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Contracts: *Allis-Chalmers v. Lueck*: Exposing the Fatal Flaw in the "Christian Principle" of Tort Liability for Breach of Good Faith

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Introduction

Seldom does any element of a United States Supreme Court decision go unnoticed for long. Even the tiniest hint of dicta is food for hungry legal scholars. However, *Allis-Chalmers v. Lueck*[1] is an exception. Although the opinion has been cited several hundred times since it was rendered in 1985, courts and legal scholars have ignored an underlying determination in the case. The determination is not precedent because the subject matter is left to the states. It is not dicta because the determination was necessary to the Court's ultimate decision. That underlying determination—that the contract duty of good faith has no extra-contractual element upon which to base a tort—is the subject of this note.

This note first discusses the importance of the tort/contract characterization, then describes the duty of good faith as a common law and statutory element of all contracts. It summarizes the history of tort liability for breach of the duty of good faith as the tort developed in the insurance context, giving rise to Oklahoma's seminal case, *Christian v. American Home Assurance Co.*[2]

The note then describes the flaw in the reasoning of *Christian* and its antecedents, as exposed by the United States Supreme Court in *Allis-Chalmers*. Two subsequent United States Supreme Court cases, *Metropolitan Life Insurance Co. v. Massachusetts*[3] and *Pilot Life Insurance Co.*

* Written by Carolyn S. Smith. The Section of Business Law of the American Bar Association awarded first prize in its 1989 Student Writing Contest to an article comprised of this note and the author's prior note, *Contracts: Rodgers v. Tecumesh Bank: Reevaluating the "Christian Principle" of Tort Liability for Breach of Good Faith*, 42 OKLA. L. REV. 291 (1989). A version of the winning article is published as Smith, *Allis-Chalmers v. Lueck: The United States Rejects Tort Liability for Breach of Good Faith*, 43 CONSUMER FIN. L. QUARTERLY REP. 258 (1989).

1. 471 U.S. 202 (1985).

2. Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977), *amended* (1978). The tort has been the subject of extensive comment nationwide. For prior comment on Oklahoma's tort, see Woodard, *Punitive Damages for Bad Faith Breach of an Insurance Contract: It's Unconstitutional*, 54 OKLA. B.J. 1125 (1983) (questioning the constitutionality of singling out the insurance industry); Koss, *The Constitutionality of Awarding Punitive Damages against an Insurance Company for Bad Faith: A Reply*, 54 OKLA. B.J. 1999 (1983) (defending the constitutionality of the tort); Note, *Punitive Damages for Breach of Insurance Contract*, 3 OKLA. CITY U.L. REV. 280 (1978) (examining the new tort); Note, *Tortious Breach of Contract in Oklahoma*, 20 TULSA L.J. 233 (1984) (discussing Oklahoma's conflict between tort and contract); Note, *The New Tort of Bad Faith Breach of Contract: Christian v. American Home Assurance Corp.* [sic], 13 TULSA L.J. 605 (1978) (discussing the elements of bad-faith breach).

3. 471 U.S. 724 (1985).

v. Dedeaux,[4] clarify the Court's description of the flaw. The note then discusses how the existence of the flaw has impaired the Oklahoma Supreme Court's ability to properly apply and restrict the tort.

The note concludes that the United States Supreme Court was correct: Tort liability for breach of the duty of good faith does violate traditional tort/contract distinctions and cannot be justified by the policy concerns inherent in insurance contracts.

The Tort/Contract Characterization

Whether an action for breach of the duty of good faith sounds in tort or contract directly affects the available remedies.[5] Traditionally, breach of a contractual duty has not given rise to an action in tort for consequential or punitive damages.[6] Instead, the rule established in *Hadley v. Baxendale*[7] defined the normal contract damages: the injured party could recover only those damages which were foreseeable and contemplated by the parties when the contract was made.[8] The *Hadley* rule is reflected in an Oklahoma statute which allows no punitive damages in contract.[9] Another statute allows only the amount due, with interest, as damages for breach of an obligation to pay money only.[10]

Furthermore, section 1-106 of the Uniform Commercial Code (U.C.C.) expressly limits damages which may be awarded under the Code for breach of the duty of good faith.[11] Under section 1-106, damages are limited to

4. 481 U.S. 41 (1987).

5. *See* Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958) (plaintiff allowed tort damages, but also allowed the more lenient statute of limitations for contracts); Lewis v. Farmers Ins. Co., 681 P.2d 67 (Okla. 1983) (insured allowed two-year statute of limitations for tort although recovery under this policy was limited to one year). *See also* Note, *Actions: Tortious Breach of Contract, A Plaintiff's Dilemma*, 26 OKLA. L. REV. 249 (1973) (analyzing the choice of statutes of limitation).

6. *See, e.g.*, Hobbs v. Smith, 27 Okla. 830, 115 P. 347, 350 (1911) ("statute fixing liability for exemplary damages does so upon those obligations, not arising from contract, and is in harmony with the common law on this subject."). *See generally* Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977) (discussing the historical distinction between tort and contract remedies and the breakdown of this distinction).

7. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

8. As stated by one author, "[i]n the case of a breach of contract, the goal of compensation is . . . the awarding of a sum which is the equivalent of performance of the bargain—the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled." C. MCCORMICK, LAW OF DAMAGES 560-61 (1935). *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 351-55 (1979); Farnsworth, *Legal Remedies for Breach of Contract*, 70 COL. L. REV. 1145, 1200-10 (1970).

9. 23 OKLA. STAT. § 21 (1981).

10. 23 OKLA. STAT. § 22 (1981). *See also* S. WILLISTON & G. THOMPSON, SELECTIONS FROM WILLISTON'S TREATISE ON THE LAW OF CONTRACTS 853-54 (rev. ed. 1938). One commentator interprets this rule to be in direct conflict with the *Hadley* rule because it is so restrictive. *See* Freemon, *Reasonable and Foreseeable Damages for Breach of an Insurance Contract*, 21 TORT & INS. L.J. 108 (1985).

11. U.C.C. § 1-106 (1988).

those necessary to put the aggrieved party in as good a position as the party would have been in if the contract had been performed. Consequential, special and penal damages are expressly excluded, except where they are specifically provided for by the U.C.C. or by other rules of law.[12]

Therefore, if the duty of good faith is nothing more than a contract duty, simple breach of that duty in Oklahoma should subject the breaching party to no more than contract damages. If, however, the duty of good faith lies outside the contract, breach of the duty could subject the breaching party to the full array of tort damages, including punitive damages.

The Duty of Good Faith

The Common-Law Duty of Good Faith

The common law recognizes an implied covenant of good faith in every contract.[13] The Oklahoma Supreme Court has noted that the freedom to contract is not absolute: "[T]he interests of the people of Oklahoma are not best served by a marketplace of cut-throat business dealings where the law of the jungle is thinly clad in contractual lace."[14]

However, at common law it is not clear whether the duty of good faith, while it lies within the contract, also lies outside the contract so that breach of the duty could be actionable in tort. The common law does provide that if a tort is committed in a contractual situation, the aggrieved party may forego the right to sue on the contract and sue on the tort instead: "[A]lthough there are some few cases not in harmony, the rule under the great weight of authority is well established that, where a breach of contract is permeated with tort, the injured person may elect to waive the contract and recover in tort. . . ."[15] The contract is not considered the basis of the tort action; the contract is merely the means by which the tort is perpetrated.[16]

12. *Id. See, e.g.*, U.C.C. §§ 2-710, 2-715 (1988).

13. "Every contract contains an implied covenant that neither party shall do anything which will destroy or injure other party's right to receive fruits of the contract." Wright v. Fidelity & Deposit Co. of Md., 176 Okla. 274, 277, 54 P.2d 1084, 1087 (1935) (citing Kirke LaShelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 188 N.E. 163, 167 (1933)).

14. Hall v. Farmers Ins. Exch., 713 P.2d 1027, 1029 (Okla. 1985).

15. Hobbs v. Smith, 117 Okla. 830, 115 P. 347, 350 (1911). Another line of cases following Jackson v. Central Torpedo Co., 117 Okla. 245, 246 P. 426 (1926), would require the plaintiff to proceed under the two-year statute of limitations for tort actions rather than the five-year statute for contract actions. The conflict between these two rules is discussed in Note, *Actions: Tortious Breach of Contract, A Plaintiff's Dilemma*, 26 OKLA. L. REV. 249 (1973). *See also* Oklahoma Natural Gas Co. v. Pack, 186 Okla. 330, 97 P.2d 768 (1939) (gas company operating as public utility has extra-contractual duty to provide safe, continuous supply of fuel).

16. For example, in a contract for the purchase of a car, an actionable tort for fraud arises if the seller misrepresents the condition of the car. The purchase contract has set the stage for the fraud, but a misrepresentation of present fact made to induce another to act to his detriment is fraud whether or not a contract is involved. The action for fraud is said,

The Duty of Good Faith Under the Uniform Commercial Code

The U.C.C. imposes a statutory duty of good faith in every commercial contract. Like the common law, the U.C.C. does not say whether this duty of good faith lies only within the contract or whether it also lies outside the contract.[17] Section 1-203 of the U.C.C. simply states that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."[18] Section 1-201(19) defines good faith as "honesty in fact," a purely objective test.[19] Section 1-102(3) prohibits contracting parties from disclaiming the duty of good faith, although they may set reasonable standards by which it can be measured.[20]

The Duty of Good Faith in Insurance Contracts

The idea that the duty of good faith could lie both within a contract and outside the contract originated with insurance contracts.[21] Tort damages for breach of the duty of good faith were first awarded in third-party insurance contracts.[22] In this generic fact pattern, Joe Consumer buys liability insurance. The contract gives the insurer the right and the duty to represent Joe in settlement negotiations with third parties to whom he may be liable. After an accident, the injured third party offers to settle

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therefore, to exist outside the contract. *See* Boise Dodge, Inc. v. Clark, 92 Idaho 902, 453 P.2d 551 (1969). In MSA Tubular Products, Inc. v. First Bank & Trust Co., Yale, Okla., 869 F.2d 1422 (10th Cir. 1989), a bank was held liable for similar fraudulent misrepresentation in a credit report, although there was no contractual relationship with the plaintiff. According to the Fourth Circuit, "South Carolina is the only state in the nation which allows punitive damages for conduct which does not give rise to an independent tort claim." Edens v. Goodyear Tire & Rubber Co., 858 F.2d 198, 201 (4th Cir. 1988).

One test for the tort/contract determination is the distinction between nonfeasance and misfeasance. Complete nonperformance of a promise is breach of contract, but defective performance may be a tort. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 658-62 (5th ed. 1984).

See also Z.D. Howard Co. v. Cartwright, 537 P.2d 345 (Okla. 1975) (consummation of the contract does not preclude recovery for fraudulent inducement of the contract). *See generally* Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977) (discussing breach of fiduciary duty, fraud, and independent, wilful torts arising from contract). *Cf.* Note, *Punitive Damages in Contract Actions—Are the Exceptions Swallowing the Rule?*, 20 WASHBURN L.J. 86 (1980) (discussing exceptions to the general rule).

17. For a strong argument that the duty of good faith as defined by the U.C.C. is intended to be directive, not remedial, see Note, *K.M.C. Co. v. Irving Trust Co.: Discretionary Financing and the Implied Duty of Good Faith*, 81 NW. U.L. REV. 539, 550 n.75 (1987).

18. U.C.C. § 1-203 (1988).

19. U.C.C. § 1-201(19) (1988).

20. U.C.C. § 1-102(3) (1988).

21. *See* Note, *Contracts: Rodgers v. Tecumseh Bank: Reevaluating the "Christian Principle" of Tort Liability for Breach of Good Faith*, 42 OKLA. L. REV. 291 (1989) (overview of the history of the tort).

22. *See, e.g.*, Boling v. New Amsterdam Cas. Co., 46 P. 916 (Okla. 1935) (establishing the third-party tort in Oklahoma).

within the policy limits, relieving Joe of any further liability. However, the insurer chooses to risk a larger award by rejecting the settlement offer. The third party sues for more than the policy limit and wins. Joe is now liable for the amount over the policy limit.

If Joe sues the insurer in tort for breach of the duty of good faith, he may recover the full amount of the judgment. The tort is said to be based on the extra-contractual "agency" duty,[23] which requires the insurer to protect Joe's interest even to the detriment of its own interest.

In recent years, courts have extended the tort to first-party insurance contracts in which this special relationship does not exist.[24] For example, Joe Consumer buys insurance which provides benefits directly to him should disaster strike. When disaster does strike, the insurer, without good reason, either ignores his claim or refuses to pay. Because Joe's bills pile up and other creditors may pressure him, he may begin to suffer emotionally as well as financially. Even if the insurer pays Joe part or all of the benefits due, not even the full amount can completely compensate Joe for the hardships caused by the insurer's unreasonable delay.

If Joe files an action in tort for breach of the duty of good faith, he may recover for all losses he has suffered and for his emotional distress. He may recover punitive damages if the insurer's refusal to promptly pay the benefits was malicious. The tort is said to be based on the insurer's extra-contractual duty to pay the policy benefits promptly.[25]

Many states, including Oklahoma, trace their first-party tort to a California case, *Gruenberg v. Aetna Insurance Company*.[26] When Gruenberg's insured building burned, he was charged with arson, partially because of the accusations of the insurer's private investigator. The insurer then demanded that he submit to an examination and produce documents as required by the state insurance code.[27] Gruenberg refused to do so while charges were pending. When the charges were dismissed for lack of probable cause, Gruenberg told the insurer he was now ready to be examined. The insurer denied liability because Gruenberg had not submitted to the examination earlier.

Gruenberg sought both compensatory and punitive damages for the "outrageous conduct and bad faith" of the insurer.[28] The trial court sustained a demurrer to the complaint, citing an earlier case with similar facts. That case had affirmed that the insured could not recover unless he had complied with the terms of the contract.[29] The California Supreme Court, citing third-party insurance cases, held that a cause of action in

23. *See, e.g.*, Douglas v. United States Fid. & Guar. Co., 81 N.H. 371, 127 A. 708 (1924) (proposing the agency duty as a basis for the tort).

24. *See, e.g.*, Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973) (establishing the first-party tort).

25. *Id.*

26. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

27. CAL. INS. CODE § 2070 (West 1972).

28. *Gruenberg*, 510 P.2d at 1035.

29. *Id.* at 1036 (citing Hickman v. London Assurance Co., 184 Cal. 524, 195 P. 45 (1920)).

tort existed for an insurance company's breach of the duty of good faith even if the insured had not fulfilled his contract obligations.[30]

The court acknowledged that the duty imposed in the third-party context—to accept reasonable settlements—was different from the duty in the first-party context—to pay policy proceeds promptly. Nonetheless, the court reasoned that these two responsibilities were "merely two different aspects of the same duty" to act in good faith in the discharge of contractual responsibilities. The court reasoned that because the duty was imposed by law instead of by the terms of the contract, it was a nonconsensual duty rather than a consensual one. Therefore, breach of the duty would lie in tort.[31]

The court's treatment of subordinate issues was conflicting. On the one hand, the court held that noninsurer defendants could not be held liable for breach of the duty of good faith because they were strangers to the contract.[32] This holding emphasized the tort's contractual nature. On the other hand, the court held that the insured's breach of his contractual duty did not excuse the insurer's breach because the insurer's duty was unconditional and independent of the insured's performance.[33] This holding emphasized the noncontractual nature of the tort. It also ignored the fact that the insured's duty was imposed by the insurance code just as the insurer's duty was.

The lone dissenter made several observations germane to this note's discussion.[34] First, the dissent noted the lack of fiduciary duty in the first-party context.[35] Second, the dissent noted that because all fire insurance policies issued in California are written by the legislature, they cannot be adhesion contracts.[36] Therefore, the dissent could find no extra-contractual duty upon which to base a tort. Third, the dissent noted that, although the words "maliciously" and "wilfully" conveyed the plaintiff's outrage, the elements of a tort had not been proved.[37] Fourth, the dissent noted that prior case law would not excuse the insured's failure to submit to examination—the duty of good faith should be a two-way street. The dissent concluded that the majority's holding directly violated the insurance code[38] and would allow plaintiffs to ignore their own obligations, no

30. *Gruenberg*, 510 P.2d at 1036-37 (citing Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967), and Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958)).

31. *Gruenberg*, 510 P.2d at 1037.

32. *Id.* at 1038-39.

33. *Id.* at 1040. The court also noted that even if the insurer's performance was dependent on the insured's performance, the insured's failure to submit to examination was excused because it was induced by the insurer's bad conduct. *Id.* at n.9.

34. *Id.* at 1042-49.

35. *Id.* at 1045.

36. *Id.*

37. *Id.* at 1044-45.

38. *Id.* at 1047-49. Section 2071 of the California Insurance Code states that "[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of

matter how well defined, yet demand performance by the insurance company.[39]

Thus, *Gruenberg* established a tort aimed at one specific class of contracting parties. Although insurers grumble, a general attitude prevails that the tort is an appropriate recognition of the special relationship between insurer and insured.

Oklahoma's First-Party Tort

Oklahoma adopted *Gruenberg* in a 1977 case, *Christian v. American Home Insurance Co.*[40] The facts of *Christian* are an excellent example of the typical first-party fact pattern. Christian purchased disability insurance, then became permanently and totally disabled in an accident covered by that policy. He presented proof of the accident to the insurer, but the insurer refused to pay benefits and refused to tell him why benefits were denied. He sued the insurer for breach of contract and sought the maximum disability benefits, plus interest. Although the insurer defended its conduct vigorously, the lack of a valid defense became obvious during the trial.[41] The trial court held for Christian.[42]

Christian then filed a second action, this one in tort for breach of the duty of good faith. He sought compensatory damages, damages for mental suffering and distress, punitive damages, and all attorney fees and litigation costs of the prior action. The trial court sustained the insurer's motion for summary judgment, but the Oklahoma Supreme Court reversed, holding that a tort action for breach of the duty of good faith exists in Oklahoma.[43]

The supreme court reasoned that the insurer was a quasi-public company in a special relationship with the insured.[44] The court also observed that the insurer had a statutory duty to pay benefits promptly.[45]

The court rejected the insurer's argument that the agency relationship created by an insurer's control of litigation against the insured did not exist.[46] The court also rejected the insurer's argument that, according to

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law or equity unless all the requirements of this policy shall have been complied with . . ." *Id.* at 1048 (quoting Claflin v. Commonwealth Ins. Co., 110 U.S. 81, 97 (1884)).

39. *Gruenberg*, 510 P.2d at 1048-49.

40. 577 P.2d 899 (Okla. 1977), *amended* (1978).

41. *Id.* at 900.

42. *Id.*

43. *Id.* at 904.

44. *Id.* at 902.

45. *Id.* at 903. 36 OKLA. STAT. § 4405(A)(8) (Supp. 1984) requires that all individual accident and health policies contain a standard clause stating that indemnities will be paid as soon as the insurer receives written proof of the loss. Another statute, 36 OKLA. STAT. § 4505 (1981), extends this protection to beneficiaries of group policies.

The *Christian* court's observation that the insurer had a statutory duty to pay benefits promptly was in error. See text accompanying note 86.

46. *Christian*, 577 P.2d at 904.

an Oklahoma statute,[47] the remedy for breach of an obligation to pay "money only" was the amount due with interest.[48] Furthermore, the court rejected two federal court decisions.[49] These decisions had rejected tort damages because tort damages were barred by state statute.[50]

The Oklahoma Supreme Court has not questioned the validity of *Gruenberg*.[51] However, when the United States Supreme Court examined the tort established by *Gruenberg*, it concluded that a basis for the tort does not exist in the first-party insurance contract.[52]

The United States Supreme Court's Assessment of the First-Party Tort

Allis-Chalmers v. Lueck

Although the Court would not normally address a state's definition of a tort, the Court addressed Wisconsin's definition in *Allis-Chalmers v. Lueck*[53] because the insurance policy at issue in the case was part of a collective bargaining agreement between an employer and a union. The insurance plan was administered by a private insurance company.

The ultimate question before the Court was whether the action for breach of the duty of good faith could be heard as a tort in state court. If the action was merely a contract action arising out of the collective bargaining agreement, it was preempted by section 301 of the Labor Management Relations Act (LMRA).[54] Therefore, a preliminary question before the Court, and the question relevant here, was whether the duty of good faith was only a contractual duty, or whether the duty could support an action in tort.[55]

47. 23 OKLA. STAT. § 22 (1971).

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

49. *See* Renfroe v. Preferred Risk Mut. Ins. Co., 296 F. Supp. 1137 (N.D. Okla. 1969) (action for money damages only, under 23 OKLA. STAT. §§ 9, 22, 96); Ledford v. Travelers Indem. Co., 318 F. Supp. 1333 (W.D. Okla. 1970) (no punitive damages because action is based on and arises out of contract). The *Christian* court distinguished these cases because they "presuppose that the obligation of an insurance company is for the payment of money only." 577 P.2d at 903.

50. *Christian*, 577 P.2d at 903. 23 OKLA. STAT. § 22 (1981) states that the remedy for breach of an obligation to pay money only is the amount due, with interest. 23 OKLA. STAT. § 9 (Supp. 1986) allows tort damages for "breach of an obligation not arising from contract."

51. For a recent application of *Christian*, see Everaard v. Hartfort Accident & Indem. Co., 842 F.2d 1186 (10th Cir. 1988).

52. *See* Allis-Chalmers v. Lueck, 471 U.S. 202 (1985).

53. *Id.*

54. *Id.* at 206. Section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185(a) (1982), states that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States . . . ." *See generally* Shaller, *The Availability of Punitive Damages in Breach of Contract Actions Under Section 301 of the Labor Management Relations Act*, 50 GEO. WASH. L. REV. 219 (1982) (punitive damages unavailable under section 301); Coleman, *Muddy Waters: Allis-Chalmers and the Federal Policy Favoring Labor Arbitration*, 44 WASH. & LEE L. REV. 345 (1987) (overview of the labor law context of *Allis-Chalmers*).

55. *Allis-Chalmers*, 471 U.S. at 212-13.

The facts of *Allis-Chalmers* have a familiar ring. After Lueck was injured on the job, the insurer allegedly withheld his benefits periodically without just cause.[56] He suffered physical and emotional distress and incurred attorney fees because of the delays, but he was eventually paid in full. Instead of complying with the grievance procedure provided in the collective bargaining agreement, Lueck sued his employer and the insurer in Wisconsin state court. He sought tort damages, including punitive damages, for breach of the duty of good faith.[57]

The trial court held that Lueck's claim could be brought in federal court under section 301 as a contract action but that it could not be brought in state court as a tort.[58] The court of appeals affirmed the judgment, but addressed other areas of labor law instead of the tort/contract question.[59]

The Wisconsin Supreme Court reversed.[60] The court held that the suit did not arise under section 301 because breach of the duty of good faith was not breach of contract.[61] The court emphasized the fiduciary relationship between the parties and Wisconsin's tradition of regulating insurers.[62] The court noted that the insurer had ultimately paid the claim, thereby fulfilling its contract, but that it could still be liable in tort for unreasonable delay. The court reasoned that while the insurer had violated its duty of good faith imposed by the state insurance laws, it had not violated the contract.[63]

On appeal, the United States Supreme Court first defined the narrow preemptory effect of section 301. The Court noted that section 301 did not preempt a state rule merely because it related in some way to a provision in a contract, or more generally to the parties to that contract.[64] Only those state rules that did not exist independently of the contract would be preempted by federal law.[65] Therefore, even if the duty of good faith existed both within the contract and apart from it, Lueck's action would be allowed to proceed as a tort in state court.

The Supreme Court next considered the origin and the scope of the Wisconsin tort. The Court noted that nothing in Wisconsin law indicated

56. *Id.* at 207.

57. *Id.* at 206.

58. *Id.*

59. *Id.* at 206 n.3. The court of appeals held that the action was preempted by federal law because Allis-Chalmers' conduct was arguably an unfair labor practice under section 8(a)(5) of the NLRA, *as amended*, 29 U.S.C. § 158(a)(5) (1982).

60. *Allis-Chalmers*, 471 U.S. at 207.

61. *Id.* at 220.

62. Lueck v. Aetna Life Ins. Co., 116 Wis. 2d 559, 342 N.W.2d 699, 704 (1984), *rev'd sub nom.* Allis Chalmers v. Leuck, 471 U.S. 202 (1985).

63. *Allis-Chalmers*, 471 U.S. at 213.

64. *Id.* at 213. The Court acknowledged that in some situations, the employee could pursue both contract and non-contract actions arising out of the same facts. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (black employee alleging discriminatory firing could file Title VII action); Peabody-Galion v. A. V. Dollar, 666 F.2d 1309 (10th Cir. 1981) (wrongful discharge in violation of Oklahoma's Workers' Compensation Act not preempted).

65. *Allis-Chalmers*, 471 U.S. at 214-15.

that the tort was anything more than a contract violation.[66] The Court unanimously concluded that the Wisconsin court's claim that the tort was independent of the contract meant no more than that the implicit duty to act in good faith differed from the explicit contractual duty to pay.[67]

Therefore, the Court's answer to the preliminary question was that the duty of good faith lay only within the contract. The duty contained no element apart from the contract upon which to attach tort liability. Accordingly, the action for breach of the duty was a contract action preempted by section 301.

Metropolitan Life Insurance Co. v. Massachusetts

Subsequent cases have further clarified the Court's reasoning in *Allis-Chalmers*. In *Metropolitan Life Insurance Co. v. Massachusetts*,[68] decided just months after *Allis-Chalmers*, the Court addressed more directly the policy arguments made by the Wisconsin Supreme Court.

The preemptive federal statute in question was the Employee Retirement Income Security Act (ERISA).[69] Preemption under ERISA is similar to that under section 301 of the LMRA (addressed in *Allis Chalmers*), but a savings clause in ERISA states that ERISA will not relieve any person from any state law which "regulates insurance."[70]

In *Metropolitan*, an insurer had failed to include in individual insurance policies a provision mandated by Massachusetts statute.[71] The Massachusetts Attorney General brought suit on behalf of the state's residents. The insurer asserted that the cause of action was preempted by ERISA.[72]

The Court held that the attorney general's cause of action was not preempted because laws regulating the terms of insurance policies are laws which regulate insurance.[73] The Court noted that the statute in question

66. *Id.* at 217.

67. *Id.* at 216.

68. 471 U.S. 724 (1985).

69. 29 U.S.C. § 1144(a) (1974).

70. Section 301 of the LMRA preempts "suits for violation of contracts." 29 U.S.C. § 185(a) (1982). ERISA supersedes any state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144 (b)(2)(A) (1974). The breadth of the ERISA preemption was underscored in Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). Nonetheless, the Court noted in *Metropolitan* that "the presumption is against preemption." *Metropolitan*, 471 U.S. at 741. Ignoring the impact of the ERISA's savings clause in the present context, ERISA may be more preemptive in practice than the LMRA. *See* Nelson, *Pilot Life Ins. Co. v. Dedeaux: The Supreme Court's Federalization of Employee Benefit Law*, 23 TORT & INS. L.J. 507 (1988).

71. MASS. ANN. LAWS ch. 175, § 47B (Law. Co-op. 1975), requires that every general health policy or employee health-care plan that covers hospital and surgical expenses also provide certain minimum mental health care benefits if the policy covers a Massachusetts resident.

72. *Metropolitan*, 471 U.S. at 734.

73. *Id.* at 758. The Court quoted from an earlier case: "The relationship between insurer and insured, *the type of policy which could be issued*, its reliability, its interpretation, and enforcement—these were the core of the 'business of insurance.' . . . Statutes aimed at protecting or regulating this [insured/insurer] relationship, directly or indirectly, are laws

was an integral part of the insured/insurer relationship, that it regulated the allocation of risk, and that it was directed specifically to insurers.[74]

Pilot Life Insurance Co. v. Dedeaux

After *Metropolitan*, commentators speculated that the savings clause in ERISA would foreclose preemption of an action analogous to *Allis-Chalmers* brought under ERISA instead of the LMRA.[75] If, as the Wisconsin Supreme Court had argued, the state's need to regulate insurance companies was the basis for tort liability for breach of good faith, then the tort should be saved to the states under ERISA. Nonetheless, in *Pilot Life Insurance Co. v. Dedeaux*,[76] the Court preempted under ERISA an action for breach of good faith factually similar to that in *Allis-Chalmers*.

In *Pilot Life*, the Court considered the same factors it had considered in *Metropolitan* for determining whether the tort for breach of the duty of good faith concerned the business of insurance. First, the Court noted that the tort did nothing to allocate risk. Second, it determined that any connection between the tort and the insurer/insured relationship was "attenuated at best" because the tort was no more integral to that relationship than any general contract law is integral to a contract.[77] Finally, when the Court surveyed the history of Mississippi's tort for breach of the duty of good faith, the Court found nothing in the tort itself to foreclose its use in any breach of contract even though the Mississippi Supreme Court had identified the tort with the insurance industry.[78]

Therefore, *Pilot Life* emphatically reaffirmed the position the Court had taken in *Allis-Chalmers*: The duty of good faith is nothing more than a contract duty, and tort liability for breach of the duty cannot be justified by a state's desire to regulate the insurance industry.

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regulating the 'business of insurance.'" *Id.* at 743 (emphasis by the court). The Court also referred to the McCarran-Ferguson Act, 15 U.S.C. § 1011, 1012(a) (1988), which provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." *Id.* at 744 n.21.

74. *Id.* at 743. The Court used three criteria it has previously developed in Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982), to interpret the McCarran-Ferguson Act's "business of insurance": 1) does the practice transfer or spread a policy-holder's risk; 2) is the practice integral to the policy relationship between insurer and insured; and 3) is the practice limited to the insurance industry. *Metropolitan*, 471 U.S. at 743.

75. *See, e.g.*, Engel, *ERISA: To Preempt or Not to Preempt, That Is A Question!*, 22 Tort & Ins. L.J. 431 (1987).

76. 481 U.S. 41 (1987).

77. *Id.* at 50-51.

78. *Id.* at 49-51. Mississippi's first-party tort relies on the reasoning of *Gruenberg* and *Christian*. *See, e.g.*, Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916 (Ala. 1981). The Court also referenced a 1926 case, American Ry. Express Co. v. Bailey, 142 Miss. 622, 107 So. 761 (1926), in which punitive damages were awarded for a finance company's failure to cable money to the plaintiff. *Bailey* relied on the traditional common law choice between tort and contract. This choice also exists under Oklahoma law. See *supra* notes 15-16 and accompanying text.

To summarize these three cases, *Allis-Chalmers* established that the duty of good faith has no extra-contractual element upon which to base a tort. *Metropolitan* and *Pilot Life* taken together established that the tort does not address the policy concerns underlying insurance contracts.

Analysis

The Validity of Applying Allis-Chalmers in the Present Context

Allis-Chalmers and its progeny cannot be reconciled with *Gruenberg v. Aetna Insurance Co.* or *Christian v. American Home Assurance Co.*, nor can the cases be adequately distinguished. *Gruenberg* and *Christian* held that the duty of good faith can support a tort because the duty is based on extra-contractual policy concerns inherent in the insurer-insured relationship. Conversely, *Allis-Chalmers* and *Pilot Life* held that the duty has no extra-contractual element and does not address these policy concerns.

The first impulse would be to say that labor law and insurance law are too disparate to allow a comparison. However, the preliminary tort/contract question is more fundamental than either the insurance law or labor law label. *Allis-Chalmers* and *Pilot Life* were insurance cases even though they arose in the labor context. Their fact patterns fit the typical first-party insurance contract described in this note.[79] The Wisconsin and Mississippi Supreme Courts derived their reasoning for the tort from the *Gruenberg* decision, which was based on the special relationship between the parties and on state regulation of the insurance industry.[80] The United States Supreme Court specifically addressed these policy concerns.

Furthermore, the focus on labor law in *Allis-Chalmers* and *Pilot Life* does not detract from the usefulness of these cases in the present context and may actually enhance it. The Court's stated reluctance to preempt unless absolutely necessary reinforces the validity of its conclusion that the duty of good faith lay only in contract. The Court was emphatic that if an extra-contractual duty could be found, that duty could be the basis for an independent tort.[81]

79. One slight difference in the fact patterns is interesting in light of traditional contract law: In *Allis-Chalmers* the insured received his benefits before he sued; Christian did not receive his benefits until after the court ordered them paid. According to the reasoning of W. Keeton, *supra* note 16, the misfeasance in *Allis-Chalmers* would more likely be considered a tort than the nonfeasance in *Christian*.

An analogy can be drawn between Oklahoma's damages statutes and the federal labor laws: there can be no tort damages (or state action) if the action is in contract, but there can be tort damages (or state action) if the action has an independent basis outside the contract, even if it also has a basis within the contract.

80. *See generally* Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W.2d 368 (1978); Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916 (Ala. 1981). Ironically, *Gruenberg* relied in turn on Hilker v. W. Auto. Ins. Co., 204 Wis. 1, 235 N.W. 413 (1931), an early Wisconsin third-party insurance case in which tort liability for breach of the duty of good faith was recognized.

81. The Supreme Court reemphasized yet again the narrowness of its *Allis-Chalmers* holding in Lingle v. Norge Div. of Magic Chef, 108 S. Ct. 1877 (1988). In that case, the

Juxtaposition of *Metropolitan* and *Pilot Life* underscores the Court's distinction between extra-contractual imposition of a duty (in which policy concerns may play a major role) and contractual performance of that duty.

The Flawed Reasoning Underlying the Tort

Courts which accept *Gruenberg* do not recognize the fatal difference between third-party and first-party insurance situations. Nor do they recognize the significance of that difference when the third-party tort is applied to first-party situations.

In the third-party liability contract, the insurer's duty is an agency duty, sometimes referred to as a fiduciary duty, to represent the insured's interest even at the risk of acting contrary to its own interest. Fiduciary duties have long been recognized as existing outside of contract and giving rise to tort liability. But those duties do not exist in the first-party insurance contract. Instead, the duty to pay benefits in exchange for the duty to pay premiums is nothing more than an arms-length bargain between insurer and an insured, an adversarial relationship common to all contracts.[82] Each party has the implied contract duty of good faith, but without more, neither has an additional duty to the other which could support a tort.

In spite of this fundamental difference between the first-party and the third-party situations, courts still try to justify the tort in first-party contracts. Typically, their arguments focus on the insurer/insured relationship. In addition to the flawed analogy to the third-party situation, the arguments fall generally into one or more of five categories. None of these arguments can withstand close scrutiny.

First, courts emphasize that, unlike contract provisions, the insurer's duty of good faith is "*imposed* by law." Insurance codes commonly require a standard clause in which the insurer promises to pay proceeds promptly.[83] In addition, the California Insurance Code requires a standard clause in which the insured promises to cooperate with the insurer's investigation.[84] The *Gruenberg* court did not explain why it considered one duty "imposed by law" a contractual duty and the other, also "imposed by law," a duty outside the contract upon which to base a tort. Nonetheless, because of

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Court refused to preempt a worker's action in tort for retaliatory discharge after filing a workers' compensation claim. The Court stated that even if the state law claim and the labor law claim required addressing "precisely the same facts," the state law claim would not be preempted if it could be resolved outside of the collective-bargaining agreement. *Id.* at 1883.

82. *Allis-Chalmers*, 471 U.S. at 216. The Kansas Supreme Court recognized the adversarial nature of the relationship in Spencer v. Aetna Life & Casualty Ins. Co., 227 Kan. 914, 611 P.2d 149, 155 (1980). *See also* Beck v. Farmers Ins. Exch., 701 P.2d 795 (Utah 1985) (third-party and first-party situations are not analogous).

83. *See* 36 OKLA. STAT. §§ 4405(A)(8), 4505 (1981 & Supp. 1984).

84. *See* CAL. INS. CODE §§ 2070-71 (West 1972).

that distinction, the insured was allowed to breach his legal duty, yet recover in tort when the insurer breached its legal duty.[85]

In addition, the statutes referenced in *Gruenberg* and *Christian* required only that the insurer *promise* to pay the proceeds promptly. The California Supreme Court held recently that there is no private cause of action under the statute which actually creates a duty "imposed by law" to pay insurance proceeds promptly.[86] To require by statute that the insurer *promise* to pay the contracted benefit may indeed impose a duty outside the contract upon which to base tort liability, but that duty is to make the promise, not to pay the benefits.[87]

The United States Supreme Court clarified this distinction in *Metropolitan* and *Pilot Life*. The Court concluded in *Metropolitan* that failure to include a required provision in an insurance contract can be an extra-contractual tort. However, the Court concluded in *Pilot Life* that failure to perform according to a contract provision, whether imposed by law or not, is simple breach of contract.

Second, courts refer to the duty of good faith as "*implied* in law." The duty is implied by both the U.C.C. and common law. In this sense, the obligation is based on the principle that the law assumes that a person promises to do what he ought to do. While contract liability arises from the contract, the implied duty arises from the liability.[88] Because the duty does not arise from the consent of the parties, it is not a true contract. Instead, this duty is called a "constructive contract," or "quasi-contract."[89] However, the duty is still enforceable only as a contract duty.[90]

85. *See Gruenberg*, 510 P.2d at 1040. A trend toward "comparative bad faith" may be developing in California. *See* Mercedes Benz of N.A. v. Hartford Accident & Indem. Co., No. CV-86-2371 (D. Cal. May 26, 1989) (insurer recovered $4.5 million in punitive damages for insured's breach of good faith); Cal. Cas. Gen. Ins. Co. v. Superior Ct., 173 Cal. App. 3d 274, 218 Cal. Rptr. 817 (1985) (comparative fault principles of tort law should apply to bad faith). *See also* Shipstead & Thomas, *Comparative and Reverse Bad Faith: Insured's Breach of Implied Covenant of Good Faith and Fair Dealing as Affirmative Defense or Counterclaim*, 23 TORT & INS. L.J. 215 (1987). Comparative fault is antithetical to the policy arguments such as adhesion and unfair bargaining power used to justify this tort.

86. *See* Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

87. The Seventh Circuit, interpreting *Allis-Chalmers*, held that if a statute merely instructs a contracting party to honor a contract, then the statute does not provide a sufficient basis for an independent action because it invokes no duty other than that already imposed by the contract. National Metalcrafters v. McNeil, 784 F.2d 817, 824 (7th Cir. 1986). *But see* 36 OKLA. STAT. § 1222 (1986), which now requires an insurer to settle claims in good faith. This statute is part of the Unfair Claims Settlement Practices Act, which does not provide a private cause of action. Instead, the Act is enforceable by the insurance commissioner. Section 1219 now provides recovery in contract for failure to pay policy proceeds promptly. 36 OKLA. STAT. § 1219 (1986).

88. BLACK'S LAW DICTIONARY 293 (5th ed. 1979).

89. *Id.*

90. *Id.* The Oklahoma Supreme Court, in Uptegraft v. Home Ins. Co., 662 P.2d 681 (Okla. 1983), stated that "[a]n action is one *ex contractu* when it is derived from (a) an express promise, (b) a promise implied in fact or (c) a promise implied in law." *Id.* at 684.

Third, courts find a "quasi-public" nature of insurance companies by drawing an analogy to public utilities. Public utilities and private companies performing public service duties have long been held to a duty higher than that of the average contracting party.[91] However, this duty is firmly grounded in specific enabling legislation and cannot be lightly extended to other businesses.

Furthermore, the duty of a public utility to the citizenry generally adheres even in the absence of a contract and extends beyond the contract.[92] The lack of a quasi-public duty upon insurers is underscored by courts' reluctance to extend the insurer's duty of good faith beyond the contract. So far, the Oklahoma Supreme Court has strictly limited the tort to the parties to an insurance contract.[93]

A particular case on point is *Allstate Insurance Co. v. Amick*,[94] in which injured third parties were not allowed to sue the liability insurer who refused to settle with them in good faith. These innocent injured parties were the members of the public that mandatory liability insurance is intended to protect.[95] If the insurer's duty of good faith were truly a quasi-public, extra-contractual duty, the presence or absence of a contract with the injured parties would be irrelevant. Instead, the fact that the insurer's duty does not extend beyond the contract indicates that it is not a quasi-public duty.

See also Piggee v. Mercy Hosp., 199 Okla. 411, 186 P.2d 817, 818 (1947) (implied contracts "may be enforced by an action *ex contractu*"). *Piggee* was quoted with approval in the present context by Justice Opala's dissent in Burk v. K-Mart Corp., 60 OKLA. B.J. 305, 310 (1989).

91. *See, e.g.*, Oklahoma Natural Gas Co. v. Pack, 186 Okla. 330, 97 P.2d 768 (1939).

92. *See id.* at 770.

93. *See* Roach v. Atlas Ins. Co., 60 OKLA. B.J. 537 (1989) (third-party beneficiary to life insurance policy can recover); Allstate Ins. Co. v. Amick, 680 P.2d 362 (Okla. 1984) (injured third parties could not recover from insurance company which refused to settle with them); Scivally v. Time Ins. Co., 724 F.2d 101 (10th Cir. 1983) (no duty to process application promptly). *But see* 36 OKLA. STAT. 1241 (Supp. 1987) (if insurer does not process application or return premium within 45 days, insurer is liable for the coverage which the premium would have covered).

In *Gruenberg*, the court refused to extend the tort liability to the insurance adjusting firm and the law firm which acted as agents of the insurer. Because these firms were not parties to the actual contract, they could not be liable for breach of the duty of good faith. *Gruenberg*, 510 P.2d at 1038-39. More recently, innocent insureds have been denied recovery because of misrepresentations of adjusters acting on their behalf. *See* O'Donnell, *Imputation of Fraud and Bad Faith: The Role of the Public Adjuster, Co-Insured and Independent Adjuster*, 22 TORT & INS. L.J. 662 (1987).

94. 680 P.2d 362 (Okla. 1984). *See also* Wilson v. Gipson, 753 P.2d 1349 (Okla. 1988) (insurance contract is not for the benefit of injured third parties).

95. *See* Duff v. Alliance Mut. Casualty Co., 296 F.2d 506, 509 (10th Cir. 1961) ("The [Oklahoma Safety Responsibility Act] does of course reflect a public policy to afford financial protection to injured parties by requiring [liability insurance]."); Hibdon v. Casualty Corp. of Am., 504 P.2d 878, 882 (Okla. Ct. App. 1972) (purpose of Oklahoma Safety Responsibility Act is "to make drivers and owners responsible for injury or loss they cause to any person").

Fourth, courts emphasize that insurance contracts are contracts of adhesion in which insurers have unfair bargaining power. However, as the *Gruenberg* dissent noted, the terms of Gruenberg's fire insurance policy had been been written by the state legislature and imposed upon both parties by state law.[96] Presumably, the legislature had carefully weighed both positions.[97] Likewise, fire insurance policies in Oklahoma must adhere to a form contract.[98]

Moreover, courts extend the tort to commercial insurance contracts which frequently are arms-length transactions.[99] The statutes which require the insurer's promise to pay promptly[100] do not apply to these commercial insurance transactions, in which the insureds may bargain through their attorneys or other experienced professionals. Adhesion and unfair bargaining power are not a significant factor in these commercial contracts.

In addition, adhesion and unfair bargaining power are problems of contract formation and interpretation, not of contract performance. Insurance codes address adhesion and bargaining power in their regulation of contract terms. Statutes which prescribe that certain terms be included in insurance contracts may go to the heart of the adhesion problem. *Metropolitan* affirms that the duty to form a contract according to statutory requirements is extra-contractual and can be the basis for a tort. But *Allis-Chalmers* and *Pilot Life* affirm that an action for nonperformance of a contract term does not address these policy concerns.

Finally, courts note that insureds buy insurance to avoid risk while insurers are in the business of risk-taking.[101] This argument ignores the fact that all contracts involve risk by both parties. Protection from unforeseen circumstances is a feature of many commercial contracts, including, for example, the common "line of credit" revolving credit plan or ordinary consumer credit card. If instead the courts are emphasizing that the losses the insured suffers when the insurer delays payment are the same losses he sought to insure against, then the obvious solution is to acknowledge that these losses may, and should, be addressed by contractual compensatory damages.[102]

The result of this reasoning is confusion. Courts generally recognize that the duty of good faith is separate from other contract duties, such as the duty to pay money.[103] Either duty may be breached independently of the

96. *See* CAL. INS. CODE §§ 2070-71 (West 1972).

97. *Gruenberg*, 510 P.2d at 1043.

98. 36 OKLA. STAT. § 4803 (Supp. 1985). The Oklahoma Supreme Court extended the tort to all insurance contracts in McCorkle v. Great Atl. Ins. Co., 637 P.2d 583 (Okla. 1981), which involved a fire insurance contract. A predecessor to the present section 4803 was in effect at that time.

99. *See McCorkle*, 637 P.2d 583 (Okla. 1981), in which the Oklahoma Supreme Court extended the tort liability to all insurance contracts.

100. *See* 36 OKLA. STAT. § 4405(A)(8), 4505 (1981 & Supp. 1984).

101. *See, e.g., Christian*, 577 P.2d at 902.

102. *See* Note, *Contracts: Rodgers v. Tecumseh Bank: Reevaluating the "Christian" Principle of Tort Liability for Breach of Good Faith*, 42 OKLA. L. REV. 291 (1989).

103. *See, e.g., Lueck*, 342 N.W.2d at 707.

other, or they may be breached together.[104] But courts err in reasoning that because the duties are different, one is in contract and the other is in tort. That reasoning is analogous to reasoning that because an apple is not an orange, it cannot be a fruit.

The Effects of the Flaw

Because the tort/contract characterization is normally a matter of state law, *Allis-Chalmers* is precedent only in the preemption context.[105] Therefore, *Gruenberg* and *Christian* are still good law.[106] Nonetheless, the seriously flawed reasoning of these cases becomes apparent as courts attempt to justify applying tort liability in one contract, but not in another. Recognition of the flaw could lead to better-reasoned cases in the future. For example, the Oklahoma Supreme Court has refused to extend the tort to two types of non-insurance contracts: commercial lending contracts and employment-at-will contracts. On its face, the limitation is illogical.

The Oklahoma Supreme Court addressed the commercial lending contract in *Rodgers v. Tecumseh Bank.*[107] More than any other single Oklahoma case, *Rodgers* exemplifies the need for a critical reexamination of the *Christian* principle of tort liability for breach of the duty of good faith in light of *Allis-Chalmers. Rodgers* is consistent with *Allis-Chalmers,* but *Rodgers* cannot be reconciled with *Christian.* Banks may be more quasi-public than insurance companies. Commercial insurance customers may be as sophisticated as commercial lending customers. Individual consumers may be just as vulnerable with their bankers as they are with their insurers.[108]

104. For example, bad-faith delayed payment is a breach of good faith, but not a breach of the duty to pay money. Good-faith nonpayment of money may be a breach of the duty to pay money, but not a breach of good faith. Bad-faith refusal to pay money may be a breach of both duties.

105. The California Supreme Court acknowledged the preemptive effect of *Pilot Life* for violation of even the statutory duty to pay insurance proceeds promptly in Commercial Life Ins. Co. v. Superior Court, 47 Cal. 3d 473, 764 P.2d 1059, 253 Cal. Rptr. 682 (1988), *cert. denied,* 109 S. Ct. 2087 (1989). The Ninth Circuit held similarly in Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489 (9th Cir. 1988), *cert. denied,* 109 S. Ct. 3216 (1989).

106. See *supra* note 45.

107. 756 P.2d 1223 (1988).

108. The *Rodgers* decision and its juxtaposition to *Christian* are critically examined in Note, *Contracts: Rodgers v. Tecumseh Bank: Reevaluating the "Christian Principle" of Tort Liability for Breach of Good Faith,* 42 OKLA. L. REV. 291 (1989). *See generally* Pierce & Harrell, *Financers as Fiduciaries: An Examination of Recent Trends in Lender Liability,* 42 OKLA. L. REV. 79 (1989); Oklahoma Bankers Ass'n and Oklahoma Bar Ass'n, *Critical Issues in Today's Banking,* Pub. No. 309, Sept. 16, 1988 (recent developments); Bahls, *Termination of Credit for the Farm or Ranch: Theories of Lender Liability,* 48 MONT. L. REV. 213 (1987) (application of the principle to acceleration, demands for more collateral, loan negotiations); Flick & Replansky, *Liability of Banks to their Borrowers: Pitfalls and Protections,* 103 BANKING L.J. 220 (1986) (definition of the liability); Lawrence & Wilson, *Good Faith in Calling Demand Notes and in Refusing to Extend Additional Financing,* 63 IND. L. J. 825 (1988) (application of U.C.C. Art. I good faith definition to banks); Note, *K.M.C. Co. v. Irving Trust Co.: Discretionary Financing and the Implied Duty of Good*

Just as the commercial lending contract is logically indistinguishable from the commercial insurance contract, other kinds of contracts may be similarly indistinguishable. For example, the consumer lending contract, the attorney-client fee contract, and the real estate contract could be vulnerable to "judicial excursions into the amorphous concept of bad faith."[109] As a Ninth Circuit judge remarked, this tort "throws kerosene on the litigation bonfire by holding out the allure of punitive damages, a golden carrot that entices into court parties who might otherwise be inclined to resolve their differences."[110]

At another extreme, the Oklahoma Supreme Court apparently does not recognize that the duty of good faith is not a threat to employment-at-will.[111] Simply put, if there is no duty to retain an employee, there can be no duty to retain the employee in good faith. Anxious to assure that the tort does not nullify employment-at-will in Oklahoma, the court declared, "We reject the implication of an obligation of good faith and fair dealing in every employment-at-will contract."[112] This holding violates one of the basic tenets of contract law. Both the employee and the employer have the right to expect the duties which are a part of the contract to be performed in good faith. For example, even an employee at will has the right to timely payment for his services.

Confusion over the definition of the duty extends to the Oklahoma Supreme Court's treatment of wrongful dismissal (of employees) in violation of public policy. Some justices appear not to recognize that this dismissal is not breach of the contract duty of good faith.[113] Instead, it is a violation of a public policy separate from the contract.

Ironically, this violation of public policy is separate from the contract in exactly the same way that courts would have breach of the duty of good faith be separate. Although it may arise from the same facts as the contract, the question of liability can be decided without interpreting the

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Faith, 81 Nw. U.L. REV. 539 (1987) (subjective and objective good faith obligations under the U.C.C.); Harrell, *The Bank-Customer Relationship: Evolution of a Modern Form*, 11 OKLA. CITY U.L. REV. 641 (1986) (detrimental reliance may be the focus of the expanding tort).

109. Hinson v. Cameron, 742 P.2d 549, 554 (Okla. 1987).

110. Oki Am. Inc. v. Microtech Int'l, Inc., 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring).

111. *See generally* Note, *Employers and Employees: Hinson v. Cameron: Dimming the "Hall Light" on Oklahoma's "Revised" Employment-at-Will Doctrine?*, 41 OKLA. L. REV. 314 (1988); Note, *Employment-at-Will and Wrongful Discharge in Oklahoma*, 23 TULSA L. J. 495 (1988); Tepker, *Oklahoma's At-Will Rule: Heeding the Warnings of America's Evolving Employment Law?*, 39 OKLA. L. REV. 373 (1976).

112. Burk v. K-Mart, Inc., 60 OKLA. B.J. 305, 306 (1989).

113. In *Burk*, the majority held that dismissal in violation of public policy could be heard in tort as an "exception" to the general rule. *Id.* at 307. Justices Opala and Lavender would have the "exception" sound in contract unless the dismissal was accompanied by malice, negligence or reckless indifference. *Id.* at 308-09. Justice Simms would have the action sound in contract if at all. *Id.* at 311.

contract. Because the action for dismissal in violation of public policy does not lie in contract, tort liability is the only appropriate remedy.

If the Oklahoma Supreme Court were to adopt the reasoning of *Allis-Chalmers*, *Metropolitan*, and *Pilot Life*, insureds could still be protected.[114] A recent statute protecting insureds did not exist when *Christian* was decided.[115] In addition, contract remedies could be interpreted more broadly to protect those who need protection without blurring the traditional distinction between tort and contract.[116]

Conclusion

The duty of good faith is an implied contractual duty to perform the expressed contract duties in good faith. It is imposed by statute in some contracts; it is implied by the common law in all contracts. Because the duty does not extend beyond the contract, it is not a quasi-public duty. According to the United States Supreme Court, any connection between tort liability for breach of this duty and the policy concerns inherent in the insurer/insured relationship is "attenuated at best." The Court also determined that the duty of good faith has no element outside the contract upon which to base tort liability.

Failure to recognize the purely contractual nature of the duty has led the Oklahoma Supreme Court to render poorly reasoned decisions in other areas of the law. Because tort liability for breach of this duty violates traditional distinctions between tort and contract, the tort threatens the entire system of contract law relationships. Therefore, *Christian* should be overruled.

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114. *See* Rodgers v. Tecumseh Bank, 756 P.2d 1223 (Okla. 1988).
115. *See* 36 OKLA. STAT. § 1219 (1986).
116. *See* Beck v. Farmers Ins. Exch., 701 P.2d 795 (Utah 1985).