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

(1) CHOCTAW NATION OF OKLAHOMA,	)	
Plaintiff,	)	
	)	**Case No. 14-CV-182-KEW**
v.	)	
(1) OCCIDENTAL FIRE AND CASUALTY COMPANY OF NORTH CAROLINA; and	)	
(2) GENERAL STAR INDEMNITY COMPANY	)	
Defendants.	)	

DEFENDANT OCCIDENTAL FIRE AND CASUALTY COMPANY OF NORTH CAROLINA'S REPLY TO PLAINTIFF CHOCTAW NATION'S RESPONSE TO OCCIDENTAL'S MOTION TO DISMISS PLAINTIFF'S SECOND CAUSE OF ACTION FOR BAD FAITH

Defendant Occidental Fire and Casualty Company of North Carolina ("Occidental"), by and through its counsel of record, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby replies to Plaintiff Choctaw Nation of Oklahoma's Response [Doc. # 18] to Occidental's Motion to Dismiss Count Two of Choctaw Nation's Petition, which asserts a claim for breach of the duty of good faith and fair dealing. [Doc. # 15]. Choctaw Nation has failed to present any factual allegation to suggest a plausible basis for a bad faith claim, where Occidental is asserting an absolute defense on behalf of the Tribe to a claim of liability against the Tribe. At a minimum, there is a legitimate dispute between the parties over whether to assert the defense, and that is all that is required to dismiss a bad faith claim.

ARGUMENT AND AUTHORITIES

I. OCCIDENTAL'S MOTION TO DISMISS IS NOT UNTIMELY.

Choctaw Nation's assertion that Occidental's Motion to Dismiss Choctaw Nation's Second Cause of Action is untimely under Fed.R.Civ.P. 12(b)(6) is incorrect. Occidental did not previously file a responsive pleading addressing the Second Cause of Action, because its contemporaneously-filed Answer [Doc. # 14] only "answered" the First Cause of Action. Occidental's Answer specifically noted it was filing a Motion to Dismiss the Second Cause of Action. [*Id*. at ¶¶ 22-26].

In any case, if this Court determines that dismissal is not proper under Rule 12(b)(6), it can, and should, dismiss under Rule 12(c). That rule provides: "After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." Where a defendant files an answer contemporaneously with a motion to dismiss, the court applies the standard for evaluating a Rule 12(b)(6) motion to dismiss, because the standard is the same as that for the alternative Rule 12(c) motion for judgment on the pleadings. *Zasaretti–Becton v. Habitat Co. of Missouri, LLC*, 2012 WL 2396868, n. 2 (E.D. Mo. 2012). Oklahoma federal courts follow this principle, and have determined in similar circumstances to "construe defendant's motion as a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c)." *See, for example, Turner v. City of Tulsa*, 2012 WL 2249262 at 1 (N.D. Okla. 2012). Such a motion is treated as a Rule 12(b)(6) motion and is reviewed under the same standard as a motion to dismiss. *Marshall v. Whirlpool Corp*., 2010 WL 348344 at 3 (N.D. Okla. 2010).

II. OCCIDENTAL'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE A LEGITIMATE DISPUTE EXISTS OVER THE USE OF TRIBAL IMMUNITY AS A DEFENSE IN THE UNDERLYING TEXAS LAWSUITS.

Choctaw Nation acknowledges that Oklahoma law requires a bad faith claim to be dismissed where there is a legitimate dispute between the insured and the insurer. In such cases, as a matter of law, a bad faith cause of action "will not lie." *Cactus Drilling Co., LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 2014 WL 1328358 at 3 (W.D. Okla. 2014); *Manis v. Hartford Fire Ins. Co*., 681 P.2d 760, 762 (Okla. 1984).

Choctaw Nation's Response acknowledges that the Tribe has sovereign immunity. [Doc. # 18, p. 2, ¶ 3]. It goes further by noting that even the Texas Accident Victims who have sued Choctaw Nation "signed waivers acknowledging that Nation had sovereign immunity." [*Id*. at p. 11]. In light of these judicial admissions, there is no question that immunity exists and that it would preclude liability on the part of Choctaw Nation. It cannot possibly be bad faith for an insurer to assert a defense on behalf of its insured *where even the parties suing the insured have acknowledged the defense exists.* Even if such was possible, at the very least, there is a legitimate dispute between the parties over the use of the defense, and that is all that is required for this Court to dismiss Choctaw Nation's bad faith claim.

The gist of Choctaw Nation's argument is found on page 8 of its Response, where it argues that Occidental's position is "unfounded and unreasonable," because if the defense of sovereign immunity is waived, then that "would allow not only for the Accident Victims to be compensated, but for a release of Nation for any damages in excess of its policy limits." If this argument seems unusual, it is because typically an insured *requires* its insurer to assert its defenses, not waive them. Yet here we have an insured who seeks to waive a *complete* defense to liability, but only insofar as will protect it from having to pay a dime for the benefit of the

accident victims for whom it feigns concern, while exposing its insurers to a financial risk of paying damages for which the Nation has *no legal liability*.[1] That is a risk that the insurers did not contract to assume.

Choctaw Nation states that "it chose to purchase insurance in order to compensate an injured persons [sic] if they are harmed as a result of negligence attributed to them." [Doc. # 18, p. 12]. Choctaw Nation may have good intentions regarding injured persons (who happen to be paying customers of the Tribe's casino),[2] but the purpose of the insurance policy it purchased was not to compensate third parties; it was to insure *itself* in case a claim was brought against it for damages which *it was legally obligated to pay*, as expressly stated in the insuring agreement of it policy contract. "[T]he primary purpose behind a business owner's purchase of liability insurance is the protection of assets." *Lieberman v. Nat'l Cas. Co.*, 2014 WL 839114 at 3 (N.D. Okla. 2014), quoting *Rednour v. JC & P P'ship*, 996 P.2d 487 (Okla. Civ. App. 2000). It is unlikely Choctaw Nation would be making its argument if it did not have its own financial interest at heart. It has certainly been willing to use its sovereign immunity to successfully defend other lawsuits, such as a racial discrimination lawsuit in *Garland v. Choctaw Casino*, 2009 WL 1444522 (E.D. Okla. 2009). Furthermore, there is nothing in the insurance contract that allows an insured such as Choctaw Nation to pick and choose when it wants the insurer to pay a claim, regardless of whether the insured has a legal obligation to pay it. What the policy actually provides is that Occidental will provide liability coverage for all sums "an 'insured'

[1] In addition to having no legal liability, the Nation's liability policy and excess policies provide $20,000,000.00 in coverage to which they apply, thus there is little likelihood any judgment would expose it to excess liability even absent its proposed waiver of sovereign immunity.

[2] The Accident Victims have received almost $5,000,000 in compensation from the insurer of the bus company and the driver involved.

legally must pay as damages." (Exhibit # 1, Policy, CA00010310).[3] Under the law, if Choctaw Nation is immunized from the Texas lawsuits, it is not "legally" liable for damages.

It cannot possibly be bad faith for an insurer to seek to provide a defense for the insured, especially an absolute defense. It is fundamental to Oklahoma bad faith law that the insurer has a contractual right and duty to *defend* the insured. *First Bank of Turley v. Fid. & Deposit Ins. Co. of Md.*, 928 P.2d 298, 302–03 (Okla. 1996). An insurance company meets this duty by asserting defenses on behalf of the insured. This contractual duty to defend "includes the right to control the course of the defense of the liability claim and to decide on litigation strategy." *Milroy v. Allstate Ins. Co.*, 151 P.3d 922, 927 (Okla. Civ. App. 2007). This right is specifically provided for in the parties' insurance contract, which provides that Occidental has "the right and duty to defend any 'insured' against a 'suit' asking for damages." (Exhibit # 1, CA00010310). And, to the extent that it is, at least in some part, the insurance company's money at risk, the right to control the defense is a critical right of the insurer under its insurance contract. Under these principles, it cannot possibly be bad faith for the insurer to comply with a right and a duty that both the law and the contract require.

Choctaw Nation's argument that Occidental should have known "it does not have the right to do what it did," [Doc. # 18, p. 18], is based on a single decision, *Smith Plumbing Co. v. Aetna Casualty & Surety Co.*, 720 P.2d 499 (Ariz. 1986). Not only is this Arizona decision not binding on Oklahoma insurers and insureds, it is very different from the instant case. It concerned enforcement of a performance-payment bond, so it applied concepts of suretyship, not

[3] Occidental's attachment of the insurance policy does not convert its motion to dismiss into one for summary judgment. *See Fitzgerald v. U.S. Bank*, 537 Fed.Appx. 811, 812 (10th Cir. 2013) (courts may, at the motion to dismiss stage and without converting the motion into one for summary judgment, consider documents referred to in the complaint that are central to the claim and where the parties do not dispute their authenticity).

concepts of insurance law. A surety is bound to make payment at the outset if the principal fails to satisfy an obligation when it is due, *Van Antwerp v. Schultz*, 217 P.2d 1035 (Okla. 1950) (syllabus of the Court # 2), but an insurer's agreement to pay is not triggered by non-payment by the insured. Further, unlike anything in a surety contract, the insurance contract between Choctaw Nation and Occidental specifically grants Occidental the right to control the defense of Choctaw Nation. (Exhibit # 1, CA00010310). Additionally, the *Smith* defendant was an *insurer* attempting to assert a tribe's defense on its own behalf in a lawsuit to which the tribe was not a party, while the instant case involves Choctaw Nation as the defendant in the underlying lawsuits in which Occidental, which is not a party to them, seeks to assert the defense on Choctaw Nation's behalf.

Finally, the *Smith* Court agreed with the argument that the insurer could have taken steps to protect itself by requiring the tribe to obtain releases from subcontractors who might seek performance of the bonds: "Having failed to do so, it cannot now escape its obligations under the bond under the guise of sovereign immunity." *Id.* at 502. That is exactly what Choctaw Nation could have done, by including a provision in its insurance policy allowing it to waive a defense to an otherwise covered liability on the basis of its sovereign immunity. Instead, its insurance agreement with Occidental expressly vested Occidental with the right to defend lawsuits against the Choctaw Nation without any limitation requiring, or even permitting, the waiver of its sovereign immunity.

As to the concept of immunity being a "personal" defense, there is certainly no Oklahoma legal authority suggesting that any distinction exists between "personal" defenses which an insurer cannot assert without permission of its insured, and "non-personal defenses" which the insurer may freely assert whether its insured agrees or not. Indeed, Choctaw Nation

does not even pretend that such authority exists. To the contrary, Oklahoma law makes clear that, absent some ambiguity in the pertinent language of the insurance contract (which has never been suggested to be present here), the plain language of the insurance contract controls the obligations of the parties. *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla. 1991). Moreover, if an insured can preclude its insurer from asserting a valid defense on the basis that it is "personal," then it might equally be argued that statute of limitations, release and satisfaction and lack of personal jurisdiction are "personal" defenses that an insured can disclaim. When Choctaw Nation contracted with Occidental to purchase liability insurance for the purpose of defending and paying claims, it bound itself to cooperate in the defense of litigation against it, specifically agreeing to "[c]ooperate with us in the . . . defense against the 'suit.'" (Exhibit # 1, CA00010310). Oklahoma does not recognize a distinction between "personal" versus "non-personal" defenses, and it is difficult to comprehend what the distinction would be.

These arguments may seem more suited to a resolution of Choctaw Nation's First Cause of Action for a declaratory judgment, but Occidental addresses the point here in response to Choctaw Nation's assertion that Occidental and General Star committed bad faith because "the Defendants are only concerned with their bottom line." Actually, the bottom line regarding the Second Cause of Action is that, at a minimum, a legitimate dispute exists over Occidental's right to assert this defense on behalf of the Choctaw Nation. Oklahoma's law is clear that in such cases, where a legitimate dispute between insurer and insured exists, a bad faith claim cannot lie.

III. OCCIDENTAL'S MOTION TO DISMISS SHOULD ALSO BE GRANTED BECAUSE CHOCTAW NATION HAS FAILED TO MEET FEDERAL PLEADING STANDARDS.

Aside from what it has stated regarding the dispute over the use of sovereign immunity as a defense, Choctaw Nation has failed to plead sufficient factual content in its Petition to avoid

dismissal. It only alleges generic descriptions of a bad faith claim: denying benefits, failing to properly investigate, placing the insurer's financial interests above the insured's, failing to provide information, causing the insured to file a lawsuit, not providing coverage, and engaging in "improper" claim practices. Choctaw Nation's Response simply repeats these allegations by alleging that Occidental has failed to investigate or share information, and that Occidental has "exposed Nation to potential liability." [Doc. # 18, p. 4]. Aside from the fact that Choctaw Nation has conceded the last point is untrue because it has sovereign immunity for the underlining claims, and seeks here only the judicial imprimatur to waive that immunity to the extent of its insurance coverage, the other allegations are simply conclusions to which the Petition has pled no facts to show that they are plausible.

Even if the *Response's* conclusory allegations provided some factual basis, which they clearly do not, that would still not cure the failure of the Petition to meet the requirements of *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). These decisions do not provide that a party can cure a defective pleading by alleging facts in a response to a motion to dismiss. Rather, they require that the *pleading itself* set forth those factual allegations. *Iqbal* at 696. It is never enough to simply allege a party is guilty of certain conduct which Oklahoma law may categorize as bad faith, without pleading facts with specificity as to what was done that brings a party within those categories.

Choctaw Nation's Response states that "Occidental has provided absolutely no facts setting forth its conduct with relation to Nation's claims or the reasonableness of those actions," [Doc. # 18, p. 7], but this ignores the essential requirement that it is Choctaw Nation that is obligated to plead facts, not the party it has sued. It further states that Occidental has "refused to provide coverage," [*Id.* at p. 10], but this statement is refuted by the very allegations in the

Nation's Petition and Response. Actually, Occidental is providing a defense to Choctaw Nation, as indicted by a reference in the Response to "the attorney hired by Occidental to represent Nation." [*Id.* at p. 3, ¶ 4]. This begs the question of how Occidental could be in bad faith for attempting to assert a legitimate defense that has been acknowledged by both Choctaw Nation and the plaintiffs who are suing it.

Finally, Choctaw Nation's Response suggests it was bad faith for Occidental to cancel a planned mediation. Yet Occidental had the *right* to control the defense of the Nation, and with that right came its entitlement to determine whether a mediation would be productive or simply polarize the parties further. Here, it is undisputed that Choctaw Nation had a valid sovereign immunity defense to liability, and it would thus be not only pointless, but counterproductive, to require the parties to participate in mediation where no settlement could be required of a party legally immune from liability.

At the close of its Response, Choctaw Nation seeks leave to file an amended petition if this Court determines the Petition does not conform to federal pleading standards. There is nothing Choctaw Nation can add that would change the fact that a legitimate dispute exists, and that is all that is required to dismiss a bad faith claim. Its repeated admissions that it is a tribal sovereign immune from liability simply precludes a basis for a bad faith claim here, where it seeks to avoid its clear contractual obligations as to that immunity.

CONCLUSION

For these reasons, Defendant Occidental Fire and Casualty Company of North Carolina respectfully moves that Plaintiff Choctaw Nation of Oklahoma's bad faith claim as set forth within Count 2 of its state court Petition, removed to this Court, be dismissed.

Respectfully submitted,

s/ Phil R. Richards
Phil R. Richards, OBA #10457
Jessica N, Battson, OBA #22843
Randy Lewin, OBA #16518
RICHARDS & CONNOR
12th Floor, ParkCentre Building
525 South Main Street
Tulsa, Oklahoma 74103
Telephone: 918/585.2394
Facsimile: 918/585.1449

ATTORNEYS FOR DEFENDANT OCCIDENTAL FIRE AND CASUALTY COMPANY OF NORTH CAROLINA

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2014, I electronically transmitted this instrument using the Eastern District of Oklahoma's ECF System for filing and electronic transmission to the following ECF registrants:

Michael Burrage, OBA #1350
Patricia A. Sawyer, OBA #30712
WHITTEN BURRAGE
1215 Classen Drive
Oklahoma City, Oklahoma 73103

Bob Rabon, OBA #7373
RABON, WOLF & RABON
402 East Jackson Street
Hugo, Oklahoma 74743

Drew Neville, OBA #6641
Ashley L. Powell #31689
HARTZOG CONGER CASON & NEVILLE
201 Robert S. Kerr Avenue
1600 Bank of Oklahoma Plaza
Oklahoma City, Oklahoma 73102
ATTORNEYS FOR PLAINTIFF CHOCTAW NATION OF OKLAHOMA

Kerry R. Lewis, OBA #16519
Nathan E. Clark, OBA #17275
RHODES, HIERONYMUS, JONES, TUCKER
& GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100

ATTORNEYS FOR DEFENDANT
GENERAL STAR
INDEMNITY COMPANY

s/ Phil R. Richards