



# BAD FAITH LAW REPORT

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## The Malicious Prosecution Analogy

By Michael Sean Quinn\*

When new standards emerge in the law, it is always difficult for a while to know how to think about them. Two generations ago a new emergent standard was the evidentiary requirement of "clear and convincing evidence," which some states applied to fraud and a few other causes of action. A great deal of time was spent trying to figure out how to conceptualize this standard by trying to figure out how it related to the preponderance of the evidence standard, on the one hand, and the beyond a reasonable doubt standard on the other.<sup>1</sup>

In the last generation, perhaps the common law tort of insurance bad faith was the most significant new standard. It swept the country, at least in substantial part. The easiest way to try a bad faith case is to conceive of it as adjustment malpractice. That standard seems very low, however, and it does not give insurance companies much breathing room. Furthermore, hardly any court ever instructs a jury that insurance bad faith amounts to a kind of negligence,<sup>2</sup> and some courts have deliberately repudiated the negligence standard, at least on the surface.<sup>3</sup> Finally, negligence is usually not associated with merely monetary losses and mental anguish. In many jurisdictions, negligence requires some sort of bodily injury or injury to property. Finally, common law judges are nervous about the idea of a tort for negligent breach of contract, and rightly so.

Recently, William T. Barker has suggested that insurance bad faith should be treated as more like malicious prosecution than anything else.<sup>4</sup> He sees the two causes of action as limited by parallel public policy concerns. Obviously, as

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\*Shareholder, Sheinfeld, Maley & Kay, P.C. (Austin, Texas). Mr. Quinn lectures on insurance and legal ethics frequently. He also teaches from time to time. He occasionally appears as an expert witness in cases involving issues of insurance and ethics.

<sup>1</sup>Michael Sean Quinn, Comment, *The Jurisprudence of Similar Acts Evidence in the Eighth Circuit*, 48 UMKC L. REV. 342 (1980).

<sup>2</sup>But see *Lunsford v. American Guar. & Liab. Ins. Co.*, 18 F.3d 653 (9th Cir. 1994).

<sup>3</sup>*Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997); see *State Farm Fire & Casualty Co. v. Simmons*, 963 S.W.2d 42 (Tex. 1997).

<sup>4</sup>William T. Barker, *Are Juries Competent To Find Judges Unreasonable?* 16 BAD FAITH L. REP. 4 (2000); William T. Barker, *Evidentiary Sufficiency and Insurance Bad Faith Suits*, 6 CONN. INS. L.J. 81 (1999).

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Barker himself recognizes, insurance bad faith is not a species of malicious prosecution, so we are thinking about an analogy. Barker, like Wittgenstein, thinks that good similes refresh the understanding.<sup>5</sup> Unquestionably, he is right about that.

The purpose of this article is to explore how far the simile can be pushed, to see whether there really is a fruitfully close analogy between the two causes of action, and to see whether insurance bad faith might even be something like a species of malicious prosecution. I will start in Section I by discussing the foundations of insurer bad faith. Thereafter, in Section II I shall spell out the tort of malicious prosecution in civil contexts. It is remarkably similar from state to state, with two significant exceptions. Next, in Section III I will try to reconceptualize the tort of bad faith, rather formally, as analogous to the tort of malicious prosecution. In Section IV I will work out differences, and in the final section, Section V, suggest that Barker's analogy fails.

### I. Insurer Bad Faith: The Problem

Insurers deny claims. Sometimes they deny claims wrongfully. Sometimes they deny claims for bad reasons or for no reason at all. Sometimes claims people act irrationally; sometimes they act hatefully; indeed, sometimes they should be taken out and flogged. I believe that most insurers try to do the right thing. Insurers pay most claims in a relatively timely manner. It is only rarely true that adjusters should be flogged.

Obviously, when an insurer denies a claim for a bad reason or no reason, the denial will likely breach the insurance contract. (Of course, one can act for bad reasons and still get things right. This does not often happen. Usually, if one thinks in the wrong way, one comes to the wrong conclusion.) If an insurer breaches the insurance contract, that fact will entitle the insured to damages. The same propositions are probably also true for at least some irrational delays in processing claims. Consequently, not everyone believes that there needs to be a common law tort of bad faith or that there needs to be a statutory sibling. Some people believe that breach of contract actions are sufficient to keep insurance companies from wrongfully denying coverage. I am not so sure. I think we should trust the unfolding wisdom of the common law, broadly conceived.<sup>6</sup> Moreover, breach of contract law is not built for handling systemic spitefulness, when it occurs, or even organizational block-headedness. Contract law is not built to distinguish between negligent error and egregious error. In fact, from a legal point of view, they are differently oriented concepts. Negligence always has process notions built into it. ("Did you do enough to investigate and think about the matter before you formed a conclusion?") The concept of egregious error does

not have the notion of process conceptually built into it. People can make whopping mistakes, even though they have investigated matters and thought about them. Bad faith may have some ideas of process built into it, but it certainly has the notion of egregiousness built into it.<sup>7</sup> I therefore take a different approach.

For most of the twentieth century, the moral overtones of contract law have been eliminated. Since Oliver Wendell Holmes, the common law has not viewed contracts as moral promises. Rather, from the legal point of view, contracts are seen as binding commitments either to perform or to pay damages.<sup>8</sup> Once people view contract law as no longer a moral matter having to do with promises and keeping them (a paradigmatically moral matter if ever there was one), a moral hazard, to use insurance terminology, arises in the context of thinking about whether to perform or breach. As a matter of intuitive sociology, if it looks as though one can breach and get away with it, and there is no moral deterrent to doing so, the probability of breach goes up. Consequently, there needs to be an added incentive to deter such breaches. This point is particularly true for entities like insurance companies, the product of which are a series of contracts and the servicing of those contracts. General Electric sells televisions. State Farm sells insurance policies. The mere payment of contractual compensation is not enough to deter breach. Now and again, wags say that insurance companies are in the business of selling structured rights to sue them. Given Holmes's definition of contract, there is truth in this remark. Surely, there is a just enough truth in the wag's joke that breach by insurers needs to be deterred.

Tort law provides that deterrent, through punitive damages and through damages for mental anguish, neither of which is generally available in contract litigation. (I am not suggesting that contract law does not have any of its own set of deterrents. At least in theory, consequential damages may be more recoverable in contract actions than in tort actions, but this is pure theory.) In many jurisdictions, legal fees are recoverable in contract litigation, including insurance litigation, whereas they are not recoverable in tort litigation. Interestingly, in Texas, where legal fees are usually recoverable in contract cases, the matter is subject to some doubt in insurance cases.<sup>9</sup>

<sup>7</sup> Michael Sean Quinn, *Insurer Bad Faith and Insurance Expertise*, 22 *INS. LITIG. RPTR.* 80 (2000).

<sup>8</sup> Oliver Wendell Holmes, *The Path of the Law*, address delivered at Boston University School of Law, January 8, 1897, in his *COLLECTED LEGAL PAPERS* 167, 175 (1920). See also Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 *FORDHAM L. REV.* 1085 (2000).

<sup>9</sup> *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 730, 731 (5th Cir. 1999) (certifying the question whether, in successful suit for breach of contract against an insurance company that is subject to the provisions listed in section 38.006 of the Texas Civil Practice and Remedies Code, the insurer liable for reasonable attorney's fees either under an Insurance Code provision listed in section 38.006 or under section 36.001 if application of one or more of these sections does not result in the award of attorney's fees.)

<sup>5</sup> Ludwig Wittgenstein, *CULTURE AND VALUE* 1e (1980). (The aphorism comes from a 1929 remark: *Ein gutes Gleiches erfrischt den Verstand.*)

<sup>6</sup> See Allen Watson, *THE EVOLUTION OF LAW* (1985); Peter Stein, *LEGAL EVOLUTION: THE STORY OF AN IDEA* (1980).

It has been known for centuries that insurance companies are tempted to—indeed, drawn toward—breach. Partly, of course, this temptation arises because insurers are subjected to so many fraudulent claims. One of the things insurance companies must do is to sort out good claims from the bad. There are bound to be errors when dealing with thousands upon thousands of claims. In addition, insureds try to get more money on insurance claims than the amounts to which they are entitled. Many otherwise honorable people see nothing wrong with fraudulently inflating their insurance claims. Insurers frequently let this happen because it is cheaper to pay than fight. Indeed, in small claims, it is often more reasonable to pay than to quibble. Nevertheless, there are a number of factors that create a special temptation on the part of insurance companies. First, some insurance companies are unscrupulous. Business cultures in some insurance companies are essentially dishonest.<sup>10</sup> Second, even if the business culture in a claims department is, broadly speaking, acceptable, some officials may be unscrupulous. Third, there are bureaucratic pressures to limit or deny claims. Sometimes those pressures result from business factors unrelated to contractual commitments. There are budgets, and line claims people sometimes feel pressure not to pay, simply because they can get away with it.

Fourth, even though contract remedies may be economically efficient theoretically, the time value of money frequently hurries people and companies of limited means to unjustly low settlements. People also grow weary of litigation. Companies that are in the business of processing claims—and therefore in the business of administering litigation—grow weary more slowly than others. Besides, claims people are frequently moved from file to file, so that the exhaustion that comes from prolonged exposure does not always set in.

Lord Acton once observed, “Power corrupts, and absolute power corrupts absolutely.” No insurance company has absolute power, of course, but in many transactions the balance of power in a transaction favors the insurance company. Consequently, the law needed to create remedies that even the balance of power—which will, as they say, level the playing field.

Now, the question becomes: What are the right principles for leveling that space? The kernel of wisdom contained in the tort of bad faith is that insurance companies should be deterred from acting unreasonably. But what counts as acting unreasonably? How much leeway should an insurance company get? The law of negligence does not give the insurance company much room for error. Errors should be deterred, but they are entirely predictable in a large bureaucratic organization run by

<sup>10</sup> *Vining v. Enterprise Fin. Group*, 148 F.3d 1206 (10th Cir. 1998); see John Grisham, *THE RAINMAKER* (1994); Allen I. Widiss, “Bad Faith” in *Fact and Fiction: Ruminations on John Grisham’s Tale about Insurance Coverages, Punitive Damages, and the Great Benefit Life Insurance Company*, 26 U. MEMPHIS L. REV. 1377 (1996). See also William Boyd, *ARMADILLO* (1998).

human beings who are cursed by limited knowledge, benevolence, sympathy,<sup>11</sup> and time, not to mention original sin. Perhaps principles analogous to those that articulate the tort of malicious prosecution are the right ones. After all, such principles would give insurance companies more breathing room. The standard is a good deal higher than the negligence standard. This is Barker’s hypothesis, of course. One wonders if that standard is not too high.

## II. The Law of Malicious Prosecution

The law of malicious prosecution is remarkably consistent from state to state. Everywhere, the law of malicious prosecution is disfavored.<sup>12</sup> As a consequence, the elements are applied strictly. An expansive itemized statement of the elements of malicious prosecution is as follows:

- (1) The defendant (*D*) in the malicious prosecution has procured, initiated, or continued a civil action against the plaintiff in the malicious prosecution (*P*).<sup>13</sup>
- (2) The earlier civil action was successfully terminated in *D*’s favor.<sup>14</sup>
- (3) *D* lacked probable cause to arrange, initiate, or continue the earlier civil action.
- (4) *D* acted with malice in instigating, initiating, or continuing the earlier civil action.
- (5) *D*’s actions with respect to the earlier civil action proximately caused injury to *P*.
- (6) *P* has sustained compensable damages as a result of his injury.

As stated, this list of elements is more formal than one finds in most jurisdictions.<sup>15</sup> Virtually all jurisdictions agree on these

<sup>11</sup> David Hume, *A TREATISE OF HUMAN NATURE* III.ii (1789).

<sup>12</sup> *Britton v. Maloney*, 196 F.3d 24, 30 (1st Cir. 1999) (Massachusetts); *Forbes v. Lanzl*, 9 S.W.3d 895 (Tex. Ct. App. 1999), *petition for review filed*; see W. PAGE KEETON, *PROSSER AND KEETON ON TORTS* § 119, at 876 (5th ed. 1984) [hereinafter KEETON].

<sup>13</sup> Keep in mind that the defendant in a malicious prosecution action was the plaintiff in the underlying action and that the plaintiff in the malicious prosecution action was the defendant in the underlying action. This can be confusing, but the confusion is notational only.

<sup>14</sup> At least one state implies that *D* must not have been liable to *P*. *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999) (Texas). Moreover, if the underlying action was successfully terminated in favor of *P* but the favorable judgment was obtained by false or perjured testimony, then this element will not apply. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880 (9th Cir. 2000).

<sup>15</sup> They are quite similar to the elements that are found in the RESTATEMENT (SECOND) OF TORTS §§ 674–681B (1965).

elements, however.<sup>16</sup> The interest protected by the tort of malicious prosecution is the interest everyone has in being free from “unjustifiable litigation.”<sup>17</sup> People have a greater interest in being free from criminal prosecution than they do from being free of civil litigation. Although civil litigation is expensive, it is not automatically detrimental to one’s reputation, whereas the criminal charge usually is, and the end result of civil litigation is usually much less dangerous than the end result of criminal litigation.

Although everyone has an interest in being free of unjustifiable litigation, we encourage people to resolve disputes through the use of litigation. Unjustifiable litigation is a rotten business. On the other hand:

The law supports the use of litigation as a social means for resolving disputes, and it encourages on a citizen’s [in this regard] consequently[, plaintiffs] must be given a large degree of freedom to make mistakes and misjudgments without being subjected to liability. On the other hand, no one should be permitted to subject a fellow citizen to [a lawsuit] for an improper purpose without an honest belief that the [defendant] may be found [liable]. The individual interest in freedom from unjustifiable litigation and the social interest in supporting resort to law have traditionally been balanced by the [existence of the tort of] malicious prosecution.<sup>18</sup>

E-3 requires that *D* have lacked probable cause to instigate, initiate, or continue the earlier action. What constitutes probable cause is a very significant question. Some cases say that if *P* brought the underlying action for a purpose other than achieving justice, then the element has been met.<sup>19</sup> This formulation is probably more suited to the context of malicious prosecution actions following criminal prosecutions than it is to the context of malicious prosecution actions following civil actions. One court said that “probable cause means ‘the existence of such facts and circumstances as would excite the belief, in a

reasonable mind, acting on the facts within the knowledge of the [plaintiff], that the person [to be sued was liable for the action upon which he was sued].”<sup>20</sup> Obviously, this is very much a negligence standard. Another court put it this way: the “Supreme Court of Arkansas defines probable cause as ‘a state of facts with credible information which would induce an ordinarily cautious person to believe that the [person to be sued] is [liable upon the theories of the alleged].’”<sup>21</sup> Even though these standards are linguistically negligence standards, their threshold is quite low. Surely *Prosser and Keeton on Torts* is the most widely cited torts text in America, and here is what it says about probable cause in the context of malicious prosecution actions arising from previous civil cases:

Apparently what is meant is simply that the instigator need not have the same degree of certainty as to the facts, or even the same belief in the soundness of his case [as must someone who brings a criminal complaint], and that [a plaintiff] is justified in bringing a civil suit when he reasonably believes that he has a good chance of establishing [that case] to the satisfaction of the court or jury. He may, for example, reasonably submit a doubtful issue of law, where it is uncertain which view the court will take.<sup>22</sup>

What constitutes probable cause under the *Restatement (Second) of Torts* is spelled out in terms of reasonable belief. According to section 675 of the *Restatement*, one has probable cause for instigating, initiating, or procuring a civil action, “if [one] reasonably believe[s] in the existence of the facts upon which the claim is based,” and has appropriate information about the law, or has relied upon counsel. Significantly, section 674(a) of the *Restatement (Second)* uncouples the requirement of probable cause from purpose and conjunctively requires, as elements for the tort of malicious prosecution, that *D* acted without probable cause and that *D* acted “primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based . . . .”

Under the right circumstances, as indicated, if a person who has instigated, filed, or carried forward an underlying civil suit has received advice of counsel, this is a defense to a claim of malicious prosecution. However, *D* must have made sufficient disclosures to counsel if that defense is to succeed.<sup>23</sup> Presumptively, lawyers who bring civil actions on behalf of clients are not liable for malicious prosecution if the actions go wrong. However, if the lawyer is not acting in good faith, he may have such a liability. For example, “an attorney who knowingly

<sup>16</sup> Blankstein v. Federated Mut. Ins. Co., 203 F.3d 834 (10th Cir. 2000); Britton v. Maloney, 196 F.3d 24 (1st Cir. 1999) (Massachusetts law); Hill v. White, 190 F.3d 427 (6th Cir. 1999) (Tennessee law); Cervantes v. Jones, 188 F.3d 805 (7th Cir. 1999) (Illinois law); Brown v. Nationsbank Corp., 188 F.3d 579 (5th Cir. 1999) (Texas law); Porus Media Corp. v. Pall Corp., 186 F.3d 1077 (8th Cir. 1999) (Minnesota law); Posr v. Court Officer Shield #207, 180 F.3d 409 (2nd Cir. 1999) (New York law); Bass v. Parkwood Hosp., 180 F.3d 234 (5th Cir. 1999) (Mississippi law); Kerr v. Lyford, 171 F.3d 330 (5th Cir. 1999) (Texas law); Evans v. Ball, 168 F.3d 856 (5th Cir. 1999) (Texas law); Saddy v. Dillard Dep’t Stores, 167 F.3d 1215 (8th Cir. 1999) (Missouri law); Hayter v. City of Mount Vernon, 154 F.3d 269 (5th Cir. 1998) (Texas law); Sneed v. Rybicki, 146 F.3d 478 (7th Cir. 1998) (Illinois law); Dean v. Olibas, 129 F.3d 1001 (8th Cir. 1997) (Arkansas law); Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123 (2nd Cir. 1997); Riley v. City of Montgomery, 104 F.3d 1247 (11th Cir. 1997); Poff v. Hays, 2000 WL 127194 (Ala. 2000); Delchamps, Inc. v. Bryant, 738 So.2d 824 (Ala. 1999); Bartal v. Brower, 993 P.2d 629 (Kan. 1999); Bergstrom v. Noah, 974 P.2d 520 (Kan. 1999); Honzawa v. Honzawa, 701 N.Y.S.2d 411 (App. Div. 2000).

<sup>17</sup> KEETON, *supra* n.15, § 119, at 870.

<sup>18</sup> *Id.* at 871 (adapted by this author from KEETON, *supra* n.15, which is explicitly focused upon malicious prosecution in the context of criminal charges.)

<sup>19</sup> Hill v. White, 190 F.3d 427, 432–33 (6th Cir. 1999).

<sup>20</sup> Kerr v. Lyford, 171 F.3d 330, 340 (5th Cir. 1999) (criminal context).

<sup>21</sup> Dean v. Olibas, 129 F.3d 1001, 1004 (8th Cir. 1997) (adapted from a criminal case).

<sup>22</sup> KEETON, *supra* n.15, § 120, at 893.

<sup>23</sup> Hill, 190 F.3d at 432: “In malicious prosecution actions, advice of counsel to the effect that there is a reasonable chance of recovery on a claim can establish probable cause. However, to invoke the defense of advice of counsel, a defendant must have disclosed to his attorney all of the material facts within his knowledge and all the facts which he could have ascertained by reasonable diligence.” (citations omitted.)

prosecutes a groundless action to accomplish some evil purpose of his client may be held accountable in an action for malicious prosecution."<sup>24</sup>

As is often the case, the California Supreme Court has written the most perceptive opinion on the matter under discussion—how to think about probable cause. In *Sheldon Appel Co. v. Albert & Oliker*,<sup>25</sup> Justice Arguelles, for a unanimous court, explored the concept at length. The existence of probable cause is to be determined by an objective standard. What the instigator of the now-litigated prior lawsuit actually believed is irrelevant to probable cause. According to the California Supreme Court, for the purposes of the tort of malicious prosecution, there is probable cause when a case is objectively tenable.<sup>26</sup> The tenability of a case has factual components and legal components. What did the instigator of the lawsuit know (or reasonably believe) is the factual component. When those facts are established or undisputed, whether the lawsuit was tenable is a legal matter to be decided according to objective standards by a court. (Since a court is to decide this matter, an appeals court can decide it just as easily as a trial court.) As a consequence, it is error to introduce expert testimony as to "whether a reasonable attorney would conclude that the claims advanced in prior action were tenable."<sup>27</sup> If the facts are not in dispute, tenability is a purely legal matter, and expert testimony is inadmissible on purely legal matters.

Obviously, since E-3—the issue of probable cause—is part of *P*'s case in chief, *P* bears the burden of proof. In other words, the plaintiff in the malicious prosecution action (the defendant in the underlying action) must prove by whatever the relevant standard is—usually by a preponderance of the evidence (but conceivably might be clear and convincing evidence)—that *D* (the plaintiff in the underlying action) lacked probable cause for bringing the underlying action. As indicated, some jurisdictions say that the existence of probable cause is a matter for the jury. Others, such as California, say that courts should determine probable cause, although it is for the jury to determine what *D* actually believed.<sup>28</sup> From the point of view of presenting a malicious prosecution case, sorting out what evidence is presented in front of the jury can be a difficult problem which is easy to mishandle. Strangely, from the plaintiff's point of view, it may be desirable to create as many factual disputes as possible. In many cases, one wants the plaintiff's and the defendant's narratives to be as similar as possible, with only a few variations. It is not at all clear that

<sup>24</sup> *Id.* at 432; see *Bergstrom v. Noah*, 974 P.2d 520, 527–27 (Kan. 1999); *Honzawa v. Honzawa*, 701 N.Y.S.2d 411, 414 (App. Div. 2000).

<sup>25</sup> 765 P.2d 498 (Cal. 1989).

<sup>26</sup> *Id.* at 499.

<sup>27</sup> *Id.* at 510.

<sup>28</sup> KEETON, *supra* n.15, § 119, at 882. Most of the case law in this matter appears to have developed in the area of malicious prosecutions for having brought criminal complaints.

this rule of thumb works in malicious prosecution cases.

In addition, *P* must prove that *D* instigated the underlying action as the result of malice. The cases do not spell out the concept of malice well. Obviously, actual malice will do. It is probably not quite right to say that *any* improper motive constitutes malice. It is easy to say in the criminal context that malice exists if the proceeding "was initiated primarily for a purpose other than that of bringing a defendant to justice."<sup>29</sup> But that standard does not work so well in the civil context, even though section 674(a) may suggest that malice should be understood in terms of having some primary purpose other than obtaining an adjudication. After all, it is understood that in civil cases, plaintiffs are trying to obtain private advantage. What would be the analog? That the plaintiff in the underlying action brought the action primarily for a purpose other than obtaining a remedy upon an arguably viable theory?

Perhaps it is not necessary to prove an improper motive. Perhaps if *D* acted in the underlying case "with flagrant disregard" for the rights of *P*, then that is sufficient to prove malice.<sup>30</sup> Of course, this would make malicious prosecution very much like gross negligence. Certainly, whatever malice is, it can be proved by circumstantial evidence. Indeed, malice may be inferred from the lack of probable cause,<sup>31</sup> although the reverse is not true: the absence of probable cause cannot be inferred from the presence of malice.<sup>32</sup>

### III. Malicious Prosecution and Insurance Bad Faith

Can common law insurer bad faith be conceptualized on analogy with malicious prosecution? The way to answer this question is to try to reformulate the elements of insurer bad faith modeled on malicious prosecution and then analyze the results. Perhaps Barker's suggestion could be elaborated as follows:

- (1) The insurer has denied a claim of an insured, or at least has failed to pay it.
- (2) The insurer has paid the claim, has admitted that it owes the claim, has settled the claim, or there has been an adjudication that the insurer owes the claim.
- (3) The insurer lacked probable cause to deny (or to fail to pay) the claim.

<sup>29</sup> RESTATEMENT (SECOND) OF TORTS § 668 (1965).

<sup>30</sup> *Hayter v. City of Mount Vernon*, 154 F.3d 269, 275 (5th Cir. 1998) ("Under Texas law, malice may be inferred from the lack of probable cause or from a finding that the defendant acted in reckless disregard of the other person's rights.")

<sup>31</sup> *Id.*

<sup>32</sup> *Steward v. Sonneborn*, 98 U.S. 187 (1878) ("[T]he existence of a want of probable cause is, as we have seen, essential to every suit for malicious prosecution. Both that and malice must occur. Malice, it is admitted, may be inferred by the jury from want of probable cause, but the want of that cannot be inferred from any degree of even express malice.") (Strong, J.)

- (4) The insurer denied the claim (or failed to pay it) maliciously.
- (5) The insurer's denying (or failing to pay) the claim proximately caused injury to the insured.
- (6) The insured has sustained monetary damages as the result of the injury.

So far, the model seems to work pretty well. Perhaps some explanation is in order.

IBF-3 requires that the insurer lack probable cause to refuse (or fail) to pay the claim. Presumably, if the insurer had something like probable cause at the point it initially refused the claim but lost that ground as time went along, then its subsequent refusal to pay the claim would become bad faith, although its initial refusal would not. Presumably, an insurer would be required to realize that it did not have grounds continue refusing to pay a claim. (In the alternative, a more stringent version of this tort might require an insured to ask for payment again. Given the size and bureaucratic nature of insurers, and given that an insured can be counted upon to be more attentive to its claim than an insurer, this more stringent standard makes a certain degree of sense. Certainly, many lawyers when they advise insureds tell the insureds to give the insurance company another opportunity to make a mistake. It is sensible both from the point of view of justice and from the point of view of strategy.)

IBF-4 requires the insured to act with malice in refusing (or failing) to pay the claim. As with common law malicious prosecution, it is not entirely clear what counts as malice. Obviously, personal animus, racism, ethnic hatreds, gender hatreds, or a desire to oppress the poor, the weak, or the elderly would be sufficient to constitute malice. Probably, having some purpose other than securing an adjudication is not necessarily malice. After all, businesses that are engaged in economic combat utilize lawsuits as swords and shields all the time. Businesses attempting to suppress competition from former employees file injunctive actions. Often, their true motive is not to obtain an adjudication but to obtain a quick settlement and thereby structure the market.

IBF-5 is nothing but the usual requirement of proximate causation. Sometimes, proximate causation is formulated in terms of natural sequences of events given a stimulus. Other times it is formulated in terms of cause-in-fact plus foreseeability. Juries probably ignore such subtleties and ask themselves whether the misconduct or nonfeasance of the insurer caused injury to the insured.

IBF-6 is no problem in theory. Presumably, all damages that are normally to be recovered in tort cases could be recovered here.<sup>33</sup> The only problem is punitive damages. Something very close to gross negligence is built into IBF -3. If so, and if dam-

ages are authorized only in the presence of something like gross negligence plus malice, then it is difficult to know what additional factor would have to be present in order to authorize punitive damages.<sup>34</sup> Express malice is probably sufficient. Some courts have expressed doubt about recovering mental anguish damages, except where there is a serious disruption of life.<sup>35</sup> Many courts are reluctant to conceptualize any aspect of insurer bad faith on the analogy with negligent infliction of emotional stress. Some states refuse to recognize the tort of negligent infliction of emotional distress.<sup>36</sup> There was a time when many states required special injury before they would uphold a finding of malicious prosecution. Many courts say that there must be an interference with a person or his property.<sup>37</sup> Most recently, the New York Court of Appeals said that there had to be something "akin to the effect of a provisional remedy," such as a temporary injunction or the like before an action for malicious prosecution would lie.<sup>38</sup>

#### IV. Bad Faith as Malicious Prosecution?

How does insurer bad faith modeled on malicious prosecution differ from present forms of insurer bad faith?

With respect to IBF-1, few states require that the claim already be resolved in favor of the insured before the bad faith case can be brought. On the one hand, bringing a bad faith action while the underlying case is going on gives insureds some leverage to obtain recoveries they may not deserve. It is not terribly difficult to make adjuster error look like adjuster bad faith. The trouble is that insurance companies are awash in paper, computer messages, calculations, bits of information, and so forth. It is entirely predictable that people will lose files, misdirect information, write down the wrong thing, become inappropriately frustrated or inappropriately angry, and so forth. All of these things can be slanted and distorted. For this reason, it might be better to require resolution of an insurance contract claim before any bad faith claim can be brought. Some states that do not have any such formal requirement routinely separate the coverage aspects of an insurance lawsuit from its bad faith aspects. Sometimes this is done by an informal stay. Sometimes it is done by formal bifurcation, which involves the creation of a new lawsuit.

<sup>34</sup> *Id.* § 120, at 896 ("Punitive damages are also recoverable in a proper case, though it si perhaps not just any degree of malice which will suffice to warrant a punitive recovery.")

<sup>35</sup> *Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54 (Tex. 1997).

<sup>36</sup> *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

<sup>37</sup> *Louis v. Blalock*, 543 S.W.2d 715 (Tex. Ct. App. 1976)

<sup>38</sup> *Engel v. CBS, Inc.*, 711 N.E.2d 626 (N.Y. 1999). Interestingly, although New York's high court upholds the special injury requirement, it acknowledged that "[t]here is no doubt that a compelling argument can be made to consign the special injury requirement to the history books." *Id.* at 414 The court goes on to say that, even though there is a compelling argument, "it seems clear that New York law has deemed special injury to be a necessary consequence of malicious prosecution." *Id.* at 629.

<sup>33</sup> KEETON, *supra* n.15, § 119, at 887-88, § 120, at 895-96.

On the other hand, requiring that bad faith lawsuits not be filed until after the underlying coverage case is resolved has a substantial down side. It will actually create an incentive for insurance companies that have made a mistake not to change their minds. People get tired of lawsuits. If an insurance company makes a mistake, it might want to have a coverage lawsuit, in the hopes that the insured would become tired of the matter and not pursue the bad faith case.

Probably, the trial of bad faith and coverage action should be separated. However, it should not be done on the model of malicious prosecution in the underlying action. Instead, it should simply be separated for trial. The same jury should be used. If the insured wins the coverage case and bad faith is pleaded, then the trial should simply plunge ahead into bad faith. This will reduce discovery costs, maintain court efficiency, and keep the process moving.

This option has problems. For example, the jury could not be told in advance about the bifurcated nature of the trial. This might anger some jurors, and some might feel as if they had been lied to. Also, trying a case in this way creates an opportunity for shenanigans. For example, if an out-of-state adjuster comes to testify in the coverage case, while he is waiting in the hall, the plaintiff-insured might have him subpoenaed for the bad faith case. Most courts know how to deal with such tomfoolery, however.

IBF-3 is extremely interesting. Obviously, the elements of malicious prosecution apply to insurance companies when they initiate or sustain litigation. The law of malicious prosecution applies to declaratory judgment actions, for example. IBF -3 becomes interesting only when we are talking about the claims context before, or outside of, the context of coverage litigation.

A requirement of probable cause in the context of denying claims (or delaying their payment) is a complicated one. Insurance claims are extremely important to the people who file them. Insurance companies must be careful. Arguably, they must be more careful in dealing with claims than the average citizen must be in filing a lawsuit.

At the same time, insurance companies must have the freedom to test a variety of propositions. Many insureds are not to be believed, or, at least, not wholly believed. It is sometimes not clear whether the purported insured is indeed an insured. Sometimes, it is not clear what the legal rule in a given state is. The status of a rule may be clear in some states but not others. Insureds frequently expand their damage claims unjustly. Sometimes, policy conditions are violated. And so forth. Insurance companies should have a right to look at each of these problems, and others, as the case may be.

Obviously, insurers should not undertake to deny claims or to delay their payment for purely experimental reasons. In general, insurance companies wish to close files, not keep them open. Consequently, the economics of insurance adjustment virtually guarantees that insurance companies will only very

seldom undertake litigation for purely experimental reasons. Entities that exist to make profits hardly ever have any abstract commitments to accumulating knowledge for its own sake.

Nor is it the case that the probable cause requirement should apply unequivocally to all insurer actions and omissions. Thus, for example, insurers need some breathing room when they formally deny claims. On the other hand, they should be awarded much less breathing room when they fail to process claims. Hence, claim denial should be treated differently from claim nonpayment not accompanied by a denial.

Moreover, although insurers need relatively lax proximate cause standards in some ways, in other ways the standard can be quite high. This is particularly true when it comes to applying the law correctly. Insurance companies have easy access to lawyers. Frequently, they have lawyers on their staffs. Not infrequently, adjustment departments have lawyers on staff as adjusters. Virtually all adjusters are trained to some degree in the law. The longer a person has been an adjuster, the more likely it is he will have received some sort of legal training. The CPCU curriculum, for example, has one exam specifically devoted to nothing but the law. Other components of that curriculum cover specific aspects of insurance law. Moreover, claims people are trained with respect to investigative techniques, and they are indoctrinated into the importance of objectivity. Every decent first-party carrier teaches its adjusters the maxim "Look for coverage!" or its equivalent, and honorable duty-to-defend decisions are made in the same sort of way. Consequently, in some ways, insurance claims departments should be held to a higher standard in dealing with claims than ordinary citizens are with respect to filing lawsuits.

The existing law of bad faith represents an advance over the law of malicious prosecution in this regard. The existing law almost everywhere requires insurers to have a good reason before denying a claim, and it requires insurers to look for reasons to support the claim as well as for reasons to deny the claim. What constitutes a good reason in the context of claims denial is difficult to state. Many have suggested that if the reason is "fairly debatable" then that is sufficient, and fair debatability is almost certainly the right rule.<sup>39</sup> On its face, it emphasizes fairness and the existence of reasoning. The opposite of "fairly debatable" is usually thought to be "arbitrary and capricious." Although these terms are not meant literally, they are both process-oriented, and they both give the insurance companies substantial breathing room. It also appears as though they permit error to be good faith error and not the commission of the tort of bad faith, so long as the insurance company tried to reason the matter out to some degree.

If so, then the standard does not need to be specified any further, and the important question becomes whether judges or ju-

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<sup>39</sup> For a recent case see *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 276 (Ariz. 2000).

ries should decide this issue in the presence of conflicting testimony. Looked at one way, fair debatability is a matter of policy—a normative matter—which should probably be decided by courts. In addition, courts have considerable expertise in knowing how insurance companies think and how they ought to think. Probably this is the core of Barker's view. Fair debatability is a policy matter because it inherently involves the concept of fairness, and what constitutes fairness is not simply a matter of fact but a matter of policy, morals, ethics, and philosophy.

Viewed from another point of view, fair debatability belongs to the jury. The question is what would a reasonable insurance company do. How would a reasonable insurance company treat this claim? Consider obvious paradigms of reasonable insurance companies. The crucial question is, what would such a company do? This appears to be a question of fact, not a question of policy or philosophy.

Of course, one could argue that a value question is hidden in the concept of a reasonable insurance company. Obviously, there is no question of values in the idea of being an insurance company. Surely, there are normative matters buried in the idea of what it is to be reasonable. These kinds of normative matters, however, go to juries all the time. Indeed, the idea of negligence has an idea of being reasonable built into it. I am not suggesting, of course, that the only criteria for being reasonable is the criteria provided by the law of negligence. However, it is crucial difference which separates insurance bad faith from ordinary negligence.

Similarly, suppose that the issue of fair debatability does contain a normative issue. Why are courts any more suited to deciding such issues than juries? Trying cases involving normative components at different places around the country is a very good way to find out what the people think. This technique might even be used to build consensus.<sup>40</sup> It is entirely unclear why the issue of proximate cause is often said to be an issue for the court. Barker has suggested that the difference is this: negligence is a matter of balancing, whereas malicious prosecution is a question as to whether a certain threshold—namely, that of having probable cause—has been crossed.<sup>41</sup> This suggestion will not work. First, balancing always involves a normative component, and no one suggests that negligence or nuisance—two premier causes of action that utilize balancing—should not be decided by juries. Furthermore, the fact that malicious prosecution involves an antecedent question as to whether a certain threshold has been crossed does not, in and of itself, suggest that the issue of probable cause is one of law, rather than fact.

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<sup>40</sup> For a general exploration of these issues see Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 1 (1999).

<sup>41</sup> William T. Barker, *Are Juries Competent To Find Judges Unreasonable?* 16 BAD FAITH L. REP. 4, 6 (2000).

It is extremely difficult to see why E-3 and therefore IBF-3 should be determined by judges rather than by juries. This is especially true when viewed as a question as to what a reasonable insurance company would do, as opposed to what a minimally good reason is. At the same time, it is perfectly true that courts are more familiar with lawsuits and their vicissitudes than are jurors, at least in general. That has not deterred the American legal system, however, in other contexts, from turning over very specialized matters to jurors. The fact that jurors are permitted to decide issues of legal malpractice proves that the mere fact that legal judgment is involved is not crucial. Moreover, adjusters are trained to make legal judgments, even though most of them are not lawyers. There is something odd about suggesting that adjusters can make legal judgments and that insurance companies should train them to do it right, but that their conduct can be judged only by professional judges. To be sure, in the context of appellate legal malpractice, judges, and not juries, decide questions of causation.<sup>42</sup> But E-3 does not deal with issues of causation. That is the province of E-5. E-3 deals with the mental state—the *mens rea*, as it were—of *D*, when he was a plaintiff in the previous law suit. Besides, appellate work is extremely specialized, and usually does not involve anything but decisions about the law. Such is not the case when it comes to reviewing the conduct of adjusters. Generally speaking, evaluations of this sort are left to jurors and are not commandeered by judges.

Perhaps the reason probable cause has been allocated to courts in many jurisdictions is because of the pinched conception of what constituted a question of fact that prevailed in the nineteenth century. In *Stewart v. Sonneborn*, Justice Strong, writing for every member of the Court, observed that because the question of probable cause was a mixed question, that is, a question of both law and fact, the question was to be decided by the court in an instruction to the jury. The formula was that the court would state alternative factual scenarios and instruct the juries as to which of those factual scenarios included probable cause and which did not.<sup>43</sup> Courts do not resolve the mixed questions of law and fact this way any more. In fact they stopped doing it decades ago. Thus, that allocation of judge versus jury decision-making in malicious prosecution cases is outmoded. Probably, the reason there has not been a change is because so few cases are processed. Another reason may be that courts are leery of juries in this context. Perhaps courts are worried that juries would find too much litigation frivolous. After all, no one likes to be sued.

With respect to IBF-4 it is entirely unclear how the requirement of malice might work. I have audited adjustment files in which racist remarks appeared. Indeed, this happened in the 1990s. However, most insurance companies are training

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<sup>42</sup> *Millhouse v. Wiesenthal*, 775 S.W.2d 626 (Tex. 1989).

<sup>43</sup> 98 U.S. 187, 194 (1878).

against such conduct, and it is a relative rarity. The same point is true for other forms of sociologically-based malice.

Personal animus is a difficult problem in adjusting many insurance claims. Some claimants are simply a pain in the neck. Of course, most good insurance companies train their people to avoid blowups, but difficulties sometimes happen. The trouble is that juries are inclined to be forgiving towards most claimants, especially if they appear in court to be souls of sweet reason, but juries are not inclined to be forgiving towards exasperated adjusters.

Of course, many jurisdictions interpret the concept of malice in the context of malicious prosecution to be identical to gross negligence. If the Barker analogy were adopted, this would probably be the major alteration—as a practical matter—in the law of insurer bad faith. Insurer bad faith would become assimilated to gross negligence.

This is probably a bad idea. For one thing, gross negligence in claim denial would be extremely difficult to prove. Gross negligence in the context of failing to pay a claim might be somewhat easier, at least sometimes. Does it really make sense to skew the law of insurer bad faith towards stupid delays, lost files, and the metaphoric “relocation” of files to the bottom of gin bottles? Such an assimilation might actually do more damage to the law of gross negligence than it would do good to the law of insurance bad faith. It is entirely predictable that juries would approach an insurer’s flagrant disregard of the rights of its insured as gingerly as they approach gross negligence. The former might end up slopping over onto the latter, as the common law evolves, and that is not a good idea.

For the same reason, it is dangerous to permit any finder of fact to infer malice from the absence of probable cause. Historically, the idea was that probable cause resembled the Cheshire Cat. It could be fully real in some cases, entirely absent in others, halfway faded in a third, and 87 percent faded in a fourth. The more faded probable cause was, the more appropriate punitive damages were. This intuitive calculus would probably not work well with insurance companies because of their lowly position in the prestige pecking order of society. People at least say that they love to hate insurance companies.

IBF-5 and IBF-6 present no real problems. It is difficult to see, however, why the tort of insurer bad faith should include any kind of special injury requirement, which some states have imposed upon malicious prosecution.

#### V. *Dalrymple* and *Filippo*

Barker has suggested that *Dalrymple v. United Services Automobile Association*,<sup>44</sup> correctly imported the law of malicious prosecution into the law of insurance bad faith. Barker is surely right in that restricted claim. However, the structure of reasoning in *Dalrymple* should not be extended beyond the

very peculiar facts of that case to the tort of bad faith in general. In order to see why this is so, a few quite specific things must be said about *Dalrymple*.

Ann Dalrymple was a neurosurgeon in the Navy. She was also crazy. Indeed, she was stark raving mad. The severity of her mental disease was such that a Navy court marshal found that she was unable to appreciate the nature and quality of her conduct. While subject to a delusion of a persecutory type, Dalrymple barricaded herself in her quarters, shot her psychiatrist in the finger, shot at a police dog, and shot a policeman in the leg.

The wounded policeman sued, and Dr. Dalrymple turned the case over to USAA, with whom she had a renter’s protection policy. It included the usual liability coverage. USAA had serious coverage questions. Intentional acts are not accidents, after all, and therefore not “occurrences.” The clearly foreseeable consequences of intentional acts are eliminated from coverage by the “expected or intended” exclusion. Dalrymple, naturally, took the position that her insanity rendered her conduct accidental and therefore a covered occurrence.

This is a very unusual question, which has not been litigated much. Drunkenness and drug-taking do not create fortuity. Involuntary madness, however, probably should. In any case, the insurer provided a defense and eventually paid indemnity. While doing so, it filed a declaratory judgment action, in which Dalrymple filed a counterclaim for breach of contract and malicious prosecution. By the time the case came to be heard, the insurer’s questions were moot, so there was no declaratory judgment action to be heard. The insurance company could not possibly have breached the contract because it had paid the indemnity cost and provided a defense. Consequently, the only issue left was whether the insurance company had acted properly in bringing the declaratory judgment action.

The issue was formulated as if it were a bad faith case. By the time it was heard, however, it was clearly a malicious prosecution case. The only issue was: Did an insurance company have the right to bring a declaratory judgment action? Except for being focused upon bringing a declaratory judgment action, this is virtually the canonical form of the central question in a malicious prosecution case.

Barker suggests that the model of reasoning in *Dalrymple* should be extended to *Filippo Industries, Inc. v. Sun Insurance Co. [Filippo II]*.<sup>45</sup> This case involved a property policy covering physical damage to inventory in a warehouse. The policy had a value reporting provision. There was a course of dealing between the insurer and the insured pursuant to which the insured was often quite late in reporting values, but the insurer accepted late reports without penalty or reproach.

<sup>44</sup> 46 Cal. Rptr. 2d 845 (Ct. App. 1995).

<sup>45</sup> 88 Cal. Rptr. 2d 881 (Ct. App. 1999); see *Filippo Indus., Inc. v. Sun Ins. Co.*, 42 Cal. Rptr. 2d 182 (Ct. App. 1995) [*Filippo I*].

In 1992, the warehouse was destroyed by fire. This was the time of some significant and fiery race riots in Los Angeles, so adjustment was slow. Filippo's inventory was substantially undervalued before the fire. After the fire, Filippo updated its warehouse reports and, thereby, doubled its coverage, if the established course of dealing were followed.

The insurance company declined to follow the established course of dealing. It persuaded the trial court in *Filippo I*, to agree with it, and that trial court granted summary judgment. That summary judgment was reversed on appeal in *Filippo I*. Subsequently, coverage was established, and a jury was permitted to determine whether the insurance company's conduct in ignoring its own course of dealing with the insured was reasonable under the circumstances or whether it constituted insurer bad faith.

The trial court in *Filippo II* prevented the jury from learning of the decision of the earlier trial court because that decision had been reversed. In the appeal of *Filippo II*, the insurers took the view that since a trial judge had granted summary judgment in favor of the insurers, that was sufficient to establish fair debatability as a matter of law. They suggested that, as a matter of law, there was at least some reasonable basis for denying the claim. After all, the trial judge had granted them summary judgment in *Filippo I*. The insurers attempted to use the malicious prosecution analogy, and they cited *Sheldon Appel* to support their position.

The California Court of Appeal disagreed. From the point of view of the law of bad faith, an erroneous decision of a trial court that has been reversed becomes something like a nullity when determining whether the insurance adjuster had a reasonable basis for denying the claim. Interestingly, the court of appeal basically said that, given the realities of trial courts, trial courts can make mistakes that are so misguided that they should not be treated as the foundation for a claim that something was at least minimally reasonable as a matter of law. Here is the actual language of the court of appeal:

We certainly have great faith in the sagacity and reasonableness of trial judges, but we decline to impute infallibility to any court, trial or appellate. There is no guarantee that a judge might not be faced with a complicated summary judgment motion on his/her first day in a civil assignment. What trial judge has not been confronted with a motion that has been mislaid till the morning of the hearing? How many wise judges have a placard strategically placed reminding them "Don't say anything stupid today?" Mistakes happen, but *Sheldon Appel* does not provide that a mistake should automatically result in depriving an insured of its right to appeal the dismissal of this claim of bad faith.<sup>46</sup>

This ruling seems entirely realistic. To treat every judicial decision, even reversed ones, as establishing fair debatability, is to blink at reality. Sometimes, judges make mistakes because they are inattentive, overworked, disoriented, drunk, ignorant,

angry, or even stoned. There is no reason why a decision that has been reversed should automatically establish the existence of a bona fide dispute.

## VI. Conclusion

For a variety of specific reasons, the Barker analogy is troublesome. First, the configuration of interests as between insureds and insurers is not the same when it comes to claims denial as it is among fellow citizens when it comes to the filing of lawsuits. This is not to imply that insurance companies are second class citizens. It does mean that they are "citizens" with special responsibilities. Almost every state recognizes that insurance contracts cannot be treated straightforwardly on an arm's-length model. Few states explicitly treat insurance companies as fiduciaries of their policyholder.<sup>47</sup> On the other hand, many states recognize that the relationship between insurer and insured is a special one.<sup>48</sup> In a duty to settle context, which is a first-party context, insurance companies must treat the interests of their insureds at least equal to their own.<sup>49</sup> No party to an arm's length deal ever needs to do this.

Second, if insurer bad faith is understood based on an analogy with malicious prosecution, socio-legal theories justifying and limiting malicious prosecution will slop over onto insurer bad faith. Malicious prosecution is not favored at the common law. If insurer bad faith is conceptualized as malicious prosecution, it would be disfavored as well. That is not a good idea, and it does not serve the social, economic, and legal purposes of the tort.

Third, to the extent that malicious prosecution is conceptualized as gross negligence, if insurance bad faith is recast on the model of malicious prosecution, it too will be conceptualized in terms of gross negligence. That standard is probably too low. To the extent that the essence of common law insurer bad faith is the norm that requires that insurers deny claims only for good reasons, the criteria for what constitutes a good reason is way too low, when one has a good reason if one is not guilty of gross negligence in the formation or detention of that reason.

Fourth, the requirement of malice is already exceedingly confusing in the context of malicious prosecution. Malice should not—in any of its various real or fictitious senses—be a necessary condition for insurer bad faith. If the malice requirement is nothing but a way of saying that an insurer must be guilty of gross negligence before it can be guilty of bad faith, that is probably the wrong standard. Gross negligence requires conscious disregard for the interests of another. Hardly anyone would disagree that very sloppy thinking, outrageous inatten-

<sup>47</sup> Douglas R. Richmond, *Trust Me: Insurers Are Not Fiduciaries to Their Insureds*, 88 KY. L.J. 1 (1999).

<sup>48</sup> *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987); see *Aranda v. Insurance Co. of Am.*, 748 S.W.2d 210 (Tex. 1998).

<sup>49</sup> *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544, 547-48 (Tex. Comm'n App. 1929).

<sup>46</sup> *Filippo II*, 88 Cal. Rptr. 2d at 889.

tion, or stupidity bordering on the bizarre are sufficient conditions for insurer bad faith if an egregiously poor decision is made. One doubts if they should be necessary conditions. Error short of that should also be sufficient, although small time negligence—garden-variety screw-ups—should probably not be. There is an inherent urge in lawyerly thinking to block things off, create separate categories, devise a well-organized series of discrete pigeonholes, and so forth. Continua and slopes are real, however. Not every incline is stopped.<sup>50</sup>

Fifth, whether an insurer has a good reason or not for denying a claim should be treated as a jury matter. Analogizing insurer bad faith to malicious prosecution will create problems about whether having a good reason is the same as having probable cause. Moreover, an insurer having a good reason to deny a claim is a more stringent requirement than probable cause. A plaintiff can have probable cause for bringing an action when it thinks it will lose in a rational court, although it cannot be rationally certain that it will lose and avoid the sobriquet of malicious prosecution. Surely, an insurance company should not be permitted to deny a claim if it thinks (or should think) it pretty certain that it will be sued and will be substantially likely to lose in court. Of course, there is a negligence theme in this last idea. However, it is combined with the idea of “being substantially likely that we will lose in a rational court.” That complex idea creates a standard other than mere negligence. It is a standard that is not analogous to the standards of malicious prosecution.

Sixth, Barker’s reason is unconvincing, although it is careful, nuanced, and insightful. Perhaps the key analogy Barker sees between malicious prosecution and bad faith is to be found in the idea of wide latitude. Barker believes that public policy dictates that plaintiffs should have wide latitude to bring lawsuits. At the same time, he believes that insurance companies should have a similarly “wide latitude to challenge claims without fear of tort liability.”<sup>51</sup> Of course, the law of bad faith ordains that not every mistake creates bad faith liability, and this principle of law is perfectly sound. Mere mistakes are not bad faith. Insurance companies need some latitude to deny claims where the facts are in doubt or where the law is doubtful. Where there is a bona fide dispute or a dispute is fairly debatable, insurance companies should be able to deny coverage without bad faith exposure. As Barker points out, this latitude exists so that insurance companies can do the right thing by everybody and so that premium rates are maintained at reasonable levels. However, it is not clear that insurance companies should have wide latitude. To be sure, they should have some latitude. It is not clear, however, how wide it should be. Insurers do not have discretionary authority to deny claims, and bad

faith is not like an abuse of discretion by a non-ministerial governmental official.

This determination, of course, is a matter of public policy, which is to say, it is a matter for values, philosophy, dialectical, rhetorical controversy, and political controversy (honorably and broadly conceived). But these matters have always been part of the evolving common law.

Plaintiffs should have more latitude in filing lawsuits than insurance companies should have in denying claims. It seems central to the democratic order that citizens should be able to resort to legal machinery without fear of retribution, within broad limits. It is not clear that economic entities, such as insurance companies, which are often profit maximizers, should have the same latitude to deny claims. *Dalrymple* holds that insurers should have the same latitude that any citizen has to file lawsuits, such as declaratory judgment actions, and that is no doubt so. Filing a declaratory judgment action, is not the same as denying a claim. Indeed, many declaratory judgment actions are filed in order to determine whether a claim should be paid.

## The Malicious Prosecution Analogy: A Reply to Quinn

By William T. Barker\*

I have advocated certain analogies between bad faith law and the law of malicious prosecution.<sup>1</sup> Michael Quinn has ar-

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\*William T. Barker is a partner in the Chicago office of Sonnenschein Nath & Rosenthal, with a nationwide practice representing insurers in complex litigation, including matters relating to coverage, claims handling, sales practices, risk classification and selection, agent relationships, and regulatory matters. He is Editor of the *Bad Faith Law Report*, has published scores of articles, and speaks frequently on insurance and litigation subjects. He has been described as the leading lawyer-commentator on the connections between procedure and insurance. See Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 257 n.4 (1995).

Mr. Barker is a member of the American Law Institute. He is Chair of the Extracontractual Liability Subcommittee of the Insurance Coverage Litigation Committee of the Tort & Insurance Practice Section (“TIPS”) of the American Bar Association and a past Co-Chair of the Subcommittee on Bad Faith Litigation of the ABA Section of the Insurance Coverage Litigation Committee. He is a past Chair of the TIPS General Committee Board and of the TIPS Appellate Advocacy Committee.

<sup>1</sup> William T. Barker, *Are Juries Competent To Find Judges Unreasonable?*, 16 BAD FAITH L. REP. 4 (2000); William T. Barker, *Evidentiary Sufficiency in Insurance Bad Faith Suits*, 6 CONN. INS. L.J. 81 (1999) [hereinafter *Evidentiary Sufficiency*].

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<sup>50</sup> NICHOLAS ABERCOMBIE, STEPHEN HILL & BRYAN TURNER, *DICTIONARY OF SOCIOLOGY* 353 (1994).

<sup>51</sup> William T. Barker, *Are Juries Competent To Find Judges Unreasonable?* 16 BAD FAITH L. REP. 4, 7 (2000).