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Shook: Litigation, Regulation, and Legislation Strategies to Better Protect Oklahoma's Earthquake Insurance Policyholders

The relatively recent and increasingly frequent rash of earthquakes plaguing the state has shaken Oklahomans and their insurers. While the number of Oklahoma residents with earthquake insurance policies and endorsements has risen with the occurrence of seismic activity, this emerging market for insurers is under-regulated and provides scant protection for policyholders.¹ Much litigation in the arena of Oklahoma's earthquakes has been devoted, with varying degrees of success, to direct challenges from property owners against the oil and gas operations believed to be responsible for the induced earthquake outbreak in the state.²

While individuals seem willing to bring this fight, insurers have been notably absent.³ Though insurance companies have the legal right to seek compensation from a source of the damage through the doctrine of subrogation,⁴ they have thus far been unwilling to enforce this right. Instead, they have left their insureds with shocking claim denial rates.⁵ Accordingly, Oklahoman insureds have been left to their own devices in remedying the damages resulting from the state's earthquakes. This Comment will argue that a combination of litigation, regulation, and legislative action will better hold absent insurers accountable during this unprecedented time in the state's history.

After briefly explaining the development of Oklahoma's earthquake crisis, Part I of this Comment will argue that the state's earthquake insurance policyholders would be better served at this time by pursuing litigation against their insurers rather than the oil and gas industry itself. Specifically, this Comment will highlight and advocate for the use of the often-overlooked doctrine of illusory insurance coverage as a potential source of relief. Part II will assert that while the Oklahoma Insurance Department and its Commissioner have taken valuable steps towards recognizing a lack of accountability from insurers handling earthquake claims, more stringent regulation under the Commissioner's authority and the Unfair Claims

1. Michael Thrasher, *Oklahoma Insurance Regulators Still Face an Unprecedented Risk*, FORBES (July 28, 2016, 4:05 PM EDT), <https://www.forbes.com/sites/michaelthrasher/2016/07/28/oklahoma-insurance-regulators-still-face-an-unprecedented-risk/#3e6d0b851536> ("More Oklahomans are buying earthquake insurance than ever before . . .").

2. *See infra* Section I.A.

3. *See infra* Section I.B.

4. *See infra* Section I.B.

5. *See infra* Section I.B.

Settlement Practices Act (UCSPA) is necessary. Finally, Part III will contend that the Oklahoma Legislature should establish a state-managed earthquake insurance authority, similar to the authority established by California in response to the infamous Northridge Earthquake of 1994.⁶ Because litigation is the most readily available of these proposed solutions for Oklahoma's policyholders, this Comment will spend the better part of its text addressing this avenue. To most effectively protect Oklahomans with earthquake insurance, however, its citizens and officials should confront each of these three facets—litigation, regulation, and legislation—contemporaneously.

Preface: A Brief History of Oklahoma's Earthquakes

While the earthquake outbreak across the South and Midwest is a recent phenomenon,⁷ some scholarship has already addressed emerging legal and environmental issues presented by the outbreak.⁸ That scholarship, however, has focused mainly on the underlying causes and development of earthquakes throughout states, including Oklahoma.⁹ Although this Comment primarily focuses on the insurance industry's response—or lack thereof—to the pandemic, some explanation of the likely tie between these earthquakes and the oil and gas industry provides a necessary context for this Comment.

There remains little scientific doubt that oil and gas operations have induced the seismic activity permeating Oklahoma.¹⁰ Early causal studies of increased earthquakes focused largely on hydraulic fracturing (“fracking”) practices but yielded little evidence connecting fracking to earthquakes and

6. The Northridge Earthquake was the most destructive earthquake in California since 1906 and the costliest ever. *Northridge Earthquake of 1994*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Northridge-earthquake-of-1994> (last visited Jan. 7, 2020).

7. See *New Earthquake Hazards Program: Lists, Maps, and Statistics*, USGS, <https://www.usgs.gov/natural-hazards/earthquake-hazards/lists-maps-and-statistics> (last visited Feb. 25, 2020) (denoting an almost 50% decrease in earthquakes in Oklahoma between 2011 and 2012, followed by a 300% increase in the number of earthquakes between 2012 and 2013, a 560% increase between 2013 and 2014, and a 150% increase in earthquakes between 2014 and 2015).

8. See, e.g., Darlene A. Cypser & Scott D. Davis, *Liability for Induced Earthquakes*, 9 J. ENVTL. L. & LITIG. 551 (1994); Lucas Satterlee, Comment, *Injecting Earthquakes into the Energy Debate*, 34 UCLA J. ENVTL. L. & POL'Y 221 (2016).

9. See Cypser & Davis, *supra* note 8.

10. According to the USGS, Oklahoma “has the most induced earthquakes in [the] US,” with only 1% to 2% linked to hydraulic fracturing. *Earthquake Hazards: Induced Earthquakes*, USGS, https://www.usgs.gov/natural-hazards/earthquake-hazards/induced-earthquakes?qt-science_support_page_related_con=4#qt-science_support_page_related_con (last visited Jan. 8, 2020).

earth shifting.¹¹ As the frequency of earthquakes intensified, so too did the research into the underlying causes. Oklahoma quickly rose through the ranks of earthquake-prone states, reporting double the earthquakes of California in 2014 before “becom[ing] the most seismically active state in the country” in 2015.¹² In that same year, after much public debate and deliberation, the Oklahoma Geological Survey declared the primary cause of seismicity to be the injection of wastewater associated with oil and gas production.¹³ This evidentiary connection explained the proliferation of earthquakes throughout the state, specifically the even higher cluster of quakes near Jones, Oklahoma, a town located in the crosshairs of four wastewater injection wells.¹⁴

The scientific, commercial, and legislative community in Oklahoma is actively debating and implementing strategies to curb the use of wastewater injection wells and mitigate the harm resulting therefrom.¹⁵ Professor Monika Ehrman of the University of Oklahoma College of Law has published an overview of these attempts and their corresponding scientific rationales.¹⁶ As a result of this general scholarly consensus on induced quakes, the Oklahoma Corporation Commission has taken and continues to take action limiting wastewater and injection well activities.¹⁷ These solutions may better protect Oklahoma’s environment and prospectively address earthquake-related injury, but because these programs largely ignore the insurance industry, a gap in the scholarship exists regarding available redresses for insured Oklahomans seeking to repair earthquake damage.

11. Monika U. Ehrman, *Earthquakes in the Oilpatch: The Regulatory and Legal Issues Arising Out of Oil and Gas Operation Induced Seismicity*, 33 GA. ST. U. L. REV. 609, 612 (2017) (citing Matt Smith & Thom Patterson, *Debate over Fracking, Quakes Gets Louder*, CNN (June 15, 2012, 3:28 PM ET), <https://www.cnn.com/2012/06/15/us/fracking-earthquakes/index.html>).

12. *Id.* (citing Paul O’Donnell, *Days After Oklahoma Earthquake, Sierra Club Lawsuit Targets Chesapeake, Devon, and Others*, DALL. MORNING NEWS (Feb. 17, 2016, 9:51 AM), <https://www.dallasnews.com/business/energy/2016/02/17/days-after-oklahoma-earthquake-sierra-club-lawsuit-targets-chesapeake-devon-others/>); see also Blake Watson, *Hydraulic Fracturing and Tort Litigation: A Survey of Landowner Lawsuits*, PROB. & PROP., Sept./Oct. 2017, at 10, 14 (noting that, in 2015, Oklahoma averaged 2.5 seismic events per day).

13. Ehrman, *supra* note 11, at 639.

14. *Id.* at 624–25.

15. See *id.* at 638–41.

16. *Id.*

17. See Press Release, Okla. Corp. Comm’n, OCC Announces Next Step in Continuing Response to Earthquake Concerns (July 17, 2015), <https://occeweb.com/News/DIRECTIVE-2.pdf> (suggesting a gradual curb in wastewater activity, particularly in areas near active or triggered fault lines).

Where there are human-made harms, there inevitably spring lawsuits seeking compensation. Tort litigation surrounding induced earthquakes has already developed in at least twelve states, the bulk of which have centered around seismic activity in Texas, Pennsylvania, Arkansas, West Virginia, and Oklahoma.¹⁸ University of Dayton Law School's Professor Blake Watson has detailed the range of this litigation, all of which seems to focus on the oil and gas corporations allegedly responsible for the claimed harm.¹⁹ Plaintiffs have alleged claims for a variety of torts, spanning from nuisance to property damage.²⁰ Invariably, these suits have led to a battle over causation. Most typically, and especially in litigation involving property damage, oil and gas defendants "deny that their disposal operations either caused the earthquakes in question or were the proximate cause of the alleged injuries."²¹ Indeed, the question of proximate cause is the crux of these cases, and despite the general scientific consensus on the link between wastewater injection and earthquakes, the results of these claims have been mixed.²²

Because plaintiffs in these cases must prove not only general causation, but also a specific operation which created the harm at issue (for example: "waste well X caused damage Y"),²³ individual plaintiffs often face an uphill battle. This Comment suggests that plaintiffs can altogether forego this causation dispute by focusing their attention on insurers, who, unlike gas companies, owe a fiduciary duty to their policyholders.²⁴ If such litigation were to hold insurers to account for their unprecedentedly high denial rates for earthquake claims in Oklahoma, the insurers themselves may be prompted to hash out the causation issue with the oil and gas industry on a macro level, through subrogation.²⁵

18. Watson, *supra* note 12, at 11.

19. *Id.*

20. *Id.*

21. *Id.* at 15.

22. *See id.* at 14–15.

23. *Id.* at 15 ("But, even if landowners are not required to establish fault (no pun intended), they will still be required to prove causation. This may be an insurmountable problem for two reasons: first, not all earthquakes are 'induced'; and second, induced seismic activity is not easily linked to particular injection wells or to particular defendants.").

24. *Christian v. Am. Home Assurance Co.*, 1977 OK 141, ¶ 32, 577 P.2d 899, 905 (holding that insurers are "under a legal duty to act in good faith and deal fairly" with their policyholders).

25. *Black's Law Dictionary* defines "subrogation" as "[t]he substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor." *Subrogation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

*I. Earthquake Litigation in Oklahoma and the Role of the Courts in
Protecting Earthquake Insurance Policyholders*

Complex litigation (either through mass joinder or class actions) relating to the Oklahoma earthquakes has thus far exhibited only a tangential relationship to insurance carriers. These attempts at large-scale litigation have pursued a variety of theories but yielded a mixed-bag of results.²⁶ Although these cases have generally ignored insurers, they still contextualize the ability of mass litigation to address Oklahoma's earthquake problem. Moreover, the shared difficulties of this litigation make even clearer why plaintiffs may be more successful in pursuing claims against insurance carriers, which in turn could take the fight to the powerful oil and gas industry. All of this litigation, massive or otherwise, was set in motion by a 2015 decision from Oklahoma's highest court.

The Oklahoma Supreme Court opened the door to earthquake-related tort claims with its decision in *Ladra v. New Dominion, LLC*.²⁷ *Ladra* presented an opportunity for the state's high court to weigh in on the state's seismic shake-up for the first time.²⁸ The plaintiff in *Ladra* certainly suffered some of the most severe injuries in any of the Oklahoma earthquake litigation; a 5.0 magnitude earthquake struck Sandra Ladra's home in Prague, Oklahoma, causing far more than property damage.²⁹ Intense shaking collapsed Ladra's fireplace, sending stone tumbling, pinning down Ladra's legs and knees.³⁰ Seeking compensation for her medical expenses, Ladra brought suit for compensatory and punitive damages, claiming the waste well disposal practice of New Dominion, LLC was the proximate cause of her injuries.³¹ The extremity of this harm may well have caught the Oklahoma Supreme Court's attention, but it also allowed them to catalyze a new segment of the state's tort law.³²

26. See Watson, *supra* note 12, at 14–15 (providing a summary of cases filed in Oklahoma).

27. 2015 OK 53, 353 P.3d 529.

28. See *id.* ¶ 2, 353 P.3d at 530 (“Since approximately 2009, Oklahoma has experienced a dramatic increase in the frequency and severity of earthquakes.”).

29. *Id.* ¶ 3, 353 P.3d at 530.

30. *Id.*

31. *Id.* ¶¶ 1, 4, 353 P.3d at 530.

32. The *Ladra* case quickly garnered national attention as a bellwether for Oklahoma earthquake litigation. See Miguel Bustillo & Daniel Gilbert, *Energy's New Legal Threat: Earthquake Suits*, WALL ST. J. (Mar. 30, 2015, 1:22 PM ET), <https://www.wsj.com/articles/frackings-new-legal-threat-earthquake-suits-1427736148>.

The district court originally dismissed the *Ladra* case in deference to the Oklahoma Corporation Commission (OCC), holding that the OCC maintained exclusive jurisdiction over any case involving oil and gas operations.³³ The Oklahoma Supreme Court disagreed and distinguished that while the OCC does retain exclusive jurisdiction over “the resolution of public rights,” the commission holds no authority over disputes between two or more private persons.³⁴ Because this decision instructed that district courts exercise exclusive jurisdiction over private tort actions even “when regulated oil and gas operations are at issue,” the court set the stage for the future of earthquake litigation.³⁵

A. Oklahoma Earthquake Mass Litigation So Far

While *Ladra* authorized the beginning of most earthquake litigation in the state, mass-scale litigation in the area has generally struggled. A brief survey of these cases reveals a relatively unbroken chain of failures. *Sierra Club v. Chesapeake Operating, LLC* is the first of these unsuccessful attempts.³⁶ Sierra Club brought its multi-party claim not through the typical means of mass joinder or a Rule 23 class action, but through a specific provision of the Resource Conservation and Recovery Act,³⁷ which allows for private parties to sue any person “who ‘has contributed . . . to the . . . disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.’”³⁸ Pursuant to this Act, Sierra Club sought an order from the court requiring an array of oil and gas companies within Oklahoma to reduce the amount of wastewater they injected into the ground, while also establishing an earthquake monitoring center which would study the relationship between specific wells and corresponding quakes.³⁹ Despite the then-recent *Ladra* ruling allowing for individual claims to proceed beyond the purview of the OCC, the Western District of Oklahoma dismissed this case before it ever gained traction.⁴⁰

The Western District recognized its jurisdiction over the injunctive relief sought but chose to decline that jurisdiction in deference to the OCC.⁴¹ Citing

33. *Ladra*, ¶ 4, 353 P.3d at 530.

34. *Id.* ¶ 10, 353 P.3d at 531.

35. *Id.* ¶ 13, 353 P.3d at 532.

36. 248 F. Supp. 3d 1194 (W.D. Okla. 2017).

37. *Id.* at 1198.

38. *Id.* at 1201 (quoting 42 U.S.C. § 6972(a)(1)(B) (2018)).

39. *Id.* at 1199.

40. *Id.* at 1209.

41. *Id.* at 1202–04.

the *Burford* abstention doctrine, which allows federal courts to decline jurisdiction in cases that implicate complex questions of state law and public policy,⁴² the court chose to exercise “the power to dismiss” the case at summary judgment.⁴³ Accordingly, the first attempt at mass-scale litigation relating to Oklahoma’s earthquakes came to an early end. Though the court certainly had the option to allow the litigation to advance past the initial fact-finding stage, it felt “ill-equipped to outperform the Oklahoma Corporation Commission in advancing [the] science” necessary to resolve Sierra Club’s environmental concerns as pleaded.⁴⁴ If *Ladra* showed potential for litigation as a tool for combatting the state’s earthquake problem, *Sierra Club* warned of the difficulty in implementing such litigation on a complex, multi-party scale.

The struggle of multi-plaintiff earthquake litigation at the federal level continued in *Meier v. Chesapeake Operating L.L.C.*⁴⁵ *Meier* appears to be the only earthquake-related class action attempted in the state with even a tangential relationship to the insurance industry. Plaintiffs in *Meier* sought compensation for their earthquake insurance payments, not from the insurers themselves, but from the oil and gas companies who allegedly necessitated the need for homeowners’ earthquake insurance.⁴⁶ Although this action originally began in the District Court of Payne County (a hotbed of seismic activity), defendants quickly removed the case to the Western District of Oklahoma (coincidentally before the same judge as *Sierra Club*) pursuant to the Class Action Fairness Act.⁴⁷ *Meier* recognized that property owners in seismically active areas felt compelled to purchase earthquake insurance coverage with surprisingly high premiums but declared the remedy that the plaintiffs sought to be too attenuated.⁴⁸ The court refused to recognize the proposed class’s requested relief, specifically holding that “the Oklahoma Supreme Court, if confronted with the issue, would find the relief requested by plaintiffs not legally cognizable under the circumstances present in the case at bar.”⁴⁹ Accordingly, the court dismissed the class petition,⁵⁰ again

42. *Id.* at 1202–03. The *Burford* abstention doctrine is a product of Supreme Court jurisprudence. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

43. *Sierra Club*, 248 F. Supp. 3d at 1204–05 (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996)).

44. *Id.* at 1209.

45. 324 F. Supp. 3d 1207 (W.D. Okla. 2018).

46. *Id.* at 1210.

47. *Id.*

48. *Id.* at 1213.

49. *Id.* at 1215.

50. *Id.* at 1220.

signaling another failure for earthquake mass actions at the federal level. The plaintiffs' bar has seemingly since recognized the need to adapt.

Signs of success for class action earthquake litigation, where they exist, appear at the state court level. The most successful mass action in Oklahoma is the Lincoln County class action, *Cooper v. New Dominion, LLC*, which survived the pleading stage.⁵¹ *Cooper* asserted a class of Oklahoma-citizen property owners who lived in one of nine named counties and suffered property damage resulting from earthquakes in November of 2011.⁵² The specificity of this class definition seems to have benefitted the claimants, as the district court certified them for class treatment in July of 2018.⁵³ The court specifically ruled that because "the common and core liability issue is whether Defendant's wastewater operations caused the earthquakes in question," common issues predominated the class members' claims and certification was appropriate.⁵⁴ Though the defendants immediately appealed the court's decision to certify the class, the case subsequently settled without any higher-court adjudication.⁵⁵

While this settlement provides no clarity for whether this class claim could survive procedural scrutiny or prove persuasive to a trier of fact, it still signals unprecedented progress for complex earthquake-based litigation in the state. Even if the claims in *Cooper* were not settled, however, the plaintiffs would have still been confronted with the difficult task of proving that a specific earthquake induced by a specific injection well caused damage to a specific property.⁵⁶ Instructively for future plaintiffs, including those

51. No. CJ-2015-24 (Okla. Dist. Ct. Lincoln Cty. Jan. 18, 2019).

52. Journal Entry Regarding Plaintiff's Motion for Class Certification Pursuant to 12 O.S. § 2023 at 2, *Cooper*, No. CJ-2015-24 (filed July 18, 2018) (on file with the *Oklahoma Law Review*).

53. *Id.* Though the case is a Lincoln County proceeding and filed as such, it was reassigned to Judge Lori Walkley in the District Court of Cleveland County.

54. Summary Order at 3, *Cooper*, No. CJ-2015-24 (filed May 22, 2018) (on file with the *Oklahoma Law Review*).

55. In January of 2019, the Cleveland County court approved an agreed class settlement and dismissed the case with prejudice. Final Judgment and Order of Dismissal with Prejudice as to Plaintiff, the Settlement Class, and Spess, Equal Energy, and Fairfield, *Cooper*, No. CJ-2015-24 (Jan. 18, 2019).

56. There does exist a split between state courts as to whether hydraulic fracturing and wastewater injection constitutes an "abnormally dangerous" or "ultra-hazardous" activity for which a strict liability theory would apply. California, Indiana, and Utah have imposed some form of strict liability for oil and gas operations, while states such as Kansas and Mississippi have declined to do the same; Oklahoma does not seem to have a case directly addressing the issue. Blake A. Watson, *Fracking and Cracking: Strict Liability for Earthquake Damage*

pursuing the theories proposed in this Comment, *Cooper* may also indicate that such cases are more likely to find success at the state court rather than federal level.⁵⁷

B. But Where Are the Insurers? Low Payouts and High Premiums from Insurers of Earthquake Risk

As earthquakes have become more frequent throughout the state, more Oklahomans are turning to their insurers for protection. But these policyholders are receiving little in return for their premium dollars. While specific numbers for each insurance company are not publicly available,⁵⁸ the premiums written by the insurance industry as a whole for earthquake coverage in Oklahoma have increased by millions in recent years.⁵⁹ The approval of higher rates is likely the underlying driver of these inflated premiums.⁶⁰ As more property owners seek coverage, insurers have unilaterally appealed to the Oklahoma Insurance Department, seeking approval for higher and higher rates, culminating in rate increases of more than 300% since 2011.⁶¹ Insurers have justified the need for these higher rates by citing the rising frequency of earthquakes in the state, which generates more insurance claims from policyholders.⁶² And yet, while the frequency of

Due to Wastewater Injection and Hydraulic Fracturing, 11 TEX. J. OIL, GAS, & ENERGY L. 1, 6–9 (2016).

57. Admittedly, class actions are often difficult to keep in state courts due to removal under the Class Action Fairness Act (CAFA). *See* 28 U.S.C. § 1453 (2018). However, smaller mass actions (with fewer than 100 plaintiffs) and CAFA's in-state controversy exception allow state courts to maintain/retain jurisdiction. *See* *Bridewell-Sledge v. Blue Cross of Cal.*, 798 F.3d 923, 928–30 (9th Cir. 2015); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009).

58. The Oklahoma Insurance Department does provide that premiums on earthquake policies and policy endorsements can add \$50 to \$300 per year in premiums. *Mulready Says Get Ready: Earthquakes*, OKLA. INS. DEP'T, <https://www.oid.ok.gov/consumers/insurance-basics/disasters/earthquakes> (last visited Mar. 25, 2020).

59. *See generally* Lacie Lowry, *Increase in Oklahomans Buying Earthquake Insurance*, NEWS 9 (Jan. 7, 2015, 6:15 PM CST), <https://www.news9.com/story/27786943/increase-in-oklahomans-buying-earthquake-insurance>.

60. A “rate,” in insurance terms, is understood as the “value of insured losses expressed as a cost per unit of insurance.” *Glossary of Insurance Terms*, NAT'L ASS'N INS. COMM'RS, https://www.naic.org/consumer_glossary.htm (last visited Jan. 18, 2020).

61. Heide Brandes, *Oklahoma Regulators Raise Concerns on Quake Insurance Rate Hikes*, REUTERS (May 24, 2016, 3:22 PM), <https://af.reuters.com/article/energyOilNews/idAFL2N18L15K>.

62. *See id.*

quakes has generally increased,⁶³ very few policyholders have been able to collect on their earthquake claims.

The Oklahoma Insurance Department (OID) has noted the incongruity of insurance rates to claim payouts, but has not provided resolution to or explanation for the problem. In June of 2016, the department's Commissioner, John Doak, declared the earthquake insurance market a "noncompetitive line of insurance," citing a series of irregularities in the industry.⁶⁴ After granting years of rate increases, the OID eventually decided that "insurers making such filings have not substantiated their need for increased rates based on objective criteria" or actuarial experience.⁶⁵ Moreover, while 119 insurance companies offer earthquake insurance to Oklahomans, four insurers have constantly held over 50% of the state's market share.⁶⁶ Indeed, any market with few competitors each selling an increasingly more expensive product is far from competitive.⁶⁷ Even since the Commissioner issued this directive, major insurers have withdrawn from the Oklahoma earthquake insurance market altogether. Farmers Insurance Company, for example, informed the OID in late 2016 that it was withdrawing earthquake coverage from the state because "our earthquake exposure and pricing in Oklahoma are not sustainable."⁶⁸ It seems then that insurers may have struggled to comport with the OID's requirements, at least with respect to rate filings.

More telling for policyholders, however, the OID found that insurers are making lucrative profits by selling earthquake coverage in the state, as "evidenced by an average loss ratio over the six years preceding December 31, 2015 of approximately 3%."⁶⁹ The department deemed this ratio to be "unreasonable."⁷⁰ An insurer's "loss ratio" refers to the number of losses

63. *See supra* note 7.

64. Order In re: Earthquake Insurance Rates, No. 16-0391-TRN, at 3 (Okla. Ins. Comm'r June 6, 2016), https://www.oid.ok.gov/wp-content/uploads/2019/10/060716_16-0391-TRN-GCA-Order-In-Re-Earthquake-Insurance-Rates.pdf.

65. *Id.* at 2. The order does not list the identities of these carriers.

66. *Id.* at 2–3.

67. *See id.* at 3 ("The concentration of the market and the reticence of consumers to lose 'package discounts' constitutes an economic barrier that could prevent new firms from entering the market.").

68. *Farmers – OK EQ FAQ Final*, SERFF Filing Access, NAIC (Submission Date: 10/28/16) (SERFF Tracking Number: FARM-130786205), <https://filingaccess.serff.com/sfa/home/OK>.

69. *See* Order In re: Earthquake Insurance Rates, *supra* note 64, at 3.

70. *Id.*

divided by premium dollars collected.⁷¹ By way of comparison, the average loss ratio for all insurers across all lines of insurance coverage in the same year was 69.3%.⁷² This “unreasonably” low ratio, married with continuous rate increases has defined the current state of earthquake insurance in Oklahoma: high premium rates for policyholders, low payouts from insurers.

While a low loss ratio necessarily implies few claim payouts, the existing data on earthquake claim payments in Oklahoma further confirms this implication.⁷³ In another 2015 bulletin to insurers, the OID specifically noted “the extraordinary denial rate of earthquake claims that the preliminary data seems to indicate.”⁷⁴ Although the bulletin did not disclose the specifics of this “preliminary data,” further analysis submitted to the U.S. Department of Insurance indicates that the OID was referring to the fact that insurers had only paid out on 8% of earthquake claims at that time.⁷⁵ The years following continued the trend noted in the report. Despite the generally ongoing rise in earthquakes across the state, insurers appear to have paid approximately 16% of all earthquake insurance claims filed in the state since the beginning of the earthquake outbreak in 2010.⁷⁶ Few claims payouts do not automatically indicate bad faith or malicious practices on the part of insurers, and the

71. For example, a high-loss ratio would approach or exceed 100%, effectively meaning that the insurer is either losing money or making as much in premiums as it is paying out in indemnity. A ratio of more than 100% would equate to a net loss. *See Glossary of Insurance Terms, supra* note 60 (defining loss ratio as “the percentage of incurred losses to earned premiums”).

72. Brian Briggs & Bree Wilson, *U.S. Property and Casualty Insurance Industry—2017 First Half Results*, NAT’L ASS’N INS. COMM’RS, https://www.naic.org/documents/topic_insurance_industry_snapshots_2017_industry_analysis_reports.pdf (last visited Jan. 18, 2020). 2016 was not an anomalous year, as the average loss ratios in 2016 and 2017 were 71.4% and 73%, respectively. *Id.*

73. *See* JOHN D. DOAK, OKLA. INS. COMM’R, EARTHQUAKE INSURANCE BULLETIN NO. PC 2015-02: EARTHQUAKE INSURANCE, EXCLUDED LOSS, INSPECTION OF INSURED PROPERTY AND ADJUSTER TRAINING (Mar. 3, 2015), https://www.oid.ok.gov/wp-content/uploads/2019/10/030415_Earthquake-Bulletin-3-3-15.pdf [hereinafter BULLETIN No. PC 2015-02].

74. *Id.* at 2.

75. FED. INS. OFFICE, U.S. DEP’T OF THE TREASURY, REPORT ON PROTECTION OF INSURANCE CONSUMERS AND ACCESS TO INSURANCE 12 (Nov. 2016), https://www.treasury.gov/initiatives/fio/reports-and-notice/2016_FIO_Consumer_Report.pdf.

76. Corey Jones & Curtis Killman, *Earthquake Insurance: 3 in 20 Claims Approved in Oklahoma Since 2010*, TULSA WORLD (Mar. 5, 2017), https://www.tulsaworld.com/earthquakes/earthquake-insurance-in-claims-approved-in-oklahoma-since/article_de588725-1475-592c-9025-bdcfbf9b8bcd.html. This number comes from data provided directly from the OID to the local press on 1800 filed earthquake damage claims, with only 292 of them receiving payment. *Id.*

Oklahoma Insurance Commissioner made as much clear in the local press.⁷⁷ Still, these low payout numbers are certainly consistent with and explanatory of the “unreasonably” low loss ratios the OID described.

Despite the broad recalcitrance towards indemnifying insurance claims, insurers maintain a unique position through which they could lead the charge to hold the oil and gas industry accountable for damage caused by induced earthquakes in Oklahoma. Because of the long-recognized doctrine of subrogation, insurers maintain the ability to recoup the amount paid to insureds by seeking compensation from third parties responsible for the damage.⁷⁸ Oklahoma courts have succinctly characterized subrogation as “the equitable right of an insurer to be put in the position of its insured so that it may pursue recovery from any third parties who are legally responsible to the insured for a loss paid by the insurer.”⁷⁹ Logically, given the aforementioned scientific link between wastewater injection wells and earthquakes,⁸⁰ insurers could apply the doctrine of subrogation against oil and gas companies responsible for damages to their insureds’ property. Just as individuals have recognized and pursued their right to seek compensation from the source of the state’s quakes, so too could insurers. In this vein, the Oklahoma Legislature has proposed a bill explicitly outlining the ability of insurers to seek subrogation for human-made earthquakes.⁸¹ The state’s Insurance Commissioner has recognized the already-existing ability of insurers to seek subrogation for such claims, however, and deemed the bill unnecessary because “[i]nsurers already have the right of subrogation in the state.”⁸²

77. See Maureen Wurtz, *Earthquake Damage Claims Rarely Paid by Insurance Companies*, KTUL (Feb. 20, 2017), <https://ktul.com/news/local/months-after-record-oklahoma-quake-insurance-companies-slow-to-pay-for-damage>. Commissioner John Doak, in this local news interview, explained, “Maybe as we’re looking at those denials, that may not mean that there’s not damage, it just may mean that it’s not reached the level of the insurance company to make a payment.” *Id.* (quoting John Doak, Oklahoma Insurance Commissioner at the time of the interview).

78. See generally *Hanover Ins. Co. v. Honeywell, Inc.*, 200 F. Supp. 2d 1305, 1308–09 (N.D. Okla. 2002).

79. *Id.* (citing 16 COUCH ON INSURANCE § 222:5 (rev. 3d ed. 2000)).

80. See *supra* notes 7–11 and accompanying text.

81. Brianna Bailey, *Oklahoma Legislature Considers Two Bills on Earthquake Insurance Reforms*, OKLAHOMAN (Feb. 25, 2016, 10:47 PM), <https://oklahoman.com/article/5481266/oklahoma-legislature-considers-two-bills-on-earthquake-insurance-reforms>.

82. *Id.* Perhaps due to the Commissioner’s comments, the bill never gained much legislative traction. Senate Bill 1498 has yet to reach the state senate floor for any votes and appears to be effectively dead at the time of this writing. *Bill Information for SB 1498*, OKLA. STATE LEGIS., <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1498&Session=1600> (last visited Jan. 18, 2020).

This right, however, is not without its limits and can be waived when insurers deny their policyholders' claims. Oklahoma courts have specifically recognized that an insurer is estopped from raising a claim of subrogation after a policyholder has refused the insurer's suggested settlement amount and the insurer has denied the claim.⁸³ Given the high denial rate for earthquake claims, it is unsurprising that major insurers in the state have not pursued their subrogation right against oil and gas producers for earthquake damages.⁸⁴ With such a low loss ratio and abnormally high profit margins, insurance companies may be reluctant to engage in what would surely be complex and expensive litigation, which has already produced uneven results for individual plaintiffs. Given that insurers are disinterested in pursuing a subrogation claim and pay such a low rate of filed claims, those individuals with earthquake insurance in Oklahoma may understandably feel that they are paying for functionally non-existent coverage.⁸⁵ The relatively untested doctrines of reasonable expectations and illusory coverage, however, may provide these policyholders with a remedy.

C. The Doctrines of Reasonable Expectations and Illusory Coverage May Allow Earthquake Policyholders to Give Meaning to Their Policies

In some circumstances, courts may intervene to enforce the terms and spirit of insurance policies. Unlike the oil and gas industry,⁸⁶ which has little direct contact with and owes few duties to the average Oklahoman whom earthquakes have harmed, insurers owe each of their policyholders an implied-in-law duty of good faith and fair dealing.⁸⁷ This duty transcends the written policy contract and "extends to all types of insurance companies and

83. *Sexton v. Cont'l Cas. Co.*, 1991 OK 84, ¶ 21, 816 P.2d 1135, 1139.

84. Steadfast Insurance has filed a subrogation action against several oil and gas producers in the Northern District of Oklahoma for almost \$400,000 in indemnity payouts, though no progression in this litigation seems apparent beyond the filing. Sarah Terry-Cobo, *Steadfast Insurance Sues Oil and Gas Companies Over Earthquake Damage*, J. REC. (Nov. 28, 2018), <https://journalrecord.com/2018/11/28/steadfast-insurance-sues-oil-and-gas-companies-over-earthquake-damage/>.

85. A news article from Glencoe, Oklahoma, while anecdotal, expressed this exact frustration. Upon denial of his earthquake claim, a local man complained that "[y]ou're better off taking your money and going to the casino. I'm serious. You got a better chance of winning." Sarah Stewart, *Oklahoma Man Warning Others: Don't Get Earthquake Insurance*, OKLA.'S NEWS 4 (May 26, 2016, 6:49 PM CDT), <https://kfor.com/2016/05/26/oklahoma-man-warning-others-dont-get-earthquake-insurance/>.

86. Of course, oil and gas companies owe basic duties to property owners as would any industry or individual. *See generally* Cypser & Davis, *supra* note 8, at 566–85.

87. *Sizemore v. Cont'l Cas. Co.*, 2006 OK 36, ¶ 15, 142 P.3d 47, 51.

insurance policies.”⁸⁸ The duty of good faith and fair dealing allows potential plaintiffs whose property is damaged from an earthquake to consider an action against their insurance carrier if their claims are denied before pursuing relief from the oil and gas industry.⁸⁹ Although policyholders can seek recourse, including class actions and multi-plaintiff actions, for a violation of this duty, the fact-specific details required for a bad faith action fall beyond the scope of this Comment.⁹⁰ All the same, the high denial rates of earthquake insurance claims in the state, partnered with the explanations of those denials, may encourage an action against insurers focused more specifically in the contracts doctrine of reasonable expectations and its progeny of illusory insurance coverage.⁹¹

The language and enforcement of insurance contracts in Oklahoma are bound to certain principles of fairness to the policyholder under the doctrine of reasonable expectations.⁹² When courts choose to implement this doctrine, ambiguous or broad exclusions contained in insurance contracts cannot “be permitted to serve as traps for policy holders” and must be interpreted in a way favorable to facilitating the payment of claims.⁹³ Generally, the doctrine of reasonable expectations as applied to insurance contracts ensures that policyholders receive the coverage they expect, despite complicated or otherwise unclear provisions that would deny the coverage in an unexpected

88. *Id.* (quoting *Goodwin v. Old Republic Ins. Co.*, 1992 OK 34, ¶ 6, 828 P.2d 431, 432–33). The duty of insurers to deal with policyholders fairly and in good faith exists largely through the common law but is more defined and codified through Oklahoma’s version of the Unfair Claims Settlement Practices Act. 36 OKLA. STAT. §§ 1250.1–1250.17 (Supp. 2018).

89. A claim denial, in itself, does not constitute bad faith claims handling or illusory coverage. *See* Luc Cohen, *Insurers Shun Risk as Oil-Linked Quakes Soar in Oklahoma*, REUTERS (May 12, 2016, 12:05 AM), <https://www.reuters.com/article/us-usa-oklahoma-earthquakes/insurers-shun-risk-as-oil-linked-quakes-soar-in-oklahoma-idUSKCN0Y30DC>. For their part, insurers will claim that they often rely on outside experts and engineers to justify any denials that fall above policy deductibles. *Id.*

90. An insurance bad faith inquiry looks to whether an insurer deals fairly with its insured and pays the claim at issue promptly. *Christian v. Am. Home Assurance Co.*, 1977 OK 141, ¶ 32, 577 P.2d 899, 905.

91. Contractual claims are often pleaded in tandem with insurance bad faith claims, even in past Oklahoma class actions. *See, e.g., Burgess v. Farmers Ins. Co.*, 2006 OK 66, ¶ 1, 151 P.3d 92, 93.

92. *Max True Plastering Co. v. U.S. Fid. & Guar. Co.*, 1996 OK 28, ¶¶ 6–10, 912 P.2d 861, 863–64.

93. *Id.* ¶ 24, 912 P.2d at 870.

way.⁹⁴ This is not to say that the clear language of insurance policies is not enforceable or cannot prevail, but there are instances where the existence of ambiguities in an insurance contract necessitate further protections for policyholders.⁹⁵

Despite Oklahoma's adoption of reasonable expectations as applied to insurance contracts and provisions, the state has yet to explicitly endorse a doctrine that has derived from this principle in other jurisdictions: the doctrine of illusory insurance coverage.⁹⁶ Though a suit directly pleading the existence of illusory coverage would likely create a case of first impression for Oklahoma courts and only apply in limited scenarios, the unique issues and astronomical denial rates of the state's earthquake insurance claims may create an ideal case in which the courts could first apply the doctrine.⁹⁷

The illusory coverage doctrine may allow Oklahoman earthquake insurance policyholders to finally receive the coverage they expected when they purchased their policies. There is little jurisdictional consensus as to an exact enumeration of this doctrine, but most agree that it allows a policyholder to challenge a policy or endorsement that is functionally worthless as written or as enforced.⁹⁸ Courts often find coverage to be illusory when some exclusion or addendum within the policy renders it generally ineffective for the policyholder.⁹⁹ Accordingly, because exclusions that are either ambiguously vague (and thus over-inclusive in application), or specific but impracticably applied, may fit the definition of illusory, courts can compel insurers to pay out under policies that they had previously

94. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967–68 (1970).

95. *Max True*, ¶ 8, 912 P.2d at 865 (“The doctrine does not negate the importance of policy language.”).

96. The illusory coverage doctrine serves a similar purpose as the doctrine of reasonable expectations, namely “to qualify the general rule that courts will enforce an insurance contract as written.” *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 118 (Minn. Ct. App. 1995).

97. Oklahoma courts have not yet explicitly endorsed the illusory coverage doctrine. However, the Oklahoma Insurance Department has referenced the doctrine with regards to insurers' vague sale of “additional coverage” for wind and hail policies. See JOHN D. DOAK, OKLA. INS. COMM’R, EARTHQUAKE INSURANCE BULLETIN NO. PC 2016-02: LAWS AND ORDINANCES, ADDITIONAL COVERAGE; FORTIFIED HOME™—HIGH WIND AND HAIL PROGRAM 2 (Apr. 25, 2016), https://www.oid.ok.gov/wp-content/uploads/2019/10/042516_Final-Bulletin2.pdf.

98. Ian Weiss, Comment, *The Illusory Coverage Doctrine: A Critical Review*, 166 U. PA. L. REV. 1545, 1546 (2018).

99. See *id.* at 1548–50.

denied.¹⁰⁰ Illusory coverage as a doctrine has largely developed on a state-by-state basis, with several courts justifying the existence of the doctrine as serving an important policy interest in protecting the expectations of insureds.¹⁰¹ With the regulatory insurance body in Oklahoma declaring the earthquake insurance market “uncompetitive” and denial rates “unreasonable,” the state is certainly at a crisis point for the expectations of its insureds and should implement this doctrine.

Earthquake insurance policies in Oklahoma may be especially susceptible to the illusory coverage doctrine because of two common exclusions found in the policies: an exclusion for human-made quakes and an exclusion for pre-existing “earth settlement.” The illusory coverage doctrine most regularly applies to specific policy endorsements like earthquake coverage, rather than an insurance policy in its entirety.¹⁰² More specifically, courts might trigger the doctrine when a particular policy exclusion “reduces the possibility that a given piece of coverage will actually come in handy to the policyholder.”¹⁰³ This doctrine does not mandate that the exclusion must necessarily render collection under the policy impossible to be found “illusory.”¹⁰⁴ The OID has recognized two such exclusions for earthquake policies, without explicitly defining them as illusory exclusions.

In October 2015, the OID advised insurers to specifically note if their policies excluded human-made earthquakes, because current policy language

100. *See id.* at 1550.

101. *Id.* at 1552. Weiss argues that any supposed “public policy” underlying the doctrine ultimately derives from more codified sources of law. *Id.* He still recognizes, as have several courts, that many believe public policy to be the ultimate foundation of the doctrine. *Id.* at 1552–54; *see, e.g.,* *Pompa v. Am. Family Mut. Ins. Co.*, 520 F.3d 1139, 1145 (10th Cir. 2008) (“[E]xclusions that render coverage illusory . . . might violate public policy.”); *Point of Rocks Ranch, L.L.C. v. Sun Valley Title Ins. Co.*, 146 P.3d 677, 680 (Idaho 2006) (“When a policy only provides an illusion of coverage . . . [it] will be considered void as violating public policy.”) (citing *Nat’l Union Fire Ins. Co. of Pittsburgh v. Dixon*, 112 P.3d 825 (Idaho 2005)). *But see* *State Farm Gen. Ins. Co. v. Emerson*, 687 P.2d 1139, 1142 (Wash. 1984) (en banc) (“[W]e have been hesitant to invoke public policy to limit or avoid express contract terms . . .”).

102. *See* Weiss, *supra* note 98, at 1556 (explaining that the issue “is whether a *particular* coverage provision is swallowed-up by an exclusion”) (quoting *Great N. Ins. Co. v. Greenwich Ins. Co.*, No. 05-635, 2008 WL 2048354, at *5 (W.D. Pa. May 12, 2008)); *see also* *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 119 (Minn. Ct. App. 1995) (“[T]he doctrine of illusory coverage is best applied . . . where part of the premium is *specifically allocated to a particular type . . . of coverage . . .*”) (emphasis added).

103. Weiss, *supra* note 98, at 1559.

104. *Id.* at 1561.

“may be ambiguous as to the coverage afforded.”¹⁰⁵ This ambiguity is exactly why the doctrine of illusory coverage exists. The OID warned of the danger of such uncertainty in a similar bulletin, published just months prior, expressing a “concern[] that insurers could be denying claims based on the *unsupported* belief that these earthquakes were the result of fracking or injection well activity.”¹⁰⁶ An Oklahoman insurance policy that either expressly writes out or ambiguously excludes induced earthquakes, combined with consistent denials of coverage due to the human-made nature of the quakes from insurers, is a perfect recipe for policyholders to seek redress under the doctrine of illusory coverage. Given that Oklahomans appear to be purchasing earthquake coverage to protect themselves from these quakes¹⁰⁷ and because the scientific consensus that the rise in the state’s earthquakes is tied to human-made causes,¹⁰⁸ it seems facially apparent that an insurance policy that excludes induced quakes fails to provide the coverage that a policyholder reasonably expects.¹⁰⁹

Even policyholders whose insurance does cover induced earthquakes may still reasonably feel as though their coverage is merely illusory.¹¹⁰ When the OID warned insurers with human-made exclusions, it also skeptically noted that many insurers are denying claims by asserting “pre-existing damage.”¹¹¹ While in that bulletin the OID did not note the exact kind of pre-existing

105. Scott Kersgaard, *Oklahoma’s Doak Tells Insurers to Clarify Earthquake Coverage*, INS. BUS. AM. (Oct. 20, 2015), <https://www.insurancebusinessmag.com/us/news/breaking-news/oklahomas-doak-tells-insurers-to-clarify-earthquake-coverage-25980.aspx> (quoting JOHN D. DOAK, OKLA. INS. COMM’R, EARTHQUAKE INSURANCE BULLETIN NO. PC 2015-04 (Oct. 9, 2015)).

106. BULLETIN NO. PC 2015-02, *supra* note 73, at 2. The Pennsylvania Insurance Department issued a similar notice to carriers in its state. *Penn.: Fracking Exclusion Not Allowed in Homeowners Earthquake Endorsements*, INS. J. (Apr. 15, 2015), <https://www.insurancejournal.com/news/east/2015/04/15/364460.htm>.

107. *See* Thrasher, *supra* note 1.

108. *See supra* note 10 and accompanying text.

109. The lack of coverage that policyholders reasonably expected is a consistent tenet of illusory coverage findings. *See, e.g., St. Paul Mercury Ins. Co. v. FDIC*, 774 F.3d 702, 709 (11th Cir. 2014).

110. The OID issued a follow up to its original 2015-02 bulletin wherein it noted “the insurance industry has begun offering enhanced earthquake coverage that treats earthquakes caused by water disposal injection wells or hydraulic fracturing as covered events” indicating that fewer insurers now exclude induced quakes. JOHN D. DOAK, OKLA. INS. COMM’R, REVISED EARTHQUAKE INSURANCE BULLETIN NO. PC 2015-02: EARTHQUAKE INSURANCE, WATER DISPOSAL WELLS AND FRACKING (Aug. 5, 2015), https://www.oid.ok.gov/wp-content/uploads/2019/10/081015_EarthquakeBulletin.pdf [hereinafter REVISED BULLETIN NO. PC 2015-02].

111. BULLETIN NO. PC 2015-02, *supra* note 73, at 2.

damage that insurers are citing, it has expressed elsewhere that “some of the most common exclusions for earthquake insurance are masonry (brick) veneer, vehicles and pre-existing damage.”¹¹² To be clear, the mere existence of a pre-existing earth settlement exception in an earthquake policy is not *prima facie* illusory coverage,¹¹³ even if the two seismic events seem similar.¹¹⁴

Moreover, the Tenth Circuit has specifically noted that the words “earth movement” in an insurance policy are not inherently ambiguous.¹¹⁵ If, however, insurers are relying on this exception to overwhelmingly deny claims and are doing so without “inspect[ing] the property prior to inception of the coverage and maintain[ing] reasonably current information as to the condition of the insured property[] prior to loss,” as the OID has suggested,¹¹⁶ then the coverage may be illusory all the same. Leaning on this particular exclusion, insurers may still not face a realistic risk of payment. A pre-existing damage rationale for a claim denial, without a pre-loss understanding of the property at issue, surely seems to strain logic. An unsupported use of this exclusion to deny coverage that policyholders reasonably expect would create a strong inference for illusory coverage. The data on how regularly insurers deny earthquake claims in the state citing pre-existing settlement is not publicly available, though courts could likely compel insurers to produce such figures in litigation.¹¹⁷

Were a plaintiff or class of plaintiffs to find that insurers frequently rely on this exclusion and do so without corroborating information regarding the damaged property, they may well be able to show that the insurers are “receiv[ing] premiums when realistically [they are] not incurring any risk of

112. *Mulready Says Get Ready: Earthquakes*, *supra* note 58.

113. See RESTATEMENT OF THE LAW OF LIAB. INS. § 32(1) (AM. LAW INST. 2019). All exclusions necessarily limit coverage and are not automatically illusory-rendering.

114. Some instances of ground settlement, including liquefaction and seismically-induced landslides, may even directly result from earthquakes. See *Ground Failure Scientific Background*, USGS, <https://earthquake.usgs.gov/data/ground-failure/background.php> (last visited Jan. 22, 2020).

115. *Davis-Travis v. State Farm Fire & Cas. Co.*, 336 F. App'x 770, 774 (10th Cir. 2009).

116. BULLETIN NO. PC 2015-02, *supra* note 73, at 2.

117. See *Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 696 (S.D. Fla. 2007) (finding that “documents related to the ‘investigation, processing, analysis’ and ultimate denial of Plaintiff’s claim are relevant” in a breach of contract case); see also 12 OKLA. STAT. § 3226(A)(1) (Supp. 2018) (outlining that “[p]arties may obtain discovery regarding any matter that is relevant to any party’s claim or defense”).

liability.”¹¹⁸ If plaintiffs could similarly tie this reliance upon an unjustified and broad exception, it would further the likelihood that a court may compel payment from an insurer, despite an insurance company’s arguments that coverage may still be possible, even with the exclusion.¹¹⁹ Although an action for illusory coverage citing this exclusion could find success, it would likely be more difficult for plaintiffs than a similar action involving an outright exclusion of induced earthquakes, because of the factual fight likely to follow.

Given the apparent similarity of earthquake claim denials among policyholders across the state and the recent spark of success in state-level mass litigation concerning earthquakes more generally,¹²⁰ plaintiffs should consider banding together and bringing their illusory coverage claims as part of a class action. A class of purely Oklahoma-based citizens, with a concentrated focus on the issue of illusory coverage, may be attractive to Oklahoma policyholders and perhaps successful in state-level courts. Due to the likely number of policyholders affected by claim denials under what may be an illusory policy, a class action would likely promote economy, efficiency, and consistency in the adjudication of this state-wide issue.¹²¹ Though such a class would likely have to overcome issues of predominance and individuality of claims and damages, Oklahoma may serve as a valuable venue all the same.¹²² Indeed, as research into the relatively certification-friendly nature of Oklahoma class action law has suggested, “the cumulative effect of Oklahoma case law . . . may well be to make Oklahoma a more desirable forum for national state law class action litigation.”¹²³ Accordingly, the facts of widespread earthquake claim denials and the landscape of the

118. *Colo. Intergovernmental Risk Sharing Agency v. Northfield Ins. Co.*, 207 P.3d 839, 843 (Colo. App. 2008) (quoting *O’Connor v. Proprietors Ins. Co.*, 696 P.2d 282, 285 (Colo. 1985) (en banc)).

119. *Martinez v. Idaho Ctys. Reciprocal Mgmt. Program*, 999 P.2d 902, 907 (Idaho 2000) (finding illusory coverage when a part of a policy “affords no realistic protection to any group or class of injured persons,” despite “some small circumstance[s] where coverage could arguably exist”).

120. Referencing the aforementioned state-level class certification of earthquake victims in *Cooper v. New Dominion, LLC*, No. CJ-2015-000024 (Okla. Dist. Ct. Lincoln Cty. Jan. 18, 2019).

121. See Steven S. Gensler, *Civil Procedure: Class Certification and the Predominance Requirement Under Oklahoma Section 2023(B)(3)*, 56 OKLA. L. REV. 289, 290–91 (2003) (highlighting these factors in class certification).

122. See 12 OKLA. STAT. § 2023(B)(3) (Supp. 2018) (requiring in pertinent part that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members”).

123. Gensler, *supra* note 121, at 326.

state's class action jurisprudence may fuse to create a favorable venue for multi-plaintiff earthquake actions.

II. The Regulatory Enforcement Power of the Oklahoma Insurance Department and Its Potential to Better Serve Earthquake Policyholders

What appears lacking from Oklahoma Insurance Department publicly issued bulletins and instructions is any pattern of enforcement from the state's Insurance Commissioner.¹²⁴ Indeed, the OID's bulletins indicate that the state's insurance regulatory body has identified many concerns facing earthquake policyholders.¹²⁵ By enforcing these existing memoranda, the OID could significantly alleviate the issues plaguing Oklahoma earthquake policyholders.

The Oklahoma Insurance Code grants the state's Insurance Commissioner and Insurance Department wide latitude to regulate—and if necessary, reprimand—insurers who choose to sell policies within the state.¹²⁶ Moreover, the OID and its Commissioner serve as a general gatekeeper to insurers who wish to practice in Oklahoma, as all insurers may only transact insurance in the state with the approval and license of the Department.¹²⁷ To maintain its license and good standing in the state, an insurer must comply with all provisions of the Insurance Code and with the “charter powers” that the Code grants to the department and its Commissioner.¹²⁸

Chief among these “charter powers” is the Insurance Commissioner's authority to regulate insurers consistent with Oklahoma's adoption of the Unfair Claims Settlement Practices Act.¹²⁹ This Act prohibits insurance

124. Since the OID first issued bulletins pertaining to concerns in earthquake insurance, it has not issued a single public reprimand, bulletin, or Final Order punishing an insurer for violating the same. *See Final Orders 2016*, OKLA. INS. DEP'T, <https://www.oid.ok.gov/about-oid/divisions-programs/legal-division/final-orders/final-orders-2016/> (last visited Jan. 22, 2020); *Final Orders 2015*, OKLA. INS. DEP'T, <https://www.oid.ok.gov/about-oid/divisions-programs/legal-division/final-orders/final-orders-2015/> (last visited Jan. 22, 2020); *Bulletins*, OKLA. INS. DEP'T, <https://www.oid.ok.gov/about-oid/divisions-programs/legal-division/bulletins/> (last visited Jan. 22, 2020).

125. *See supra* notes 73, 106 and accompanying text.

126. 36 OKLA. STAT. § 307.1 (Supp. 2018) (“The Commissioner may adopt reasonable rules and regulations for the implementation and administration of the provisions of the Insurance Code.”).

127. *Id.* § 607(A).

128. *Id.*; *see also id.* § 618 (granting the Insurance Commissioner the ability to refuse to renew or revoke an insurer's license to operate if the insurer is (1) in violation of the Code, or (2) “no longer meets the requirements for the authority originally granted”).

129. *Id.* § 1250.13.

companies from conducting a wide range of dishonest dealings, pertinently including failing to comply with issued orders of the Commissioner.¹³⁰ Penalties for violations of the Insurance Code and subsequent orders range from revocation of the insurer's license to other appropriate methods which would "limit, regulate, and control the insurer's line of business."¹³¹ Compounded, these provisions of the Oklahoma Insurance Code allow the state's Insurance Commissioner to set rules of practice for insurers and penalize insurers who fail to abide by those regulations.

A. Recognized Issues Without Prescribed Solutions in the Oklahoma Insurance Department's Earthquake Insurance Findings

Oklahoma Insurance Commissioner John Doak's first notable bulletin regarding earthquake insurance, Earthquake Insurance Bulletin No. PC 2015-02, presented several actionable criteria for the department to enforce against insurers in the state. As previously mentioned, the Commissioner expressed concern that insurers, hesitant to enter into the debate over the causation of induced earthquakes, could be refusing to fulfill claims "on the unsupported belief" these quakes were human-made.¹³² Appearing to support enforcement, the Commissioner has advised that "[i]f that were the case, companies could expect the Department to take appropriate action to enforce the law."¹³³ This bulletin implies that the OID would take action to reprimand insurers who deny claims with an unsubstantiated claim that the earthquake was human-made, but public follow-up to this bulletin is nonexistent.¹³⁴ Moreover, the Commissioner signaled his intent to further investigate these unpaid claims through a market conduct exam, though the Commissioner has not conducted nor published the results of such an examination.¹³⁵

In the same bulletin, the Commissioner expressed his concerns regarding pre-existing damage claims and exclusions concerning earthquake damage.¹³⁶

130. *Id.*

131. *Id.* § 1250.13(A).

132. BULLETIN NO. PC 2015-02, *supra* note 73, at 2 (emphasis removed).

133. *Id.*

134. The Oklahoma Insurance Department website lists no public filings showing a follow-up that addresses these issues. *See supra* note 124.

135. BULLETIN NO. PC 2015-02, *supra* note 73, at 3. The Commissioner has statutory authority to conduct such an evaluation. 36 OKLA. STAT. § 311.4(F) (Supp. 2018) ("The Insurance Commissioner may use market conduct annual statements or amendments or addendums . . . in determining compliance with the laws of this state and rules adopted by the Insurance Commissioner."). This lack of evaluation may be because of OID's revision of Bulletin PC 2015-02. *See REVISED BULLETIN NO. PC 2015-02, supra* note 110.

136. BULLETIN NO. PC 2015-02, *supra* note 73, at 2.

Again, while litigation allows policyholders to challenge these disputes instantly, proactive measures from the OID may preempt the need for such litigation altogether. Through the bulletin, the Commissioner expressed concerns that while insurers have the right to exclude certain damage in earthquake claims attributed to pre-existing damage, insurers must actually inspect the property to engage these exceptions.¹³⁷ Specifically, the Commissioner questioned if “insurers are employing fair claims practices” in these denials,¹³⁸ presumably implicating the Unfair Claims Settlement Practices Act. As a solution to this worry, the Commissioner clarified his expectation that “[i]f an insurer intends to deny a claim, asserting [‘pre-existing’ damage, I expect that the insurer has inspected the property prior to inception of the coverage and maintained reasonably current information as to the condition of the insured property, prior to loss.”¹³⁹ As already noted, this lack of justification for denied claims leaves insureds susceptible to functionally non-existent coverage.¹⁴⁰ This susceptibility is especially unacceptable given that the Commissioner hinted here towards a follow-up market conduct exam that seems to have never taken place.¹⁴¹

Lastly, in the 2015-02 bulletin, the Commissioner expressed his expectation for the training of insurance adjustors who handle earthquake damage claims.¹⁴² Citing his belief that earthquake “coverage may not be well understood” and noting the “[c]omplex fact questions [which] arise when determining whether earth movement has resulted from a covered cause or an excluded cause[,]” the Commissioner recommended heightened training requirements for adjustors in this field.¹⁴³ Specifically, the Commissioner asked that earthquake damage adjustors receive training on masonry veneer, high deductible costs, and structural damage.¹⁴⁴ By terming all of these undoubtedly helpful policies as “expectations” and by failing to issue corresponding orders, however, the Commissioner has still not gone far enough to protect the policyholders he is obligated to safeguard.¹⁴⁵

137. *Id.*

138. *Id.*

139. *Id.*

140. *See supra* note 85 and accompanying text.

141. *See* BULLETIN NO. PC 2015-02, *supra* note 73, at 3.

142. *Id.*

143. *Id.*

144. *Id.*

145. The Oklahoma Insurance Department has issued bulletins for a variety of issues, oftentimes clearing up legal uncertainties, *see* OKLA. INS. DEP’T, BULLETIN NO. PC 2010-05 AND LH 2010-04: ARBITRATION CLAUSES (Oct. 12, 2010), <https://www.oid.ok.gov/wp-content/uploads/2019/10/PC-2010-05-and-LH-2010-04.pdf> (discussing arbitration clauses),

Unenforced half-measures fall short of the immediate security that injured policyholders deserve.

B. The Transition to Enforceability: The Oklahoma Unfair Claims Settlement Practices Act as an Avenue of Redress

The Commissioner has already demonstrated exactly how these bulletins can unambiguously transform into enforceable orders from the OID. In the aforementioned “Order In Re: Earthquake Insurance Rates,” the Commissioner made clear that he was acting under “the duty of administering and enforcing all provisions of the Oklahoma Insurance Code.”¹⁴⁶ Moreover, the OID served its order on “[a]ll licensed property and casualty insurers issuing earthquake insurance in the State of Oklahoma.”¹⁴⁷ That same language is absent from bulletins 2015-02 and 04, and while that absence does not inherently prove a lack of enforceability, it does leave room for the Commissioner to clarify its expectations for the industry.¹⁴⁸ Oklahoma’s Insurance Code provides the Commissioner and OID with more than sufficient authority to see that insurers adhere to the bulletins, just like the earthquake rate order.¹⁴⁹

Because of the importance of the guidance outlined to insurers in the Commissioner’s bulletins, the OID or the Commissioner himself could re-issue these same bulletins as orders with explicit reference to Oklahoma’s Unfair Claims Settlement Practices Act.¹⁵⁰ Specifically, each of the Commissioner’s “expectations” as outlined in the bulletins seem to go to specific concerns or provisions of UCSPA.¹⁵¹ First, the Commissioner expressed concern that insurers were denying coverage on the unsubstantiated basis that policyholders’ damage resulted from injection well

or setting expectations from the OID, *see* JOHN D. DOAK, OKLA. INS. COMM’R, BULLETIN NO. PC 2013-07: PUBLIC ADJUSTERS AND FEES (June 14, 2013), https://www.oid.ok.gov/wp-content/uploads/2019/10/061713_public-adjuster-bulletin.pdf (discussing public adjusters and fees).

146. Order In re: Earthquake Insurance Rates, *supra* note 64, at 1. Moreover, the notice was quite literally labeled as an “Order.” *Id.*

147. *Id.* at 4.

148. Oklahoma law does allow for a state agency to interpret the regulations, and occasionally statutes, pertaining to that agency’s scope through bulletins and other issued interpretations. *See Cox Okla. Telecom, LLC v. State ex rel. Okla. Corp. Comm’n*, 2007 OK 55, ¶¶ 23–27, 164 P.3d 150, 160.

149. *See* 36 OKLA. STAT. § 307.1 (Supp. 2018); *see also infra* Section II.A.

150. 36 OKLA. STAT. § 1250.13. The Insurance Code grants the Insurance Commissioner with the ability to enforce all orders issued consistent with the Unfair Claims Settlement Practices Act. *Id.*

151. *See* BULLETIN NO. PC 2015-02, *supra* note 73.

activity;¹⁵² the UCSPA punishes insurers who “[k]nowingly misrepresent[] to claimants pertinent facts or policy provisions relating to coverages at issue.”¹⁵³ Second, the Commissioner worried that insurers were claiming pre-existing damage without adequately maintaining pre-loss information on property;¹⁵⁴ the UCSPA prohibits insurers from “[f]ailing to adopt and implement reasonable standards for prompt investigations of claims arising under its insurance policies or insurance contracts.”¹⁵⁵ Finally, the Commissioner feared that insurers had not properly trained adjustors on the specifics of earthquake damage;¹⁵⁶ again, the UCSPA demands that insurers maintain reasonable investigative standards.¹⁵⁷ The Unfair Claims Settlement Practices Act then, provides Oklahoma’s Insurance Commissioner with both the legal authority to issue orders and several rationales upon which to base those orders.

As this Comment has already noted, orders which derive from the UCSPA carry with them significant enforcement power.¹⁵⁸ With these bulletins re-issued as orders, the OID and its Commissioner would retain the clear authority to crack down on noncompliant insurers. If insurers refused to provide a reasonable basis for a denial, maintain pre-loss records of insureds’ property, or train claims adjustors to specifically handle earthquake damage, the Commissioner would have the ability to take the most severe action authorized under Oklahoma law: “revoke or suspend the insurer’s certificate of authority.”¹⁵⁹ Orders consistent with the UCSPA also allow the Commissioner to take intermediate steps “to the extent deemed necessary to obtain the insurer’s compliance with the order,” presumably including the imposition of fines or similar financial penalties.¹⁶⁰

The Commissioner’s enforcement of orders under the UCSPA not only serves to create stronger and more apparent guidelines by which insurers must abide, but such orders and corresponding reprimands would also aid plaintiffs pursuing individual cases under the USCPA. While the UCSPA exists to serve the regulatory functions of Oklahoma’s Insurance Department, violations of the Act are not entirely separated from private causes of action.

152. *Id.* at 1–2.

153. 36 OKLA. STAT. § 1250.5(2).

154. BULLETIN NO. PC 2015-02, *supra* note 73, at 2.

155. 36 OKLA. STAT. § 1250.5(3).

156. BULLETIN NO. PC 2015-02, *supra* note 73, at 3.

157. 36 OKLA. STAT. § 1250.5(3).

158. *See id.* § 1250.5.

159. *Id.* § 1250.13(A); *see also id.* §§ 606–607 (mandating that all insurance carriers must maintain a certificate of authority in order to transact business in Oklahoma).

160. *Id.* § 1250.13(A).

Though an individual plaintiff cannot bring suit solely for a claimed violation of the UCSPA, “the UCSPA can provide the district court [or any trial court] with guidance in determining whether particular conduct on the part of an insurer is unreasonable and sufficient to constitute a basis for a bad faith claim.”¹⁶¹ Moreover, the Insurance Commissioner may turn to the state’s Attorney General for assistance in enforcing the Commissioner’s orders.¹⁶² And if the Attorney General pursues judicial intervention from the state’s courts, the insurer is liable for attorney fees should the state prevail.¹⁶³

Unfortunately, however, the OID has a documented history of regularly issuing bulletins, while seldomly following through with more forceful orders. As the public record demonstrates, the OID has issued twenty-one bulletins since 2010 concerning property and casualty insurance issues.¹⁶⁴ Within the same span of time, the Department issued a total of three orders.¹⁶⁵ Not one of the issued orders appears to correspond with the issued bulletins.¹⁶⁶ It seems then that enforcement through the OID has typically followed the same pattern: the Commissioner issues a bulletin, threatens enforcement of that bulletin, and enforcement never comes.¹⁶⁷ But there is no reason for this trend to continue. The Commissioner can and should buck this trend to issue UCSPA follow-up orders to the corresponding earthquake bulletins.

To most effectively ensure compliance with the issues that the Insurance Department has noted, the OID would be well-served to convert the Commissioner’s bulletins into UCSPA orders and enforce them as such.

161. *Beers v. Hillory*, 2010 OK CIV APP 99, ¶ 30, 241 P.3d 285, 294.

162. 36 OKLA. STAT. § 1250.13(A).

163. *Id.* § 1250.13(B).

164. *Bulletins*, *supra* note 124.

165. *Commissioner’s Orders*, OKLA. INS. DEP’T, <https://www.oid.ok.gov/regulated-entities/rate-and-form-filing/property-and-casualty-insurance/commissioners-orders/> (last visited Mar. 26, 2020).

166. *Id.*

167. Past scholarship on the OID has commented on this same trend. Kelsey D. Dulin, *The Disaster After the Disaster: Insurance Companies’ Post-Catastrophe Claims Handling Practices*, 61 OKLA. L. REV. 189, 195 (2008) (“Under existing laws, Oklahoma appears to be sufficiently equipped with the tools necessary to bring the insurance industry’s claims handling behavior into accord with Oklahoma’s Insurance Code—it is the enforcement of existing laws that is lacking.”).

*III. Moving Forward; Building a Legislative Framework to Better Regulate
the Earthquake Insurance Market*

While litigation and tightened regulation would both help to rectify potential past conduct of earthquake insurers in Oklahoma, the legislature is in the best position to outline a clear set of policies to avoid recurring issues. Fortunately for the Oklahoma legislature, it is not the first state to experience a sudden uptick in seismic activity, followed by a panicked earthquake insurance market. California experienced a similar crisis following the catastrophic Northridge earthquake of 1994.¹⁶⁸ Although California's responses to that disaster were then and are now imperfect,¹⁶⁹ Oklahoma would be well-served to follow its example of insurance lawmaking in the years after the quake. Specifically, the Oklahoma legislature should strongly consider establishing an Oklahoma Earthquake Authority, modeled after the California Earthquake Authority. Because the formation of such an agency is strongly tied to a legal requirement for insurers to offer earthquake insurance to their policyholders, the Oklahoma legislature should pass a similar accompanying law. Oklahoma may be able to form its own Authority separate and apart from the existence of such a legal mandate, but such a requirement would strengthen and attune the state's market.

A. An Example Worth Following: The California Earthquake Authority as a Model for Oklahoma

No stranger to seismic activity, California's insurance industry forever changed following one of its most severe earthquakes: the 1994 Northridge earthquake just outside of Los Angeles.¹⁷⁰ Given its proximity to one of the world's most populous cities, the quake caused an estimated \$20 billion in residential damage, less than half of which was ultimately covered by insurance.¹⁷¹ Unprepared for an event of this size, 93% of California homeowners' insurers either restricted or altogether withdrew their earthquake policies.¹⁷² In the aftermath of this insurer exodus, Californians found it arduous, if not impossible, to locate a carrier who would insure their

168. Leslie Scism, *California's Earthquake Problem: People Aren't Scared Enough About Them*, WALL ST. J. (Aug. 30, 2015, 8:15 PM ET), <https://www.wsj.com/articles/california-pushes-homeowners-to-insure-against-earthquakes-1440980138>.

169. Some have been critical of the CEA's slow rate in increasing the number of Californians with sufficient earthquake insurance. *See id.*

170. *History of the California Earthquake Authority (CEA)*, CAL. EARTHQUAKE AUTH., <http://www.earthquakeauthority.com/About-CEA/CEA-History> (last visited Jan. 22, 2020).

171. *Id.*

172. *Id.*

home against the next potential quake.¹⁷³ After two years of proposed solutions and political back and forth, the California legislature created the first-of-its-kind California Earthquake Authority (CEA).¹⁷⁴

Not itself an insurance company, the CEA exists as a “public instrumentality of the State of California,” which offers and facilitates the offering of earthquake insurance to Californian policyholders.¹⁷⁵ The CEA provides earthquake coverage through this two-fold approach: providing CEA “basic residential earthquake insurance” policies and providing the ability for CEA-authorized insurers to “sell residential earthquake insurance products that supplement or augment the basic residential earthquake insurance provided by the authority.”¹⁷⁶ Through this system, the state provides basic coverage while private insurers’ plans fill any existing gaps and provide for coverage over and above that baseline. However, and importantly, the CEA itself does not sell products directly to the public.¹⁷⁷ Instead, CEA participating insurers issue these products pursuant to the CEA guidelines and expectations, thus avoiding a significant cost burden to the state.¹⁷⁸ CEA policies are available for standard homeowners, as well as mobile home residents, condominium/apartment owners, and renters.¹⁷⁹

The CEA formed primarily through the existence of a unique California law, under which insurers must offer earthquake homeowners insurance to their insureds.¹⁸⁰ Due to the typically high rate of earthquakes in California, the state has required insurers, since the 1980s, to offer earthquake coverage to its policyholders as a condition to selling or renewing any homeowners

173. *See id.*

174. Daniel Marshall, *An Overview of the California Earthquake Authority*, 21 RISK MGMT. & INS. REV. 73, 74–75 (2018) (noting also that the title of the authorizing legislation was the Homeowners Insurance Availability Act of 1996) [hereinafter Marshall, *Overview Article*].

175. *Id.* at 91 (quoting CAL. INS. CODE § 10089.21).

176. *Id.* (quoting CAL. INS. CODE § 10089.27(b)(1)).

177. *Id.* (noting that the CEA provides insurance “through its legal agents”).

178. *Id.* at 91.

CEA receives no financial support through the California state budget—its sole capital comes from private sources (contributions from participating insurance companies, accumulations of surplus revenues, accumulated investment returns), and its sole revenue comes from premiums realized through sale (by participating insurers) of CEA insurance products and from investment returns.

Id. at 100.

179. *Id.* at 76.

180. *Id.* at 81.

policy.¹⁸¹ California is, at the time of this writing, the only state in the nation with such a requirement.¹⁸² Policyholders are not under a duty to accept this offer, but the insurer must continue to make it available throughout the lifespan of the policy.¹⁸³ As the CEA itself explains, “In California, insuring a home for earthquake is important enough that the choice to do so belongs—with certain conditions imposed—to the policyholder, not the insurer.”¹⁸⁴

Rates and premium prices for CEA policies are not created or maintained by the CEA itself, but through the California Department of Insurance.¹⁸⁵ By putting these rates in the control of this regulatory agency, California avoids “noncompetitive” market crises, while generally keeping premiums and policy costs low.¹⁸⁶ As evidence of the regulation’s efficacy, the CEA estimates that without its rate control mechanisms, the average premium on its policies would more than double.¹⁸⁷ CEA policies also offer and prescribe a range of premiums to better share the risk between insurers and policyholders, while maintaining a consistent market.¹⁸⁸ These rates are based on actuarial predictions from the CEA’s internal actuary and finance departments.¹⁸⁹ Independent rate-setting and limited premium and deductible ranges ensure uniformity and ease of access for would-be insureds seeking earthquake coverage.

There exists a debate as to the efficacy of the CEA in meaningfully increasing the number of earthquake policyholders within its state.¹⁹⁰ In an overview presented to Pennsylvania’s Wharton School of Business, CEA’s general counsel noted that “statewide take-up [also known as policy adoption] plummeted after CEA’s start-up.”¹⁹¹ However, over a ten-year period from 2006-2016, the number of CEA policies in force grew by nearly

181. *Id.* at 81–82 (“The offer must state the proposed dwelling, contents, and additional living expense limits; the deductible, and the estimated annual premium.”).

182. *Id.* at 82 (noting, however, Kentucky’s regulatory “preference” that such offers be made to policyholders regularly but noting no statutory requirement exists).

183. *Id.*

184. *Id.* at 84.

185. *Id.* at 94.

186. *See id.* at 94–95.

187. *Id.* at 97 fig.8.

188. *Id.* at 105. As of 2016, deductibles are available at 5%, 20%, and 25% of the overall coverage limit. *Id.*

189. *Id.* at 113.

190. *Id.* at 96 (“The question of why so many fewer households buy earthquake insurance today, 20+ years after Northridge is frequently posed . . .”).

191. DANIEL MARSHALL, RES. FOR THE FUTURE, POLICY BRIEF NO. 17-03, AN OVERVIEW OF THE CALIFORNIA EARTHQUAKE AUTHORITY 5 (Feb. 2017), <https://media.rff.org/documents/RFF-PB-17-03.pdf> [hereinafter MARSHALL, RFF POLICY BRIEF].

200,000 insureds, with 931,589 Californians insured under a CEA policy in 2016.¹⁹²

B. The Oklahoma Earthquake Authority as a Legislative Solution

Because Oklahoma now experiences earthquakes more frequently than California,¹⁹³ the legislature should follow the lead of the CEA to protect its citizens. Today, Oklahoma is undeniably an earthquake-prone state, and the time is past due for its legislators to treat it as such. While the day may come, especially with increasingly frequent climate disasters,¹⁹⁴ for a larger federal-based disaster insurance program, Oklahoma can begin to confront its issues now at the state level.¹⁹⁵

First, the Oklahoma legislature should require, not merely allow, insurers within the state to offer earthquake coverage both at the sale and annual/bi-annual renewal of coverage. As discussed, this straightforward law is the simple, but unique, underpinning of the CEA and California's approach to earthquake insurance regulation more generally.¹⁹⁶ While Oklahoma has not yet experienced its own Northridge quake,¹⁹⁷ there is a similar dysfunction across the state's earthquake insurance market that requires vigorous legislative intervention in line with California's novel concept. The legislature could even create the Authority with a possible sun-setting window to gain wider support, citing the recent decrease in earthquakes

192. *Id.* at 6 tbl.2.

193. Ehrman, *supra* note 11, at 612.

194. *How Can Climate Change Affect Natural Disasters?*, USGS, https://www.usgs.gov/faqs/how-can-climate-change-affect-natural-disasters-1?qt-news_science_products=0#qt-news_science_products (last visited Feb. 29, 2020) (noting the likelihood of increased natural disasters "with increasing global surface temperatures").

195. The federal government already supplements the private insurance market in one area where insurers had trouble containing risk: flood insurance. See Noel King & Nick Fountain, *Episode 797: Flood Money*, NPR (Sept. 29, 2017, 6:36 PM ET), <https://www.npr.org/sections/money/2017/09/29/554603161/episode-797-flood-money>.

196. California's compulsory earthquake insurance offer law passed in 1984. While some recognized its general usefulness, scholars at the time were quick to note that the law, in and of itself, did not sufficiently protect Californian's from earthquake market irregularities. See generally Jeffrey B. Hare, Comment, *Earthquake Insurance: A Proposal for Compulsory Coverage*, 24 SANTA CLARA L. REV. 971 (1984).

197. Though many of Oklahoma's earthquakes cause little damage, "[t]he earthquake severity hazard will be high for the next several years because of the energy in those fault systems from previous, historical wastewater injection," per the Oklahoma Geological Survey. Ken Miller, *Damage Reported After Earthquakes in Oklahoma*, FOX NEWS (Mar. 5, 2018), <https://www.foxnews.com/us/damage-reported-after-earthquakes-in-oklahoma> (quoting Jacob Walter, seismologist with the Oklahoma Geological Survey).

consistent with fewer wastewater wells.¹⁹⁸ With earthquakes established as a regular part of Oklahoman life, citizens in the state should have adequate protection against the relatively new risks they encounter, not just by choice of insurers, but through legal mandate.

Second, Oklahoma needs to establish its own version of the CEA to better protect its citizens and provide for a more stable and predictable market for earthquake insurance.¹⁹⁹ As the CEA general counsel explained in the report referenced above, the California model should not remain a novelty to that state alone; its principles and foundations remain “transferable and practicable.”²⁰⁰ It is past time for Oklahoma to transfer these practicable lessons to its own insurance market.

Many, if not perhaps all, of the issues noted (unpaid claims, untrained adjustors, and non-competitive markets) in this Comment and by the Oklahoma Insurance Department could be proactively addressed through an Oklahoma Earthquake Authority. Oklahoma earthquake insurers have created a “noncompetitive” marketplace with few options and high premiums.²⁰¹ An Oklahoma Earthquake Authority, following the California model, would offer earthquake policies subject to consistent and controlled rates and premiums. Oklahoma earthquake insurers have created ambiguity as to whether their policies cover human-made or induced quakes.²⁰² An Oklahoma Earthquake Authority, following the California Model, could offer clear and uniform definitions, tailored to Oklahoman concerns. Almost as if the CEA anticipated an application to Oklahomans and induced quakes, CEA policies rely on definitions created by the state government’s head geologist, not insurers themselves.²⁰³

198. Oklahoma earthquakes registering a 3.0 or greater have decreased commensurate with a regulatory tightening of wastewater injection. *Oklahoma Earthquakes Decrease for 3rd Straight Year*, AP NEWS (Jan. 1, 2019), <https://www.apnews.com/216ddc7f8391467c90bd526696beb4f3>.

199. Under the CEA, Californians still often choose to forego earthquake insurance. Still, the CEA creates a more affordable and regulated marketplace. *See* Liz Pulliam Weston, *Rethinking Your Stance on Earthquake Coverage*, L.A. TIMES (Feb. 25, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-feb-25-fi-2645-story.html>; *see also* Andrew Blankstein & Monica Alba, *Why Do So Few California Homeowners Have Earthquake Insurance*, NBC NEWS (Oct. 17, 2014, 8:28 AM CDT), <https://www.nbcnews.com/news/investigations/why-do-so-few-california-homeowners-have-earthquake-insurance-n227711>.

200. MARSHALL, RFF POLICY BRIEF, *supra* note 191, at 6.

201. *See supra* Section I.B.

202. *See supra* Section I.B.

203. Marshall, *Overview Article*, *supra* note 174, at 105.

Within an Oklahoma Earthquake Authority, these definitions could pay particular notice to induced quakes and their underlying causes.²⁰⁴ A single, precise definition of “earthquake” could similarly dispel disagreements over “ground settlement” versus “earthquake” and mandate the inclusion of induced quakes in policies upfront, rather than retroactively as the Oklahoma Insurance Commissioner has required.²⁰⁵ Earthquake policies offered through an Oklahoma Earthquake Authority would also help ease market tensions for private insurers by mandating the offer of uniform, state-managed policies. Similarly, an Oklahoma Earthquake Authority could better regulate earthquake insurers in conjunction with the Oklahoma Insurance Department.

Under the control of an Oklahoma Earthquake Authority modelled after the CEA, all private insurers would be required to be a “participating insurer.”²⁰⁶ For the state to recognize a participating insurer, the CEA requires all insurers to enter into an “Insurer Participation Agreement” between the insurer and the California Insurance Commissioner.²⁰⁷ Oklahoma, under its own Earthquake Authority, should do the very same, essentially creating a heightened and earthquake-specific form of its insurance licensure requirements. It is here that the Oklahoma equivalent of the CEA could work hand-in-glove with the OID. As discussed, the Oklahoma Insurance Commissioner retains control over insurer rules and regulations.²⁰⁸ Through the OID, the Commissioner could impose earthquake-specific requirements, like the CEA’s, onto Oklahoman insurers.²⁰⁹

Most pertinently for Oklahomans, the CEA mandates claims-handling requirements for its adjustors, which seem to address some of the concerns that the Oklahoma Insurance Commissioner has outlined.²¹⁰ Claims representatives under the CEA are required to be trained according to CEA

204. The Oklahoma Geological Survey (OGS) has dedicated a significant amount of scholarship to the circumstances surrounding wastewater induced quakes. The OGS could excellently provide these definitions. *See* Okla. Geological Survey, Statement on Oklahoma Seismicity (Apr. 21, 2015), http://wichita.ogs.ou.edu/documents/OGS_Statement-Earthquakes-4-21-15.pdf.

205. *See supra* Section II.A.

206. *See For Insurers: Helping Financially Protect Californians from Damaging Earthquakes*, CAL. EARTHQUAKE AUTH., <http://www.earthquakeauthority.com/Insurance-Professionals/For-Insurers> (last visited Jan. 22, 2020).

207. *Id.*

208. *See* 36 OKLA. STAT. § 307.1 (Supp. 2018).

209. The Insurance Commissioner maintains the ability to adopt rules and regulations pertaining to the Oklahoma Insurance Code. *Id.*

210. *See supra* Section II.A.

claim-handling guidelines and the California version of the UCSPA.²¹¹ Among other requirements, “[t]he CEA requires every [participating insurer] to comply with the California Department of Insurance regulations that set forth standards governing the training of insurance adjusters in evaluating damage caused by earthquakes and the procedures for reporting unaccredited adjusting.”²¹² Within the CEA claims-handling guidelines itself, the CEA encourages insurers to train its adjusters on the difference between earthquake damage and other forms of property damage, as well as outlining the specifics of the state’s UCSPA.²¹³ The Oklahoma Insurance Department could monitor compliance with these requirements through its existing agency and market conduct review process.²¹⁴ An Oklahoma Earthquake Authority would address and more definitely prevent issues of earthquake insurance already recognized in the state, while mandating that they do not recur in the future.

To guarantee that participating insurers are following CEA guidelines, California requires insurance adjusters to adhere to the Consortium of Universities for Research in Earthquake Engineering (CUREE) guidelines in adjusting claims.²¹⁵ This thorough CUREE earthquake damage inspection checklist ensures that adjusters are checking and noting issues of topography, geotechnical issues, wall leaning, foundation cracking, and fireplace cracking among its thirty-four required questions.²¹⁶ To this point, the CEA requires a completed CUREE checklist as part of a “complete investigation” into claims

211. *For Insurers: Helping Financially Protect Californians from Damaging Earthquakes*, *supra* note 206.

212. *Earthquake Event Reference Document for California Earthquake Authority Participating Insurer Claims Liaison(s)*, CAL. EARTHQUAKE AUTH., <https://www.earthquakeauthority.com/Insurance-Professionals/For-Adjusters/CEA-PI-Claim-Liaison-Reference-Document-2018.pdf> (last visited Jan. 22, 2020).

213. CAL. EARTHQUAKE AUTH., CLAIM MANUAL 11–12 (Sept. 22, 2015), <https://www.earthquakeauthority.com/Insurance-Professionals/For-Adjusters/CEA-Claim-Manual-1-1-2016> [hereinafter CLAIM MANUAL].

214. *See* 36 OKLA. STAT. § 311.4 (Supp. 2018).

215. CLAIM MANUAL, *supra* note 213, at 62. CUREE is a non-profit comprised of more than twenty-five universities with the “goal of advancing earthquake engineering research and engaging in outreach efforts to develop STEM-related educational resources to benefit the public as well as the next generation of engineers.” *See About CUREE*, CUREE, <http://www.curee.org/archive/organization.html> (last visited Jan. 22, 2020).

216. *General Earthquake Damage Inspection Checklist*, CUREE, <https://www.curee.org/projects/EDA/docs/EDA-F2-rev1.pdf> (last visited Feb. 26, 2020). The checklist covers a near-exhaustive inspection of a home, and asks for additional notes and photographs documenting any damage that an adjuster may find. *Id.*

with earthquake damage.²¹⁷ Because Oklahoma does not mandate this requirement as California currently does, there is presumably no demand that Oklahoma adjustors follow the instructions of the CUREE checklist. When insurers adjust claims in Oklahoma, there is no requirement to abide by a proscribed checklist even if compliance with that checklist would otherwise constitute claims-handling best practices.

The specificity of this checklist and its mandatory nature highlight the extent to which the CEA, and a potential Oklahoman counterpart, can ensure uniformity and consistency in the earthquake claims handling process.²¹⁸ Moreover, the Oklahoma Insurance Department could work with CUREE to better tailor this checklist to Oklahoma-specific concerns (accounting for clay soil, wastewater induced quakes, etc.). This itemized checklist, in itself, would not entirely cure the worries of Oklahoma's earthquake insurance market. If California, a state with even fewer quakes than Oklahoma,²¹⁹ finds these criteria necessary, then Oklahoma should too.

The Oklahoma legislature maintains the ability to follow California and protect its citizens from a market that it already knows to be faulty and often unhelpful to those with earthquake insurance. An Oklahoma Earthquake Authority would be able to offer Oklahomans a more affordable, basic form of earthquake insurance than currently available, while ensuring that such a policy remains appropriately priced and rated. Moreover, the Oklahoma Earthquake Authority would be able to work in tandem with the state's Insurance Department to prevent existing abuses from recurring by mandating heightened requirements on all insurers that would wish to serve as a participating insurer in the Authority. It remains to be seen if the Oklahoma legislature will ever consider this sweeping reform, or is even aware of such a statutory scheme.²²⁰ The results from the CEA partnered with

217. CLAIM MANUAL, *supra* note 213, at 62.

218. *See id.* The CEA Manual even notes that “[u]se of the CUREE inspection checklist ensures consistent and complete inspections by all the CEA participating insurance companies.” *Id.*

219. *See Oklahoma Now Has More Earthquakes on a Regular Basis Than California. Are They Due to Fracking?*, USGS, https://www.usgs.gov/faqs/oklahoma-now-has-more-earthquakes-a-regular-basis-california-are-they-due-fracking?qt-news_science_products=0#qt-news_science_products (last visited Jan. 22, 2020).

220. Oklahoma State Senator Clark Jolley has proposed a government reinsurance program modeled after the CEA, but it seems to lack the exacting regulations and state-written policies of the CEA. Lyle Adriano, *Oklahoma Considers “California-Style” Approach to Earthquake Insurance*, INS. BUS. AM. (Feb. 25, 2016), <https://www.insurancebusinessmag.com/us/news/breaking-news/oklahoma-considers-californiastyle->

the recognized flaws in the Oklahoma earthquake insurance market make clear, however, that the state and its citizens would be well-served by the formation of an Oklahoma Earthquake Authority.

IV. Conclusion

Many Oklahomans and their insurers alike presumably never expected the state to become the national epicenter of earthquakes and seismic activity. Indeed, the state and its citizens are accustomed to taking shelter during tornado season and fearing catastrophic wind and hail damage to their property,²²¹ but few could have predicted the frequency and extent of the threat now existing beneath their homes' foundations. The fact remains, however, that despite the near-universal recognition of the cause of the state's earthquake phenomenon,²²² earthquake insurers in Oklahoma still fail to provide their policyholders with adequate coverage to protect against this newer risk.

In the near term, earthquake policyholders whose insurers have wrongfully-denied their claim due to an unsubstantiated policy exemption should band together in taking their fight to the insurers through doctrine of illusory coverage.²²³ Through this litigation strategy, policyholders can compel insurers to honor their policy and eliminate the most contemptible avenues for excuses and non-payments. More effective and rigid regulation from the Oklahoma Insurance Department can clarify the expectations between insurers and policyholders and bolster enforcement efforts. By realizing the full power of the Insurance Commissioner and the UCSPA, the state's regulatory body can set a clear standard for how earthquake insurers should treat consumers and handle claims. Finally, though it is a substantial legislative overhaul to be sure, the state legislature should form an Oklahoma Earthquake Authority to both offer affordable coverage to all Oklahomans and further establish comprehensive expectations for insurers. As the ground beneath Oklahomans' feet continues to shift, these measures through litigation, regulation, and legislation can meaningfully assure those with earthquake damage that their insurers will honor the terms and spirit of their

approach-to-earthquake-insurance-28742.aspx. No legislation in Oklahoma based on these other CEA features is apparent at the time of this writing.

221. See Scott Neuman, *A Brief History of Oklahoma Tornadoes*, NPR (May 20, 2013, 7:06 PM ET), <https://www.npr.org/sections/thetwo-way/2013/05/20/185613204/a-brief-history-of-oklahoma-tornadoes> ("Kansas and Oklahoma rank at the top [of all U.S. states] for tornadoes per square mile.").

222. See *supra* text accompanying notes 7–25 (Introduction).

223. See *supra* Section I.B.

coverage. Meanwhile, the state's citizens can do what they have done time and time again: rebuild.

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