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Tortious Breach of Contract in Oklahoma

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NOTES AND COMMENTS

TORTIOUS BREACH OF CONTRACT IN OKLAHOMA

I. INTRODUCTION

Whether punitive damages[1] should be allowed for breach of contract continues to be a live issue in tort and contract law.[2] Historically, punitive damages have been recoverable in tort, but not in contract actions.[3] The courts have gradually circumvented this traditional rule

1. Punitive or exemplary damages are defined as:

> [D]amages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages. Unlike compensatory or actual damages, punitive or exemplary damages are based upon an entirely different public policy consideration—that of punishing the defendant or of setting an example for similar wrongdoers, as above noted. In cases in which it is proved that a defendant has acted willfully, maliciously, or fraudulently, a plaintiff may be awarded exemplary damages in addition to compensatory or actual damages. Damages other than compensatory damages which may be awarded against [a] person to punish him for outrageous conduct.

BLACK'S LAW DICTIONARY 352 (5th ed. 1983).

2. Berstein, *Recovery of Punitive Damages for Breach of a Contract Implied in Law*, 34 S.C.L. REV. 32 (1982); Coleman, *Punitive Damages for Breach of Contract: A New Approach*, 11 STETSON L. REV. 250 (1981-82); Diamond, *The Tort of Bad Faith Breach of Contract: When, If at all, Should it Be Extended Beyond Insurance Transactions?*, 64 MARQ. L. REV. 425 (1981); Hill, *Breach of Contract as a Tort*, 74 COLUM. L. REV. 40 (1974); Louderback & Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F.L. REV. 187 (1982); Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307 (1969); Sassaman, *Punitive Damages in Contract Actions—Are the Exceptions Swallowing the Rule?*, 20 WASHBURN L.J. 86 (1980); Shaller, *The Availability of Punitive Damages in Breach of Contract Actions Under 301 of the Labor Management Relations Act*, 50 GEO. WASH. L. REV. 219 (1982); Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284 (1959); Stern, *Will the Tort of Bad Faith Breach or Contract be Extended to Health Maintenance Organizations?*, 11 LAW, MED. & HEALTH CARE 12 (1983); Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977); Note, *The Expanding Availability of Punitive Damages in Contract Actions*,8 IND. L. REV. 668 (1975) [hereinafter cited as Note, *The Expanding Availability*]; Comment, *Actions: Tortious Breach of Contract, A Plaintiffs Dilemma*, 26 OKLA. L. REV. 249 (1973); Note, *Punitive Damages for Breach of Contract in South Carolina*, 10 S.C.L. REV. 444 (1958); Note, *Exemplary Damages in Contract Cases*, 7 WILLIAMETTE L.J. 137 (1971). *See also* J. MCCARTHY, PUNITIVE DAMAGES IN BAD FAITH CASES (2d ed. 1978 & Supp. 1982).

3. *See infra* notes 10-30 and accompanying text.

by allowing punitive damages for a breach of contract under a tort theory.[4] Although most courts have limited the fiction to specific types of circumstances[5] and have not made the remedy available to all breach of contract claims, there appears to be a trend toward the creation of a new tort that could apply to any sufficiently malicious breach of contract.[6]

This Comment will attempt to summarize the current methods used by the courts to award punitive damages for breach of contract, while discussing the emergence of a new tort for the malicious breach of contract. Finally, Oklahoma case law will be analyzed and an approach suggested for Oklahoma courts to follow in the future. This Comment will not focus on the reasoning behind the principles differentiating tort and contract law. Likewise, it will not attempt to analyze the bases or economics behind punitive awards.

II. JUDICIAL EVOLUTION OF TORTIOUS BREACH

Judicial approaches to the issue of awarding punitive damages for breach of contract can be categorized, at least theoretically, into a scheme of three progressively more liberal views. The traditional view adheres to the general rule that punitive damages are not recoverable in breach of contract actions, irrespective of the breaching party's motives.[7] The traditional approach has been subject to a great deal of criticism and has generated numerous exceptions.[8] These exceptions form what this Comment will refer to as the "middle view." In order to fall within one of these exceptions two requirements must be met: (1) there must be a separate implied duty arising outside of the contract and (2) the breach must involve malice, fraud, gross negligence, wantonness, or oppressive behavior. Under the third view, punitives could be awarded without a breach of an implied duty, provided the second

4. One commentator has characterized the judicial attitudes in recent cases as to which side of the tort-contract borderline an action fell as being "more casual than calculated." Sullivan, *supra* note 2, at 252.

5. *See infra* notes 32-67 and accompanying text.

6. *See infra* notes 68-99 and accompanying text.

7. *See* 25 C.J.S. *Damages* § 120, at 1126-28 (1966); 22 AM. JUR. 2D *Damages* § 245, at 337 (1965); RESTATEMENT OF CONTRACTS § 342 (1932); RESTATEMENT (SECOND) OF CONTRACTS Ch. 16 intro. note, at 100 (1979); 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1338, at 197-99, § 1340, at 209-10 (3d ed. 1968 & Supp. 1983).

8. *See* W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 92, at 615-16 (4th ed. 1971); 22 AM. JUR. 2D *Damages* § 245, at 337 (1965); 25 C.J.S. *Damages* § 120, at 1128-29 (1966); 11 S. WILLISTON, *supra* note 7, § 1340, at 211-12.

requirement is met.[9] In order to better understand the evolutionary process, each of the views will be discussed separately.

A. *The Traditional View*

Contract law, in its essential design, is a law of strict liability, and the accompanying system of remedies operates without regard to fault.[10] Hence, the long recognized general rule, supported by an overwhelming weight of authority, is that exemplary damages are not recoverable for breach of contract.[11]

The traditional view encompasses those decisions which have expressly declined to view a malicious or bad faith breach as a tort, thus limiting the remedy to contract law and compensatory damages. Cases following the traditional view[12] often state that there was no tortious behavior independent of the contract.[13]

The courts have stated a variety of explanations supporting the traditional view.[14] One view holds that breach of contract is not suffi-

9. *See e.g.*, Whitfield Constr. Co. v. Commercial Dev. Corp., 392 F. Supp. 982 (1975) (bad faith failure to pay building contractor); Cleary v. American Airlines, 111 Cal. App. 3d 433, 168 Cal. Rptr. 722 (1980) (wrongful termination of employment); Boise Dodge, Inc. v. Clark, 92 Idaho 902, 453 P.2d 551 (1969) (sale of second-hand automobile as new); Bank of N.M. v. Rice, 78 N.M. 170, 429 P.2d 368 (1967) (malicious breach of bank loan contract); Sweet v. Grange Mut. Casualty Co., 50 Ohio App. 2d 401, 4 Ohio Op. 3d 399 (1975) (malicious failure to settle insurance claim).

10. E. FARNSWORTH, CONTRACTS § 12.8, at 842 (1982). "[N]o matter how reprehensible the breach, damages that are punitive. . . . are not ordinarily awarded . . . . [It is] a rule oblivious to blame . . . ." *Id.*

11. Annot., 84 A.L.R. 1345-46 (1933).

12. *See, e.g.*, Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544 (1903) ("If a contract is broken the measure of damages generally is the same, whatever the cause of breach."); Wood v. Citronelle-Mobile Gathering System, 409 F.2d 367, 369 (5th Cir. 1969) (punitives not recoverable in dispute over debt on conversion of crude oil since "debt sounds in contract, and under the law of Alabama the motive or intent of the debtor is not material"); White v. Metropolitan Merchandise Mart, 107 A.2d 892, 894 (Del. Super. Ct. 1954) (court declares relief could not be granted on claim that breach of contract was "in bad faith," per defendant's "motives of self interest," and to "embarrass plaintiff financially and adversely affect his credit standing"); Den v. Den, 222 A.2d 647, 648 (D.C. 1966) (punitives are not allowed "regardless of . . . motive" in a dispute involving separation agreement payments); Tanshnek v. Tanshnek, 630 S.W.2d 653, 655 (Tex. Civ. App. 1981) (reversing award of punitives since independent tort not proven, even if the "breach was brought about intentionally, capriciously and with malice"); McDonough v. Zamora, 338 S.W.2d 507, 513 (Tex. Civ. App. 1960) (dispute where a gambler stopped payment on two checks, punitives not allowed "though the breach is brought about capriciously and with malice"); White v. Benkowski, 37 Wis. 2d 285, __, 155 N.W.2d 74, 77 (1967) (dispute over use of water supply, court held punitives, without exception, are not available in contract actions "even if the breach, as in the instant case is willful").

13. *E.g.*, Wagner v. Benson, 101 Cal. App. 3d 27, 33, 161 Cal. Rptr. 516, 520 (1980); Sawyer v. Bank of America, 83 Cal. App. 3d 135, 139, 145 Cal. Rptr. 623, 626 (1978); Tanshnek v. Tanshnek, 630 S.W.2d 653, 655 (Tex. Civ. App. 1981); *see also* Coleman, *supra* note 2, at 13 n.13.

14. [O]ne of the principal impediments to analysis of contract cases treating the question of punitive damages is the consistent absence, particularly in the early cases, of any

ciently repugnant as a matter of public policy to warrant punitives.[15] Possibly contributing to this view is the perception that breach is so common an occurrence that it is an accepted risk.[16]

A second view is that an extension of the doctrine of punitive damages into the commercial field would introduce uncertainty and confusion in business transactions.[17] The evils of uncertainty in the business world were discussed in the landmark case of *Hadley v. Baxendale*[18] in which the court established the black letter law that damages should be limited by the concepts of foreseeability and the probable consequences of breach. The rationale followed in *Hadley* could equally apply to punitive damages.[19] In other words, *Hadley* appears to opine that the benefits which might follow from awarding punitive damages are outweighed by the uncertainty and apprehension it would create at market.

Another explanation for the limitations on damages for breach is that economically efficient breaches are socially beneficial and should

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meaningful judicial discussion of the philosophy of damage law. . . . Whatever the explanation, we must begin without any firm idea of *why*, beyond adherence to traditional English standards, American courts have held [to the] general rule . . . .

Sullivan, *supra* note 2, at 221.

15. *See* 5 A. CORBIN, CORBIN ON CONTRACTS § 1077, at 438 (1964) ("Breaches . . . do not in general cause as much resentment and physical discomfort as do the wrongs called torts . . . . [t]herefore the remedies to prevent them are not so severe."); *see also* Simpson, *supra* note 2, at 284 (referring to the "feeling that . . . compensatory damages is an adequate remedy . . ." and that punitives would be an "unequal weighting of the scales.").

16. *See, e.g.*, Iron Mtn. Security Storage v. American Specialty Foods, 457 F. Supp. 1158 (E.D. Pa. 1978). In this often cited case, the court declined to expand tort liability for bad faith breach beyond insurance contracts, fearing most contract violators would then be subject to liability. *Id.* at 1165.

17. *See* C. MCCORMICK, LAW OF DAMAGES § 81, at 286 (1935); Simpson, *supra* note 2, at 284.

18. 156 Eng. Rep. 145 (1854). *Hadley* was an attempt by the court to encourage commercial transactions in a maturing British economy. *See* E. FARNSWORTH, *supra* note 10, § 12.14, at 873 (1982) (explaining "[a] solicitude for burgeoning enterprise" led to *Hadley's* rules curbing jury discretion to assess punitives); Patterson, *The Apportionment of Business Risk Through Legal Devices*, 24 COLUM. L. REV. 335, 342 (1924) ("the law . . . manifests a policy to encourage the entrepreneur by reducing the extent of his risk below that amount . . . the promisee has actually been caused to suffer."). *But cf.* Dansig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975). Dansig argues that industrial development was only partly the cause of *Hadley*. *Id.* at 259. Dansig also points out the very interesting fact that *Hadley* was handed down at a time when principals were personally liable for the misfeasance of their companies. *Id.* at 263. Dansig concludes, "[u]nder these conditions a severe restriction on the scope of damages in contract actions must have seemed both less alien than it would have appeared to a judge a decade earlier, and more important than it would have seemed to a judge a decade later." *Id. See also* G. GILMORE, THE DEATH OF A CONTRACT (1974). Gilmore stated that *Hadley* "is still, and presumably always will be, a fixed star in the jurisprudential firmament." *Id.* at 83. He also makes the unorthodox suggestion that *Hadley* actually expands contract liability by making some lost profits and consequential damages recoverable. *Id.* at 51-52.

19. 156 Eng. Rep. 145, 151 (1854).

not be discouraged.[20] Basically, a breach is economically efficient if one party to a contract pays the other party full compensatory damages, and is still better off than if performance had been compelled under the contract.[21] Such a redistribution of wealth is desirable if the breaching party values his gains more than the loser values his losses.[22] The fallacy with the efficient breach theory is the idea that full compensatory damages are recoverable. There will always be some costs that are unrecoverable.[23]

The rationale behind denying punitive damages for a breach of contract may be the same basis used to specifically deny recovery for mental distress, humiliation, indignity, and wounded feelings caused by a breach of contract.[24] Generally, the rule which precludes such a recovery, whether as punitive[25] or compensatory,[26] is based on the principle that mental suffering is properly a parasitic element to bodily

20. *See* E. FARNSWORTH, *supra* note 10, § 12.3, at 817 (1982); R. POSNER, ECONOMIC ANALYSIS OF LAW § 4.9, at 88-90 (2d ed. 1977); A. KRONMAN & R. POSNER, THE ECONOMICS OF CONTRACT LAW 6 (1979) (explaining that the law will supply terms where the parties have not done so explicitly, but the parties are normally free to supplant with their own, more efficient terms); Birmingham, *Breach of Contract, Damages, Measures and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1979); *cf.* Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277, 278-79 (1972).

21. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.1, at 786 (1973); R. POSNER, ECONOMIC ANALYSIS OF LAW § 4.9, at 89 (2d ed. 1977); *E.g.*, Diamond, *supra* note 2, at 435-36.

22. See E. FARNSWORTH, *supra* note 10, § 12.3, at 817 n.3. This is known as the Kaldor or Kaldor-Hicks criterion, initially stated in Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939); *see also* Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939).

See also Diamond, *supra* note 2, at 433. Diamond views this concept as "*the* undisclosed underlying rationale" which explains the "unexplained judicial reluctance to impose tort liability upon those who in bad faith, breach . . ." *Id.* (emphasis added). Describing it as "one of the most poorly kept secrets in legal history," he states that a "close scrutiny of commercial law doctrine and the briefest scrutiny of commercial practice, makes it transparently clear that our system not only sanctions such bad faith breaches but, with limitations, actually encourages them." *Id.* Furthermore, he laments judicial "zeal to deny that the law provides incentive to breach." *Id.* at 436.

"[I]t is an open secret that a contract breaker rarely stands to lose as much by his breach as he would by performance. And the more deliberate the breach, the more apt he is to gain." Mueller, *Contract Remedies, Business Fact and Legal Fancy*, 1967 WIS. L. REV. 833, 835.

23. *See generally* Speidel & Clay, *Seller's Recovery of Overhead under UCC 2-708(2): Economic Cost Theory and Contractual Remedy Policy*, 57 CORNELL L. REV. 681, 687 (1972) ("in short both the costs of using the legal system and the difficulty of establishing the amount of loss are critical factors in the decision to sue"); *see also* Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 8 (1970) (citing reasons for the high cost of due process).

24. *See* FARNSWORTH, YOUNG & JONES, CASES AND MATERIALS ON CONTRACTS 530 (2d ed. 1972).

25. 5 A. CORBIN, *supra*, note 15, § 1077, at 442; *see also* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1983) (one purpose of punitive damages is to compensate victims for otherwise uncompensable losses).

26. The general purpose of granting compensatory damages in a contract action is to put the plaintiff in as good a position as he would have been in had the defendant not breached. *See* 5

harm.[27] Historically, there could be no award at all if the mental harm was independent of bodily harm.[28] Today intentional or reckless infliction of mental distress is a tortious cause of action in itself,[29] but the parasitic theory and general rule still holds in contract law.[30] Accordingly, it seems fair to question why contract law should provide shelter to such conduct.[31]

B. *The Middle View*

The traditional view has gradually been eroded away to the point where the exceptions have almost totally engulfed the general rule.[32] The first direct exceptions were breach of a promise to marry[33] and failure to provide a public service.[34] Many indirect exceptions have followed, but each new case and exception seems to be only a variation on the same theme, that the defendant's action at the time of breach constituted an independent tort.[35]

CORBIN, *supra* note 15, § 1002, at 31; 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1338, at 198 (3d ed. 1968 & Supp. 1983).

Damages for mental suffering are generally regarded as being actual or compensatory in character, and not vindictive or punitive. 22 AM. JUR. 2D *Damages* § 197, at 277 (1965). However, the contrary is true in some states as to those damages which are allowed for insult, indignity, and the like. *Id.* at 278.

27. *See* 5 A. CORBIN, *supra* note 15, § 1076, at 427-28.

28. *See id.* at 429-30.

29. *See* W. PROSSER, *supra* note 8, § 12, at 52; Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

30. 5 A. CORBIN, *supra* note 15, § 1076, at 427-28. Comment, B & M Homes, Inc. v. Hogan: *Breakthrough in the Law's Reluctance to Award Damages in Contract for Mental Anguish and Other Non-economic Detriments*, 26 S.D.L. REV. 48 (1981); Comment, *Recovery for Mental Anguish from Breach of Contract: The Need for an Enabling Statute*, 5 CAL. W.L. REV. 88 (1968).

31. *See* 5 A. CORBIN, *supra* note 15, § 1077C, at 304 (Kaufman Supp. 1984). "[A] strong trend has developed toward allowing punitive damages . . . where the defendant has the same state of mind as an intentional tortfeasor, but chooses to accomplish his ends by means of a breach of contract instead of undertaking to commit a separate tort." *Id. See also* Z.D. Howard Co. v. Cartwright, 537 P.2d 345, 347 (Okla. 1975) ("Consummation of the contract does not shield the wrongdoer or preclude recovery of [punitive] damages . . . .").

32. *See* FARNSWORTH, *supra* note 10, § 12.8, at 842-44. Consideration of all of the exceptions leads one commentator to ask "are the exceptions swallowing the rule?" Sassaman, *supra* note 2, at 86.

33. *See* Coryell v. Colbaugh, 1 N.J.L. 90 (1791). *See also* Baumle v. Verde, 33 Okla. 243, 244, 124 P. 1083, 1084 (1912) ("While the action for breach of promise of marriage is one which has its inception in the violation . . . of a contract, the authorities have, since a very early date, very generally treated the action as . . . a tort.").

34. Fort Smith & W. Ry. v. Ford, 34 Okla. 575, 575, 126 P. 745, 745 (1912) (a railroad's failure to transport a passenger to proper station "states a cause of action sounding in tort rather than contract," since the "gist of the action being defendant's breach of a public duty" and "the contract of carriage is regarded as a mere inducement to the action to show the right to sue as a passenger").

35. *See supra* note 8 and accompanying text.

Under this view, the occurrence of an actual or alleged breach of contract is collateral or incidental to the tortious behavior arising independent of the contract. Commentators have taken a variety of approaches in grouping, distinguishing and explaining these exceptions.[36] Basically, the exceptions can be grouped into six categories.

1. Breach of a Promise to Marry[37]

Punitives have been allowed for a breach of a promise to marry if accompanied by conduct that is cruel, fraudulent, malicious, or actuated by evil motives.[38] Punitive damages are usually awarded to compensate for mental suffering, social disgrace, humiliation or embarrassment[39] as well as to punish the defendant,[40] to set an example to prevent future offenses, and to express community approbation.[41] The reasoning behind the promise to marry exception is that it involves personal rather than pecuniary interests, and is therefore analogous to the present-day tort of infliction of mental distress.[42]

2. Breach of a Public Service Contract[43]

Public utilities, common carriers, banks or others who enjoy a monopoly or quasi-monopoly position in a community may be found to have committed a tortious breach of a statutory duty by failing to provide adequate services.[44] The basis for this exception has been to "both

36. *See* Coleman, *supra* note 2, at 251-52, 281 (grouping all exceptions under one of four labels, and explaining that these four are really one exception: breach of an implied-in-law duty); Simpson, *supra* note 2, at 287 (also finding only two categories: breach accompanied by fraud and breach accompanied by an independent tort); Sassaman, *supra* note 2, at 93-95 (simply addressing each of six exceptions); Sullivan, *supra* note 2, at 226, 229, 236, 240, 250-51 (after addressing exceptions of ordinary duty, fraud, and independent torts in general and insurance cases, he concludes, that the disparity in bargaining power is the reason for the increase of punitive damage awards in contracts); Note, *The Expanding Availability*, *supra* note 2, at 688 (breaking exceptions into breach plus fraud and breach plus oppression).

37. In a number of states this right of action has been abolished by statute. 12 AM. JUR. 2D *Breach of Promise* § 18, at 717 (1965). *But cf.*, OKLA. STAT. tit. 23, § 40 (1981) ("damages . . . rest in sound discretion of the jury").

38. *See* 11 C.J.S. *Breach of Marriage Promise* § 45, at 813-14 (1966).

39. *See* 12 AM. JUR. 2D *Breach of Promise* § 27, at 727 (1965); 11 C.J.S. *Breach of Marriage Promise* § 45, at 813-14 (1966).

40. Punishment is for the original act(s) plus any attempts to blacken the plaintiff's character in defense. 5 A. CORBIN, *supra* note 15, § 1077, at 441-42.

41. *See id.* at 440-43 and § 1076, at 430-32.

42. *See* D. DOBBS, *supra* note 21, § 12.4, at 819-21. "The essential idea seems to be that some contracts clearly have what might be called personal rather than pecuniary purposes in view, and that the purpose of such contracts is utterly frustrated until mental distress damages are awarded for the breach." *Id.* at 819.

43. *See supra* note 8 and accompanying text.

44. For a thorough historical background regarding this exception *see generally* Burdick, *The*

punish and protect against the abuse of economic power,"[45] and "to protect the public against exploitation or oppression."[46] Again, it is within the jury's discretion to award punitives if the conduct was sufficiently unreasonable, malicious, wanton, oppressive, or wrongful.[47]

3. Breach Accompanied by Fraud

Fraud was the first of the modern day exceptions[48] and is generally referred to as the South Carolina rule.[49] Cases involving this exception epitomize judicial restivity in this quasi-tort, quasi-contract area.[50] The vague and ambiguous nature of this exception[51] has prompted one commentator to state, "A rule composed of concepts so obscure can be described as a governing legal doctrine only by a long leap of faith."[52] Moreover, it is a rule resting upon "deceptive concepts"[53] that "provides convenient camouflage for otherwise legally indefensible

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Origin of the Peculiar Duties of Public Service Companies, 11 COLUM. L. REV. 514 (1911); Wyman, *The Law of Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156 (1904).

45. Wyman, *supra* note 44, at 226.

46. *Id.* at 224.

47. *See* 5 A. CORBIN, *supra* note 15, § 1077, at 444.

48. *See* Note, *Punitive Damages for Breach of Contract in South Carolina*, 10 S.C.L. REV. 444, 448-58 (1958); *see also* Welborn v. Dixon, 70 S.C. 108, 49 S.E. 232 (1904) (explains history and evolution of the rule).

49. As opposed to the Texas rule, which requires the breach to be accompanied by an independent tort. Although the Texas rule appears to be broader than the South Carolina rule, probably the contrary is true:

> Under the Texas rule, before the plaintiff can recover punitive damages the facts must be such that he actually has two causes of action, one in tort and one in contract. Under the [S.C.] rule the action for breach . . . may be the only action open to the plaintiff, as where the accompanying fraudulent act is a mere omission for which no tort action in deceit would be.

Simpson, *supra* note 2, at 287-88.

Even the court which first adopted this view recognized that the term "fraud" was both broad and vague, and that their holding could result in punitives being allowed based on a finding of merely "dealing unfairly." Wright v. Public Sav. Ins. Co., 204 S.E.2d 57, 59 (S.C. 1974).

> Fraud assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.

Id.

50. Some cases in this area show creative courts using a variety of explanations to allow the award of punitives while appearing not to violate the general rule. See *infra* notes 51-54 and accompanying text. However, "[t]he judicial freedom derived from a definition of fraud couched in obscure terms exacts an important price: it makes the prediction of results in future cases, always a hazardous undertaking, especially treacherous." Sullivan, *supra* note 2, at 231.

51. *See* Coleman, *supra* note 2, at 261-69 (providing a critical analysis of the largely unsuccessful efforts to use this exception in Florida); Sullivan, *supra* note 2, at 229-36.

52. Sullivan, *supra* note 2, at 235-36.

53. *Id.* at 236.

decisions."[54]

Despite the vagueness problem, the exception still requires a finding of malice, ill will, oppression, wanton disregard for the rights of others, or wrongfulness.

4. Breach of Duty of Good Faith

Breach of good faith is a common law exception possibly born in the frustration of hard cases, in which the action involved did not constitute a recognized tort but the failure to award punitives would encourage wrongful and oppressive behavior.[55] The majority of these actions involved insurance cases.

Since the landmark case of *Crisci v. Security Ins. Co.*,[56] almost every jurisdiction has recognized a tort of bad faith breach of an insurance contract.[57] The basis for this action is that while in every contract there is an implied duty of good faith and fair dealing which accompanies the expressed contractual obligations,[58] a separate implied-in-law duty also arises, and it is the breach of this duty, not the contractual obligations, which will justify the award of punitive damages.[59] Another rationale is that when an insurance company forces an unfair settlement, unreasonably refuses to settle, or wrongfully cancels coverage it is committing a tortious abuse of economic power.[60] As before,

54. *Id.* at 236.

55. *See* Note, *The Expanding Availability*, *supra* note 2, at 678-79.

56. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). In *Crisci*, the insurer refused a settlement offer of $9,000 from a party with a claim against the insured, ostensibly because the policy limit was $10,000 and thus the insurer stood little to lose by going to court. *Id.* at __, 426 P.2d at 175-76, 58 Cal. Rptr. at 15-16. The ensuing suit resulted in the insured being held liable for $101,000. *Id.* at __, 426 P.2d at 176, 58 Cal. Rptr. at 16. The insured then endured severe emotional distress in addition to economic collapse. *Id.* The *Crisci* court affirmed an award to the insured of $25,000 punitives for mental harm from the insurer, in addition to compensatory damages. *Id.* at __, 426 P.2d at 178-79, 58 Cal. Rptr. at 18-19.

57. *See* J. MCCARTHY, *supra* note 2, at 117-23 (Supp. 1982) (summarizes the status of the tort or statute used in every jurisdiction to award punitives for breach of duty of good faith).

58. UCC § 1-203 (1977); Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 216 (1968); *see also* Louderback & Jurika, *supra* note 2, at 192-96 (short summary of both the relevant UCC and common law on good faith).

59. *See, e.g.*, Silberg v. California Life Ins., 11 Cal. 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974); Campbell v. Government Employees Ins. Co., 306 So. 2d 525 (Fla. 1974); United States Fidelity & Guar. Co. v. Peterson, 91 Nev. 617, 540 P.2d 1070 (1975); Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co., 279 N.W.2d 638 (N.D. 1979); McCarty v. First of Ga. Ins. Co., 713 F.2d 609 (Okla. 1983); Gay v. Taylor, Inc. v. St. Paul Fire & Marine Ins., 550 F. Supp. 710 (Okla. 1981); Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1978). *See also* Diamond, *supra* note 2, at 425-29; Louderback & Jurika, *supra* note 2, at 196-202; J. MCCARTHY, *supra* note 2, § 1.35, at 84-87.

60. *See* Louderback & Jurika, *supra* note 2, at 198-99 (noting several types of wrongful con-

this tort requires a finding of malice, fraud, gross negligence, wantonness, or oppressive behavior.[61]

Although the breach of good faith exception has been expanded to non-insurance cases,[62] these cases fail to articulate objective standards that could be used to determine when an actionable implied-in-law duty may be found.[63]

5. Breach of a Fiduciary Duty

A breach of a fiduciary duty[64] has been found to warrant punitive damages because it is a breach of an implied-in-law duty created by the relationship rather than the contract itself.[65] Just as the term fraud is vague and lacking in objective content, so too is the phrase "fiduciary relationship."[66] Consequently, the finding of an implied fiduciary relationship is haphazard, inconsistent and unpredictable. Furthermore, it ignores the fact that the relationship was created by, and essentially is, the contract.

6. Other Exceptions

There have been other exceptions used in a variety of areas including employment, commercial contracts, landlord-tenant, and con-

duct by insurance companies will warrant punitives); Note, *The Expanding Availability*, *supra* note 2, at 678-79. "If the courts deny punitives for such oppression they are positively encouraging this sort of barbarism." *Id.* at 679.

61. *Crisci*, 66 Cal. 2d at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19.

62. *See* J. MCCARTHY, *supra* note 2, § 6.1, at 335-37; *But cf.* Iron Mtn. Sec. Storage v. American Specialty Foods, 457 F. Supp. 1158 (E.D. Pa. 1978). Declining to expand this approach beyond insurance cases, the court criticized this middle view approach in general. Noting a duty of good faith is implied in every contract, the court wrote "that it is a broad jump from that premise to the conclusion that breach of this duty should be separately actionable in tort merely because the duty is imposed by law rather than by consensual agreement of the parties. Not every breach of a legal duty is actionable in tort." *Id.* at 1166. "Breach of the duty is synonymous with breach of the contract." *Id.* at 1169 (citing Hoy v. Gronoble, 34 Pa. 9, 11-12 (1859)).

63. "Good faith has no definite meaning; the reasons for invocation in a particular case are not always clear." Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 201 (1968).

64. *See, e.g.*, PSG Co. v. Merrill Lynch, Inc., 417 F.2d 659 (9th Cir. 1969), *cert. denied*, 397 U.S. 918 (1970); Brown v. Coates, 253 F.2d 36 (D.C. Cir. 1958); Boyd v. Bevilacqua, 247 Cal. App. 2d 272, 55 Cal. Rptr. 610 (1967); Crogan v. Metz, 47 Cal. 2d 398, 303 P.2d 1029 (1956); Harper v. Interstate Brewery Co., 168 Ore. 26, 120 P.2d 757 (1942); *see also* Coleman, *supra* note 2, at 289-92, n.98 (citing an additional seven cases, with a discussion of two cases); J. MCCARTHY, *supra* note 2, § 2.10, at 110-11.

65. *See* J. MCCARTHY, *supra* note 2, § 2.10, at 110-11.

66. Sullivan describes the terms fiduciary relationship, relationship of trust, and confidential relationship as "vague, haphazard and fragmentary." *See* Sullivan, *supra* note 2, at 229 n.119 (citing Bogert, *Confidential Relations and Unenforceable Express Trusts*, 13 CORNELL L.Q. 237 (1928)). Sullivan concludes, "In reality such terms are almost as flexible as a court wishes to make them." Sullivan, *supra* note 2, at 229.

sumerism. These exceptions generally involve a transference to one of an uncounted number of torts.[67]

The preceding exceptions demonstrate the rationale behind middle view cases. The cases following the middle view perpetuate the legal fiction of an implied duty arising outside and independent of the contract. This rationale, though nobly inspired, is flawed since these duties do not predate the contract, but arise from it. A breach of these implied duties is a breach of the contract.

C. *Bad Faith Breach as a Free-Standing Tort*

This third view rejects the cumbersome approaches of the middle view by adopting a single tort action, available for any sufficiently malicious breach of contract.[68] Under this view, breach of the contract itself may constitute a tortious act.[69] The recognition of bad faith breach of contract as a free-standing tort eliminates the need for courts to refer to legal fictions in order to promote justice. Also, the adoption of a more direct and simple basis for allowing punitives creates the appearance of greater legal legitimacy for such actions, thus hastening legal consistency and predictability in this area of law. This view dramatically redefines the general rule because in every case the breaching party's motives would be relevant for determining the degree of bad faith present.[70]

1. The Prima Facie Case

The prima facie case for the new tort of bad faith breach of contract is presently unclear, its parameters undelineated, and its basis elusive.[71] However, many commentators already seem convinced that at

67. *See* 5 A. CORBIN, *supra* note 15, § 1077B (Kaufman Supp. 1984); J. MCCARTHY, *supra* note 2, at §§ 6.1 to .11.

68. "Therefore, it is the finding of the court that the actions of the defendant were such as to be a *breach of contract* amounting to a wilful, wanton and malicious tort and fixes punitive damages. . . ." Kirk v. Safeco Ins. Co., 28 Ohio Misc. 44, 46, 273 N.E.2d 919, 921 (C.P. Franklin County 1970) (emphasis added).

69. *Id.*; *see infra* notes 81-99 and accompanying text.

70. It is usually the defendant's mental state that is said to justify a punitive award, not his outward conduct. Therefore, punitive damages are never available for simple negligence. *See* DOBBS, *supra* note 21, § 3.9, at 205; C. MCCORMICK, *supra* note 17, § 18, at 280; W. PROSSER, *supra* note 8, § 2, at 9-10.

71. *See* Coleman, *supra* note 2. She, rejects the individual area exceptions of the middle view, but advocates the implied-in-law approach. She proposes a three-prong test:

(1) There must be contract.
(2) Plaintiff must show an implied-in-law duty.
(3) There must be a malicious or willful breach that causes injury to the plaintiff.

the heart of this action is the concept of oppression.[72] This view is supported by the public policy that the courts should lean toward protecting those with lesser bargaining power.[73] If this is the case, a collateral issue is raised as to whether this tort will be applicable beyond circumstances involving disparity in bargaining power and adhesion contracts.

Although the standards for the degree of bad faith required have not been fully established, it is clear that a mere intentional breach alone is not enough.[74] Undoubtly, the standard will call for a finding of malice, unconscionability, evil intent, or the intentional and wanton harming of the other party.[75] One suggested definition for the willful bad faith breach of contract is "a knowing breach by a party capable of performing made with an unreasonable lack of regard for the other party."[76] Unfortunately, the use of the broad term "unreasonable" could be interpreted as requiring the plaintiff to carry the heavy burden of proving the defendant's behavior was intentional.[77] Furthermore, the term could open the door to arguments of economic waste and disproportionality.[78]

While lawyers may struggle to finesse a definition for the standard, comfort can be found in that type of errant behavior to be condemned

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Id. at 257-58.

72. *E.g.*, D. DOBBS, *supra* note 21, § 3.9, at 206-07; Sullivan, *supra* note 2, at 249-51; Note, *The Expanding Availability*, *supra* note 2, at 687.

73. There are numerous cases where the relative bargaining power of the parties had an impact on the decision. *See, e.g.*, Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 133 N.W.2d 267 (1965) (plaintiff made significant expenditures and preparations during negotiations for purchase of a supermarket franchise, reliance interest granted based on promissory estoppel); Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969) (contract found to be unconscionable and the plaintiff relieved of making further payments after paying $600 of $1,235 sales price for home freezer worth a maximum of $300 retail); Williams v. Walker-Thomas Furniture Store, 350 F.2d 445 (D.C. Cir. 1965) (contract which allowed defendant to repossess prior and/or subsequent purchases by low-income plaintiff upon default on single purchase held to be unenforceable as unconscionable); Ortelere v. Teacher's Retirement Bd., 25 N.Y.2d 196, 303 N.Y.S.2d 362, 250 N.E.2d 460 (1969) (reversal of change in election on retirement plan allowed after death of insured persuant to a new standard for mental capacity); *see* Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041 (1976); Henderson, *Promissory Estoppel and Traditional Contract Doctrines*, 78 YALE L.J. 343 (1969); Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1969); Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

74. *See* 5 A. CORBIN, *supra* note 15, § 1077B (Kaufman Supp. 1984).

75. *Id.*

76. Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 ARIZ. L. REV. 733, 758 (1982).

77. *Id.*

78. *Id.*

is intuitively recognizable.[79] Simply put, it is when the breacher was more than just unsavory or wrong; it is when his breach, by nature of the contract or method of breach, unconscionably or maliciously harms the plaintiff.

Despite any inherent conceptual difficulties, the tort of bad faith breach is preferable since it directly addresses the problem of malicious breaches by placing substance ahead of legal form. The focus under this third view concerns the severity of the breaching conduct, while the focus under the middle view is on shaping the breaching conduct to fit a separately actionable tort.

As Justice Felix Frankfurter said, "Proper accommodation is dependent on an empiric process, on case-to-case determinations. Abstract propositions and unquestioned generalities do not furnish answers."[80] Juries are assigned other tasks of reification, and this one does not appear to be any more strenuous. Moreover, juries should be trusted to distinguish those breaches that are accompanied by aggravating circumstances which go beyond what is socially tolerable.

2. Case Law[81]

The leading case under the third view is *Vernon Fire and Casualty Insurance Co. v. Sharp*.[82] In *Vernon* the insurer, without reasonable explanation, refused to pay the insured's legitimate claim for a factory

79. *See* J. McCARTHY, *supra* note 2, § 3.5, at 213 (3rd ed. 1983).

80. United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62, 76 (1956).

81. The cases which support a new tort of bad faith breach are numerous but not comprehensive. *See, e.g.*, Adams v. Whitfield, 290 So. 2d 49, 50-51 (Fla. 1974) (malicious prosecution case, holding only legal, not actual, malice required for award of punitives whether action for tort or breach of contract; legal malice inferrable from wanton disregard for rights of others); Dold v. Outrigger Hotel, 54 Hawaii 18, ___, 501 P.2d 368, 369 (1972) (wanton or reckless refusal to honor reservations was breach of contract constituting a tort for emotional distress); Vernon Fire & Casualty Ins. Co. v. Sharp, 161 Ind. App. 413, 316 N.E.2d 381, 382 (1974) (bad faith failure to settle claim was breach of contract sufficient to find conduct amounted to heedless disregard of consequences, malice, gross fraud or oppression); Food Fair Stores v. Havey, 275 Md. 50, 52-55, 338 A.2d 43, 45-46 (1975) (reversing punitives in dispute over employee benefits because the breach lacked the requisite elements of actual malice, express animosity, a sole purpose to harm rather than benefit self or circumstances which give rise to inferences of oppression); Isagholian v. Carnegie Inst. of Detroit, 51 Mich. App. 220, 221-22, 214 N.W.2d 864, 864 (1974) (punitives denied in breach of teaching contract by employer for lack of malice, however, the plaintiff was allowed to recover for mental anguish since the contract was personal in nature and intimately bound up with matters of mental concern and solicitude); Eakman v. Robb, 237 N.W.2d 423, 430 (N.D. 1975) (punitives awarded in a bad faith breach of restrictive covenants since damages at law were not sufficient to compensate plaintiffs for irreversible damages); Kirk v. Safeco Ins. Co., 28 Ohio Misc, 44, 46, 273 N.E.2d 919, 921 (C.P. Franklin County 1970) (bad faith failure to honor insurance claim was malicious breach of contract constituting a tort).

82. 161 Ind. App. 413, 316 N.E.2d 381 (1974), *modified*, 264 Ind. 599, 349 N.E.2d 173 (1976).

fire loss. After acknowledging the traditional rule[83] and middle view exceptions,[84] the Supreme Court of Indiana set forth a new two-part standard: "a serious wrong" must have been committed and "[it] must also appear that the public interest will be served by the deterrent effect" of a punitive award.[85] Because the court emphasized that no finding of an independent tort must be proven,[86] the court effectively moved beyond the middle view. Moreover, by holding that the punitive award was granted for tortious conduct, the court managed to bypass the traditional view without violating it.[87] In short, *Vernon* held that punitives could be awarded for breach of contract per se, if the breach was accompanied by intentional, wanton and oppressive conduct.[88] *Vernon* now appears to be sound law and has been followed in both insurance and non-insurance cases.[89]

Likewise, in *Cleary v. American Airlines*,[90] the California Court of Appeals extended a good faith concept, developed in previous insurance cases, to allow for the possible award of punitives in a non-insurance situation.[91] In *Cleary* an employee of eighteen years was wrongfully discharged for engaging in union activities. The court stated that American Airlines had a good faith duty that was uncondi-

83. Punitives are not recoverable in contract actions and motive is generally irrelevant. 264 Ind. at 607, 349 N.E.2d at 179-80.

84. *Id.* at 608, 349 N.E.2d at 180.

85. *Id.*

86. "Neither of these functions of the independent [tort] requirement is very compelling when it appears . . . a serious wrong, tortious in nature, has been committed, but the wrong does not conveniently fit the confines of a predetermined tort." *Id.* "When these factors coalesce, . . . the independent tort requirement [will] be abrogated." *Id.* The court noted that there was sufficient evidence for the jury to find fraud, despite the plaintiff's failure to plead fraud. *Id.* at 614, 349 N.E.2d at 184. Justice Prentice, however, disputed the existence of fraud. *Id.* at 617, 349 N.E.2d at 185 (Prentice J., dissenting).

87. *Id.* at 608, 349 N.E.2d at 180-81.

88. *Id.* at 608, 615, 349 N.E.2d at 180-81, 184. The court 1) found tortious conduct without an "independent tort," 2) found the breach tortious since in contract law punitives cannot be awarded, and 3) determined a breach could be tortious despite contract law proscribing inquiry into motive.

89. *See, e.g.*, Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979) (breach of franchise agreement); Jones v. Abriani, 169 Ind. App. 556, 350 N.E.2d 635 (1976) (sale of defective mobile home); Rex Ins. Co. v. Baldwin, 163 Ind. App. 308, 323 N.E.2d 270 (1975) (breach of contract on a life insurance policy). *See also* Linscott v. Ranier Nat'l Life Ins. Co., 100 Idaho 854, —, 606 P.2d 958, 963-64 (1980) (concluding *Vernon* preferable to general rule because it serves a consumer protection function).

Vernon has also been cited in cases where the conduct involved was not found to be sufficiently tortious, thus indicating that the third view would not make punitives available for every breach. *See* Owen County Farm Bureau Coop. Ass'n v. Waeger, — Ind. App. —, 398 N.E.2d 713 (1980).

90. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

91. *Id.* at 453, 168 Cal. Rptr. at 728.

tional and independent of the terms of the contract.[92] The court went on to note that, "A termination of employment without legal cause after such a period of time offends the implied-in-law convenant of good faith and fair dealing *contained in all contracts*, including employment contracts."[93]

Correspondingly, in *Boise Dodge, Inc. v. Clark*[94] the Supreme Court of Idaho awarded the plaintiff punitives after the new car he had purchased from the defendant was found to be second hand. In support of this outcome, the court stated, "[t]he rule . . . is that punitive damages may be assessed in contract actions where there is fraud, *malice, oppression or other sufficient reason for doing so.*"[95]

Punitive damages have also been awarded for bad faith breach of large commercial contracts. For instance, in *Whitfield Construction Company, Inc. v. Commercial Development Corporation*[96] the defendant's failure to honor pay requests, unjustified delay in seeking consultation for a construction decision, and attempts to hamstring the plaintiff/contractor towards the end of a construction project were all bad faith breaches warranting a punitive award of $50,000.[97] Similarly, in *B. B. Walker Company v. Ashland Chemical Company*[98] a contract for the sale of 30 million pounds of a styrene-butadiene rubber was breached by Ashland. In addition, Ashland attempted to induce Walker's customers to deal with a major competitor of Walker. The court concluded that "the conduct of the defendant, both in its deliberate breach of the contract and its conduct thereafter, [are found] to have been willful, malicious, reckless and unfair; findings which warrant punitive damages." The court consequently approved a punitive award for bad faith breach in the amount of $250,000.[99]

III. TORTIOUS BREACH IN OKLAHOMA

A. *A Statutory Problem*

Despite statutory authority expressly limiting exemplary damages

92. *Id.*
93. *Id.* at 455, 168 Cal. Rptr. at 729 (emphasis added).
94. 92 Idaho 902, 453 P.2d 551 (1969).
95. *Id.* at 907, 453 P.2d 556 (emphasis added) (citations omitted).
96. 392 F. Supp. 982 (D.V.I. 1975).
97. *Id.* at 1007.
98. 474 F. Supp. 651 (M.D.N.C. 1979).
99. *Id.* at 664, 666 (citing Newton v. Standard Ins. Co., 291 N.C. 105, __, 229 S.E.2d 297, 301, 302 (1976)).

to "obligation(s) not arising from contract,"[100] Oklahoma courts have awarded punitive damages in bad faith breaches involving willful negligence,[101] fraud,[102] conversion,[103] gross negligence,[104] and oppression or malicious disregard for another's rights.[105] The usual rationale

100. OKLA. STAT. tit. 23, § 22 (1981). The Oklahoma statute states that,

> In any action for the breach of an obligation *not arising from contract*, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

Id. (emphasis added). *See also* OKLA. STAT. tit. 22, §§ 21, 61 (1981).

Numerous Oklahoma cases have followed the rule that punitives cannot be awarded on a breach of contract. *See e.g.*, Phillips Mach. Co. v. LeBlond Inc., 494 F. Supp. 318, 325 (N.D. Okla. 1980) (breach of distribution agreement); Wheeler v. Stuckley, Inc. v. Southwestern Bell Tel. Co., 279 F. Supp. 712, 715 (W.D. Okla. 1968) (omission of phone book listing); Fox v. Overton, 534 P.2d 679, 681 (Okla. 1975) (failure to purchase stock); Pointer v. Hill, 536 P.2d 358, 361 (Okla. 1975) (violation of broker's exclusive listing contract); Burton v. Juzwik, 524 P.2d 16, 19-20 (Okla. 1974) (breach of oral trust agreement by transfer of an oil and gas lease).

101. *See* Lilly v. St. Louis & San Francisco Ry., 27 Okla. 830, 115 P. 347 (1911) (train passenger suffered a loss of time, additional fares and inconveniences when carried beyond her junction point in disregard of repeated efforts for service and information).

102. *See* Hobbs v. Smith, 31 Okla. 521, 122 P. 502 (1912) (sale of hogs allegedly known to be infected with cholera despite promises to the contrary). Since *Hobbs*, fraud has been frequently used to justify punitive awards for actions arising from a contract. *See* Investors Preferred Life Ins Co. v. Abraham, 375 F.2d 291 (10th Cir. 1967) (surviving corporation liable for false representations regarding stock ownership by executive of merged corporation); Bridgess v. Youree, 436 F. Supp. 458 (W.D. Okla. 1977) (agent/horse trainer induced client to sell horse at price known to be below actual value); Payne v. Volkswagon, Inc., 70 F.R.D. 565 (W.D. Okla. 1976) (sale of a defective automobile); Taylor v. Parker, 611 P.2d 1131 (Okla. 1980) (real estate agent misrepresented his authority to sell property); Barnes v. McKinney, 589 P.2d 698 (Okla. 1978) (contractor acquired final payment on home construction by falsely representing that the plumbing had passed final city inspection); Z. D. Howard Co. v. Cartwright, 537 P.2d 345 (Okla. 1975) (involving the intentional sale of a used car as new); Southwestern Bell Tel. Co. v. Brown, 519 P.2d 491 (Okla. 1974) (town residences relied on telephone company's broken promise to provide area wide service). *But cf.* Smith v. Johnston, 591 P.2d 1260 (Okla. 1978) (electrician's inferior and dangerous wiring insufficient to support finding of fraud); Allred v. Rabon, 572 P.2d 979 (Okla. 1977) (concealment of an alleged breach of duty to file an estate claim did not suffice to prove fraud in an attorney malpractice suit where the original negligent breach of duty was not sufficiently proven and a separate cause of action for fraud was not plead); Fox v. Overton, 534 P.2d 679, 681 (Okla. 1975) (allegation that defendant "willfully and fraudulently refused to complete said sale as agreed" did not suffice as fraud even though the failure to abide by the sales agreement resulted in plaintiff having to close his business).

103. *See* Davidson v. First Bank and Trust Co., 609 P.2d 1259 (Okla. 1976) (malicious equipment repossession); Sopkin v. Premier Pontiac, Inc., 539 P.2d 1393 (Okla. Ct. App. 1975) (malicious or reckless repossession and resale by auto dealer).

104. Oklahoma Natural Gas Co. v. Pack, 186 Okla. 330, 97 P.2d 768 (1939) (failure to provide reasonable gas service resulted in a breach of an implied duty of reasonable care).

105. *See* Sunray DX Oil Co. v. Brown, 477 P.2d 67, 68, 70 (Okla. 1970) (pollution resulting from lessee's 31 separate salt water leaks evidenced such reckless disregard as to infer malice); Tomlinson v. Bailey, 289 P.2d 384, 387 (Okla. 1954) (oil property lessee allowed salt water to overflow onto owner's land, enabling jury to infer malice from the reckless disregard of owner's rights); Morriss v. Barton, 200 Okla. 4, 190 P.2d 451 (1947) (lessee's unnecessary damage to oil and gas wells, or sabotage, found sufficient to warrant punitives which were reversed due to defendant's death prior to trial); Nichols v. Burk Royalty Co., 576 P.2d 317 (Okla. Ct. App. 1977) (lessee's salt-water pollution due to ten-year-old pipes, known to be rusted out, evidenced such

given by the courts is that

> every contract carries with it the common law duty to perform with care, skill, reasonable expediency and faithfulness which, if breached, may be treated as a tort as well as a breach, giving the injured party the option to elect which legal course to pursue. This allows recovery in situations where a breach of contract results from willful, intentional, purposeful or malicious conduct, thus expanding the statutory right to recover punitive damages ordinarily excluded by statute in contract actions.[106]

Although these middle view holdings are ostensibly based on a tort separate from bad faith breach itself, the cases are, nevertheless, still blatantly contrary to the statutes. The existence of a contract obligation and relationship in these cases cannot be ignored or fairly described as merely incidental to the action. Consider, for instance, the difference between a situation where a defendant devised a contractual relationship intentionally designed to harm the plaintiff and another situation where a contract was originally made in good faith but was later maliciously breached.[107] The distinction between the two situations is moot under the generic terms of whether the harm arose from a contractual obligation. In fact, one might argue that under both scenarios it is the breach of the agreement which proximately causes the harm.

Interestingly, the Supreme Court of Oklahoma has also directly rebuked this statutory objection. In a recent insurance case, the court expressly disapproved two prior federal district court decisions which invoked the statutes to limit recovery on an insurance contract to the face value of the policy.[108] The Oklahoma court gave little explanation other than to say it was the intent of the legislature that insurance companies be imposed with an obligation to pay valid claims promptly.[109]

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reckless disregard as to infer malice); Holliman v. Ed Grier Volkswagen, Inc., 554 P.2d 117 (Okla. Ct. App. 1976) (car salesman's inducing customer to leave car, later converted, and impeding discovery of used car's defects evidenced oppressive overreaching to gain unfair advantage); Ford Motor Credit Co. v. Goings, 527 P.2d 603, 605, 609 (Okla. Ct. App. 1974) (malice and oppression inferred from repossession of auto after full payment tendered).

106. Djowhazaden v. City Nat. Bank & Trust Co., 646 P.2d 616, 620, n.3 (Okla. App. 1982) (quoting Natural Gas Co. v. Pack, 186 Okla. 330, 97 P.2d 768 (1939)).

107. *See supra* note 70; Food Fair Stores v. Hevey, 275 Md. 50, —, 338 A.2d 43, 45-46 (1975) (discussing use of contract to deliberately harm).

108. Christian v. American Home Assurance Co., 577 P.2d 899, 903-04 (Okla. 1977) (disapproving Renfroe v. Preferred Risk Mutual Ins. Co., 296 F. Supp. 1137 (N.D. Okla. 1969); Ledford v. Travelers Indemnity Co., 318 F. Supp. 1333 (W.D. Okla. 1970)).

109. *Christian*, 577 P.2d at 903.

B. *The New Tort*

The Supreme Court of Oklahoma appeared to strongly support the new tort of bad faith breach in *Christian v. American Home Assurance Co.*,[110] which could be considered as Oklahoma's delayed response to *Crisci*.[111] *Christian* went further than *Crisci* in several respects,[112] but was based on the same implied-in-law duty concept which was further emphasized in California by *Gruenberg v. Aetna Insurance Co.*[113] The Supreme Court of Oklahoma reinforced this view again in *Timmons v. Royal Globe Insurance Co.*[114] However, in another recent case, *Mann v. State Farm Mutual Auto Insurance Co.*,[115] the court wrote:

> *Christian* contemplated that as a general rule the action in tort and the actions in contract would be brought together, arising as they do from the same transaction. Oklahoma has adopted the general rule that a cause of action includes all theories of recovery or types of damages stemming from one occurrence or transaction . . . .[116]

These Oklahoma insurance cases are very similar to the California insurance cases in that they acknowledge that the implied convenant or duty arises from the contract, but deny that the recovery of punitive damages is allowed for the breach of contract itself.[117]

Although it appears that Oklahoma has effectively adopted the new tort for insurance cases, it is unclear as to whether the tort will be expanded outside the insurance field.[118] Authority against the adop-

110. 577 P.2d 899 (Okla. 1977).

111. *See supra* note 70 and accompanying text.

112. *Christian* was based on bad faith conduct which was much more subtle, "the wrongful conduct being in the nature of a deviation from standard ethical business practices; a simple refusal to settle promptly," while the conduct in the California cases was "apparent and outrageous." Comment, *New Tort*, *infra* note 118, at 610; *see supra* notes 56, 59, 60 and accompanying text. In California an insurer must give the interests of the insured at least as much consideration as it gives its own; in Oklahoma the insurer must give the insured's interest more than his own. *See* Comment, *New Tort*, *infra* note 118, at 611.

113. 9 Cal. 3d 566, 573, 510 P.2d 1032, 1036, 108 Cal. Rptr. 480, 484 (1973).

114. 653 P.2d 907, 911-12 (Okla. 1982); *see* Recent Development, Timmons, *infra* note 118, at 351-52.

115. 699 P.2d 768 (Okla. 1983).

116. *Id.* at 772; *see* Rutherford v. Halliburton Co., 572 P.2d 966 (Okla. 1977) (damages may be sought in only one lawsuit).

117. *See Gruenburg*, 9 Cal. 3d at 573-74, 510 P.2d at 1037, 108 Cal. Rptr. at 485 (quoting *Crisci*, 66 Cal. at 430, 426 P.2d at 177, 58 Cal. Rptr. at 71) (California denials); Timmons v. Royal Globe Ins. Co., 653 P.2d 907, 911-13 (Okla. 1982) (Okla. denials). *See also* Manis v. Hartford Fire Ins. Co., 681 P.2d 760 (Okla. 1984). In *Manis*, the court, noting that insurers have a right to a good faith dispute, reversed an award for punitive damages because it was not clearly shown that the insurer unreasonably and in bad faith withheld payment. *Id.* at 762. The court clearly distinguished the case from others where "there was a breach of duty *independent* of the breach of contract." *Id.* (emphasis added).

118. *See* Comment, *The New Tort of Bad Faith Breach of Contract:* Christian v. American Home Assurance Corp., 13 TULSA L.J. 605 (1978) [hereinafter cited as Comment, *New Tort*]; Re-

tion of the new tort in Oklahoma dates back to 1936 when the Supreme Court of Oklahoma decided *Sinclair Refining Co. v. Shaffer*.[119] In *Sinclair*, the plaintiff owned a filling station and the defendant was his supplier.[120] The defendant also rented him equipment that was necessary for handling, storing, dispensing and advertising. After the plaintiff refused to accept an offer by the defendant to buy his station, the defendant removed his equipment in an attempt to force the plaintiff out of business, thereby breaching the contract.[121] The jury awarded the plaintiff $929.20, including $500.00 for punitive damages,[122] however, the Oklahoma Supreme Court reversed the punitive damages award and held that the trial judge should not have given instructions permitting the punitive damages because the "action was founded upon contract and not upon tort."[123] The fact that the defendant was guilty of malice, actual or presumed,[124] was viewed as irrelevant.

In contrast, the same court in *Smith v. Johnston*[125] expressly contemplated that the "relation between remedies in contract and tort is a confused field."[126] In *Smith*, the plaintiff sued the general contractor and electrician hired to build his home[127] because aluminum wire was used rather than the agreed copper, and the installation was so negligent as to be a fire hazard.[128] The jury awarded $432.25 in actual damages[129] against both defendants in addition to punitive damages of $25,000 against the contractor and $10,000 against the electrician.[130] The court, however, ordered remittitur of $5,000 against each defendant, which the plaintiff accepted.[131]

On appeal, the Oklahoma Supreme Court overruled the finding of

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cent Development, *Insurer's Liability for Bad Faith Damages:* Timmons v. Royal Globe Insurance Co., 18 TULSA L.J. 349 (1982) [hereinafter cited as Recent Development, Timmons]. *See also* Woodward, Punitive Damages for Bad Faith Breach of an Insurance Contract: It's Unconstitutional, 54 OKLA. B.J. 1125, 1125 (1983) (concludes that limiting punitive damages to insurance contracts is discriminatory).

119. 177 Okla. 610, 61 P.2d 571 (1936).
120. *Id.* at 571.
121. *Id.*
122. *Id.* at 572.
123. *Id.*
124. *Id.*
125. 591 P.2d 1260 (Okla. 1978).
126. *Id.* at 1262.
127. *Id.* at 1261.
128. *Id.*
129. Actual damages were attributable to the cost to make the house conform to the contract. *Id.*
130. *Id.*
131. *Id.*

fraud as erroneous since "the remedy of a finished product not conforming to the contract is nonperformance and not one based on fraud."[132] Nevertheless, the court affirmed the reduced verdict, concluding that the jury was properly instructed as to the "requirements of actual damages and of finding malice through an utter indifference to or conscious disregard for the owners rights as a 'willful and wanton' course of action."[133]

The significance of *Smith* is that it demonstrates judicial frustration with the middle view. The facts in *Smith* were sufficient for a finding of malice,[134] but were not sufficient to satisfy the requisite elements of an established tort since there was not a sufficient finding of actual harm necessary to support a claim of negligence.[135] Consequently, the decision can only be explained by stretching a negligence theory or condemning malicious behavior as being tortious in itself.

The Oklahoma Supreme Court further expressed a willingness to consider malicious behavior in contractual situations when it decided the recent case of *Storck v. Cities Service Gas Co.*[136] *Storck* involved a dispute over the interpretation of terms to a gas lease.[137] The court first concluded that "under [the] circumstances the contract interpretation appears to be without malice and intent to deliberately injure as a matter of law."[138] It explained, "The law does not require each party to a contract to be infallibly correct in its interpretation of contract terms at peril of being charged with punitive damages. It only requires that each party conduct itself *reasonably*."[139] Finally, the court continued

132. *Id.* at 1262. "We find no tort action based upon fraud nor evidence of fraud upon which the jury could have allowed the actual damages determined. . . ." *Id.*

133. *Id.* at 1264.

134. *Id.*

135. A necessary element of negligence is that there must be "[a]ctual loss or damages resulting to the interests of another . . . . The threat of future harm, not yet realized is not enough . . . . Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it . . . ." W. PROSSER, *supra* note 8, § 30, at 143-44. The actual harm in *Smith* was just the actual cost of nonperformance. 591 P.2d at 1263.

136. 634 P.2d 1319 (Okla. Ct. App. 1981).

137. *Id.* at 1320. The case has rather technical facts, which were summarized in an oil and gas article as follows:

> In the unusual case of *Storck* . . . the lessee operated an underground gas storage facility, and the lessor sued for the right to drill to formations both above and below the stored gas, though this was prohibited by the gas storage lease. The courts refused to concel the gas storage lease, but they did hold that the landowners could drill to any formation not used for storage, subject to supervision by the storage lessee. The lessors were also held entitled to damages for any drainage that occurred after they filed suit.

Waldman, *The Demise of Automatic Termination*, 54 OKLA. B.J. 2767, 2770 (1983).

138. *Storck*, 634 P.2d at 1323.

139. *Id.* (emphasis added).

with these conspicuous words: "We agree certain contract breaches can and do amount to tortious conduct; that such breaches, if founded in malice, fraud or oppression, could even justify punitive damages. However, breach . . . under these circumstances does not automatically form the basis for punitive damages."[140]

The court stated that the breach of the contract, considered alone, was insufficient for an award of punitive damages, but remanded the case to the trial court to determine the extent to which the requisite facts for punitive damages, i.e., malice, fraud, or oppression, were present.[141]

It is difficult to read *Storck* without concluding the court has finally recognized the tort of bad faith breach of contract. It is interesting that there is no mention of the presaging insurance cases here.[142] Although *Storck* may be just another "middle view" case,[143] it does indicate that the Oklahoma Supreme Court could be in favor of granting punitive damages if the breach is malicious enough.[144]

IV. CONCLUSION

The foregoing analysis has shown that the status of tortious breach in Oklahoma is about on par with the rest of the nation as a whole. This means that within this jurisdiction cases and other authority show three successive and conflicting theories existing simultaneously.[145] These theories were described herein as the traditional, middle and third views.[146]

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140. *Id.*

141. *Id.* at 1324.

142. However, the court did cite six middle view cases. *Id.* at 1323 n.2. *See* Oklahoma Natural Gas Co. v. Pack, 186 Okla. 330, 97 P.2d 768, 770 (1939) ("Accompanying every contract is a common law duty to perform . . . with care, skill, reasonable expediency, and faithfulness, and a . . . failure . . . is a tort as well as a breach of contract. . . .").

143. *See* Jackson v. Glasgow, 622 P.2d 1088 (Okla. Ct. App. 1980). In *Jackson*, the court stated that exemplary damages are not allowed for breach of contractual obligations but may be awarded if the defendant's breach amounts to an independent willful tort. *Id.* at 1090.

144. Oklahoma seems to recognize an unnamed general tort where one recklessly or wantonly disregards another's rights such that malice and evil intent may be inferred. *See* Thiry v. Armstrong World Indus. 661 P.2d 515, 515 (Okla. 1983) (asbestos products liability suit, setting standard of "reckless disregard for the public safety"); McCorkle v. Great Atl. Ins. Co., 637 P.2d 583, 586 (Okla. 1981) (failure to settle fire loss claim was unreasonable and malicious through indifference to and conscious disregard for plaintiff's rights); Smith v. Johnston, 591 P.2d 1260, 1264 (Okla. 1978) (homeowner awarded punitives from electrician whose poor workmanship constituted utter indifference to and conscious disregard for the owner's rights; punitives awarded per finding of malice, and willful and wanton action); *see supra* notes 104-117 and accompanying text.

145. *See supra* notes 100-144 and accompanying text.

146. *See supra* notes 7-9 and accompanying text.

The authority supporting the traditional and middle views is considerable.[147] These two views clearly are the law, but predicting which view will be applied in a given case, and therefore the outcome, is very uncertain business. There is little authority supporting the third view, however, the robust dicta in *Storck*,[148] the essence of middle view cases like *Christian*,[149] and problems with middle view cases like *Smith*,[150] all combine to show the third view is present in Oklahoma. This work refutes the argument that the middle view's transferance to other torts suffice to make the tort of bad faith breach unnecessary. A fractionalized, indirect and often uncertain approach to the problem of bad faith breach can hardly be preferable to the more candid third view. Allowing punitive damages for any sufficiently malicious breach of contract directly focuses on the heart of the wrongfulness and represents a logical and natural progression of law.

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147. *See supra* notes 100-110 and accompanying text.
148. 634 P.2d 1319 (Okla. Ct. App. 1981). *See supra* text accompanying note 140.
149. 577 P.2d 899 (Okla. 1977). *See supra* notes 110-117 and accompanying text.
150. 591 P.2d 1260 (Okla. 1978). *See supra* notes 125-134 and accompanying text.