

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

(1) CHOCTAW NATION OF
OKLAHOMA,

Plaintiff,

v.

(1) OCCIDENTAL FIRE AND CASUALTY
COMPANY OF NORTH CAROLINA; and

(2) GENERAL STAR INDEMNITY
COMPANY,

Defendants.

Case No. 14-CV-182-KEW

Removed from Bryan County
Case No. CJ-2014-49

**PLAINTIFFS' RESPONSE AND OBJECTION TO DEFENDANT
OCCIDENTAL'S MOTION TO DISMISS PLAINTIFF'S SECOND CAUSE OF
ACTION**

Defendant, Occidental Fire and Casualty Company of North Carolina ("Occidental"), has filed with this Court a motion to dismiss Plaintiff's cause of action for breach of the duty of good faith and fair dealing. Occidental's motion is twofold: First, Occidental claims that it is entitled to judgment as a matter of law on Plaintiff's bad faith claim because Plaintiff's Petition alleges the existence of an "actual controversy" between the parties regarding whether the insurer can require Plaintiff to assert the defense of sovereign immunity. Occidental reasons that the fact there is an "actual controversy" over that issue entitles it to judgment in its favor because a bad faith claim cannot lie where there is a "legitimate dispute" between the parties. Second, Occidental claims Plaintiff's Petition must be dismissed as it fails to plead sufficient facts upon which a claim for breach of the duty of good faith and fair dealing can be granted. Occidental is neither entitled to

judgment as a matter of law nor an Order dismissing Plaintiff's bad faith claim. In support hereof, Plaintiff states as follows:¹

FACTS

1. In its Petition Choctaw Nation of Oklahoma ("Nation") alleges that it is an insured under commercial automobile liability insurance coverage issued by Occidental with coverage limits of \$5,000,000 per accident, and excess automobile liability insurance coverage issued by General Star in the amount \$5,000,000. Exhibit 1, ¶¶ 7 and 8.
2. The Petition alleges that a bus accident involving a bus carrying passengers to the Choctaw Casino & Resort, which is owned and operated by Nation, occurred on April 11 2013, resulting in the deaths of three people and multiple injuries to other passengers (the "Accident Victims"), eventually resulting in claims being brought directly against Nation. Exhibit 1, ¶¶ 9, 10.
3. Prior to the claims being brought directly against Nation, a mediation process was set up involving substantially all of the claims of the Accident Victims. Once Nation became aware of the proposed mediation process, Nation's counsel drafted a stipulation agreement in order to clarify, protect, and maintain its sovereign immunity. The stipulation agreement provided that Accident Victims would not seek damages directly against Nation in excess of the available liability insurance coverage limits. Exhibit 1, ¶ 11.

¹ Plaintiff has previously filed a Motion to Remand asserting that this Court has no subject matter jurisdiction over this case. In an abundance of caution, however, Plaintiff is filing this Response to Defendant's Motion to Dismiss. *See* Doc. 17.

4. Occidental and General Star would attend the mediation and make available the proceeds of the liability insurance policies covering Nation—but only to the extent the Accident Victims were able to establish Nation’s liability for the accident. The stipulation agreement was presented to all insurance carriers, including Defendants, for their agreement. After all carriers approved the stipulation agreement, the attorney hired by Occidental to represent Nation in the Accident Victims’ claims presented the agreement to counsel for the Accident Victims. Substantially all of the Accident Victims agreed to the stipulation. Exhibit 1, ¶ 11.

5. Thereafter, Occidental unilaterally refused to attend the mediation without explanation, thereby exposing Nation to potential liability from direct claims for damages brought by the Accident Victims above Nation’s policy limits. Exhibit 1, ¶ 12.

6. Nation alleges that it is willing to agree to a partial waiver of its sovereign immunity up to the applicable liability insurance policy limits (only to the extent that the liability of Nation is first established) in order to protect Nation from exposure to potential damages in excess of the applicable liability insurance policy limits. Exhibit 1, ¶ 16. However, Occidental’s cancellation of the Mediation and General Star’s assertions that a partial waiver of Nation’s immunity would result in a breach of the underlying liability insurance contracts prevent Nation from entering this agreement with any of the Accident Victims. Exhibit 1 ¶¶ 13 and 16.

7. Nation’s second claim seeks damages for breach of the covenant of good faith and fair dealing. Specifically, Nation requests tort damages from Defendants based upon their egregious conduct in connection with handling the claims of the Accident Victims. Nation

alleges that Defendants have not investigated the claims, have not shared information about the claims with Nation, and have exposed Nation to potential liability. Both directly from the Accident Victims because of risk of claims above the limits of its applicable liability insurance coverage, as well as other economic losses related to the accident in Texas. Exhibit 1, ¶ 12.

ARGUMENT AND AUTHORITY

In order to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 1960. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 1940. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* at 678, 1949. The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief. *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). Without question, drawing reasonable inferences from Plaintiff's Petition, it is clear Defendant's motion must be denied.

I. Occidental's Motion is Untimely

As an initial matter, it must be pointed out that Occidental has filed its Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. According to Rule 12(b), a motion made pursuant to Rule 12(b)(6) must be made before any responsive pleading. Because Occidental filed its Answer to Plaintiff's Petition before filing its

Motion to Dismiss, its Motion is untimely. For this reason alone, its Motion should be denied.

II. Occidental is not entitled to judgment as a matter of law.

The first argument Occidental makes in support of its Motion to Dismiss is based on the bald claim that, because Nation has plead there is an “actual controversy” between the parties and this (somehow) amounts to an admission of a “legitimate dispute”, the Court should dismiss the case. In essence, Occidental’s Motion is a thinly veiled attempt to have this Court grant it summary judgment by applying the defense of “legitimate dispute” to Nations’s bad faith claims. However, Nation’s claim in its Petition of the existence of a controversy between the parties is *not* the same thing as saying Occidental’s position in that controversy was “legitimate” within the parameters of the meaning of the legitimate dispute defense to a claim of the breach of the duty of good faith and fair dealing. Moreover, none of the facts plead otherwise support a legitimate dispute defense by Occidental.

“Actual controversy” and “legitimate dispute” are not the same thing.

A declaratory judgment action filed pursuant to Oklahoma Declaratory Judgment Act requires that the party plead the existence of an actual controversy between the parties. 12 O.S. § 1651. (“District courts may, in cases of actual controversy, determine rights, status, or other legal relations,...”). Nation did that by setting forth the existence of an insurance policy and the circumstances that gave rise to the disagreement between the

parties under the terms of that insurance policy². Then, pursuant to the requirements of the Act, Nation set forth the particular findings it wanted this Court to make with regard to that disagreement. Exhibit 1, ¶ 21.

Nation's request for certain declaratory rulings in this case is no different than had Nation pled a breach of contract claim against Occidental. Either way, Nation would be seeking to resolve issues related to Occidental's obligations under the insurance policy it issued to Nation and would be asking the Court for relief. *See, e.g. St. Paul Fire & Marine Ins. Co. v. Runyon*, 53 F.3d 1167 (10th Cir. 1995). Surely, had Nation filed its claim as a breach of contract claim, setting forth the same conduct that it describes in its Petition, Occidental would not be arguing Nation had somehow admitted the existence of a "legitimate dispute" defense on the part of Occidental.

Moreover, simply saying there is a controversy does not mean that both sides of that controversy were reasonable in coming to their positions, which is what the defense to the duty of good faith and fair dealing would require. *Brown v Patel*, 157 P. 3d 117 (Okla. 2007). The duty of good faith and fair dealing is implied in every insurance contract in Oklahoma. *Christian v. American Home Assurance Co.*, 577 P.2d 899 (Okla. 1977). The

² Plaintiff purchased insurance coverage meant to cover for exactly the type of claims the Accident Victims have asserted against Plaintiff in the underlying actions. Petition, ¶ 10. Occidental participated in a meeting and in the formulation of a plan that would help dispose of the Accident Victims' claims. Petition, ¶ 11. Then, Occidental unilaterally, with no explanation whatsoever, withdrew from that plan, exposing Plaintiff to the suits the Accident Victims filed against it. Petition, ¶ 12. Not only that, Occidental refused to answer questions posed of it regarding Plaintiff's right to waive its sovereign immunity. Petition, ¶ 16.

essence of an action for breach of the duty of good faith and fair dealing “is the insurer's unreasonable, bad-faith conduct.” *Vining on Behalf of Vining v. Enterprise Financial Group, Inc.*, 148 F.3d 1206 (1998). *McCorkle v. Great Atlantic Ins. Co.*, 637 P.2d 583, 587 (Okla. 1988). In order to determine whether a breach has occurred, the question is whether the insurer had a good faith belief in some justifiable reason for the actions it took or omitted to take that violate the duty. *See Buzzard v. McDanel*, 736 P.2d 157, 159 (Okla. 1987). The good faith duty requires that the insurer act promptly, conducting a thorough, fair and unbiased investigation, analysis and evaluation of the claim. *Willis v. Midland Risk Ins. Co.*, 42 F.3d 607 (10th Cir. 1994); *Timberlake Const. Co. v. USF&G Co.* 71 F.3d 335 (10th Cir. 1993); *Brown v. Patel*, 157 P.3d 117, 122 (Okla. 2007); *Newport v. USAA*, 11 P.3d 190, 195 (Okla. 2000); *Buzzard, supra*; *see also*, Ex. 9, pp. 143:21-25, 151:18-25, 152:10-15, 159:9-20. It requires the insurance company to have an accurate understanding of the facts of the claim, as well as the applicable law. *Willis*, 42 F.3d at 612; *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 913-14 (Okla. 1982).

In order for an insurance company to successfully assert the legitimate dispute defense to a bad faith case, it must demonstrate that its position with regard to the insured's claim was reasonable. *See, e.g. Badillo v Mid Century Ins, Co.*, 121 P.3d 1080, (Okla. 2005); *Buzzard v. McDaniel*, 736 P.2d 157, 159 (Okla. 1987). Here, Occidental has provided absolutely no facts setting forth its conduct with relation to Nation's claims or the basis for the reasonableness of those actions. Occidental would simply have this Court rule there was a legitimate dispute because Occidental wanted to assert the Nation's sovereign immunity and the Nation didn't want it to. This argument in no way establishes that

Occidental has formed a reasonable basis for its position, or otherwise establish why that position is reasonable.

Further, the hypothetical Occidental as support for why it is reasonable to dispute Nation's ability to waive its immunity is unpersuasive. An inapplicable hypothetical alone does not demonstrate *what* Occidental did when faced with the question, nor *why* it did what it did. In the absence of any factual basis to support the reasonableness or legitimacy of its conduct, Occidental is not entitled to judgment in its favor.

Finally, it should be noted that none of the facts Nation pled in its Petition supports a defense of legitimate dispute on the part of Occidental. The facts pled demonstrate that Defendants conduct with regard to the Accident Victims' claims against Nation was unfounded and unreasonable. Defendants knew that Nation wanted to waive its sovereign immunity for a limited purpose, which would allow not only for the Accident Victims to be compensated, but also for a release of Nation for any damages in excess of its policy limits. Occidental participated in a meeting where this plan was discussed, as well as took part in scheduling a mediation between Nation and the Accident Victims. With no explanation, however, Occidental pulled out of the plan and cancelled the mediation, to Nation's detriment. Had Occidental conducted a fair, reasonable investigation, however, Occidental would have known that it does not have the right to do what it did. *See Smith Plumbing Co., v. Aetna Cas. & Sur. Co.*, 720 P.2d 499, 502 (Ariz. 1986).³ Surely, then, Occidental is not entitled to judgment in its favor.

³ The *Smith* court established that an Indian tribe's sovereign immunity is a personal defense unavailable to its insurance carrier. In that case the contractor sued Aetna, the

III. Nation has plead sufficient facts in its Petition to demonstrate its claim is plausible.

In order to establish a cause of action for bad faith, “the insured must present evidence from which a reasonable jury could conclude that the insurer did not have a reasonable good faith belief for withholding payment of the insured’s claim.” *Oulds v. Principal Mut. Life Ins. Co.*, 6 F.3d 1431, 1436 (10th Cir. 1993).

To avoid dismissal pursuant to Rule 12(b)(6), Nation’s claims must only contain enough factual allegations to state a plausible claim for relief. *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1144–1145 (10th Cir. 2013) (discussing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). However, Rule 8 only requires a “short and plain statement showing that the pleader is entitled to relief.” Fed. R. Civ. Pro. 8(a)(2). To meet the Rule 8 standard, and avoid dismissal under Rule 12(b)(6), the Petition need not contain a detailed recitation of every fact but simply “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555.

The reasonable inferences that may be taken from Nation’s Petition demonstrate that the Defendant’s Motion to Dismiss should not be granted. Nation’s claims in its

insurer of a tribal housing development. Aetna tried to assert the tribe’s sovereign immunity as a defense in a claim brought against it by the plumbing supply company. Because only the Indian tribe could decide whether to assert or waive its sovereign immunity, the court held that it was a personal defense belonging to the tribe and not available to the insurance carrier. The Court acknowledged that, generally, an insurance company “may assert any defense available to its principal” but held that *personal defenses* of its principal are the one exception to that general rule that an insurance company “may assert any defense available to its principal.” *Smith*, 720 P.2d at 502.

Petition have clearly articulated a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).

The elements of a cause of action for breach of duty of good faith and fair dealing require 1) the plaintiff's loss was covered under the insurance policy issued by the insurers; 2) the insurers refusal to pay claim is unreasonable under the circumstances because it had no reasonable basis for the refusal, it did not perform a proper investigation, or it did not evaluate the results of the investigation properly; 3) the insurer did not deal fairly and act in good faith with the plaintiff; and 4) the insurer's violation of its duty of good faith and fair dealing was the direct cause of the injury sustained by the plaintiff. *Bailey v. Farmers Ins. Co., Inc.*, 137 P.3d 1260, 1264 (Okla. Civ. App. 2006).

Nation's loss is covered under the insurance policy issued by the Defendants.

It is not disputed that the Nation has automobile liability policies covering the bus accident that occurred on April 11, 2013. Nation is an insured under commercial automobile liability insurance coverage issued by Occidental with coverage limits of \$5,000,0000 per accident, and excess automobile liability insurance coverage issued by General Star in the amount \$5,000,000. The policies provide liability coverage and a defense to the Nation for any third party claims asserted against the Nation. Exhibit 1, ¶¶ 7, 8, 18 and 23.

The Defendants refusal to provide coverage is unreasonable under the circumstances because it had no reasonable basis for the refusal, it did not perform a proper investigation, or it did not evaluate the results of the investigation properly.

Prior to the accident victims filing lawsuits against the Nation, the Defendants engaged in pre-trial discovery and a mediation process involving substantially all of the accident victims. These accident victims signed waivers acknowledging that Nation had sovereign immunity, and agreed that entering into pre-trial discovery and mediation was not an express or implied waiver of immunity. Before Occidental's unilateral cancellation of the mediation process the Nation hoped the claims would be settled within the limits of the policy and believed an end was within reach. However, with the cancellation came multiple lawsuits naming the Nation. The Nation made The Nation is now exposed to risk of loss in excess of the policies. There was never an obligation that insurance proceeds actually be paid. The mediation process, was *set up by the Defendants*, not the Nation and it *did not obligate* Defendants to do anything they are not legally required to do under the policies they sold to the Nation and by law. The law *requires* insurers to settle claims in a reasonable and timely manner, and initiating and cancelling mediation, without explanation, is unreasonable.

Dallas attorney Frank Branson ("Branson") represents a substantial number of victims, including some who died in the accident, or sustained severe injuries. Branson continues to agree that neither he nor his clients will seek damages in excess of the Nation's available coverage *in the event the Nation is found legally liable to Branson's clients*. However, Defendants argue in their motion that by agreeing to enter into a waiver limiting the Nation's exposure to the limits of the policy would "clearly" put the Nation at risk of breaching its policy. The waiver being offered limits risk to the amount of the policies, the

policies that the Defendants bargained for when they sold them to the Nation. The Defendants are being asked to provide the coverage they are *legally obligated* to provide the Nation. Nothing more and nothing less. This is ludicrous and very telling. It is a reasonable inference, and one the Nation believes; the Defendants are only concerned with their bottom line and not all concerned with protecting the Nation. Defendants' motion argues that by not allowing them to assert the Nation's sovereign immunity, for their advantage, is somehow a breach of the policy? The Defendants have the gall to suggest to this court that is it *reasonable and legitimate* for them to sell insurance policies to the Nation, collect the premiums, and then when they have to provide the coverage, they want to assert the Nations immunity, over which they have no legal right to control, in order to avoid paying out the coverage. Why would the Nation purchase insurance? It could have asserted immunity on its own, however it chose to purchase insurance in order to compensate an injured persons if they are harmed as a result of negligence attributed to them.

The Defendants did not deal fairly and act in good faith with the Nation.

The Defendants have refused to allow the Nation to give a limited waiver of its sovereign immunity up to the limits of their policy in exchange for the Accident Victims agreeing not to seek damages in excess of the Nation's insurance coverage. The Nation is seeking to protect itself from further risk, an obligation that belongs to the Defendants. This prohibition issued by the Defendants to the Nation has stymied any further negotiations or settlement discussions. A reading of the Nation's Petition makes it

abundantly clear that Defendants are looking out for themselves in order to avoid paying out claims. General Star even claims in writing that by limiting Nation's losses to the policy limits somehow the Nation has *prejudiced* Defendants. Further, the Defendants have threatened that the Nation will violate the terms of its policy if it does not assert its sovereign immunity for the benefit of Defendants. Nation has asked for any authority that allows them to control the Nation's immunity and it has not been provided.

The Nation has no reason to believe that an investigation has been conducted at all, let alone reasonably and competently. The Nation has repeatedly asked Defendants as well as counsel appointed by Occidental to represent the Nation ("Counsel"), both written and orally, for the results of any investigation that has been conducted in the underlying claim.

The Nation has asked Defendants for its claims files, coverage opinions, explanations regarding its initiation and subsequent cancellation of the mediation process, position on the Nation's use of a limited waiver up to the policy limits to the extent of liability, position of Nation's control of its sovereign immunity (General Star did respond to this, agreeing with the Nation that it was a personal defense to the Nation).

The Defendants violation of its duty of good faith and fair dealing was the direct cause of the injury sustained by the Nation.

As a result of the Defendants' refusal to enter into a mediation process and continued obstruction of settlement opportunities, the Nation is at risk of financial loss above the policy limits. Damage could also come indirectly through loss of revenue, and other factors related to the Nation's business. The inability to use a limited waiver to potentially settle these claims increases the risk of loss for the Nation. These multiple claims filed in Texas,

which based on the numerous victims and the severity of the injuries, including (deaths) will involve prolonged litigation and high cost. The Nation has sustained damages, including but not limited to deprivation of benefits owed under the policies. The Nation has incurred additional legal expenses as a result of this ongoing saga with the Defendants. The Nation must insure it is adequately represented with regards to the claims, and against the actions taken by the Defendants related to the limited waiver, and refusal to adequately respond to Nation's reasonable inquiry, which leaves Nation wary of relying on them for protection.

The Nation purchased liability insurance to protect itself from the risk of exposure to claims made in the event of an accident or occurrence that caused injury to persons or property. Public policy dictates that if a party sustains injury or damage to property caused by the negligence of another, they be compensated.

The protection the Nation expected when it paid for the policies is not there, it's illusory. The Nation alleges that the Defendants sold insurance to the Nation promising liability coverage, and when claims were made they want to assert the Nation's sovereign immunity without its consent thereby avoiding the risk they bargained for when they sold the policies, thereby making the policies illusory and obtaining unjust enrichment. This is further evidence that the Defendants are putting their financial interest ahead of the Nation's.

CONCLUSION

For the reasons set forth above, Occidental's motion should be denied in its entirety. Finally, when Nation's Petition was filed in Oklahoma state court, it was not governed by Fed. R. Civ. P. 8(a)(2). If this Court did determine that Nation's Petition did not conform to federal pleading standards, and if this Court denies Nation's Motion to Remand, then Nation should be granted leave to file an amended Petition.

Respectfully Submitted,

s/ Michael Burrage
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2014, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing which forwards a copy to the following ECF registrants:

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s/ Michael Burrage

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