Bad Fath Claims Against Insurers: The State Of Utah Law Fifteen Years After Beck v. Farmers Insurance Exchange

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Bad Faith Claims Against Insurers: The State of Utah Law Fifteen Years after *Beck v. Farmers Insurance Exchange*

A hundred years ago, insurance companies dwelt in a blessed state... [they] would never have to spend more than the limits of [their] liability as set forth in the insurance policy... the burden of paying the excess portion of the judgment fell upon the insured... [and the insured] would receive no compensation for the consequences of the insurer's breach of the policy.1

I. INTRODUCTION

In June of 1985, the Utah Supreme Court decided *Beck v. Farmers Insurance Exchange*,2 which definitively concluded that an insured, standing in a first-party relationship with the insurer, can bring a cause of action against its insurer for both first and third-party claims when the insurer breaches the implied covenant of good faith and fair dealing existing in every contractual relationship.3 The *Beck* court also held that such a claim, because it is part of the insurance contract, is based in contract and not tort.4 However, *Beck* opened the door for consequential damages that resulted from the insurer's breach of the duty of good faith and permitted these damages to exceed the policy limits.5 In the past fifteen years, several cases have relied on or cited *Beck* in defining bad faith insurance claims.

An analysis of *Beck* and its progeny is important for a proper understanding of Utah contract law. First, as is explained below, Utah is in the minority of states that treat a bad faith claim as a contract action, rather than as a tort. Therefore, the Utah practitioner and others who bring claims in Utah must comprehend the unique attributes of a contract

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* Copyright © 2000 by William Kevin Tanner.
1. STEVEN S. ASHLEY, BAD FAITH ACTIONS § 1:01 (2d ed. 1997).
2. 701 P.2d 795 (Utah 1985).
3. See id. at 799-800.
5. See *Beck*, 701 P.2d at 801-02.
claim. These attributes include privity of contract, contractual defenses, and limited damages in both kind and amount. Second, because Beck and later cases open doors to different types of damage claims, the practitioner must trace damages resulting from the contractual breach. Last, the reasoning of the decisions discussed below is based on distinct public policies used by the Utah courts to balance the rights of the insured and the insurer. This paper discusses the framework created by the Beck decision and traces expansions, contractions, and modifications of this framework over the last fifteen years.

The following discussion will begin with a summary of Beck. Then, with the goal of mapping bad faith insurance claims in Utah, the author will examine recent Utah Supreme Court and Court of Appeals cases which define the elements composing a bad faith insurance claim: who may bring the claim, what damages may be claimed and the potential defenses of an insurance carrier. The discussion provides only an overview of the general principles of breaches of the implied covenant of good faith and fair dealing, though specific cases will be discussed in detail in order to examine the outer limits of bad faith claims. These cases will present to the reader certain factors considered by the Utah courts and the way in which the general guidelines announced in Beck and more recent cases apply to the particular actions of insurers. As is noted in Beck, the Utah Supreme Court did suggest that tort actions with their requisite elements were allowed in certain situations, but those possible tort actions arising from insurance contracts will not be discussed directly in this paper. However, in some of the following cases a tort action was filed as part of a bad faith claim, and therefore the tort action’s impact on the particular case will be noted.

II. LAYING THE FOUNDATION: Beck v. Farmers Insurance Exchange

A. History

The plaintiff, Wayne Beck, was injured in an accident when another car hit his automobile in a hit-and-run accident. Beck’s Farmer’s insurance policy had uninsured motorist protection as well as no-fault coverage. Beck filed a claim under his policy, and Farmers paid Beck

6. See id. at 800 n.3. “We recognize that in some cases the acts constituting a breach of contract may also result in breaches of duty that are independent of the contract and may give rise to causes of action in tort.” Id. (citations omitted).
7. See id. at 796.
8. See id.
the no-fault policy limit of $5,000 towards his medical expenses and to pay him a sum for his lost wages.\textsuperscript{9}

Beck later filed a claim for the $20,000 uninsured motorist policy limit.\textsuperscript{10} His attorney compiled information demonstrating that Beck’s general damages were in excess of this policy limit; however, “Farmers’ adjuster rejected the settlement offer without explanation . . . .”\textsuperscript{11} A month later Beck filed a lawsuit against Farmers stating causes for breach of contract, bad faith, and emotional distress.\textsuperscript{12}

Farmers filed a motion to dismiss the punitive damages prayed for by Beck because those damages were not available for breach of contract. The court granted its motion.\textsuperscript{13} The parties later settled the uninsured motorist claim and stipulated its dismissal, leaving only the bad faith claim for disposition.\textsuperscript{14} Farmers then filed another motion to dismiss the remaining cause of action for two separate reasons.\textsuperscript{15} First, relying on Lyon v. Hartford Accident and Indemnity Co.,\textsuperscript{16} Farmers argued that it had no duty to settle or bargain Beck’s claim, thereby nullifying a bad faith or breach of contract claim.\textsuperscript{17} Second, Farmers claimed that, even if such a duty existed, the pleadings were not sufficient to show an actual breach.\textsuperscript{18} This motion was granted, despite Beck’s supporting affidavits stating issues relating to the bad faith claim, and Beck appealed.\textsuperscript{19}

\textsuperscript{9} See Beck, 701 P.2d at 796.
\textsuperscript{10} See id.
\textsuperscript{11} Id.
\textsuperscript{12} See id. at 796-97. The specifics of these causes of action are important because some sound in contract, and one sounds in tort. Further, these claims exceed the policy limits, which is an important subject in \textit{Beck} as well as the cases that follow. Specifically, \textit{Beck} claimed:

[F]irst, that by refusing to pay his uninsured motorist claim, Farmers had breached its contract of insurance with him; second, that by acting in bad faith in refusing to investigate the claim, bargain with Beck, or settle the claim, Farmers had breached an implied covenant of good faith and fair dealing; and third, that Farmers had acted oppressively and maliciously toward Beck with the intention of, or in reckless disregard of the likelihood of, causing emotional distress. Under the first claim, Beck sought damages for breach of contract in the amount of the policy limits; under the second, he asked for compensatory damages in excess of the policy limits for additional injuries, including mental anguish; and under the third, he sought punitive damages of $500,000.

\textit{Id.} at 797.

\textsuperscript{13} See Beck, 701 P.2d at 797.
\textsuperscript{14} See id. at 795.
\textsuperscript{15} See id.
\textsuperscript{16} 480 P.2d 739 (Utah 1971).
\textsuperscript{17} See Beck, 701 P.2d at 797.
\textsuperscript{18} See id.
\textsuperscript{19} See id.
B. Beck’s Holding

On appeal, the court stated the public policy concerns justifying the remedies, discussed a contract cause of action, set the groundwork for who may bring these claims, defined bad faith actions, and declared what damages may be sought. Each of these is discussed in turn in relation to the holding in Beck.

1. Public policy reasoning for new standard of insurer conduct

The Beck court began its analysis by reviewing the Lyon holding, recognizing the public policy flaw in the Lyon decision. It was this recognition that began the court’s creation of a new standard of insurer conduct. The court, speaking within the context of bargaining or settling with the insured, stated:

Our ruling in Lyon left an insured without any effective remedy against an insurer that refuses to bargain or settle in good faith with the insured. An insured who has suffered a loss and is pressed financially is at a marked disadvantage when bargaining with an insurer over payment for that loss. Failure to accept a proffered settlement, although less than fair, can lead to catastrophic consequences for an insured who, as direct consequence of the loss, may be peculiarly vulnerable, both economically and emotionally. The temptation for an insurer to delay settlement while pressures build on the insured is great, especially if the insurer’s exposure cannot exceed the policy limits.

The court stated that these policy considerations called for a remedy for the insured. The following two sections demonstrate that the court mandated a contract type of action but allowed tort claims to be brought in some situations.

2. Contract cause of action

The court stated that the proper remedy in this situation should not be a tort action but one in contract. A good faith duty to bargain or to settle “is only one aspect of the duty of good faith and fair dealing implied in all contracts and that a violation of that duty gives rise to a

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20. Beck, 701 P.2d at 798. This language suggests the overruling of Lyon. The court clarified this holding in a footnote: “The Court in Lyon considered only the questions of whether a claim of bad faith gave rise to a tort cause of action; however, to the extent that Lyon is philosophically inconsistent with our recognition today of a cause of action in contract, it is overruled.” Id. at 798 n.1.

21. See Beck, 701 P.2d at 797.

22. See id. at 798.
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claim for breach of contract." The court recognized that only a minority of states had adopted a contract approach instead of a tort approach.

The court acknowledged that other states used the tort approach in order to allow the claimant to exceed the policy limits of the particular insurance policy because holding damages to that limit "provides little or no incentive to an insurer to promptly and faithfully fulfill its contractual obligations." However, the tort approach was, according to the court, one "without a sound theoretical foundation and [had] the potential for distorting well-established principles of contract law." The court in Beck reasoned that insurance providers could be controlled through contract claims. Further, the contract approach would prevent "the analytical straining necessitated by the tort approach and would have far less potential for unforeseen consequences to the law of contracts." An additional problem with the tort remedy was determining the level of bad faith necessary for such a claim. In order to avoid this problem, a "practical" solution was adopted by the court, "the state of mind of the insurer is irrelevant; even an inadvertent breach of covenant of good faith implied in an insurance contract can substantially harm the insured and warrants a remedy." Thus, the court determined that, in the first-party relationship, the cause of action sounded in contract and not tort.

The court, however, did leave the possibility open to tort claims against insurers. In a footnote, the court stated: "We recognize that in

23. Id.
A number of states have steadfastly resisted the dominant trend toward an award of punitive damages for an insurer's breach of the implied covenant of good faith and fair dealing in a first-party setting. These jurisdictions hold to the theory that any remedy in the context of an insurance agreement should not depart from those available under any other contract.
Id. Bopp includes Utah among these states and specifically cites language from Beck. See id.
26. Id.
27. See id.
28. Id. This paper does not discuss the correctness of this decision, or if the tort based approach has had this effect on contract law in those states that have chosen the tort approach to bad faith claims.
29. See Beck, 701 P.2d at 800.
30. Id.
31. See id.
32. See id. The court stated:
Although this Court, in Ammerman v. Farmer's Ins. Exch., 430 P.2d 576 (Utah 1967), recognized a tort cause of action for breach of an insurer's obligation to bargain in a third-party context, it stated that:
[W]e cannot agree... that the considerations which compel the recognition of a tort cause of action in a third-party context are present in the first-party situation. In
some cases the acts constituting a breach of contract may also result in breaches of duty that are independent of the contract and may give rise to causes of action in tort.\textsuperscript{33} Examples include: intentional infliction of emotional distress, fraud, or statutory causes of action.\textsuperscript{34} Although the court was very careful in defining Beck's claims as contractual and distinguishing this case from cases in other states, it left the door open to possible tort claims. Further, as is noted in the following section, the court distinguished between first-party situations and third-party situations, as well as the type of claims that an insured may bring.

3. First-party and third-party relationships

Beck was in the first-party position with Farmers,\textsuperscript{35} so the court distinguished this case from both Lyon and Ammerman, in which third-party situations existed.\textsuperscript{36} "In a third-party situation, the insurer controls the disposition of claims against its insured, who relinquishes any right to negotiate on his own behalf."\textsuperscript{37} An insurer not acting in good faith could expose the insured to damage awards above the policy limits.\textsuperscript{38} The insured is therefore "wholly dependent" on the insurance company and that gives rise to a fiduciary responsibility beyond that found in the contract.\textsuperscript{39} The court then distinguished this situation from the first-party situation where "[n]o relationship of trust and reliance is created by the insured ... in accordance with the contract"\textsuperscript{40} and concluded that "the

\begin{quote}
\textit{Ammerman}, we stated that because a third-party insurance contract obligates the insurer to defend the insured, the insurer incurs a fiduciary duty to its insured to protect the insured's interests as zealously as it would its own; consequently, a tort cause of action is recognized to remedy a violation of that duty. \textit{Id.} (quoting \textit{Ammerman} 430 P.2d at 578-79).
\end{quote}
insured and the insurer have parallel obligations to perform the contract in good faith."  

"Beck stands for the proposition that a first-party bad faith claim sounds in contract, and, in conjunction with Ammerman, a tort claim may be brought in a third-party context where the insured has turned its defense over to the insurance company. In short, Beck allows an insured to bring a contract cause of action against its insurer when the insurer breaches its implied duty of good faith in its relationship with the insured and to bring a tort action in a third-party situation where the insurer acts as the agent of the insured."

4. Bad faith actions defined

After concluding that Beck did have a remedy against his insurer and relying on tort cases which had explored bad faith causes of action, the court listed examples of those actions that constitute bad faith by the insurer. The court stated, "[T]he implied obligation of good faith performance contemplates, at the very least, that the insurer will diligently investigate the facts to enable it to determine whether a claims is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim." The insurer must also deal with its insureds as "laymen," not experts, and can do nothing to interfere with the insurance benefits reaching the insured. The court then restated the public policy behind these requirements: "These performances are the essence of what the insured has bargained and paid for, and the insurer has the obligation to perform them." The cases decided since Beck demonstrate that Utah courts have relied on these elements, as will be manifested in the sections that follow.

5. Damages

Beck created a consequential damages approach: "When an insurer has breached this duty [implied obligation of good faith], it is liable for

41. Id. at 801 (citations omitted).
42. See supra note 32.
43. See Westerby, supra note 4.
44. See Beck, 701 P.2d at 801.
45. Id. (emphasis added). The italicized language seems important to the author for at least two reasons. First, it suggests a minimum bar be established for these requirements. Second, it suggests by implication that in some situations an insurer will be required to do more than "the very least." Further, the cases which followed Beck looked to some of these elements to provide a potential defense to a bad faith insurance claim, specifically, what actions are reasonable and how an insurer may contest a claim to determine its validity. Both of these topics are discussed below.
46. See id.
47. Id.
damages suffered in consequence of that breach." The tort approach was often adopted in other states because contractual damages were usually limited by policy limits, but the Beck court held that such a limitation was baseless. The court stated that the policy limits only set the cap on what the insurer is required to pay in the performance of the contract, not for the damages that result from the insurer's breach of the contract. The court then added in a footnote that dictum to the contrary in Ammerman was "disavowed."

The Beck court opened the door to further damages that were caused by a breach that had been previously limited in Ammerman. As noted above, Ammerman involved a third-party situation and suggested that tort damages were appropriate in those cases. Beck could be read to suggest that, in the damages aspect of bad faith insurance claims, both third party and first party cases are now more comparable. Some of the ramifications of this language will be seen in the cases that follow.

The Beck court then broadly defined the possible damages that could be awarded. It defined general damages as those that "flow[] naturally from the breach." Consequential damages are "those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." The court emphasized that these latter damages may extend beyond the contract, citing several examples, including attorneys' fees, recovery of losses due from falling interest rates, losses of home or business, and even mental anguish. A limit, however that the court placed on the damages was placed in footnote 6 by the court: "Clearly, damages will not be available for the mere disappointment, frustration, or anxiety normally experienced in the process of filing an insurance claim and negotiating a settlement with an insurer."
6. **Summary of Beck**

*Beck* established the parameters of Utah's bad faith actions against insurers. First, because of the nature of the insurance business and the dependence of the insured on the insurer, especially in third-party situations, *Beck* recognized the need to provide a remedy when the insurer breaches its implied duty to act in good faith. Second, the Utah Supreme Court chose the contract action as the proper vehicle to press these claims against the insurers. In fact, *Beck* requires that first-party actions be brought in contract. Third, the court restated that the third-party action as one which created a fiduciary duty allowing for tort type actions. The fourth aspect of *Beck* was its establishment of a minimum bar; enumerating standards that define bad faith. The final aspect of *Beck* was its broad definition of damages, which permits consequential damages that extend "beyond the bare contract terms." 58

### III. The Current State of the Bad Faith Claims in Utah

It has been fifteen years since the *Beck* decision, and the Utah Supreme Court and Court of Appeals have had several opportunities to examine the results of *Beck* and to address new questions in light of the *Beck* decision. This section examines the current state of bad faith claims in Utah, summarizing recent decisions by the Utah Appellate Courts that have reaffirmed, modified, expanded and narrowed the *Beck* decision. Although some changes have occurred, all the cases show *Beck* as the definitive point of origin for any case dealing with bad faith insurance claims. The structure of this section mirrors the analysis of the *Beck* decision. It will begin by examining the current public policy in this area of law and will continue through the same topics discussed above until concluding on the issue of damages as defined in the more recent cases.

#### A. Public Policy

Public policy behind the *Beck* decision has not changed but has been tempered to recognize the insurer's rights in some cases. This policy, as enunciated in *Beck*, was to protect the insured from becoming a victim to the greater financial power of the insurance companies. At the same time, the court in *Beck* wished to provide an incentive to insurers to honor their policies by laying down specific acts that constitute good faith.

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58. *Id.* at 801.
Although this case did not arise in the context of a bad faith insurance claim, the Utah Supreme Court recognized the public policy of protecting the insurer in *Chatterton v. Walker*.\(^{59}\) In this case, the plaintiff, Chatterton, was struck by an uninsured motorist, Walker, and Chatterton brought suit, obtaining a default judgment against the defendant.\(^{60}\) During these proceedings, however, State Farm, Chatterton’s insurer, sought to intervene and filed a motion in opposition to the default judgment because the judgment affected the rights of State Farm.\(^{61}\) The district court entered the default judgment against Walker, and State Farm appealed.\(^{62}\) The Supreme Court determined that State Farm stood in the place of the uninsured motorist and would in fact be required to pay if the uninsured motorist had to pay.\(^{63}\) The court stated:

> The conflict of interest generated by uninsured motorist protection is indeed problematic. Individuals naturally look upon their relationship with their insurer as a protective relationship. This view must of course be tempered by the knowledge that an insurer will often aggressively investigate an insured's claim to verify the accuracy and veracity of that claim . . . . It is certainly unsettling for the insured when that insurer appears in court and presents itself in a thoroughly adversarial posture—indeed even taking up the defense of the other motorist’s position and arguments.\(^{64}\)

This statement could suggest that while courts recognize the vulnerable position of the insured, it must be remembered that insurers have public responsibilities extending beyond the individual. The conflict between the duty to shareholders and the need to maintain rates agreed to by policyholders is a legitimate issue. In this case, however, State Farm was allowed to intervene to determine the liability of the uninsured motorist.\(^{65}\)

At the same time, the Utah courts reaffirmed the policy concerns in *Beck*. In *Campbell v. State Farm Mutual Automobile Ins. Co.*,\(^{66}\) the court of appeals quoted *Beck* at length in support of the duty owed by the

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59. 938 P.2d 255 (Utah 1997).
60. See *Chatterton*, 938 P.2d at 256.
61. See *id*.
62. See *id*.
63. See *id*. at 260.
64. *Id.* at 261. The court added in a footnote: “We also note that an insurer has an obligation not merely to its own stockholders, but also to its other policyholders, to assure that when it makes payment on a claim, there is a legitimate legal basis for making that payment.” *Id.* at 261 n.10.
66. 840 P.2d 130 (Utah Ct. App. 1992). This case will be discussed at length below in the context of first and third-party claims, as well as consequential damages.
insurer when a third-party brought a claim against the insured. 67 This demonstrates that the policy reasons behind Beck and first-party situations also covered third-party situations.

The policy concerns that support Beck remain valid in Utah. However, Utah courts have recognized the legitimacy of insurer’s concerns, regarding the duty owed to other policyholders, as well as recognition of the insurer’s duty to validate claims submitted to it. 68 Thus, when the insured claims that he has been dealt with in bad faith, both concerns of the insured and those of the insurer must be balanced when evaluating the behavior of the insurer.

B. The Contract Based Claim

In 1993, the Utah Supreme Court in Broadwater v. Old Republic Surety 69 reaffirmed the necessity of an existing contract prior to raising a bad faith claim against an insurance company. In this case, a shareholder brought an action for the wrongful conversion of stocks. 70 In conjunction with her claims, the plaintiff also filed a complaint against the insurer of the tortfeasor for breaching the implied covenant of good faith. 71 The lower court dismissed the bad faith claims, and the plaintiff appealed. 72

On appeal, the court cited Beck and Ammerman stating that “the duty of an insurer to deal fairly is derived from the insurance contract.” 73 The court related that without a contractual relationship, the majority of courts hesitate to allow a third-party to sue another’s insurer for bad faith. 74 The plaintiff, however, relying on Culp Construction Co. v. Buildmart Mall, 75 claimed that privity of contract was not required to state a claim for breach of good faith. 76 In contrast, the Broadwater court stated that Culp “stands only for the proposition that the same facts giving rise to a breach of contract may also give rise to an independent tort claim, such as intentional infliction of emotional distress, fraud, or

67. See id. at 137-38. As noted above, this third-party situation was not involved in Beck, but was the subject of Ammerman.
68. This latter topic will be discussed later in the section relating to the insurer’s potential “fairly debatable defense.”
69. 854 P.2d 527 (Utah 1993).
70. See id. at 528.
71. See id. at 529.
72. See id.
73. Id. at 535-36.
74. See id. This holding also relates to the following section on privity of contract.
75. 795 P.2d 650 (Utah 1990). This case will be discussed as well in the following section relating to privity of contract.
76. Broadwater, 854 P.2d at 536.
misrepresentation.\textsuperscript{77} The court continued: "To bring an independent tort claim, the plaintiff must allege all the elements of the claimed tort."\textsuperscript{78} The court added that because the plaintiff failed to establish the elements of any tort claim her action was properly dismissed.\textsuperscript{79}

In \textit{Savage v. Educators Ins. Co.},\textsuperscript{80} the Supreme Court affirmed both lower courts' decisions, which had determined that the claimant could not bring a claim against her employer's workers' compensation provider because she was not in privity of contract and with the provider.\textsuperscript{81} In her dissent, Justice Durham echoed the policy concerns in the context of the workers' compensation claims:

This reliance [on workers compensation providers], combined with the exclusive control workers' compensation insurers exercise over the processing of claims, creates a considerable disparity in bargaining power . . . . Thus, injured employees are particularly vulnerable to delaying tactics and other bad faith acts by workers' compensation insurers.\textsuperscript{82}

Thus, the \textit{Savage} court required a contractual relationship between the parties to support an injured workers claim against his employer's worker's compensation provider.\textsuperscript{83} Although the Supreme Court rejected the claim, two of the five Justices were prepared to allow a tort type claim.\textsuperscript{84} The majority did recognize that a separate tort action might have existed in that case outside the contract,\textsuperscript{85} acknowledging in a footnote that the separate tort was not considered "because Savage did not raise this issue in her petition for a writ of certiorari."\textsuperscript{86} This suggests that Justice Durham and Stewart were prepared to recognize the tort action in the breach and not as a "separate" claim.

In her note entitled "Breach of an Insurer's Good Faith Duty to its Insured: Tort or Contract?"\textsuperscript{87} Theresa Agee analyzed \textit{Beck} and the reasoning behind tort and contract remedies. A brief discussion of her

\textsuperscript{77.} Id.
\textsuperscript{78.} Id.
\textsuperscript{79.} See id.
\textsuperscript{80.} 908 P.2d 862 (Utah 1995). This case will be discussed below in the section relating to contract causes of action.
\textsuperscript{81.} See id. at 866.
\textsuperscript{82.} Id. at 869 (Durham, J., dissenting). Judge Durham, with whom Justice Stewart concurred, would have recognized "a tort-based duty on insurers to deal in good faith with injured employees." Id.
\textsuperscript{83.} See supra notes 80-82 and accompanying text.
\textsuperscript{84.} See supra note 68.
\textsuperscript{85.} See \textit{Savage}, 908 P.2d at 866 n.4.
\textsuperscript{86.} Id.
\textsuperscript{87.} See, Agee supra note 4.
note is helpful, because it demonstrates what arguments may be presented to affect change on the Beck line of cases. Some of the arguments presented in the article are similar to those raised by Justice Durham’s dissent in Savage.88

Agee noted that bad faith claims have “traditionally been limited to contract damages. In recent years, however, a trend has developed that recognizes an independent cause of action in tort for breach of an insurer’s duty to deal fairly and in good faith in a first party situation.”89 She also noted that several states, beginning with California, have recognized this tort type of action.90

Agee noted that there are two public policy objectives to be considered when choosing between the contract and tort based claims:

First, “the law should deter [insurance companies] from unreasonably delaying or denying benefits due their insureds under, the policy, while providing compensation to insureds suffering damages caused by misconduct.” Second, “the law should not discourage [insurance companies] from asserting valid defenses and defending [against] questionable claims.”91

She then explained why some courts have chosen the tort theory. The first reason is “because of the imbalance in bargaining power between the insurer and its insured, the insured needs the added leverage that a potential tort action can provide.”92 This reasoning is very similar to the language used by Justice Durham in her dissent in Savage, when she described the position of the injured employee with respect to the employer’s insurer.

The second reason for tort recovery is that “if a tort measure of recovery for first-party bad faith was not available to the insured, the only penalty to the insurer for arbitrary delay of payments or denial of coverage would be the interest on the amount owed to the insured.”93 However, as noted above in Beck, the court eliminated this concern by providing a broad interpretation of consequential damages that can exceed the policy limits and would be available for the breach.94
The last reason is that:

[A] tort action is justified because the insured is likely to be in a particularly vulnerable position at the very time an insurer refuses to pay, and a bad faith denial of the claim or a lengthy delay in settling may result in personal calamity for the insured, causing the insured to accept a less than adequate remedy.95

As noted above, the *Beck* court recognized broad damages, which may compensate for this situation.96 Therefore, while *Beck* directly addressed the last two justifications for tort recovery by allowing broad compensatory damages, the first justification relating to the inherent differences in bargaining power has been addressed directly only in *Savage*, which divided the court on this issue.

However, Agee points out a flaw in the tort approach: “Because overzealous efforts to weed out frivolous claims could be interpreted as bad faith, however, the tort theory of recovery and its accompanying punitive damage awards sacrifices the second public policy objective ‘of avoiding disincentives to insurers that discourage them from contesting questionable claims.’”97 It has already been noted above that courts recognize the need for the insurance companies to investigate claims.98 The need of the insurance company to investigate claims is also supported by the “fairly debatable defense,” which is described below.

As stated by Agee: “The practical effect of the *Beck* decision is to allow recovery of tort damages by an insured bringing a cause of action in contract without allowing punitive damages against the insurance company.”99 This seems to accurately summarize the current situation. For now, the Utah Appellate Courts are firm in the contract cause of action, and as noted above, the courts have justified this position by allowing for consequential damages. The *Savage* case presents an

95. Agee, *supra* note 4, at 141.
96. See *supra* notes 56-61 and accompanying text. This topic is also addressed below in the section on damages. Further, the *Beck* court related an example of a “calamity” that may occur: An insured frequently faces catastrophic consequences if funds are not available within a reasonable period of time to cover an insured loss; damages for losses well in excess of the policy limits, such as for a home or business may therefore be foreseeable and provable. *Beck*, 701 P.2d at 802. This conclusion was also noted by Agee in her support of the contract theory. See Agee *supra* note 4, at 145-46. See, e.g. Reichert v. General Insurance Co., 428 P.2d 860, 864 (1967), vacated on other grounds, 442 P.2d 377 (Cal. 1968) (holding that because bankruptcy was a foreseeable consequence of fire insurer’s failure to pay, insurer was liable for consequential damages flowing from bankruptcy).
98. See *supra* notes 64-65 and accompanying text.
expression by two of the five Supreme Court Justices to allow a tort cause of action claim in particular situations.\(^{100}\)

**C. First-Party Relationships and the Privity of Contract**

1. **Privity of contract**

Several cases have expounded on the necessity of a contractual relationship before a person has standing to sue. The first is *Savage*, which has been discussed at length above.\(^{101}\) The employee later brought a suit alleging bad faith on the part of his insurance company.\(^{102}\) The court stated: "We conclude, as did the court of appeals, that an action for breach of the covenant of good faith and fair dealing may be brought only by a party to the insurance contract."\(^{103}\) The court also seemed to heighten the standard for a possible tort remedy in this case.

Taken together, *Beck* and *Ammerman* demonstrate that the duty of good faith and fair dealing is a contractual covenant, one that arises solely as an incident to contractual obligations owed by an insurer to its insured. Even though the remedy set out in *Ammerman* sounds in tort because the relationship of the contracting parties is a fiduciary one while that in *Beck* is purely contractual, both first- and third-party claims arise only because of the contractual relationship of the parties.\(^{104}\)

It seems that the court was not dissolving the tort action, but stating that the breach of good faith arises from the contract and that a separate tort claim must be based on other acts, distinct from the contractual relationship.\(^{105}\)

2. **Contractual relationship must be part of the claim**

Two recent cases have limited, by strict interpretation, the privity of contract required to bring these types of bad faith claims. The first is *Pixton v. State Farm Mutual Automobile Insurance Co., of Bloomington*,

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100. See supra notes 80-82.

101. See *Savage v. Educators Ins. Co.*, 908 P.2d 862, 863 (Utah 1995). Again, this was a case in which an employee was injured and sought recovery from his employer's workers' compensation company.

102. See id. at 864.

103. Id. at 865. See also *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 798 n.8 (Utah 1991) ("We note that the covenant of good faith and fair dealing is an implied contractual provision, and a case of action for its breach sounds in contract." Id.).


105. See *Culp Constr. Co. v. Buildmart Mall*, 795 P.2d 650, 654 (Utah 1990) ("'Without more, a breach of those implied or express duties can give rise only to a cause of action in contract, not one in tort.' However, our holding in *Beck* does not preclude the bringing of a tort claim independently of a contract claim."). Id. (quoting *Beck*, 701 P.2d at 800 (emphasis added)).
Illinois.\textsuperscript{106} Pixton was injured when a runaway vehicle struck her car.\textsuperscript{107} State Farm insured both Pixton and the owner of the other car.\textsuperscript{108} State Farm contracted with another group, IRA, to evaluate Pixton’s injuries and pay for these services directly.\textsuperscript{109} Pixton brought a claim against State Farm as the insurer of the other driver for additional damages and sought information from IRA so that she could “evaluate her claim for settlement.”\textsuperscript{110} When State Farm refused to permit Pixton access to the information, she initiated a bad faith action against State Farm.\textsuperscript{111}

State Farm moved for, and was granted, a motion for summary judgment dismissing Pixton’s bad faith claims.\textsuperscript{112} The court cited Beck, stating that the good faith duty is “a contractual duty running from the insurer to its insured.”\textsuperscript{113} The court continued: “All Pixton’s claims are grounded in her status as an injured claimant attempting to recover against State Farm as the insurer of the tortfeasor . . . .”\textsuperscript{114} It was found that “her first-party claims [arising from her policy with State Farm] were settled to her satisfaction.”\textsuperscript{115} The court drew a bright line showing that a duty only existed in a first-party relationship. The court stated: “As one well-known commentator on insurance law noted, ‘[t]he duty to exercise due care or good faith is owed to the insured and not to a third-party.’”\textsuperscript{116}

Pixton tried to avoid classification as a third-party claimant under the no-fault provision of her insurance policy.\textsuperscript{117} However, Pixton had previously settled with State Farm under this provision.\textsuperscript{118} Pixton also relied on an Arizona case, in which the Arizona Supreme Court recognized an action where the insurer in a similar situation “unreasonably impeded recovery on the liability policy.”\textsuperscript{119} The \textit{Pixton} court distinguished this case noting that Arizona’s cause of action was a tort and “Utah has carefully adopted a more restrictive contract

\begin{itemize}
\item \textsuperscript{106} 809 P.2d 746 (Utah Ct. App. 1991).
\item \textsuperscript{107} See id. at 747.
\item \textsuperscript{108} See \textit{Pixton}, 809 P.2d at 747.
\item \textsuperscript{109} See id.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} See id.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id. at 749.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} \textit{Pixton}, 809 P.2d at 750 (quoting 14 G. COUCH, \textit{COUCH ON INSURANCE} § 51:136 (rev.2\textsuperscript{nd} ed. 1982)).
\item \textsuperscript{117} \textit{Pixton}, 809 P.2d at 750.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id. at 750 n.2 (discussing Rawlings v. Apocada, 151 Ariz. 149, 726 P.2d 565 (1986)).
\end{itemize}
approach.” Pixton restated the Beck proposition that the proper remedy lies in contract law. At the same time, Pixton emphasized the necessity of privity of contract in making that claim. One commentator noted that his “holding is consistent with the trend in most jurisdictions to limit the availability of bad faith claims against insurers . . .”

3. Co-insureds and privity of contract

The second case relating to the privity of contract required to bring this claim is Sperry v. Sperry. In this case, the plaintiff, Annette, brought a wrongful death claim against her husband, Robert, who fell asleep while driving their car and had an accident that resulted in the death of their son. The Sperrys were co-insureds on the vehicle as the policy had been sold to both of them and they had paid with joint monies. Annette also filed bad faith and misrepresentation claims against the insurance company, AMCO, for misrepresenting the policy limits during negotiations on the wrongful death claim. AMCO filed, and was granted, a motion to dismiss the bad faith claims because Annette was a third-party and could not bring such a claim. The parties settled the wrongful death claim and Annette appealed the dismissal of the bad faith claim.

Relying on Savage, Ammerman, and Pixton, the Sperry court stated, “Utah law clearly limits the duty of good faith to first parties to insurance contracts. Consequently, only a first party can sue for breach of that duty.” Because the parties were co-insured, however, this did not end the analysis. The court recognized that the issue “whether a named insured is a first or third party, when asserting a liability claim against a co-insured, is an issue of first impression in Utah.” AMCO argued that Utah should adopt the reasoning of Rumley v. Allstate Indemnity Co., a Texas case that held that an insured could not bring a bad faith claim.
when suing a co-insured. The Utah court summarized Rumley by stating:

The Texas court reasoned that because the plaintiff's claim was not based "upon benefits payable to her under the policy, but upon her husband's tort liability to her for his negligence . . . she assumed the posture of a third party claimant: by bringing a liability claim against her husband. The court also noted the conflicting duties that would be imposed upon insurers if such a cause of action was allowed.

The Utah court adopted the Rumley approach, holding it to be "consistent with [its] prior decisions." The court recognized that, similar to Rumley, Annette's original action was based not on her coverage with AMCO, but rather based on the negligent act of her husband. It also noted the conflict of interest concerns that would occur if both co-insureds brought bad faith claims. AMCO, under Ammerman, had a duty to defend the claim brought by Annette and would pay any liability that Robert might incur. The court noted that if AMCO also owed a good faith and fair dealing duty to Annette the conflict of interest would be "almost certain." The court, dismissing Annette's claim, concluded:

This [conflict] would make any such insurer an almost certain target for a claim of breach of one of these duties, in addition to the claim for the underlying negligence. We are loath to create such a Hobson's choice for an insurer absent a clear reason to do so. Here, there is no such reason, either in law or in policy.

4. Summary

These three cases demonstrate first, that the first-party relationship is an absolute requisite for a claim that an insurer has breached the implied covenant of good faith and fair dealing and that the first-party relationship is to be interpreted narrowly. Second, these cases reaffirm that Beck limited the bad faith cause of action to contract. Although a separate tort action can be maintained, it must be completely separate. The contract claim originates solely and absolutely in the contract. Third,

131. Sperry, 990 P.2d at 384.
132. Id. (quoting Rumley, 924 S.W.2d at 450 n.1).
133. Sperry, 990 P.2d at 384.
134. See id.
135. See id.
136. See id.
137. Id.
138. Id.
these cases clearly indicate that being an "insured" with a contractual relationship alone does not implicate the good faith duty. The party claiming the breach must be directly pressing for its rights under the contract with the insurer. The cases demonstrate that the duty to act in good faith arises only in the first-party contractual relationship where, in accordance with the terms of the policy, the insurer bears the liabilities of the insured.

D. Bad Faith Redefined and the Insurance Defenses

Beck defined the minimum acceptable behavior for an insurer complying with the duty of good faith and fair dealing and listed several examples of bad faith acts in that decision. Beck, however, did not specifically list all actions that may reach the level of breaching this duty. Since Beck, several courts have found additional breaches to have occurred and found others they have dismissed. Also, several courts have enumerated factors that a court may consider to determine whether a breach of the implied duty of good faith and fair dealing has occurred. Subsection 1 of this section looks at other bad faith or related actions taken by insurers that may constitute a breach.

Courts since Beck have also, as noted above in the policy discussion, recognized that insurance companies must be able to deny some claims. Beck and its progeny have not allowed punitive damages because these damages may discourage companies from questioning the validity of certain claims. Cases decided since Beck have determined that a denial of a claim alone does not demonstrate a breach of this duty, unless the insurer had no "debatable" reason for doing so. Subsection 2 below outlines the policy of allowing the insurer to defend its actions relating to the insurance policy. Subsection 3 discusses what the recent cases call the "fairly debatable defense," which allows the insurance companies to demonstrate that no bad faith existed.

139. In Pixton, it was not enough that one had a contract with the insurance company; and in both Pixton and Sperry the same policies were affected; however, the complaining party could not bring the claim.
140. See supra notes 45-47 and accompanying text.
141. See supra note 94 and accompanying text.
142. The "fairly debatable defense" is one of several potential defenses of an insurer. It is discussed in his paper because of the public policy reasoning discussed above, that an insured may reasonably deny a claim and its unique relationship with insurance bad faith claims. However, several other claims are available to insurers. In his Treatise, BAD FAITH ACTIONS, Stephen S. Ashley discusses several potential defenses. See ASHLEY, supra note 1, at §§ 7:01-7:28 (2d ed. 1997).
1. Bad faith breaches and weighing factors in bad faith claims

a. The duty to defend. A bad faith action may arise if an insurance company fails to defend its insured. In Simmons v. Farmers Insurance Group, the court of appeals expressly noted that “the insurance company is held to a duty to discharge its policy obligations in good faith, including its duty to defend the insured against claims covered by the policy.” The duty to defend may, however, be limited by the terms of the policy. In this particular case, the court concluded that the duty was confined to the policy limits and that once the insurer had paid the policy limits on the claim, the insurer no longer had the duty to defend. However, the court cited language suggesting that the duty to defend does not always end with the payment of the policy limits.

b. Failure to settle a claim in good faith: Campbell v. State Farm Mutual Automobile Insurance Co. (1) Background. The court in Beck concluded that one of the duties owed the insured required that the insurer will “diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim.” Campbell v. State Farm Mutual Automobile Insurance Co. held that this duty includes the duty to settle with a third-party under certain conditions.

In Campbell, the insured, Campbell, was traveling with his wife on a two-lane road. Campbell passed a series of vans traveling in the same direction at the same time that Ospital was coming the other direction in 143. 877 P.2d 1255 (Utah Ct. App. 1994).
144. Id. at 1258 (citations omitted).
145. See id.
146. See id. at 1258.
147. See id. Although the court concluded that in this case the duty ended with the payment of the policy limits, the court also cited several cases and their holdings that suggest that this may only be the case if the insured is not prejudiced. The court cited Heredia v. Farmers Ins. Exch., 228 Cal. App. 3d 1345, 279 Cal. Rptr. 511, 518 (1991) for the proposition that “the duty to defend ends with the policy limits, assuming no prejudice attaches to the insured”; Johnson v. Continental Ins. Co., 202 Cal. App. 3d 477, 248 Cal. Rptr. 412, 417 (1988) for the following: “if insurer tenders its policy limits in response to the demand of its insured prior to the initiation of litigation arising from an accident, insurer generally has no further duty to defend”; and Kantack v. Progressive Ins. Co., 618 So. 2d 494, 497 (La. Ct. App. 1993) for the conclusion that “an insurer must make every effort to avoid prejudicing its insured by the timing of its withdrawal.” Simmons, 877 P.2d at 1259.
150. See id. at 132. As will be noted, this case resulted from a summary judgment dismissal of Campbell’s bad faith claims against State Farm. The facts that are related in this case are part of the motion for summary judgment and therefore are related by the court in the light most favorable to Campbell. The actions brought by the Ospitals and Slusher were tried and a judgment which was affirmed on appeal was entered against Campbell. See id. at 134-35.
his own vehicle. His own vehicle. Ospital swerved and collided with a vehicle driven by Slusher. Ospital was killed and Slusher was injured. The Ospitals and Slusher settled their claims, but at the time of trial, both had claims against Campbell, who believed that he had not caused the accident.

State Farm assigned an investigator, Summers, to investigate the claims of Ospital and Slusher. His investigation showed Campbell to be at fault for the accident, and Summers believed that Campbell would be faced with a judgment exceeding the policy limits of $25,000 per person and $50,000 per accident. These conclusions were based on the death of Ospital and the degree, costs, and permanency of Slusher's injuries. Summers concluded settlement to be in the best interest of Campbell and forwarded these conclusions to State Farm. His superiors disagreed and ordered that he destroy the report's conclusions of Campbell's fault. Summers agreed, fearing his job security.

Campbell was never informed of the conclusions of State Farm's investigation, nor was he informed of the "numerous witnesses who would testify against him, or that he would be legally liable for the entire amount of the judgment if he were adjudged even partially at fault." Both the Ospitals and Slusher offered to settle for the policy limits on several occasions, and the Ospitals might have settled for less, but State farm refused these offers. At the conclusion of trial in 1983, Campbell was found wholly at fault, and the jury awarded damages for $253,957 against him. State Farm appealed the judgment but informed Campbell that he would be responsible for the excess judgment. Two months after trial when Slusher, the Ospitals, and Campbell demanded the full judgment, State Farm for the first time offered the full policy limits. The Ospitals and Slusher rejected this offer. State Farm did not offer to

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151. See Campbell, 840 P.2d at 132.
152. See id.
153. See id.
154. See id.
155. See Campbell, 840 P.2d at 133.
156. See id.
157. See id.
158. See id.
159. See id.
160. See id.
161. See id.
162. Campbell, 840 P.2d at 134.
163. See id.
164. See id.
165. See id.
166. See id.
167. See id.
pay the full judgment until three years later and then only if Campbell would release his bad faith claim.\textsuperscript{168} This offer was also rejected.\textsuperscript{169}

Campbell hired another attorney to take care of the excess judgments and, later, the bad faith claim.\textsuperscript{170} Campbell’s attorney worked with the Ospitals and Slusher to reach a settlement.\textsuperscript{171} The parties agreed that the Ospitals and Slusher would not execute on Campbell’s assets.\textsuperscript{172} As part of their agreement, Campbell would pursue his bad faith claim against State Farm.\textsuperscript{173} Campbell, Slusher and the Ospitals then brought a bad faith claim against State Farm.\textsuperscript{174} State Farm argued that all the claims should be dismissed because, if the judgment against Campbell were affirmed on appeal, State Farm would pay the judgment and all the related costs.\textsuperscript{175} Slusher’s and the Ospitals’ claims were dismissed with prejudice and Campbell’s claim was dismissed without prejudice pending the resolution of his prior case on appeal.\textsuperscript{176} In the end, the Utah Supreme Court affirmed the judgment against Campbell and “State Farm paid the excess judgments with interest and costs on July 28, 1989.”\textsuperscript{177}

(2) \textit{The bad faith claim.} Following this ruling, the Campbells began the action that is the subject of this case.\textsuperscript{178} The Campbells claimed several types of actions including: “1) a breach of the implied covenant of good faith and fair dealing; 2) the tort of bad faith; 3) a breach of fiduciary duty; 4) fraudulent misrepresentation; and 5) intentional infliction of emotional distress.”\textsuperscript{179} State Farm moved for summary judgment for two reasons.\textsuperscript{180} First, State Farm argued that the judgment against Campbell was not final during the appeal.\textsuperscript{181} Second, State Farm noted that, as it had paid the entire judgment, “the Campbells were never ‘exposed’ to excess liability.”\textsuperscript{182} Therefore, the Campbells had “never

\textsuperscript{168} See Campbell, 840 P.2d at 135.
\textsuperscript{169} See id.
\textsuperscript{170} See id. at 134.
\textsuperscript{171} See id. at 135.
\textsuperscript{172} See id.
\textsuperscript{173} See id. The fruit of such a claim, if any, was to be applied first to the expenses of litigation and to satisfy the judgments in favor of Slusher and the Ospitals. Any recovery above that amount would be distributed as follows: 45% to Slusher, 45% to the Ospitals, and 10% to the Campbells. Id. at 135 n.8.
\textsuperscript{174} See Campbell, 840 P.2d at 135.
\textsuperscript{175} See id.
\textsuperscript{176} See id.
\textsuperscript{177} Id.
\textsuperscript{178} See id.
\textsuperscript{179} Id.
\textsuperscript{180} See Campbell, 840 P.2d at 136.
\textsuperscript{181} See id.
\textsuperscript{182} Id.
suffered any legally cognizable damages." The district court granted summary judgment and dismissed the Campbells' claim, reasoning that "no cause of action for bad faith exists if the insurer immediately satisfied the entire excess judgment when it became final."

Because the motion was for summary judgment, all the above facts were taken in the light most favorable to the Campbells. It is important to note that the lower court affirmed this judgment despite the actions allegedly taken by State Farm. That court reasoned that in the context of bad faith failure to settle, no matter how shocking the actions of the insurer, no claim is possible if the insurer paid all damages weighed against the insured. The court therefore implied that a breach for failure to settle a claim may be cured by an insurance company simply paying the excess judgment beyond the policy limits, even if the insurance company should have accepted the offer and knew that it would lose (or that a strong possibility existed that it would lose) the case at trial.

The court of appeals addressed State Farm's reasoning in a footnote prior to its analysis. The court noted:

> It appears from the record that State Farm did not post a supersedeas bond on appeal. Thus, Slusher and the Ospitals would have been free to execute upon their judgments against Campbell, notwithstanding the fact that the judgments were being appealed, until the time when they reached an accord among themselves.  

The court further stated that the eventual payment of the judgment "mitigates the insured's damages, but there may indeed be other legally cognizable damages sustained by the insured which were not remedied by the" payment. The court went on to quote Beck at length, noting all the possible reasons that one might have for a bad faith claim.

The court of appeals concluded that the duty of good faith included this situation: "Part of the insurer's implied duty to its insured is to zealously guard the insured's interests when deciding whether to accept an offer of settlement of the third-party's claim or to take the case to trial. The court added that this duty includes "accept[ing] an offer of settlement within the policy limits when there is a substantial likelihood of a judgment being rendered against the insured in excess of those

184. Id.  
185. See id.  
186. Campbell, 840 P.2d at 136 n.11.  
187. Id. at 137.  
188. Id. at 138 (footnote omitted).
The court stated that the test to judge "the insurer’s conduct [was] one of reasonableness."

In a footnote, the court noted that it would use an objective reasonableness test. The court continued, "[t]hus, irrespective of whether the insurer’s unreasonable decision not to settle resulted from willful misconduct or simple ineptitude, the insurer has violated the duty of good faith owed to the insured." The court concluded that when the insurer makes determinations relating to settlement offers it "must give the insured’s interests at least as much consideration as it gives its own.

At this point in the court’s analysis, it was clear that a duty would be found in this case. The court stated that, under Beck, an insured had an available tort action for a breach such as this. The court of appeals in its footnote suggested that the breach of good faith in respect to settlement could be expanded further. The court cited other cases in which other courts "held that the insurer has an affirmative duty to initiate settlement negotiations if the third party has made no settlement offers.

(3) Consequential damages. Having found that failure to settle breaches a duty, the court turned to State Farm’s argument that no claim remained as it had paid the excess judgment. The court stated, however, that this payment did not remove the breach of the duty of good faith. The court noted that Beck, in the context of possible tort damages, could encompass other damages beyond the excess judgment. In a footnote the Court stated that the entry of an excess judgment could effect the "peace of mind" that one would expect when obtaining insurance, and that further "real damage [occurs] because of the potential for harm to the insured’s credit rating and in the form of liens on the insured’s property." Therefore, the court noted that emotional, reputation, and economic damages could be recovered.

The court, beyond the policy reasons above, also noted that "it is the unreasonable failure to settle the third-party claim in the first place, not the later failure to pay the resulting excess judgment, which breaches the

189. Id. (citation omitted).
190. Id. (footnote omitted).
192. Id.
193. Id. at 139 (citations omitted).
194. See id.
195. Campbell, 840 P.2d at 138 n.15 (citation omitted).
196. See id. at 139.
197. See id.
198. Id. at 139 & n.19 (citation omitted).
insurer’s duty and causes injury to the insured.” The court also bolstered this position using the holdings of other courts. It stated that an insured withholding payment is analogous to the tort of conversion in that the plaintiff in such a case would still have a cause of action even if the stolen property was returned to the owner, and, like conversion, the return of the property only acts to reduce the total amount of the damages. Therefore, the breach is found in the failure to settle, and not in the necessity of damages.

The court finally added that allowing an insured to pay late without penalty “does not adequately encourage an insurer to properly discharge its fiduciary duty.” The court, quoting the Kansas Supreme Court, stated that, “all the good faith and settlement offers in the world after suit [against the insured] is filed will not immunize a company from the consequences of an unjustified refusal to [settle] which made the suit necessary.” Therefore, for the policy reasons found in Beck and the cases decided since Beck, the insured should have protection and this bad faith claim is to deter this type of behavior by insurance companies.

In its argument, State Farm also stated that allowing the claim in this situation would create an unjustified increase in bad faith claims. The court rejected this argument noting that the analysis above is only to test the reasonableness of the insurer’s decision not to settle and try the case. The court noted that “no amount of suffering caused by the ordeal of a trial and entry of judgment will give an insured a cause of action in bad faith.” The court added in a footnote that an insured that won at trial or suffered a judgment below the policy limits “would have great difficulty stating a claim for bad faith.”

(4) Campbell’s conclusions. Having stated the general rules and having recounted the facts of the case, the court concluded, on the facts presented, that bad faith could have been found. First, the court noted

199. Id. at 139 (citation omitted).
200. See Campbell, 840 P.2d at 140. In support of this proposition the court cited Berry v. United of Omaha, 719 F.2d 1127, 1129 (11th Cir. 1983); see also Restatement (Second) of Torts § 922(1) (1979).
201. Campbell, 840 P.2d. at 140.
203. See Campbell, 840 P.2d at 140.
204. See id.
205. Id. at 141 (footnote omitted).
206. Id. at 141 n. 23.
207. Because the court looked at the facts raised in Campbell’s motion for summary judgment, the court had to accept them in the best light. Therefore, not all may have been proven at trial. However, assuming that the facts were true, this discussion is useful in determining what factors and acts by an insured may result in a bad faith claim.
that an offer was made below the policy limits and a judgment greater than the policy limits was awarded against the insured. \(^{208}\) Next, the investigator's recommendations were based on "substantial evidence" of Campbell's fault. \(^{209}\) Further, the damages were likely to be high because of the death of one driver and Slusher's severe injuries. \(^{210}\) And last, the actions relating to the insurer's communications with Campbell. \(^{211}\) The court noted that Campbell was unaware of the strong testimony against him, the dangers of the excess judgment and of State Farm's responsibility for it, and the false information that he was not in any of these dangers. \(^{212}\) The court found the actions of State Farm, including destroying the file, disclaiming any responsibility, and suggesting that Campbell sell his property to pay the excess judgment could constitute bad faith. \(^{213}\) The court concluded that the summary judgment was improper because all these alleged actions could result in bad faith being found against State Farm. \(^{214}\) This case demonstrates that insurers have an affirmative duty to deal in good faith when approaching settlement offers. Further, by enumerating the actions alleged by the Campbells, the court identified acts, which if proven, will result in a finding of bad faith.

2. The fairly debatable defense

a. Callioux: The introduction of the fairly debatable defense. The first case discussing the "debatable defense" after Beck was Callioux v. Progressive Insurance Co. \(^{215}\) In this case the insured, Callioux, made a claim for the loss of their vehicle, claiming that the destruction of the vehicle was an accident. \(^{216}\) Progressive's investigation, however, indicated that the cause was arson, and it denied the claim and notified local law enforcement. \(^{217}\) Criminal charges were filed against David Callioux, who was acquitted at the end of trial. \(^{218}\) Progressive then paid the Callioux claim. \(^{219}\)

\(^{208}\) See Campbell, 840 P.2d at 141.
\(^{209}\) Campbell, 840 P.2d at 141.
\(^{210}\) See id.
\(^{211}\) See id.
\(^{212}\) See id.
\(^{213}\) See id. at 141-42.
\(^{214}\) See id.
\(^{216}\) See id.
\(^{217}\) See id.
\(^{218}\) See id.
\(^{219}\) See Callioux, 745 P.2d. at 840.
The Callioux brought the action "alleging bad faith denial of first-party insurance claim, malicious prosecution, and intentional infliction of emotional distress." Progressive filed a motion for summary judgment that was granted by the lower court. The court first looked at the bad faith claim, citing Beck for the proper acts required by an insurer when evaluating the claim. The court stated:

If the evidence presented creates a factual issue as to the claim's validity, there exists a debatable reason for denial, thereby legitimizing the denial of the claim, and eliminating the bad faith claim... When a claim is fairly debatable, the insurer is entitled to debate it, whether the debate concerns a matter of fact or law.

The court then examined the facts presented in the summary judgment to determine if the denial of the Callioux claim was "fairly debatable." The court noted several actions that demonstrated the debatable nature of the claim. First, the lower court made a judicial finding of probable cause before the trial when the charges were submitted to the jury. Second, the independent investigator hired by Progressive also believed it was arson. Last, the court noted that Progressive "immediately paid the claim in full" after the acquittal.

The court concluded that these factors were enough to sustain the summary judgment against the claim of bad faith.

b. The expansion of the fairly debatable defense. Since Callioux, other courts have expanded on the fairly debatable defense. The first case was Larsen v. Allstate Insurance Co., in which the insured brought a bad faith action as the insured denied coverage under its interpretation of the contract terms. The court cited Callioux and stated that the insurer is entitled to debate its coverage. The court noted the policy reasons behind this conclusion: "It would not comport with our ideas of either

220. Id. at 839.
221. Id. at 840.
222. See id. at 842.
223. See id.
225. See Callioux, 745 P.2d at 842.
226. See id.
227. See id.
228. Id.
229. See id.
231. See id. at 264.
232. See id. at 266.
law or justice to prevent any party who entertains bona fide questions about his legal obligations from seeking adjudication thereon in the courts." The court concluded that "Allstate’s position was ‘fairly debatable.’"  

c. Factors to be weighed in the fairly debatable defense. The following list of actions taken by Allstate could be raised as factors in other cases. First, Allstate based its denial on the opinion of legal counsel. Second, other jurisdictions had case law supporting ("tenably") its position. The court, as its third reason, noted that the policy considerations also supported its actions. The court also noted that the trial court, in granting the motion for summary judgment, had agreed with Allstate’s position. The court concluded that these factors showed that Allstate’s position was fairly debatable.

Other cases have also discussed whether an insurer has a fairly debatable defense. In S.W. Energy Corp., v. Continental Insurance Co., the court cited another jurisdiction for the requirement of "reasonable basis for denying coverage." This court also noted that the insurer could not be charged in this case because it did not act "dilatory or otherwise unreasonable in its investigation.

d. Current recognition of the fairly debatable defense. This defense continues to be upheld in both Utah and Federal courts interpreting Utah Law. In 1999 the Supreme Court of Utah cited both Billings v. Union Bankers Insurance Co. and S.W. Energy, upholding the right of an insurer to debate a claim if it is fairly debatable. The federal courts recognized the debatable defense quickly after Beck. In American Insurance Co., v. Freeport Cold Storage, Inc., the Utah District Court recognized that Beck and Ammerman allowed the contract and tort actions as outlined above. The court in its holding summarized the

234. Larsen, 857 P.2d at 266.
235. See id.
236. Id.
237. See id.
238. See id.
239. See id.
240. 974 P.2d 1239 (Utah 1999).
246. See id. at 1478.
Utah law only two years after *Beck*. This definition accurately states the law today:

[H]ere the court has already determined that the scope of American’s liability under the insurance policy is legitimately in dispute between the parties. Since the sole basis for plaintiff’s bad faith claim has to do with the scope of liability under the policy which is in bona fide dispute, and no bad faith is asserted as to the defendant’s conduct in investigating or handling [the] claims, the court holds that [the plaintiff] cannot maintain its cause of action for bad faith under either *Beck* or *Ammerman*.

**E. Damages**

1. The expansion of consequential damages

The cases described above have noted that several types of damages can be properly assessed against an insurer. In *Campbell*, the court, citing *Beck*, noted that damages may extend beyond the policy limits of the insurance contract. Courts thus allow all consequential damages resulting from the breach. The cases cited above demonstrate that emotional damages, damages to one’s financial reputation caused by liens or foreclosures, damages to credit ratings, and similar costs are recoverable.

In *Castillo v. Atlanta Casualty Co.*

The court of appeals noted that consequential damages may be above the policy limits. In this case, the insureds were without a vehicle for a period of time and wished to be compensated for the loss of the use of their car. The trial court rejected the claim, as did the court of appeals, on different grounds. The trial court and the court of appeals agreed that liability existed because the act of the insurance company was “a reasonably foreseeable consequence of the insurer’s delay.” The court of appeals outlined the three-part test for the recovery of consequential damages:

Thus, to recover consequential damages in a breach of contract action, a claimant must (1) prove that he in fact has such damages, (2) establish the amount of such damages with reasonable certainty, and (3)

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247. Id. at 1479.
250. See id. at 1208.
251. See id.
252. See id.
253. Id. at 1208 (footnote omitted)
show that such damages were within the *contemplation* of the parties at the time of contracting.\textsuperscript{254}

The plaintiffs failed to satisfy the second prong of this test and were therefore not granted consequential damages relating to their destroyed automobile.\textsuperscript{255}

Under the same analysis, the court held that the plaintiffs were entitled to interest on the amount due them since the time of the breach.\textsuperscript{256} The court stated that the breach occurred one week after the accident, though the actual award was granted much later.\textsuperscript{257} The court went on to state that if the insurer had properly acted the amount would have been owed three weeks after the accident (allowing two weeks for a proper investigation) and the interest would accrue from that point on.\textsuperscript{258}

While *Beck* opened the door to consequential damages stemming from the breach, and other cases such as *Campbell* recognized the potential causes of action, *Castillo*, however, defined the test to determine consequential damages with greater specificity, allowing damages on any item within the "reasonable contemplation" of the parties. Further, *Castillo*’s ruling on interest indicates that all compensable damages begin at the time of the breach or at the time a reasonable action by the insurance company should have been taken.

2. Attorneys fees

Although *Castillo* defines the law as it stands today, another topic needs to be mentioned as one that has received attention in many cases: attorneys fees. Several cases, including *Beck*, have held that attorneys fees are consequential damages and must be paid by the insurer.\textsuperscript{259} However, one case soon after *Beck*, *Canyon Country Store v. Bracey*,\textsuperscript{260} noted that the amount of attorneys fees to be paid by the insurer is "the same amount [the plaintiff] was legally obligated to pay counsel."\textsuperscript{261} In this particular case, the court remanded the matter to the lower court as

\textsuperscript{254} See id. at 1209.
\textsuperscript{255} See *Castillo*, 939 P.2d at 1209.
\textsuperscript{256} See id. at 1212 (emphasis added).
\textsuperscript{257} See id.
\textsuperscript{258} See id.
\textsuperscript{259} See also Gibbs M. Smith, Inc. v. United States Fidelity & Guar. Co., 949 P.2d 337, 345 (Utah 1997) ("On remand, the trial court should determine whether the covenant [of good faith and fair dealing] has been breached and award or deny attorney fees accordingly") and *Gagan v. State Farm Mut. Auto. Ins. Co.*, 746 P.2d 1194, 1197 (Utah Ct. App. 1987) ("consequential damages such as attorney fees may be recoverable in an insurance carrier lack of good faith case").
\textsuperscript{260} 781 P.2d 414 (Utah 1989).
\textsuperscript{261} Id. at 420 (citations omitted).
the trial court had awarded reasonable attorney fees instead "of one-third of the amount ultimately recovered, as provided for in its attorney fees agreement." In *Canyon Country*, this amount was implied to be lower, as the appeal costs were sought by the plaintiff.

The opposite occurred in *Billings*. In this case, the plaintiff was awarded $1,800,000 and his attorney was awarded $110,651 for reasonable attorney fees. *Billings* appealed, arguing that the fee agreement of one-third of recovery should be the award for attorneys fees. Noting the foreseeability that future attorney fees would be sought in this amount, the court remanded the case for a new determination of fees in accordance with Billing's fee agreement. The court noted that Billings argued, unopposed by Bankers, that the customary Utah rate for an attorney to make a claim against an insurance company was one-third of the recovery and a higher percentage if appealed. Billings, also without evidence to the contrary, argued that this arrangement is one that "all insurance carriers would reasonably anticipate and foresee." The court again noted that Bankers did not refute these arguments before remanding the case. This seems to imply that an insurance company may be able to argue that it did not foresee this circumstance. However, with strong support in Utah case law, it may be difficult for an insurance company to make this argument.

3. The foreseeable damages standard

These last cases indicate that *Beck* established the foreseeable damages standard. This standard has been expanded by several cases with courts noting specific damages that an insurer might pay. As noted, examples were replaced by the three-pronged test announced in *Castillo*. Insurance companies must now be prepared to pay one-third or more of a recovery against them to compensate attorneys who are able to show the insurer breached its good faith duty.
IV. CONCLUSION

*Beck* created a bad faith remedy when an insurer violates its implied duty of good faith and fair dealing (which duty exists in all contracts). The remedy was to be available in contract and not tort. Policy reasons for this ruling were, to protect the insured, regulate the insurers, and at the same time not permit contract law to be affected by tort remedies. The court listed several minimum behaviors it would require of insurers including diligence in their actions relating to claims and treating the insureds as "laymen." Contract privity would be required in making a bad faith claim. This meant that only the insured could bring a claim, though he could bring a claim in both first and third-party cases. Finally, the court granted and opened the door to first-party consequential damages, resulting from the breach, and stated that the amount of these damages could exceed the policy limits.

In the last fifteen years, the Utah courts have expanded the bad faith claim announced in *Beck*. Several aspects, however, of *Beck* have remained. An insured's remedy still sounds in contract. Despite the movement of other states to a tort based claim, Utah courts have repeatedly required that the insured not only be a first-party to the contract, but that the insured fall within the scope of the contract as to the particular claim. Without a contractual relationship, no claim is available. *Beck* and its progeny maintain that the policies behind these claims protect the insured. At the same time, the insurance companies may choose to debate an arguable claim and defend their own rights through adjudication. A company that reasonably acts to investigate a claim, and does so promptly, relying on relevant facts and case law, will be able to defend itself in a bad faith lawsuit. Further, the compensation sought by the insured after the breach must be supported by the three-prong test announced in *Castillo*. Finally, the insurance company, while not faced with punitive damages, may in an exceptional case be required to pay one-third or more of these consequential damages in the form of attorneys fees.
The insured is not the unprotected creature of the past. Courts now look to all the insurer's actions. Taken together the insurer must act promptly and diligently in its investigation and its decision to pay or deny a claim. No longer can the insurer wait out the financially destitute client or ignore the realities of a losing cause. It cannot wait for the settlement or even deny the unreasonable one. The insurer must foresee the consequences of the contract it enters or pay the price to remedy the situation.

William Kevin Tanner