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# The Oklahoma Unfair Claims Settlement Practices Act: A Private Right of Action

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# THE OKLAHOMA UNFAIR CLAIMS SETTLEMENT PRACTICES ACT: A PRIVATE RIGHT OF ACTION?

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## I. INTRODUCTION

In 1986 the Oklahoma legislature passed the Unfair Claims Settlement Practices Act[1] (the "Oklahoma Act") as part of the Oklahoma Insurance Code.[2] The statute prohibits property and casualty insurers from engaging in claim settlement practices that are unfair to insureds, and gives the Insurance Commissioner broad enforcement authority. The Oklahoma Act is based upon the Model Unfair Trade Practices Act[3] (the "Model Act") which was originally drafted and proposed by the National Association of Insurance Commissioners[4] (the "NAIC"). Versions of the Model Act have been adopted in a majority of American states.[5]

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1. OKLA. STAT. tit. 36, §§ 1221-1228 (Supp. 1988).

2. OKLA. STAT. tit. 36, §§ 101-5005 (1981 & Supp. 1988).

3. MODEL UNFAIR TRADE PRACTICES ACT §§ 1-15, 2 N.A.I.C. Proc. 900-1 to -10 (1977) [hereinafter "Model Act"]. The Model Act combines the prohibition of unfair claims settlement practices with other unfair trade practices. Only § 4(9) of the Model Act specifically deals with unfair claims settlement practices. Oklahoma, and certain other jurisdictions, adopted § 4(9) of the Model Act as a separate act rather than inserting the provisions into the State Unfair Trade Practices Act. This distinction is not significant. For the most part, references herein to the Model Act are to § 4(9) of the Model Act.

4. The National Association of Insurance Commissioners ("NAIC") is a voluntary organization of state insurance commissioners.

5. The following is a partial listing of State Acts: ALASKA STAT. § 21.36.125 (Supp. 1984); ARIZ. REV. STAT. ANN. § 20-461 (1987 Supp.); ARK. STAT. ANN. § 23-66-206(9) (1987); CAL. INS. CODE § 790.03(h) (West Supp. 1989); COLO. REV. STAT. § 10-3-1104(h) (1988); CONN. GEN. STAT. § 38-61 (1987); DEL. CODE ANN. tit. 18, § 2304(16) (1975); FLA. STAT. § 626.9541(i) (1984); HAW. REV. STAT. § 431-643(10) (1985); IDAHO CODE § 41-1329 (1977); IND. CODE ANN. § 27-4-1-4.5 (1986); IOWA CODE ANN. § 507B.4.(9) (1988); KAN. STAT. ANN. § 40-2404(9) (1986); MASS. GEN. LAWS ANN. Ch. 176D, § 3(9) (West 1987); MICH. COMP. LAWS § 500.2026 (1983); MINN. STAT. § 72A.20(12) (1986); MO. ANN. STAT. § 375.936(10) (Vernon Supp. 1989); MONT. CODE ANN. § 33-18-201 (1987); NEB. REV. STAT. § 44.1525(9) (1988); NEV. REV. STAT. § 686A.310 (1987); N.H. REV. STAT. ANN. § 417:4.XV (1983); N.J. STAT. ANN. § 17B:30-13.1 (1985); N.M. STAT.

Unfortunately, several recurring problems of interpretation and application of these State Acts have arisen in recent years. Some of the interpretation problems stem from the fact that, according to certain courts, the various state legislatures did not have the same motivations in adopting the State Acts that the NAIC had for proposing the Model Act.

One of the most significant issues litigated in a number of jurisdictions involves the question of whether a private right of action can be inferred under the State Acts. Although courts which have addressed this issue are split on whether their State Act gives rise to a private right of recovery,[6] most courts have declined to add remedies not expressly mentioned in the State Acts.

The Oklahoma courts have not addressed the question of whether the Oklahoma Act should be interpreted to provide a private right of recovery in addition to the administrative remedies expressly listed.[7] This issue may be particularly significant for Oklahoma. At least one author has hypothesized that a private cause of action will or should be allowed in jurisdictions where the common law has already been modified to permit tort remedies against insurers for bad faith breach of the insurance contract.[8] Oklahoma, along with a growing number of states, has adopted such a modification of common law. Implying a private cause of action under the Oklahoma Act would, however, put Oklahoma in the minority with regard to interpreting state enactments of the Model Act.

Although there are some valid arguments to support a private cause of action under the Oklahoma Act, it does not appear that the drafters of the Act contemplated such private remedies. As willing as the

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ANN. § 59A-16-20 (1988); N.Y. INS. LAW § 2601 (McKinney 1985); N.C. GEN. STAT. § 58-54.4(11) (1982); N.D. CENT. CODE § 26.1-04-03.9 (Supp. 1987); OR. REV. STAT. § 746.230(1) (1987); PA. STAT. ANN. tit. 40, § 1171.5(10) (Supp. 1988); TENN. CODE ANN. § 56-8-104(8) (Supp. 1988); TEX. REV. INS. CODE ANN. art. 21.21-2 (Vernon 1981); VT. STAT. ANN. tit. 8, § 4724(9) (1984); VA. CODE ANN. § 38.2-510 (1986); and W. VA. CODE § 33-11-4(9) (1988). In addition, in some jurisdictions the Model Act's prohibitions have been enacted as part of the state's administrative regulations. *See* WIS. ADMIN. CODE § Ins. 6.11(3) (1986).

For ease of reference, the Unfair Claims Settlement Practices Act as adopted by the states will be referred to as the State Acts or, individually, as the [State's name] Act.

6. *See infra* notes 27-97 and accompanying text.

7. The administrative remedies are provided in OKLA. STAT. tit. 36, §§ 1224-1226 (Supp. 1988).

8. Sherman & Crowl, *The Judicial Response to Unfair Claims Practices Laws: Applying the National Experience to the Minnesota Act*, 12 WM. MITCHELL L. REV. 45, 72-75 (1985). If this hypothesis holds true, the Oklahoma courts might be expected to recognize a private right of recovery since the Oklahoma courts have recognized that it may be appropriate for insureds to recover damages in tort against insurers for bad faith breach of the insurance contract. *See, e.g.*, Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977).

Oklahoma courts may be to limit unfair claim practices by insurers, inferring private enforcement rights is not the appropriate means for accomplishing this result.

## II. DIFFERENCES BETWEEN THE OKLAHOMA ACT AND THE MODEL ACT

The Model Act on which the Oklahoma Act is based was originally proposed by the NAIC in 1971.[9] The Model Act is a modified version of the Model Trade Practices Law,[10] adapted to take into consideration certain present-day problems.

The Model Trade Practices Law, which was adopted by many states, including Oklahoma, in the years following 1947, contained broad definitions of unfair and deceptive practices, but did not specifically mention unfair claims settlement practices.[11] In contrast, the Model Act specifies a number of claims settlement practices which should be treated as unfair trade practices if "committ[ed] or perform[ed] with such frequency as to indicate a general business practice."[12] In fact, the Model Act lists more than a dozen separate types of claims settlement practices that might be deemed to be unfair.[13]

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9. *See supra* note 3 and accompanying text.

10. MODEL TRADE PRACTICES LAW, 2 N.A.I.C. Proc. 392-400 (1947) [hereinafter "Model Law"].

11. The 1947 Model Law provided that unfair practices were those which were based on misrepresentations and false advertising, false information and advertising generally, defamation, boycott, coercion and intimidation, false financial statements, stock operations and advisory board contracts, unfair discrimination, or rebates. Model Law, 2 N.A.I.C. 392-400, § 4(1)-(8) (1947). The Oklahoma version of the Model Law is codified at OKLA. STAT. tit. 36, §§ 1201-1219 (1981).

12. Model Act, 2 N.A.I.C. Proc. 900-1 to -10 (1977).

13. Section 4(9) of the Model Act provides that all of the following actions may be treated as unfair claims settlement practices:

(a) misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
(b) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
(c) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
(d) refusing to pay claims without conducting a reasonable investigation based upon all available information;
(e) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
(f) not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
(g) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;
(h) attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

The Oklahoma Act, while clearly based on that portion of the Model Act dealing with unfair claims settlement practices, is not identical to it. There are several significant differences between the two versions. For example, while the Model Act identifies fourteen different practices as being potentially unfair, the Oklahoma Act lists only six categories of unfair acts.[14]

In addition, the Model Act prohibits a policy of "compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds."[15] Under the comparable subsection of the Oklahoma Act, however, the prohibited practice must include settlement offers that are also substantially less than the claims made by policy holders.[16] The Oklahoma statute also adds an administrative requirement that insurers maintain records of all complaints for three years or since the date of the last examination by the insurance commission, whichever period of time is shorter.[17]

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(i) attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;
(j) making claims payments to insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments are being made;
(k) making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
(l) delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
(m) failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under the other portions of the insurance policy coverage;
(n) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

Model Act, 2 N.A.I.C. Proc. 900-1 to -10, § 4(9)(a)-(n) (1977).

14. OKLA. STAT. tit. 36, § 1222 (Supp. 1988). The practices omitted from the Oklahoma Act are: refusing to pay claims without conducting a reasonable investigation; failing to affirm or deny coverage within a reasonable time after proof of loss statements have been received; attempting to settle a claim for less than the amount to which the policyholder is reasonably entitled; attempting to settle claims on the basis of an altered application; making claims payments which are not accompanied by statements setting forth the coverage under which the payments are being made; advertising a policy of appealing from arbitration awards in favor of insureds for the purpose of compelling them to accept settlements or compromises less than the arbitration amount awarded; delaying claims investigation by requiring preliminary and formal proof of loss forms; failing to promptly settle claims under one portion of the insurance coverage in order to influence claims on other covered items; and failing to provide a reasonable explanation of the basis in the policy for denial of a claim or offer of compromise. *See* Model Act, 2 N.A.I.C. Proc. 900-4, -5, §§ 4(a)(d)-(e) & (h)-(n).

15. *Id.* at § 4(9)(g).

16. OKLA. STAT. tit. 36, § 1222.5 (Supp. 1988).

17. *Id.* at § 1222.6.

Another difference between the Oklahoma Act and the Model Act is that the Oklahoma Act prohibits any of the listed acts "by a property and casualty insurer, if committed without cause."[18] The Model Act, on the other hand, specifies that the listed practices will be deemed unfair only if committed or performed "with such frequency as to indicate a general business practice."[19] The Oklahoma Act incorporates the requirement that the violation amount to a general practice only in the section allowing the Oklahoma Insurance Commissioner to require additional periodic reports from an insurer who is being investigated.[20]

An additional distinction is that the Model Act is now accompanied by Model Regulations which were promulgated by the NAIC in 1977.[21] These regulations add specificity to the requirements of the Model Act.[22] At this time no such regulations have been promulgated by the Oklahoma Insurance Commissioner.[23]

One final difference between the Model Act and the Oklahoma Act is the provision in the Model Act, missing from the Oklahoma version, declaring that the Act is not intended to "in any way relieve or absolve any person . . . from any liability *under any other laws* of this state."[24] The significance of this omission is unclear. State Acts which have included such a "savings clause" have been interpreted as creating a private cause of action, and as precluding the creation of such remedies, both results being reached *because* of this language.[25]

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18. *Id.* at § 1222.

19. Model Act, 2 N.A.I.C. Proc. 900-1 to -10, § 4(9) (1977).

20. The statute allows the Insurance Commissioner to determine from his investigation of complaints that the insurer "has engaged in unfair claim settlement practices with such frequency as to indicate a general business practice." OKLA. STAT. tit. 36, § 1223.A.1 (Supp. 1988). If such a determination is made, the insurer may be required to file periodic reports to facilitate closer inspection of the insurer's business. *Id.*

21. UNFAIR CLAIMS SETTLEMENT PRACTICES MODEL REGULATION, 2 N.A.I.C. Proc. 890-1 to -4 (1977) [hereinafter "Model Regulations"].

22. For example, one of the subsections of the Model Act requires that an insurer "acknowledge and act reasonably promptly upon communications with respect to claims." Model Act, 2 N.A.I.C. Proc. 900-1 to -10, § 4(9)(b) (1977). The Model Regulations describe specific time periods for such responses. *See* Model Regulations, 2 N.A.I.C. Proc. 890-1 to -4, §§ 6(a), 6(b) & 7 (1977).

23. Pursuant to the requirements of OKLA. STAT. tit. 36, § 1228 (Supp. 1988), the Oklahoma Insurance Commissioner is in the process of promulgating rules and regulations to implement the provisions of the Oklahoma Act. These proposed rules and regulations are not based on the Model Regulations, and do not appear to add significant specificity or detail to the operative provisions of the Oklahoma Act.

24. Model Act, 2 N.A.I.C. Proc. 900-1 to -10, § 4(9)(d) (1977) (emphasis added).

25. For example, the Arizona Supreme Court held that "this section contemplates a private suit to impose civil liability irrespective of governmental action." Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 541, 647 P.2d 1127, 1139, *cert. denied*, 459 U.S. 1070 (1982). The United States District Court for the Eastern District of Missouri, however, determined that the phrase "any *other* laws of this state" contained in the Missouri statute meant that "civil liability will not arise from a

Clearly these departures from the Model Act do not determine whether the Oklahoma Act is intended to create a private right of action. While it appears that the NAIC did not intend the Model Act to include private enforcement actions,[26] there is no such assurance which can be given with regard to the Oklahoma Act. It is therefore appropriate to examine how courts in other states have dealt with this issue in order to determine how Oklahoma courts might decide the question.

## III. CONSTRUING STATE ACTS TO FIND A PRIVATE RIGHT OF ACTION

The problem of construing the Oklahoma Act is not unique. Courts from several jurisdictions have been faced with the question of whether State Acts can be enforced by private action. Several courts have concluded that a private remedy should be allowed. For example, courts in Arizona,[27] California,[28] Montana,[29] North Dakota,[30] and West Virginia[31] have all held that their State Act gives rise to a private right of recovery. An examination of the decisions from each of these jurisdictions is helpful in understanding how the Oklahoma courts are likely to approach interpretation of the Oklahoma Act, and how the Oklahoma courts ought to react.

### A. *Reliance upon the Statutory Language*

Both the Arizona and California courts have relied upon the language included in their State Act to find that a private cause of action exists. In *Sparks v. Republic National Life Insurance Co.*,[32] the Arizona Supreme Court carefully considered the following statutory language: "No order of the director pursuant to this section or order of court to enforce it, or holding of a hearing, may in any manner relieve or absolve

violation of the Unfair Claims Settlement Act." Tufts v. Madesco Inv. Corp., 524 F. Supp. 484, 487 (E.D. Mo. 1981).

26. It seems clear that the NAIC did not intend the Model Act to provide such a private right of recovery. "In any event, the intent of the NAIC as evidenced by the language of the Model Act and the NAIC proceedings, and supplemented by this Report, was clearly not to create a new private right of action for trade practices which are prohibited by the Model Act." Report of Director Robert Ratchford, Jr., of Ohio, "Regarding a Private Right of Action Under § 4(9) of the NAIC Model Unfair Trade Practices Act," 2 N.A.I.C. Proc. at 350 (1980).

27. Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127 (1982).

28. Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979).

29. First Sec. Bank of Bozeman v. Goddard, 181 Mont. 407, 593 P.2d 1040 (1979).

30. Farmer's Union Cent. Exch. v. Reliance Ins. Co., 626 F. Supp. 583 (D.N.D. 1985).

31. Jenkins v. J. C. Penney Casualty Ins. Co., 280 S.E.2d 252 (W. Va. 1981).

32. 132 Ariz. 529, 647 P.2d 1127 (1982).

any person affected by the order or hearing from any other liability, penalty or forfeiture under law."[33] The court found "that this section contemplate[d] a private suit to impose civil liability irrespective of governmental action against the insurer."[34]

Similarly, the Supreme Court of California cited the precise wording of the California Act in finding that there is a private cause of action which will support an award of damages for unfair claim settlement practices in that state.[35] In *Royal Globe Insurance Co. v. Superior Court*,[36] the California Supreme Court found that a private right of action existed because the California Act provides that a cease and desist order issued by the California Insurance Commissioner will not absolve insurers from "civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive."[37] The California court noted that the California Act differed from the Model Act by eliminating the word "other" from the Model Act provision which states that administrative enforcement is not intended to absolve insurers from liability under any "other" state law.[38]

This reliance on statutory language is appropriate since the cardinal rule of statutory construction requires courts to examine the legislature's intent in passing the statute, and such intent can often be ascertained from the wording chosen by the legislature.[39] However, these cases offer little in the way of guidance in interpreting the Oklahoma Act because the statutory language considered by both the Arizona and California courts does not appear in the Oklahoma version of the Model Act.

### B. *Reliance Upon General Rules for Inferring Private Remedies*

Perhaps the most thoroughly reasoned decision interpreting a State Act to permit a private right of action is *Jenkins v. J. C. Penney Casualty Insurance Co.*.[40] In *Jenkins* the West Virginia Court of Appeals applied

33. *Id.* at 541, 647 P.2d at 1139 (citing ARIZ. REV. STAT. ANN. § 20-456(C) (1981)).

34. *Id.* This rationale had previously been adopted by the Arizona Supreme Court in Sellinger v. Freeway Mobile Home Sales, Inc., where the court held that the Arizona Consumer Fraud Act created, by inference, a private cause of action for certain prohibited sales practices. 110 Ariz. 573, 521 P.2d 1119 (1974).

35. Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 885, 592 P.2d 329, 332, 153 Cal. Rptr. 842, 845 (1979) (citing CAL. INS. CODE § 790.03(h)).

36. *Id.*

37. *Id.* (citing CAL. INS. CODE § 790.09).

38. *Royal Globe*, 23 Cal.3d at 886, 592 P.2d at 333, 153 Cal. Rptr. at 846.

39. *See, e.g.*, Wilson v. Stocker, 819 F.2d 943 (10th Cir. 1987); United States v. Ray, 488 F.2d 15 (10th Cir. 1973); Skelly Oil Co. v. United States, 255 F. Supp. 228 (N.D. Okla. 1966).

40. 280 S.E.2d 252 (W. Va. 1981).

a four-part analysis to determine whether a private cause of action should be inferred under the West Virginia Act.

Citing an earlier West Virginia decision,[41] the *Jenkins* court found four factors important in deciding whether to infer a private cause of action under the state statute. First, the plaintiff must be a member of the class for whose benefit the statute was enacted. Second, the legislative intent, either express or implied, must not preclude a private right of action. Third, a private cause of action must be consistent with the underlying purposes of the legislation. Finally, a private cause of action must not intrude into an area delegated exclusively to the federal government.[42]

The first problem[43] dealt with in *Jenkins* was that the claimant was not actually the insured, but a third party seeking to recover under the terms of someone else's insurance policy. From reviewing the West Virginia Act the court found that the prohibited practices were not limited to activities between the insured and the insurance company. Rather, the court determined that there were a number of unfair claims settlement practices which would apply equally to third party claimants as well as insureds.[44] The court therefore concluded that the West Virginia Act was designed to protect insureds *and* third party claimants.

With regard to legislative intent, the court began its analysis by noting that determining legislative intent was difficult in West Virginia because of the absence of legislative history.[45] However, the court concluded that the statute itself showed a strong policy declaration against unfair insurance practices. This, in itself, suggested to the court the appropriateness of a private remedy.[46]

The *Jenkins* court also noted the fact that the statute itself provided only an administrative remedy, and acknowledged this as a possible

41. Hurley v. Allied Chem. Corp., 262 S.E.2d 757 (W. Va. 1980).

42. 280 S.E.2d at 254. This test is clearly derived from the analysis used by the United States Supreme Court in Cort v. Ash, 422 U.S. 66, 78 (1975). It is quite similar to the test applied in Oklahoma. *See* Holbert v. Echeverria, 744 P.2d 960, 963 (Okla. 1987); *infra* notes 101-109 and accompanying text.

43. Before applying the four-part test to determine if the State Act permitted a private right of action, the court went out of its way to note that West Virginia had a strong history of implying private remedies. 280 S.E.2d at 255 (citing Costello v. City of Wheeling, 145 W. Va. 455, 461, 117 S.E.2d 513, 517 (1960); Barniak v. Grossman, 141 W. Va. 760, 765, 93 S.E.2d 49, 53 (1956)). This discussion set the tone for the whole opinion.

44. *Id.*

45. *Id.* at 257. A similar problem exists in Oklahoma.

46. *Id.*

counterbalance to the strong policy statement that unfair insurance practices should not be permitted.[47] However, because the West Virginia Act also included language to the effect that administrative remedies will not "absolve any person affected by such order or hearing from any other liability, penalty or forfeiture under law,"[48] the court ultimately concluded that the administrative remedy was not to be considered exclusive.

The *Jenkins* court dealt easily with the third factor, whether a private cause of action would be consistent with the underlying purposes of the legislative act. The court determined that allowing a private cause of action would enhance the underlying goal of preventing improper settlement practices. The court concluded without hesitation that "[t]he right of a person injured as a result of an unfair settlement practice to recover damages acts as a deterrent against the violations of the act."[49]

The final factor, whether the private cause of action would intrude into an area exclusively delegated to the federal government, was even more easily resolved, since the regulation of insurance has been left to the states.[50]

The detailed treatment given to the issue of whether a private cause of action should be inferred under the West Virginia Act gives some indication of its complexity. Although the West Virginia Act includes language very similar to the versions of the Act passed in Arizona and California, the West Virginia court was not content to conclude that a private right of action should be inferred solely because the West Virginia Act had a "savings clause" specifying that administrative enforcement will not absolve insurance companies from other liability.

While recognizing the complexity of the issue undoubtedly makes the judicial task of statutory construction more difficult, following carefully thought-out rules for inferring a private cause of action not only gives legislatures guidance in drafting statutes, but also helps practitioners and litigants to evaluate actual or potential claims. For these reasons, the approach taken by the West Virginia Court of Appeals merits careful evaluation. Unfortunately, simplistic tests have an obvious appeal that some jurisdictions seem unable to resist.

47. *Id.*
48. *Id.* (citing W. VA. CODE § 33-11-6(c)).
49. *Id.* at 258.
50. *Id.* (citing 15 U.S.C. §§ 1011 et seq.).

C. *Inferring a Private Right of Action Without Supporting Analysis*

As with virtually any legal issue, there are some state courts which appear to have reached their decisions about whether to infer a private cause of action "just because." This approach is characterized by an opinion which announces the court's conclusion without much, if any, supporting analysis. It is typified by the Montana Supreme Court's opinion in *First Security Bank of Bozeman v. Goddard*.[51]

In *Goddard*, the Montana court "explained" that insurance companies have statutory duties, independent of the insurance contract itself, to settle claims as soon "as possible and in accordance with the terms of the insurance contract."[52] The court concluded without further analysis that a breach of that statutory requirement gives rise to tort liability.[53] It is unclear from a reading of *Goddard* what factors influenced the Montana court.

A less drastic example of this approach can be seen in *Farmer's Union Central Exchange, Inc. v. Reliance Insurance Co.*,[54] a case arising in the United States District Court for the District of North Dakota. In *Farmer's Union*, the district court was faced with the admittedly difficult task of determining what the North Dakota courts would do if faced with the issue of construing the North Dakota statute prohibiting unfair claims settlement practices.

The district court acknowledged that the North Dakota statute did not expressly recognize a private right of action but, after noting that the statute was enacted to protect claimants, concluded that the statute imposed a duty upon insurance companies "not to engage in unfair insurance claim settlement practices as defined by the statute."[55] While it is possible that the North Dakota district court was relying heavily on an unreported state district court decision which apparently recognized a private cause of action,[56] the opinion simply does not give much guidance in determining the rationale for inferring a private cause of action.

Individuals seeking to utilize these decisions to predict when a private cause of action will be inferred in the future are given little guidance. Certainly the relative ease with which the issue is resolved by the court is more than offset by the inherent ambiguities and uncertainties which will

51. 181 Mont. 407, 593 P.2d 1040 (1979).
52. *Id.* at 420, 593 P.2d at 1047 (citing MONT. CODE ANN. § 33-21-105).
53. *Id.*
54. 626 F. Supp. 583 (D.N.D. 1985).
55. *Id.* at 590.
56. *Id.* (citing Weber v. Horace Mann Ins. Co., Civ. No. 13684 (S.C.D.N.D. May 27, 1982)).

face any practitioner or litigant in attempting to understand or utilize such decisions in the future.

## IV. CONSTRUING STATE ACTS TO DENY A PRIVATE RIGHT OF ACTION

The courts which have construed their State Acts to permit a private cause of action are in the minority. The majority of courts which have addressed the issue have refused to permit private enforcement actions. The reasons offered by the courts refusing to infer a private remedy are as diverse as the reasons offered by other courts for allowing such actions.

### A. *Denying a Private Right of Action Without Supporting Analysis*

Just as some courts permitting private recovery under State Acts have done so without offering much in the way of explanation or reasoning, other courts have denied private rights of action without explaining their conclusions. For example, in *Russell v. Hartford Casualty Insurance Co.*,[57] the Texas Court of Civil Appeals held that the Texas Act did not confer a private cause of action on individuals because "the State Board of Insurance, upon finding an insurer in violation of the Act, is empowered to issue a cease and desist order to the insurer directing it to stop such unlawful practices."[58] While it is possible to construe this conclusion as being based on the principal that the only remedy mentioned is to be deemed the only remedy intended, the court offers no guidance for when the principal should be followed. Additionally, it is not at all clear that this is the proper way to interpret *Russell*. It may also be plausible to conclude that the court viewed state administrative enforcement as wholly adequate so that a private cause of action would be unnecessary.

Similarly, in *Frizzy Hairstylists, Inc. v. Eagle Star Insurance Co.*[59] a New York court held that the punishment of an insurer for refusing to pay under the terms of a policy was "properly within the province and jurisdiction of the State Superintendent of Insurance."[60] The court offered no real explanation for why a private right of recovery should not be recognized in addition to the express administrative remedies. One is left to wonder whether the court believed that the state legislature would

57. 548 S.W.2d 737 (Tex. Civ. App. 1977).
58. *Id.* at 742 (citing TEX. INS. CODE ANN. art. 21.21-2 § 6(a)).
59. 93 Misc. 2d 59, 403 N.Y.S.2d 389 (N.Y. Sup. Ct. 1977).
60. *Id.* at 60, 403 N.Y.S.2d at 390.

have expressly provided for private enforcement if such remedies were intended, or that the express remedies were adequate therefore making other remedies unnecessary, or whether the court was relying on some other reasoning entirely.

The problem with these cases is not that the result reached was obviously wrong, but rather that the lack of analysis offers little guidance to practitioners in construing other statutes or in predicting whether the same statute will be held to give rise to a private cause of action in any other situation. For this reason, the decisions of courts in other jurisdictions offer more guidance in predicting how the Oklahoma courts will and should react to this problem of interpretation.

### B. *Exclusivity of Administrative Remedy*

In *Farmer's Group, Inc. v. Trimble*,[61] the Colorado Court of Appeals found that since the Colorado Act expressly authorized the insurance commissioner to investigate and punish violations, the legislature intended there to be no other implied remedies. The court concluded that the legislature could have added private remedies and its failure to do so indicated its intent to exclude them.[62]

While this reasoning is also somewhat simplistic, it is in accordance with a primary rule of statutory construction which requires a court to ascertain legislative intent when a statute is ambiguous. However, by using this rule of construction to the exclusion of all others, the Colorado court may have failed to take into consideration all of the factors which may have been relevant.

### C. *Inconsistency with Legislative Scheme*

One of the more comprehensive approaches adopted by some jurisdictions requires a determination of whether a private cause of action would be consistent with the overall legislative scheme. This approach is substantially broader than merely asking whether a specific remedy has been clearly provided in a statute and, by being expressed, excludes other remedies from being inferred.

Alaska is one jurisdiction employing the broader approach. In *O.K. Lumber Co. v. Providence Washington Insurance Co.*,[63] the Alaska Supreme Court began its analysis by stating that the Alaska Act does not

61. 658 P.2d 1370 (Colo. Ct. App. 1982), *aff'd*, 691 P.2d 1138 (Colo. 1984).
62. *Id.* at 1378.
63. 759 P.2d 523 (Alaska 1988).

expressly provide a private cause of action and that the relevant inquiry must therefore be whether the statute contains an implied private right of action. After noting that the reactions of other courts to this issue have been mixed, the court concluded that there were substantial reasons for declining to expand the Alaska Act.

In the opinion of the court, the statute itself suggested that a private cause of action was not intended. Because the statute prohibited only frequently committed acts, it did not lend itself to an action based on a single claim. Moreover, the remedies provided were detailed explicitly, thus implying that they were intended to be exclusive. The court also noted that the statute limited the sanctions to be imposed. No such limits are imposed on compensatory and punitive damages available in a private cause of action.[64] Given these facts, the Alaska court declined "to upset the implicit legislative judgment that the broad proscriptions of the act are tolerable because of the limited sanctions imposed when violations occur."[65]

Oregon is another jurisdiction denying a private right of action on the grounds that it would be inconsistent with the legislative intent embodied in the state statute. The Oregon Supreme Court held in *Farris v. United States Fidelity and Guaranty Co.*[66] that although the legislature intended to prohibit intentional breaches of the contract to settle insured's claims, the statute did not permit recovery of tort damages by claimants.[67] Although the court's treatment of the issue is somewhat less comprehensive than that of the Alaska court, it concluded that the Oregon legislature had not intended to put additional pressure on insurers to perform insurance contracts by allowing recovery of damages for emotional distress or other tort remedies. The court found that the civil damages recoverable by the state under the Oregon Act adequately served the intended purposes of the Act.[68]

The Minnesota Supreme Court has also declined to infer a private right of recovery on the grounds that such a remedy would not be consistent with the legislative scheme. Unfortunately, the relevant Minnesota decision, *Morris v. American Family Mutual Insurance Co.*,[69] is rather confusing.

64. *Id.* at 527.
65. *Id.*
66. 284 Or. 453, 587 P.2d 1015 (1978).
67. *Id.* at 458, 587 P.2d at 1018.
68. *Id.*
69. 386 N.W.2d 233 (Minn. 1986).

The *Morris* court began its analysis of the Minnesota Act by noting that the Act provides administrative sanctions but "says nothing about a private person having a right to sue the insurer for a violation."[70] The court also found it significant that the Model Act, from which the Minnesota Act was derived, was not intended by its drafters to create a private right of action.[71] Additionally, the court noted that the "savings clause," specifying that a commissioner's order under the Minnesota Act will not relieve an insurer from liability under any other state laws, did not by itself create a new cause of action.[72]

The court then began a somewhat involved analysis of the legislative history of the Minnesota Act and a second Minnesota statute dealing with the state attorney general's authority.[73] The plaintiff in *Morris* based his claim for relief on language in the state attorney general statute giving private citizens concurrent enforcement powers over certain types of actions. According to the *Morris* court, the flaw in the plaintiff's reasoning was that the statute upon which he predicated his claim did not mention the Minnesota Act as one of the acts for which private enforcement is contemplated.[74] The Minnesota court eventually concluded that the statutory authority cited by the plaintiff did not express an intent to create a private cause of action under the Minnesota Act.[75]

Finally, the court examined the consequences of inferring a private cause of action. The first consequence noted by the court was that a private right of action would enable private citizens to share the enforcement duties of the Minnesota Commissioner of Commerce and State Attorney General.[76] The court did not say whether this would be desirable, but noted that "the statutory scheme seems ill-designed for a private cause of action, particularly if a private plaintiff must prove multiple violations of the Act amounting to a 'general business practice.' "[77] However, the court then noted that the Minnesota Act had been amended to permit the Commissioner of Commerce to punish single, isolated violations,[78] making its previously stated reasoning seem suspect.

70. *Id.* at 235.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 236. Perhaps most significant to the court was the fact that the Minnesota legislature had earlier rejected two bills which would have expressly created a private civil remedy for violations of the Minnesota Act. *Id.*
76. *Id.*
77. *Id.* at 237.
78. *Id.*

Ultimately, the Minnesota court seems to have been persuaded by the fact that permitting a private cause of action would result in significant deviation from Minnesota common law. This would be so because the Minnesota Act "would apparently grant third party claimants a direct cause of action against an insurer that could be brought at any time."[79] The availability of punitive damages would also represent a change from Minnesota common law.[80] The Minnesota court decided that the Minnesota Act should be construed to harmonize with the common law because no clear intent to modify it had been expressed by the legislature.

The Minnesota court, while purporting to deny a private right of action in order to be consistent with the legislative intent behind the Minnesota Act, relied on a rule of statutory construction which states that legislative intent is presumed to be consistent with common law unless a different intention is clearly expressed. Other rules of statutory construction have also been relied upon by courts in reaching the conclusion that legislative intent precludes any private right of recovery under the relevant State Act.

For example, in *Earth Scientists (Petro Services) Ltd. v. United States Fidelity & Guaranty Co.*,[81] the United States District Court for the District of Kansas, applying Kansas law, concluded that the Kansas courts would not interpret the Kansas Act to give rise to a private right of action. The court reasoned that since the Kansas Act did not expressly provide a private right of action with monetary damages, it was to be presumed that the legislature did not intend any such remedy to be available.[82] The presumed legislative intent was derived from several principles of statutory construction.

The first rule of statutory construction used to determine the legislature's intent in *Earth Scientists* was that a statute should be construed in accordance with its plain language.[83] Because the Kansas Act clearly provides certain remedies without mentioning a private right of action, the federal court concluded that it was unlikely that the Kansas legislature intended the statute to give rise to an implied private right of action.

The court also relied upon the rule of statutory construction that the

79. *Id.* The court does not explain why this must be the case. Arguably, the Minnesota Act could be interpreted to allow actions by the insureds but not third parties.

80. *Id.*

81. 619 F. Supp. 1465 (D. Kan. 1985).

82. *Id.* at 1470.

83. *Id.* at 1471.

expression of one idea excludes any implication that other ideas, which are not expressed, should also be included.[84] Therefore, the express mention of an administrative remedy and the legislature's failure to provide for private remedies in the Kansas Act "imply that the legislature intended to exclude any private remedies."[85]

Finally, the district court relied on the rule that a uniform law adopted by the Kansas legislature should be construed in accordance with the construction placed on it by its drafters, unless that intent would be contrary to the Kansas constitution or public policy.[86] Since the NAIC, having drafted the Model Act, has consistently argued that the Model Act was never intended to create a private cause of action,[87] the court concluded that the Kansas Act could not be construed to permit private recovery.

A similar result was reached on more simplistic grounds by the Wisconsin Supreme Court in *Kranzush v. Badger State Mutual Casualty Co.*[88] The Wisconsin court held that it would not be proper to interpret the Wisconsin Act to permit a private right of action because any such interpretation "would be in clear derogation of the common law."[89] Noting that legislative intent is to be determined primarily from the form or language of the statute, the court concluded that since the Wisconsin Act did not expressly confer a private right of action or impose a duty, the breach of which would be actionable, it would not be consistent with the presumed legislative intent to infer a private right of action against the insurer.[90]

### D. *No Need for Private Right of Action*

Still other jurisdictions have declined to expand State Acts to permit private recovery on the ground that such an expansive treatment is not necessary in order to fulfill the legislation's goals. The Idaho Supreme Court has adopted this approach.[91] Idaho courts recognize that insurers have a common law duty to their insureds to settle first party claims in

84. *Id.*

85. *Id.*

86. *Id.* (citing *In re* Reed's Estate, 233 Kan. 531, 541, 664 P.2d 824, 832, *cert. denied*, 464 U.S. 978 (1983)).

87. *See, e.g.*, Shernoff, *Insurance Company Bad Faith Law*, TRIAL, May 1981, at 24.

88. 103 Wis. 2d 56, 307 N.W.2d 256 (1981).

89. *Id.* at 74, 307 N.W.2d at 265.

90. *Id.* at 74-81, 307 N.W.2d at 265-69.

91. *See, e.g.*, White v. Unigard Mut. Ins. Co., 112 Idaho 94, 730 P.2d 1014 (1986). *See also* Greene v. Truck Ins. Exch., 114 Idaho 63, 753 P.2d 274 (Idaho Ct. App. 1988); Windsor v. Guar. Trust Life Ins. Co., 684 F. Supp. 630 (D. Idaho 1988).

good faith.[92] The Idaho Supreme Court has also held that a breach of this duty will give rise to an action in tort.[93] Therefore, the Idaho Supreme Court has concluded that "a statutory remedy [under the Idaho Act] is neither prescribed nor necessary."[94]

Pennsylvania has also used this rationale.[95] The Pennsylvania Supreme Court has held that the Pennsylvania Act does not need to be supplemented by a judicially-created cause of action because the enforcement mechanisms expressly provided appear adequate.[96] Citing an article criticizing California's approach of inferring a private right of action, the Pennsylvania court concluded: "State insurance departments are intended to serve the public and handle complaints from insureds as to insurer practices on a regular basis. Likewise, state legislatures are capable of prohibiting what are considered to be unfair claims handling practices and of imposing penalties for violations."[97]

## V. CONSTRUING THE OKLAHOMA ACT

### A. *When to Infer a Private Cause of Action*

Even a cursory examination of the various decisions from other jurisdictions dealing with the question of when to infer a private right of action under the various State Acts indicates that there are many different approaches which can be and have been taken. The approaches range from extremely simplistic[98] to very complex examinations of legislative intent.[99] To a large extent, the question of what test to apply in Oklahoma has been resolved by a recent decision of the Oklahoma Supreme Court dealing with whether the Oklahoma Consumer Protection Act[100] should be construed to permit a private right of action.

In *Holbert v. Echeverria*[101] the Oklahoma Supreme Court addressed

92. *White*, 112 Idaho at 101, 730 P.2d at 1021.
93. *Id.*
94. *Id.*
95. D'Ambrosio v. Pennsylvania Nat'l Mut. Casualty Ins. Co., 494 Pa. 501, 431 A.2d 966 (1981).
96. *Id.* at 507, 431 A.2d at 969-70.
97. *Id.* at 507-08, 431 A.2d at 970 (citing Kircher, *Insurer's Mistaken Judgment — A New Tort?*, 59 MARQ. L. REV. 775, 786 (1976).
98. Those jurisdictions applying the "just because" tests seem to prefer this approach. *See supra* note 51-56 and accompanying text.
99. *See* Morris v. American Family Mut. Ins. Co., 386 N.W.2d 233 (Minn. 1986) (finding that there was no private right of action); Jenkins v. J. C. Penney Casualty Ins. Co., 280 S.E.2d 252 (W. Va. 1981) (finding that a private right of action did exist).
100. OKLA. STAT. tit. 15, §§ 751-763 (1981).
101. 744 P.2d 960 (Okla. 1987).

for the first time the question of when a private right of action should be derived from a regulatory statute in Oklahoma. The court found that the test established by the United States Supreme Court in *Cort v. Ash*[102] for evaluating federal statutes should be utilized in evaluating Oklahoma statutes.

Under the *Cort* test, a private cause of action can be inferred under a federal statute only if each of four criteria are met: (1) the plaintiff must be a member of a class "for whose *especial* benefit the statute was enacted";[103] (2) there must be some indication of legislative intent, which may be either express or implied, suggesting that a private remedy was intended; (3) a private remedy must be consistent with the underlying purposes of the legislation; and (4) the cause of action must not be one which is traditionally relegated to state law.[104] The Oklahoma court found the fourth factor to be inapplicable to state legislation, and it was therefore disregarded in *Holbert*.[105] The *Holbert* test for whether a private right of action may be inferred from an Oklahoma regulatory statute, then, is based upon the first three factors of the *Cort* test.

In applying this test to the Oklahoma Consumer Protection Act, the *Holbert* court addressed at length the meaning of the first requirement. The court determined that the question of whether a plaintiff is a member of a class of persons for whose "especial benefit" legislation was enacted is not satisfied merely by the fact that the plaintiff is "especially harmed" as a result of the act's violation.[106] In the opinion of the *Holbert* court, "[w]hen a statute is created for the benefit of the public at large, no special class is created in its wake."[107] Concluding that there is no broader class than "consumers," to which the Consumer Protection Act is addressed, the court found that the first factor of the analysis could not be met. However, the court did not end its analysis there.

The Oklahoma court also addressed the second factor which requires some indication of legislative intent to create a private remedy. The court first noted that recent Supreme Court decisions have particularly emphasized this factor when applying the test.[108] The Oklahoma

102. 422 U.S. 66 (1975).
103. 744 P.2d at 963 (citing Cort v. Ash, 422 U.S. at 78).
104. *Id.* at 963.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 964 (citing Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 535-36 (1984)); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981); California v. Sierra Club, 451 U.S. 287, 293

court then determined that legislative intent is generally to be ascertained by examining the precise wording of the legislation, and studying the legislative history. Rules of statutory construction are to be applied in resolving any ambiguity.

The *Holbert* court relied on the maxim *"expressio unius est exclusio alterius"*[109] which means that the mention of one thing in a statute implies exclusion of things which are not mentioned. This led to the conclusion that the Oklahoma Consumer Protection Act did not give rise to a private right of action. Since the Oklahoma Consumer Protection Act specifies that enforcement is to be through attorney general action, this indicates an intent to exclude any unexpressed private rights of action.[110]

The Oklahoma court did not examine whether the third factor of the *Cort* test was met under the Consumer Protection Act. However, an examination of each of the elements of the *Holbert* test gives substantial guidance in evaluating whether a private right of action should be inferred under the Oklahoma Unfair Claims Settlement Practices Act.

### B. *Determining For Whose Benefit the Oklahoma Act was Passed*

The Oklahoma Act, as discussed earlier,[111] prohibits certain acts of insurers. Although some of the prohibitions are specifically addressed to actions taken by insurers with regard to their policyholders,[112] the majority of prohibited acts can affect any kind of claimant.[113] It therefore appears that the parties most directly harmed by violation of the act are policyholders and third party claimants injured by some act or inaction of the insured. However, it is not completely clear that the Oklahoma Act was intended to operate for the especial benefit of these persons as a narrow class, rather than the public as a whole.

As with the Oklahoma Consumer Protection Act, it is possible to conclude that the Oklahoma Act was intended to benefit the public as a whole. Virtually everyone is a potential claimant under insurance policies, and an examination of the acts prohibited under the Oklahoma Act indicates that it might not be appropriate to limit enforcement of the Act

(1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979)).

109. *Holbert*, 744 P.2d at 965. This maxim is intended to be used as an aid in determining legislative intent. *See, e.g., In re* Arbuckle Master Conservancy Dist., 474 P.2d 385, 391-92 (Okla. 1970).

110. *Holbert*, 744 P.2d at 965.

111. *See supra* notes 9-27 and accompanying text.

112. *See, e.g.*, OKLA. STAT. tit. 36, § 1222.5 (Supp. 1988).

113. *Id.* at § 1222.1-4.

to policyholders if a private right of action is inferred. This conclusion seems logical in view of the fact that a majority of the prohibited practices can relate to any claimant rather than to the policyholder alone.[114]

On the other hand, it is also possible to conclude that the Oklahoma Act was really intended only to benefit the insureds. While it is indisputable that the Oklahoma Act prohibits certain practices which relate to all claimants, with a little imagination, the ultimate beneficiary of the prohibited unfair claims settlement practices can be viewed as the insured. In most if not all instances, the insured is ultimately liable, and unfair settlement practices engaged in by the insurance company, even if directed against third-party claimants, may result in actions against the insured. Statutory prohibitions designed to curtail unfair settlement practices would therefore have the ultimate effect of benefiting the insured, even if the prohibition is broadly worded to cover settlement practices relating to claims by third parties. It is therefore not completely clear that the Oklahoma courts must conclude that the Oklahoma Act is too broad to have been intended to benefit a narrow class.

One possible approach which would allow the Oklahoma courts to find that the legislation was intended to benefit an "especial class" would be for the courts to limit actions to insureds, and to preclude private enforcement by third parties. Certain cases in other jurisdictions have held that there is no private right of action for third parties, while allowing direct recourse by the insureds.[115] Similarly, although both the Arizona and Connecticut courts have construed their State Acts to create a cause of action for insureds, the rights of third party claimants in those jurisdictions have not been addressed.[116]

Alternatively, it is also possible, and more likely, that the Oklahoma courts will find that the Oklahoma Act was passed to protect both policyholders and third party claimants. If this is the conclusion reached by the Oklahoma courts, a private right of action could exist only if the courts also conclude that this constitutes a sufficiently specific class of persons. This would also seem to involve some "stretching" by the courts, but it is clearly a possibility. In any event, while it seems more probable and more logical that the Oklahoma courts will find that the

114. *Id.*

115. *See, e g.*, Tweet v. Webster, 614 F. Supp. 1190, 1191 (D. Nev. 1985); Scroggins v. All State Ins. Co., 74 Ill. App.3d 1027, 1031-34, 393 N.E.2d 718, 720-21 (1979); Kranzush v. Badger State Mut. Casualty Co., 103 Wis. 2d 56, 64-65, 307 N.W.2d 256, 265 (1981).

116. *See* Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127 (1982); Griswold v. Union Labor Life Ins. Co., 186 Conn. 507, 442 A.2d 920 (1982).

Oklahoma Act was intended to protect the public as a whole, the second and third elements of the test should be evaluated in order to predict not only how the Oklahoma courts *will* react, but also how the Oklahoma courts *should* react.

### C. *Determining the Intent of the Oklahoma Legislature*

The second element of the *Holbert* test requires a determination of whether the Oklahoma legislature intended to permit a private right of action. Unfortunately, this is a difficult question to answer because of the lack of definitive legislative history in Oklahoma. This deficiency necessarily forces reliance on rules of statutory construction pursuant to which Oklahoma courts will imply legislative intent.

The principal rule of statutory construction utilized in Oklahoma, as well as in other jurisdictions, is that the intent of the legislature in enacting a particular statute will govern its interpretation by the courts.[117] Thus, it is not surprising that most rules of statutory construction are framed in terms of what the legislature presumably intended. For example, it has been held that in determining the legislative intent, inquiry should begin with the language employed in the particular statute.[118] The courts may also look to the problems sought to be remedied by the legislation in ascertaining the legislature's intent.[119] The purpose of the statute may also be examined in ascertaining legislative intent.[120]

Although there are all manner of rules of statutory construction which may be relevant in interpreting the Oklahoma Act, at least one rule appears to support the conclusion that a private right of action should be permitted. In interpreting a statute, the courts must consider the purpose behind the legislation.[121] Since the purpose of the Oklahoma Act was clearly to minimize unfair claims settlement practices by Oklahoma insurers, a court could reasonably conclude that it would

117. *See* Darnell v. Chrysler Corp., 687 P.2d 132 (Okla. 1984); Walker v. St. Louis-San Francisco Ry. Co., 671 P.2d 672 (Okla. 1983); Udall v. Udall, 613 P.2d 742 (Okla. 1980).

118. *See, e.g.*, Wilson v. Al McCord, Inc., 611 F. Supp. 621, 623 (W.D. Okla. 1985); Rea v. Big Chief Drilling Co., 673 P.2d 515, 518 (Okla. Ct. App. 1983); Beall v. Town of Hennessey, 601 P.2d 758, 759 (Okla. Ct. App. 1979).

119. Stockyards Loan Co. v. Nichols, 243 F. 511, 516 (8th Cir. 1917); Blevins v. W. A. Graham Co., 72 Okla. 308, 309, 182 P. 247, 248 (1919).

120. Oliver v. Oklahoma Alcoholic Beverage Control Bd., 359 P.2d 183 (Okla. 1961); Equitable Royalty Corp. v. State, 352 P.2d 365 (Okla. 1960); State v. Dinwiddie, 186 Okla. 63, 95 P.2d 867 (1939).

121. Lekan v. P & L Fire Protection Co., 609 P.2d 1289 (Okla. 1980); Owens v. State, 665 P.2d 832, 834 (Okla. Crim. App. 1983); Oklahoma Journal Publishing Co. v. City of Oklahoma City, 620 P.2d 452, 454, (Okla. Ct. App. 1979).

serve this purpose if a private right of action were inferred.[122]

Concluding that a private cause of action should be inferred could be supported by the fact that the administrative enforcement mechanism provided in the Oklahoma Act does not seem substantial.[123] In essence, the Oklahoma Act gives the Oklahoma Insurance Commissioner authority to issue a cease and desist order directing the insurer to stop unlawful settlement practices, and to "limit, regulate, and control the insurer's line of business"[124] in the event the insurer refuses or fails to comply with the cease and desist order. No monetary penalties or fines for past violations are imposed by the statute. Given these relatively insubstantial enforcement provisions, it might easily be concluded that private enforcement mechanisms would add substantially to the deterrent effect of the Act.

Most of the rules of statutory construction which appear to be relevant to the questions raised by the ambiguities in the Oklahoma Act, however, support the conclusion that no private right of action was intended. One of the simplest rules of construction which supports this result is that the plain words of a statute will generally govern the statute's construction.[125] Obviously, a reading of the plain words of the Oklahoma Act indicates that administrative remedies were provided, and no mention of private remedies is made.

Similarly, the enumeration of specific items in a statute is frequently interpreted as evidencing an intent to exclude those items which are not enumerated.[126] Of course, this rule of statutory construction is intended to aid in determining legislative intent, and is not a rule of substantive law.[127] Nonetheless, under this rule, the fact that the legislature expressly provided administrative remedies without mentioning any private cause of action gives rise to the implication that the legislature intended to create no such private rights.

Finally, it has been held that it is appropriate to examine authorities

122. The West Virginia appellate decision in Jenkins v. J. C. Penney Casualty Ins. Co. adopted this reasoning. 280 S.E.2d 252 (W. Va. 1981).

123. OKLA. STAT. tit. 36, § 1226 (Supp. 1987).

124. *Id.* § 1226.A.

125. *See, e.g.*, American-First Title & Trust Co. v. First Fed. Sav. & Loan Ass'n, 415 P.2d 930 (Okla. 1965) (a statute is open to construction only where the language is ambiguous); City of Duncan v. Barnes, 293 P.2d 590 (Okla. 1956) (language given its plain meaning when the statute is not ambiguous and its affect not absurd); Loeffler v. Federal Supply Co., 187 Okla. 373, 102 P.2d 862 (1940) (words given their ordinary meaning unless this would defeat legislative intent).

126. City of Tulsa v. Midland Valley R.R. Co., 168 F.2d 252, 252 (10th Cir. 1948) (applying Oklahoma law); State v. Cline, 322 P.2d 208, 213 (Okla. Crim. App. 1958) (citing 82 C.J.S. *Statutes* § 333 (1953)).

127. Spiers v. Magnolia Petroleum Co., 206 Okla. 510, 513, 244 P.2d 852, 856 (1951); Branson v. Branson, 190 Okla. 347, 352, 123 P.2d 643, 648 (1942).

relative to the source of Oklahoma law. For example, a statute adopted from another state will be presumed to have been adopted with the construction previously placed on it by courts of that other state.[128] In this case, the Oklahoma Act is derived from the Model Act proposed by the NAIC. The NAIC did not intend the Model Act to give rise to a private right of action, and therefore the Oklahoma legislature might be presumed to have accepted that interpretation.[129] It is, however, unclear how much reliance should be placed on the NAIC's interpretation, as this general rule of statutory construction normally applies to interpretations of statutes given by courts of sister states.[130]

On the whole it seems more plausible to believe that the Oklahoma legislature did not intend to create a private right of action under the Oklahoma Act. However, this is by no means a certain conclusion, and it therefore seems appropriate to examine the third and final prong of the *Holbert* test to evaluate whether a private right of action should be inferred under the Oklahoma Act.

### D. *Determining the Underlying Purposes of the Act*

The second and third prongs of the *Holbert* test are closely related, especially since one of the rules of statutory construction requires an examination of the purposes of the legislation in evaluating the probable intent of the legislature.[131] However, the question of whether a private remedy will be consistent with the legislative scheme can also include consideration of factors broader than the intent of the legislature relative only to the particular statute being evaluated. For example, if the function which would be served by a private remedy is fulfilled by other rights and remedies available to aggrieved persons, the necessity for a private remedy may be obviated.

The Oklahoma courts have relatively recently recognized a cause of action for bad faith breach of an insurance contract by insurers.[132] In *Christian v. American Home Assurance Co.*,[133] the Oklahoma Supreme Court held that "an insurer has an implied duty to deal fairly and act in good faith with its insured and that the violation of this duty gives rise to

128. *See* Brook v. James A. Cullimore & Co., 436 P.2d 32, 34 (Okla. 1967); Knox v. McMillan, 272 P.2d 1040, 1043 (Okla. 1954); Ciesler v. Simpson, 187 Okla. 641, 642, 105 P.2d 227, 228 (1940).
129. *See supra* note 26 and accompanying text.
130. *See supra* note 127 and accompanying text.
131. *See, e.g., supra* note 120 and accompanying text.
132. Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977).
133. *Id.*

an action in tort."[134] While *Christian* dealt only with obligations owed by disability insurers, the rule was later expanded to cover all insurers.[135] Under the rules adopted in *Christian*, it is now possible to sue an insurer either for breach of contract or for the tort of breach of the implied duty of good faith.[136]

The duty owed by insurers is not without limitations. For example, third parties cannot bring a tort action against insurers, as an insurance company generally owes the duty of good faith only to its insureds.[137] However, the tort recognized in *Christian* clearly covers bad faith refusals to settle claims.[138] To some extent, therefore, an implied right of action under the Oklahoma Act should be unnecessary. An examination of the Oklahoma Act indicates that most of the more serious types of unfair claims settlement practices which are prohibited by the Oklahoma Act can also give rise to liability under the rules announced by the Oklahoma Supreme Court in *Christian*.

The first type of act prohibited by the Oklahoma statute is knowing misrepresentation concerning pertinent facts or policy provisions relating to coverage.[139] If the misrepresentation is material, and causes injury to the insured, presumably Oklahoma law would recognize a right to recover under *Christian*, even without granting private enforcement rights under the Oklahoma Act.[140]

The fourth and fifth prohibited practices also seem likely to support a recovery under the tort recognized in *Christian*. The fourth type of practice is failing to attempt in good faith to effectuate prompt, fair, and equitable settlements for claims where liability has become reasonably clear.[141] The fifth prohibition is against compelling policyholders to initiate suits to recover amounts due by offering substantially less than the amounts ultimately recovered, when the policyholders have made claims

134. *Id.* 904.

135. McCorkel v. Great Atl. Ins. Co., 637 P.2d 583 (Okla. 1981).

136. In *Christian*, the Oklahoma Supreme Court "clearly recognized the two causes of action which may be asserted premised on the existence of an insurance contract: an action based on the contract; and an action for breach of the implied duty to deal fairly and in good faith." Lewis v. Farmers Ins. Co., 681 P.2d 67, 69 (Okla. 1983).

137. Allstate Ins. Co. v. Amick, 680 P.2d 362, 365 (Okla. 1984).

138. "An insurance company has a duty to defend its insured and settle claims in good faith." Wilson v. Gipson, 753 P.2d 1349, 1356 (Okla. 1988) (citing Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977)). In fact, the liability found in *Christian* was premised on the insurance company's bad faith refusal to pay the insured's valid claim. *Christian*, 577 P.2d at 903-904.

139. OKLA. STAT. tit. 36, § 1222.1 (Supp. 1988).

140. It is also possible that such a knowing misrepresentation would give rise to the independent tort of deceit, which is codified at OKLA. STAT. tit. 76, §§ 2-3 (1981).

141. OKLA. STAT. tit. 36, § 1222.4 (Supp. 1988).

for amounts reasonably similar to the amounts ultimately recovered.[142] Where an insurance company's actions run afoul of either of these prohibitions, it would seem likely that those actions would also give rise to liability in tort. The failure to settle in good faith was recognized as giving rise to liability in *Christian*,[143] and compelling policyholders to initiate suits to recover amounts due under the policy would seem to be one manner of refusing to settle in good faith.

The analysis of the Oklahoma Supreme Court in *Christian*, however, seems unlikely to support three types of actions prohibited by the Oklahoma Act. These are failure to acknowledge communications with reasonable promptness,[144] failure to implement reasonable standards for prompt investigation of claims,[145] and failure of the insurer to maintain complete records of complaints for three years or since the last examination by the insurance commissioner.[146] It is difficult to see how these prohibited acts could cause direct injury to an insured, and, unless the failure to acknowledge communications or failure to implement reasonable standards for prompt investigation results in a failure to settle in good faith, violation of these statutory prohibitions does not seem likely to result in an independent tort. Therefore, while the Oklahoma Supreme Court has recognized the potential liability of insurers for certain acts which may be prohibited by the Oklahoma Act, the current tort liability probably does not extend to all of the practices prohibited by the Oklahoma Act.

The question then becomes whether inferring a private right of action under the Oklahoma Act would materially enhance its effectiveness in prohibiting unfair claims settlement practices. There are several reasons why a private cause of action might not effectively further the objectives behind the Oklahoma Act. First, the activities which would not subject insurers to tort liability are not really as significant as those practices which would support recovery for the breach of the covenant of good faith. Failure of an insurer to respond to communications by claimants with reasonable promptness should not, by itself, cause the same level of harm that failure to attempt prompt, fair, and equitable settlements does. It is only where the failure to communicate is indicative of a failure to attempt prompt settlements that the claimant is likely

142. *Id.* § 1222.5.
143. 577 P.2d 899, 904 (Okla. 1977).
144. OKLA. STAT. tit. 36, § 1222.2 (Supp. 1988).
145. *Id.* § 1222.3.
146. *Id.* § 1222.6.

to be significantly injured. In the latter event, of course, tort liability would probably already exist.

Similarly, failure to adopt and implement standards for prompt investigation of claims is not a significant problem unless the lack of standards results in failure to effectuate equitable settlements. The lack of standards itself is not a problem if the ultimate action taken by the insurer, even if the result of a haphazard investigation, is in fact fair and equitable. Again, however, if the ultimate settlement is not prompt, fair and equitable, the possibility of tort liability has already arisen.

Finally, the failure of an insurer to maintain a complete record of complaints is not a substantive problem. It is merely a procedural inadequacy which the legislature believed to be of sufficient significance to warrant administrative enforcement.

Another reason why a private cause of action would hamper the effectiveness of the Oklahoma Act is that the problem of setting standards for violations would become significant. The Oklahoma Act itself, for example, offers no standards for what constitutes failure to acknowledge communications with respect to claims "with reasonable promptness."[147] Similarly, there are no guidelines for satisfying "reasonable standards for prompt investigation of claims."[148] While it is true that courts and juries are often called upon to determine standards of reasonableness where liability is to be imposed for breach of statutory duty, the courts would be required to ascertain what standards the legislature intended to impose. In the case of the Oklahoma Act, such standards are simply unstated. Therefore, reliance on administrative enforcement seems particularly appropriate since the administrative agency would be expected to have the experience necessary to develop reasonable and consistent standards for compliance.

Additionally, implying a private cause of action would require a determination of whether multiple violations of the statute would be required for liability. While the problem is not as obvious in Oklahoma as in certain other jurisdictions where the State Acts expressly prohibit practices "committed with such frequency as to indicate the general business practice,"[149] the issue is not completely clear.

The Oklahoma Act, while prohibiting each of the listed practices "if committed without cause," also includes the provision that the Insurance

147. *Id.* § 1222.2.
148. *Id.* § 1222.3.
149. *See, e.g.*, ALASKA STAT. § 21-36-125 (Supp. 1984).

Commissioner has the right to determine whether a property and casualty insurer "has engaged in unfair claim settlement practices with such frequency as to indicate a general business practice."[150] In such event, the Insurance Commissioner can require periodic reports to assist in closer evaluation of that insurer.[151] The enforcement procedures contained in the Oklahoma Act generally require the Insurance Commissioner to find that the number and type of complaints against an insurer are out of proportion to those made against other insurers, or do not meet minimum standards of performance set down by the Insurance Commissioner.[152]

If it is determined that the Oklahoma Act was intended to prohibit general business practices rather than specific violations, private enforcement mechanisms would appear to be particularly inappropriate. An act premised on general business practices and multiple violations seems ill-suited to private enforcement,[153] as private litigants could not know if there was a statutory violation based merely on their own experiences.

Finally, if a private right of action is inferred, the question will arise as to whether enforcement actions should be limited to insureds only, or also allowed to third-party plaintiffs. Oklahoma does not recognize the tort of bad faith breach of contract against third parties.[154] Therefore, any implication of a private right of action under the Oklahoma Act would be limited to the insureds, or else represent a substantial change from existing Oklahoma common law.[155] The difficulties associated with drawing these limits under the Oklahoma Act would be compounded by permitting a private right of action for the insured, but not for third party claimants, since the Act itself is not addressed to insureds only.

It therefore appears that there are substantial reasons why inferring a private right of action would be inconsistent with the underlying purposes of the Oklahoma Act. Thus the Oklahoma courts should be wary of treating the statute expansively, particularly when considered in connection with the lack of clear evidence that the Oklahoma legislature intended a private right of action to be granted.

150. OKLA. STAT. tit. 36, § 1223.A (Supp. 1988).

151. *Id.*

152. *Id.* § 1224.C.

153. *Accord* O.K. Lumber Co. v. Providence Washington Ins. Co., 759 P.2d 523 (Alaska 1988).

154. Allstate Ins. Co. v. Amick, 680 P.2d 362 (Okla. 1984).

155. In general, a statute is not to be construed as changing the common law unless a clear intent that such a change be made has been expressed. *See, e. g., In re* Adoption of Graves, 481 P.2d 136, 138 (Okla. 1971); Fenton v. Young Chevrolet Co., 191 Okla. 161, 163, 127 P.2d 813, 814 (1942).

## VI. CONCLUSION

When the Oklahoma legislature enacted the Unfair Claims Settlement Practices Act it is entirely possible that no thought was given to whether that Act would or should give rise to a private cause of action for insureds or third party claimants. Although a few courts from other jurisdictions have held that the Act as passed in their state does support private enforcement actions, the majority rule is otherwise. While there are some valid arguments which can be raised to support the proposition that the Oklahoma courts should expand the Oklahoma Act to allow private remedies, the better result would be to conclude that the Oklahoma Act does not contemplate a private enforcement action, and that no such cause of action exists.

It is true that the unfair claims settlement practices prohibited by the Oklahoma Act can, in certain instances, be a significant problem for insureds, as well as for third-party claimants. However, insureds already have a tort cause of action against their insurers for bad faith breach of contract, and failure of an insurance company to settle does not preclude a third party claimant from proceeding directly against the insured.

To broaden the Oklahoma Act beyond its express terms would seem to be an unwarranted intrusion upon the legislative prerogative. It is an oversimplification to conclude that the Oklahoma legislature did not intend a private cause of action because it could easily have provided one if this was its intention. However, when the test for identifying a private cause of action developed by the Oklahoma Supreme Court is applied, the same result should be reached.

Oklahoma courts would have to stretch the rules of statutory interpretation to find that the Oklahoma Act was intended to benefit a narrow class of citizens. Moreover, it is doubtful that the Oklahoma legislature actually intended to create a private remedy. In addition, inferring such a remedy would, perhaps unnecessarily, complicate this area of the law in such a way that the purposes of the statute would be hampered. Therefore, notwithstanding the fact that the Oklahoma courts probably will and probably should be eager to limit unfair claims settlement practices by insurers, a private cause of action under the Oklahoma Act does not appear to be the appropriate mechanism to accomplish this result.