn Kaselonis, Meena Allen, Amy Headrick, Jennifer Noya, Sonya Burke, and Alicia Santos ("Bad Faith and Coverage Defense Counsel's Objections"), and we share their concerns about the drastic revisions proposed to the subject uniform jury instructions. The proposed revisions do not reflect prior developments in New Mexico law concerning insurance bad faith claims. Rather, adopting the proposed revisions as written would improperly change New Mexico's law on insurance bad faith. We support the objections submitted by the above-listed counsel and submit the following additional comments regarding the proposed revisions to Chapter 17 of the New Mexico Uniform Jury Instructions.

UJI 13-1701

The proposed draft of UJI 13-1701 ("Proposed Instruction") improperly injects the "reasonable expectations" doctrine into an instruction on the "Duty of the insurance company[.]" The Committee commentary accompanying the Proposed Instruction cites no authority supporting the notion that an insurer has a duty to "protect" the reasonable expectations of the insured. To the contrary, *OR&L Construction, L.P. v. Mountain States Mut. Cas. Co.*, 2022-NMCA-035, ¶ 31, 514 P.3d 40, held that the reasonable expectations doctrine "is not a doctrine applicable to insurers themselves, nor does it govern what insurers must cover in an insurance policy." Thus, the Proposed Instruction on "Duty of the insurance company" cannot be adopted as written, since it misstates New Mexico law.

UJI 13-1702

The proposed draft of UJI 13-1702 ("Proposed Instruction") contains the following statement, which is overly broad and not supported by New Mexico law: "An insurer may act in bad faith in its handling of a claim even if the policy provides no coverage for that claim." The purported support for this statement is *Haygood v. United States Auto. Assoc.*, 2019-NMCA-074, 453 P.3d 1235. Although *Haygood* held that an insured could assert a bad faith claim in the absence of coverage based on an insurer's failure "to deal fairly in handling the claim," "to conduct a fair investigation," or "to fairly evaluate coverage," *Haygood* also concluded that a bad faith failure to pay claim cannot be asserted in the absence of coverage. *See id*. ¶¶ 21-24. The Proposed Instruction suggests that all types of bad faith claims can be asserted "even if the policy provides no coverage," which is incorrect. Accordingly, the Proposed Instruction cannot be adopted as written and must be revised to provide that the absence of coverage defeats any claim for bad faith failure to pay.

UJI 13-1703A

The proposed draft of UJI 13-1703A ("Proposed Instruction") should not be adopted as written because it fails to account for the scenarios in which an insurer *does not* have a duty to defend its insured. An "insurer has no duty to defend if the allegations in the complaint clearly fall outside the policy's provisions[.]" *Guar. Nat'l Ins. Co. v. C de Baca*, 1995-NMCA-130, ¶ 14, 120 N.M. 806, 907 P.2d 210. An insurer also has no duty to defend if a "complaint's allegations place[] it 'directly within [an] exclusionary clause'" of policy, *Ins. Co. of N. Am. v. Wylie Corp.*, 1987-NMSC-011, ¶¶ 21-24, 105 N.M. 406, 733 P.2d 854, or if "the alleged acts occurred after the expiration of the policy," *Bernalillo Cty. Deputy Sheriffs Ass'n v. Cty. of Bernalillo*, 1992-NMSC-065, ¶¶ 3-5, 114 N.M. 695, 845 P.2d 789. The Proposed Instruction explains when an insurer *does* have a duty to defend but omits these scenarios when an insurer *does not*. Consequently, the Proposed Instruction is misleading and impermissibly slanted in favor of insureds in duty to defend cases.

Additionally, the Proposed Instruction is misleading because it appears to suggest that an insurer must obtain a judicial determination to be relieved from a duty to defend. No such requirement exists under New Mexico law. As outlined in *Dove v. State Farm Fire & Cas. Co.*, 2017-NMCA-051, ¶ 12, 399 P.3d 400, "an insurer's three options when presented with a request to defend a claim that may be outside a policy's coverage are to 'seek a declaratory judgment regarding its obligations before or pending trial of the underlying action, defend the insured under a reservation of rights, or refuse either to defend or to seek a declaratory judgment at its peril that it might later be found to have breached its duty to defend.'" (quoting 44 Am. Jur. 2d

Insurance § 1405 (2017)). In other words, obtaining a judicial determination that they have no duty to defend is an *option* available to insurers, but not a *requirement*, as the Proposed Instruction suggests.

UJI 13-1703B

The Committee commentary accompanying UJI 13-1703B erroneously states that "New Mexico courts have expressed a strong preference for insurers to obtain judicial determinations of their duty to defend[.]" The cited authority for this assertion is *Dove v. State Farm Fire & Cas. Co.*, 2017-NMCA-051, ¶ 12, 399 P.3d 400, but *Dove* does not support the assertion. *Dove* recognizes that insurers have no duty to defend, and are not obligated to seek a judicial determination regarding such duty, "if the allegations in the complaint clearly fall outside the policy's provisions[.]" *Id.* ¶ 11 (quoting *Guar. Nat'l Ins. Co. v. C de Baca*, 1995-NMCA-130, ¶ 14, 120 N.M. 806, 907 P.2d 210). Further, while *Dove* states that the "norm" is for insurers to defend insureds until they receive a judicial determination that they are not obligated to do so, *Dove* does not state that this course of action is our courts' preference—much less their "strong preference," as the Committee commentary claims. *Dove*, 2017-NMCA-051, ¶ 12. An insurer who chooses not to provide a defense without first seeking a judicial determination "does so at its peril," because "if the insurer guesses wrong, it must bear the consequences of its breach of contract." *Id.* ¶ 14 (citations omitted). Simply because an insurer will face consequences if it "guesses wrong" about its duty to defend does not mean that "New Mexico courts have expressed a strong preference for insurers to obtain judicial determinations of their duty to defend[.]" New Mexico law, including *Dove*, does not support this assertion and it must be stricken from the Committee commentary.

Respectfully submitted,

Tim L. Fields (tlf@modrall.com)
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Dominic A. Martinez (dam@modrall.com)
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New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Objections and comments concerning UJI-Civil Proposal 2023-018

Ronda Morehead <MoreheadR@civerolo.com> Mon, Apr 24, 2023 at 4:26 PM
Reply-To: moreheadr@civerolo.com
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>
Cc: "Lisa E. Pullen" <pullenl@civerolo.com>, Ronda Morehead <MoreheadR@civerolo.com>

Ms. Garcia,

Please see attached letter from Lisa Entress Pullen.

Ronda Morehead
Assistant to Lisa E. Pullen and David M. Wesner
Civerolo, Gralow & Hill, P.A.
P.O. Box 93940
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Letter to Supreme Court clerk re bad faith jury instructions 4-24-23..pdf
291K

Lisa Entress Pullen
Lance D. Richards
Megan Day Hill
Justin L. Robbs

Lawrence H. Hill (of Counsel)

Civerolo, Gralow & Hill

A Professional Association
Counselors and Attorneys At Law

David M. Wesner
Lauren R. Wilber
Hannah R. Jiacoletti

Richard C. Civerolo (1917-2014)
William P. Gralow (Retired)

April 24, 2023

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov

Re: Objections and comments concerning UJI-Civil Proposal 2023-018

To Whom it May Concern:

I have reviewed the Bad Faith and Coverage Defense Counsel's Objections to Proposed Revisions to Uniform Jury Instructions – Civil Proposal 2023-018. I agree that the Proposed Revisions do not accurately reflect the current state of New Mexico law and I ask that the Supreme Court decline to adopt the proposed revisions.

Sincerely,

CIVEROLO, GRALOW & HILL
A Professional Association

Lisa Entress Pullen

Mailing Address:
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New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Proposed Revisions to Uniform Jury Instructions – Civil Proposal 2023-018

1 message

Leslie Basha <lbasha@obrienlawoffice.com> Tue, Apr 25, 2023 at 6:24 AM
Reply-To: lbasha@obrienlawoffice.com
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>
Cc: Dan O'Brien <dobrien@obrienlawoffice.com>

Dear Ms. Garcia:

Please see the attached correspondence from Daniel J. O'Brien.

RECEIVED AFTER THE COMMENT DEADLINE

Leslie Basha

Legal Assistant to Daniel J. O'Brien, Esq.

Legal Assistant to William R. Anderson, Esq.

O'BRIEN & PADILLA, P.C.

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Obj Proposed Bad Faith UJIs ltr-04-24-23.pdf
164K

O'BRIEN & PADILLA, P.C.

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OF COUNSEL:
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April 24, 2023

RECEIVED AFTER THE COMMENT DEADLINE

nmsupremecourtclerk@nmcourts.gov
Elizabeth A. Garcia, Chief Clerk of Court
NEW MEXICO SUPREME COURT
P O Box 848
Santa Fe, NM 87504-0848

RE: Proposed Revisions to Uniform Jury Instructions – Civil Proposal 2023-018

To Whom it May Concern:

I have reviewed the Bad Faith and Coverage Defense Counsel's Objections to Committee's Proposed Revisions to Uniform Jury Instructions – Civil Proposal 2023-018. I agree that the Proposed Revisions do not accurately reflect the current state of New Mexico law and I ask that the Supreme Court decline to adopt the proposed revisions.

Very truly yours,

O'BRIEN & PADILLA, P.C.

By: */s/ Daniel J. O'Brien*
DANIEL J. O'BRIEN