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# Use of Colossus to Measure the General Damages of a Personal Injury Claim Demonstrates Good Faith Claims Handling

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THE USE OF COLOSSUS® TO MEASURE THE GENERAL  
DAMAGES OF A PERSONAL INJURY CLAIM DEMONSTRATES  
GOOD FAITH CLAIMS HANDLING

I. INTRODUCTION ..... 107

II. WHAT IS COLOSSUS? ..... 110

III. COLOSSUS AND GOOD FAITH CLAIMS HANDLING..... 114

A. *History of Bad Faith Causes of Action* ..... 114

B. *How Using Colossus Demonstrates Good Faith  
Claims Handling Under Each Jurisdiction’s  
Standards* ..... 116

1. Tort of Bad Faith ..... 116

a. *Negligence Standard* ..... 116

b. *Bad Faith Standard* ..... 120

i. No Reasonable Justification..... 120

ii. Intent to Injure..... 125

2. Breach of Contract..... 126

3. Statutory Causes of Action ..... 129

VI. CONCLUSION..... 132

I. INTRODUCTION

Another driver negligently hits your car at a high rate of speed. You sustain a fractured femur, which requires a rod to be inserted into your leg to assist the bone in healing. After a year of doctor visits and physical therapy, your doctor releases you from active care and instructs you to continue home therapy exercises and to follow up with her as needed. Your leg has some occasional aches and pains, but you’re not bothered with normal activities. Your medical bills total approximately \$35,000, and you lost approximately \$15,000 in income due to four months off work. The negligent driver’s insurance company’s claims representative contacts you to set an appointment to meet with you to settle your claim. He asks you to think about what would fairly compensate you for your pain and suffering. Take a second and think about how much money would fairly compensate you for your injury claim.

How did you evaluate your fair settlement? Did you take the amount of special damages (\$50,000) and multiply it by a factor of three, four or ten? Did you take the number of days you were treated for this injury (365) and multiply it by \$100, \$250, or \$500 for each day of care and add in your specials? Did you look at jury verdicts in your venue to determine the amount a jury awarded for this injury? Personal injury lawyers and claims professionals have all used these types of “evaluations.”<sup>1</sup> These “evaluations” yield wildly different results from \$150,000 to \$500,000, from

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<sup>1</sup>See PAT MAGARICK & KENN BROWNLEE, CASUALTY INS. CLAIMS § 16:11 (4<sup>th</sup> ed. 1995); Robert Darroch, *Too Great Expectations: Unrealistic Plaintiffs Force Big Companies to Trial*, FULTON COUNTY DAILY REP., Apr. 30, 2002; Sally Whitney, *Calculating the Value of Pain*, BEST’S REV. 131 (Nov. 2001).

\$86,500 to \$232,500, and from \$128,800<sup>2</sup> to \$250,000.<sup>3</sup> Perhaps this uncertainty contributes to why “compensation for pain and suffering is widely perceived as one of tort law’s worst excesses and is a popular target for reform.”<sup>4</sup>

Insurers, wanting to assist their claims professionals in evaluating bodily injury claims more consistently, looked to artificial intelligence for an answer. Allstate led the charge by implementing “Claim Core Process Redesign (CCPR)”<sup>5</sup> to remedy its findings of past inconsistent claims payments.<sup>6</sup> As part of its CCPR program, Allstate began using Colossus, a software program designed to help the insurer evaluate injury claims more consistently. By 2002, twelve of the top twenty insurance companies in North America used Colossus.<sup>7</sup> Personal injury lawyers began attacking the insurance industry’s use of the computer program.<sup>8</sup> A seminar called “How to Hammer Allstate,”<sup>9</sup> became the hot ticket for continuing legal education classes around the country.<sup>10</sup> Plaintiffs’ lawyers also wrote articles in

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<sup>2</sup>Karen Birkmeyer v. City Dash, Inc., 15 No. 10, JAS Publications, Inc., 17 (2001) (reporting a Hamilton County, Ohio, jury verdict), *available at* 2001 WL 898856.

<sup>3</sup>Andrew Gray v. Jerry A. Sherrod, Jr. & Werner Enterprises, Inc., 17 No. 1, JAS Publications, Inc. (2002) (reporting a Franklin County, Ohio, jury verdict), *available at* 2002 WL 3129742.

<sup>4</sup>JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 22:8 (2003).

<sup>5</sup>Mark Ballard, *Allstate Faces New Liability*, NAT’L L.J., Feb. 7, 2000, at A1. Allstate’s CCPR program also attempted to reduce the number of claimants seeking legal representation. *Id.* Allstate’s claims representatives advised its injured claimants that hiring an attorney will cost the injured party about a third of his/her settlement and likely delay the claims process. *Id.* According to a 1998 Insurance Research Council study, represented claimants yield a loss of \$699 after deducting the claimants’ economic losses (medical bills and wages), court costs and attorney fees, while unrepresented claimants gained \$133. MAGARICK & BROWNLEE, *supra* note 1, at §§ 1:18, 2:14 (citing “Paying for Auto Injuries,” Insurance Research Council, 718 Providence RD, Malvern, PA 19355-0725, Chapter 4). Furthermore, a represented claimant’s claim will settle within three months of the accident 19% of the time, but take more than a year 42% of the time. *Id.* at § 2:14. However, an unrepresented claimant will settle his/her claim 55% of the time within three months and only 7% take longer than a year. *Id.*

<sup>6</sup>See Barbara Bowers, *Take it to Court*, BEST’S REV. (May 2000) (quoting Allstate’s spokesman Jim Dudas that Allstate admits overpayment and underpayment of injury claims in the past).

<sup>7</sup>Jerry Guidera, ‘Colossus’ at the Accident Scene: Insurers Use a Software Program to Pay Out Claims for Injuries, But Law Suits Claim Its Misused, WALL ST. J., Jan. 2, 2003, at C1.

<sup>8</sup>See Mark Ballard, *Hot CLE Class: Hammering Allstate*, 22 No. 16 THE NAT’L L.J., Dec. 13, 1999 (quoting Allstate’s general counsel William Vainisi, who claim that Allstate is not at war with all personal injury lawyers, but is only against the ones that condone “built-up medicals [to impact] general damages”).

<sup>9</sup>*Id.* (stating a record number of people attended the Washington state seminar).

<sup>10</sup>See *id.*; Evelyn Apgar, *Combat Lesson: P.I. Lawyers Take Dead Aim at Allstate*, 42 N.J. LAW.: WKLY. NEWSPAPER, Oct. 16, 2000, at 2071.

magazines and newspapers expressing concerns of the insurance industry's use of Colossus.<sup>11</sup>

The plaintiff's bar began filing lawsuits on behalf of its injured clients in various states indirectly attacking the insurance companies' use of Colossus through claims of failure to negotiate in good faith, bad faith claims handling, misrepresentation, and negligent infliction of emotional distress.<sup>12</sup> A class action lawsuit filed in New Mexico alleges "breach of contract, misrepresentation, violations of the covenants of good faith and fair dealings, [and] bad faith" through the insurer's use of Colossus.<sup>13</sup> And as recent as February 2004, a group of California property and casualty policyholders filed a class action lawsuit against Farmers Group, Inc. alleging breach of duty of good faith and fair dealing, breach of contract, fraud by concealment, fraud by false promise and unfair business practices through Farmers' use of Colossus.<sup>14</sup>

Because the law of bad faith is the most volatile of the causes of action,<sup>15</sup> this Note will discuss how using Colossus demonstrates good faith claims handling by

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<sup>11</sup>See Rodney F. Pillsbury, *Dear Colossus*, TRIAL, Feb. 1, 2001, available at 2001 WL 12692417 (publishing a demand letter that Mr. Pillsbury addressed to Colossus instead of the claims professional); Ritchenia A. Shepherd, *Jury Returns Verdict Six Times As Large As Allstate's Settlement Offer: Insurance Co. Used Computer to Figure Settlement Amount*, No. 62 LEGAL INTELLIGENCER, Mar. 31, 1998, at 3; Jeffrey A. Block, *Colossus Mess*, 215 N.Y.L.J. 2, 2 (1996) (letter to the editor).

<sup>12</sup>*Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 594 (E.D. Pa. 1999) *aff'd*, 234 F.3d 1265 (3d. Cir. 2000) (applying Pennsylvania law, plaintiff alleged Allstate acted in bad faith when Allstate used Colossus to evaluate plaintiff's underinsured motorist claim); *Shekhter v. Financial Indem. Co.*, 89 Cal. App. 4th 141, 148 (2001) (claiming Colossus is "an illegal set of claim criteria"); *Benyo v. Allstate Ins. Co.*, No. SCV 37386, 1998 EXTRA LEXIS 82, at \*6, 11-12, 18, 21 (Cal. App. Dep't Super. Ct. 1998) (granting Allstate's summary judgment motion nullifying plaintiff's claims of bad faith claims handling, breach of contract and negligent infliction of emotional distress due to Allstate's claims handling which included the use of Colossus to evaluate the plaintiff's underinsured motorist claim); *Hovet v. Lujan*, 66 P.3d 980, 982 (N.M. Ct. App. 2003) (discussing Amicus brief by New Mexico Trial Lawyers Association that claims Allstate's use of Colossus "evaluates claims 'without any real regard for the individual characteristics of any particular claim or claimant'"); *Penberthy v. Caprett*, No. 77416, 2001 Ohio App. LEXIS 247, at \*12, 13 (Ohio Ct. App. 2001) (alleging Colossus did not completely and fairly evaluate Plaintiff's psychological injury claim).

<sup>13</sup>*Truong v. Allstate Ins. Co.*, No. CV-99-003474 at 6 (N.M. 2d Jud. Dist. filed Apr. 8, 1999).

<sup>14</sup>*In re Farmers Colossus Litigation*, No. BC289250 (Cal. App. Dep't Super. Ct. filed Feb. 23, 2004).

<sup>15</sup>Mark Gergen, *Symposium on the Law of Bad Faith in Contract and Insurance: The Availability of Tort Remedies for Breach of Contract: A Cautionary Tale about Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235, 1236 (1994) ("The huge stakes in bad faith cases and its flimsy doctrinal garb make this a particularly volatile area of the law."). Because the standard for bad faith actions changes so frequently, any plaintiff interested in pursuing an insurer should consult Stephen Ashley's treatise BAD FAITH ACTIONS, at note 62, *infra*, for the latest decisions in each jurisdiction.

insurance companies.<sup>16</sup> Initially, this Note will discuss how Colossus works so readers have an understanding of the product. Following the Colossus section, the Note will discuss the history of bad faith. Finally, this Note will analyze how Colossus assists insurers in meeting the different good faith standards across the nation.

## II. WHAT IS COLOSSUS?

In simplest terms, an insurer uses Colossus to assist its claims professionals in placing a dollar value on personal injury claims. When Allstate began using the system, the public knew very little about how it worked.<sup>17</sup> Personal injury lawyers did not like the secrecy.<sup>18</sup> Insurers must keep the intellectual property information confidential due to non-disclosure agreements with Computer Sciences Corporation (“CSC”), proprietary owner of Colossus.<sup>19</sup> Instead of considering CSC’s monetary investment and intellectual property rights, plaintiffs’ attorneys assumed that the insurers’ secrecy indicated foul play.<sup>20</sup> Personal injury lawyers launched a campaign to acquire knowledge about the computer program.<sup>21</sup> Through litigation, personal injury lawyers began using discovery to obtain information about Colossus.<sup>22</sup> When an attorney would obtain information about the system, he would share it with others.<sup>23</sup> Today, there are dozens of articles in law journals and on the Internet

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<sup>16</sup>Other expert systems like ICE and ISO Claims Outcome Advisor do exist. Whitney, *supra* note 1, at 131. Colossus, however, is the most widely known. Roselyn Bonanti & David Ratcliff, *Colossus: What it is and How Insurance Firms Misuse it*, FORUM, July/Aug. 2001, at 10 [hereinafter *Colossus*]. Therefore, the Colossus system will be the focus of this paper.

<sup>17</sup>See Sylvia Hsieh, *PI Lawyers Find New Ways to Beat ‘Colossus,’* LAW. WKLY USA, Sept. 15, 2003.

<sup>18</sup>See Christine A. Bremer & Lance Trollop, *Colossus*, WIS. ACAD. OF TRIAL LAW., Jan. 2002, at 13; Bonanti & Ratcliff, *Colossus*, *supra* note 16, at 10.

<sup>19</sup>See William F. Merlin, Jr. & Mary E. Kestenbaum, *Colossus: Taking on a Giant*, TRIAL, Sept., 2000, at 6.

<sup>20</sup>Joe Frey, *Allstate Under Colossal Pressure From Trial Bar*, 26 CONN. L. TRIB., Aug. 14, 2000, at 1; Joe Frey, *Putting a Price on Auto Injuries: How Software Called Colossus Evaluates Claimant’s Pain*, 26 CONN. L. TRIB., Aug. 14, 2000, available at <http://info.insure.com/auto/collision/colossus.html> [hereinafter *Putting a Price on Auto Injuries*].

<sup>21</sup>Ballard, *supra* note 5.

<sup>22</sup>Hsieh, *supra* note 17; see also Ralph Buss, *Tall Stories, Lies and Other Biker Bull*, NATL. COALITION OF MOTORCYCLISTS & AID TO INJURED MOTORCYCLISTS, Apr. 10, 2003, at 27, available at <http://www.bikernews.com/StoriesP27.htm> (stating that the A.I.M. attorney network shares information); Debbie Lynn Elias, *Trial Resources*, TRIAL EXCELLENCE, Oct. 2001, at 10-11 (sharing web sites that will provide information about Colossus).

<sup>23</sup>See Merlin & Kestenbaum, *supra* note 19 (stating a Colossus manual is “available through ATLA’s [American Trial Lawyer’s Association] Bad Faith Litigation Group” and citing two cases where information about Colossus has been discovered).

regarding Colossus. However, few of them are accurate. Therefore, this section will summarize the actual facts of the system.<sup>24</sup>

An Australian company developed the software program in the late eighties.<sup>25</sup> The Continuum Company purchased the program and CSC acquired the Continuum Company in 1996 bringing Colossus to CSC.<sup>26</sup> Many people believe Colossus was the first expert system to evaluate personal injury claims, but it was not.<sup>27</sup> As early as 1983, ComLaw marketed a software package called P.I. Damages to attorneys.<sup>28</sup> The system “permit[ted] an attorney to perform a sophisticated evaluation of personal injury and wrongful death claims . . . . Using a series of questions, P. I. Damages enable[d]” an attorney to determine the potential settlement value of a claim.<sup>29</sup> Colossus works in the same basic way by asking a claims professional “a series of interactive questions.”<sup>30</sup> These questions simulate the human thought process to assist a claims professional in determining the value of a personal injury claim.<sup>31</sup> Long before the information can be entered by the claims professional, the insurance company must lay the foundation to obtain values from Colossus.

Once an insurer decides to license Colossus, it has quite a bit of work to do to implement the system. Different insurance companies have different settlement philosophies.<sup>32</sup> Consequently, Colossus does not determine the value of an injury without using an insurer’s data.<sup>33</sup> While each company sets up the system differently, generally a company will conduct roundtables to “assess the claim value factors” in an injury claim.<sup>34</sup> The insurance company’s most skilled and experienced casualty claims professionals come together to “evaluate hypothetical injury claims.”<sup>35</sup> Next, the insurance company may conduct a closed claims study to

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<sup>24</sup>In determining which facts to use, this author used articles written by insurance industry sources since the insurers know how Colossus works. From the plaintiff’s side, this author used articles written by William F. Merlin, Jr., who specializes in bad faith litigation and has given presentations about how Colossus works. William F. Merlin, Jr., Presentation at the Ninth National Forum on Litigating Bad Faith and Punitive Damages (Apr. 28, 2003).

<sup>25</sup>Tony Attrino, *Software Helps Bolster Claims Assessment*, NATL. UNDERWRITER – PROP. & CASUALTY, May 4, 1998, at 14.

<sup>26</sup>Press Release, CSC, *CSC, Continuum Set Shareholders Meetings to Approve Merge* (June 6, 1996), available at <http://www.csc.com/newsandevents/news/1281.shtml>.

<sup>27</sup>See *Legal Economics*, 9 A.B.A. 58, 58 (1983).

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>Mike Conroy & Steve Barney, *Case Evaluation Tools in the Claims Handling Process* (Nov. 21, 2002), (on file with author).

<sup>31</sup>LIABILITY CLAIM PRACTICES 8.31 (James R. Jones ed., Insurance Institute of America 2003) (2001) [hereinafter Jones].

<sup>32</sup>Darroch, *supra* note 1.

<sup>33</sup>Frey, *Putting a Price on Auto Injuries*, *supra* note 20.

<sup>34</sup>Jones, *supra* note 31, at 8.31-32.

<sup>35</sup>*Id.*

compare the baseline values determined by the roundtables to its claims practice history.<sup>36</sup> The insurer uses both the closed claim study and the roundtables to assign monetary values to injury severity.<sup>37</sup>

After CSC enters the insurer's data, the claims professional can evaluate an injury. The claims professional first begins the evaluation by entering claim data, such as the insured's name, claimant's name and age and the venue.<sup>38</sup> Next, the claims professional enters all diagnosed and accident related injuries.<sup>39</sup> Once the claims professional enters the correct injuries into the system, Colossus guides the claims professional through a series of questions regarding the treatment, prognosis, pre-existing conditions, and symptoms of the injury.<sup>40</sup> Colossus has over 10,000 rules determining what questions the system will ask the user based on the prior entries by the claims professional.<sup>41</sup> The program uses the type and length of treatment along with the documented subjective complaints to assess the injury.<sup>42</sup> Colossus will also ask the claims professional if the injured party had difficulty doing certain activities during his/her recovery period.<sup>43</sup> The claims professional can also enter information regarding a claimant's inability to continue certain hobbies in his/her life.<sup>44</sup> Colossus then assigns severity points based on the totality of the entries submitted by the claims professional.<sup>45</sup> Colossus, using the insurer's information regarding the value of injuries, then recommends a value for the injury claim.<sup>46</sup> The claims professional then uses this information as a guide in determining the settlement value of the injury claim.<sup>47</sup>

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<sup>36</sup>Frey, *See Putting a Price on Auto Injuries*, *supra* note 20. Critics of Colossus attack the lack of jury verdicts in the evaluation system. Merlin & Kestenbaum, *supra* note 19. However, Allstate states that it considered jury verdicts when determining the base values. Guidera, *supra* note 7. By using the closed claims study, the insurer would likely have some data from those closed claims that involved jury verdicts.

<sup>37</sup>*See* Jones, *supra* note 31; Frey, *Putting a Price on Auto Injuries*, *supra* note 20.

<sup>38</sup>William F. Merlin, *Colossus: What We Know Today* (2000) (unpublished article) (on file with author).

<sup>39</sup>*Id.*; *see also* Merlin & Kestenbaum, *supra* note 19.

<sup>40</sup>*See Colossus – Knowledge is the Key*, RECOVERY AND RESOLUTION (Graham Lundberg & Peschel) Feb./Mar. 2003, available at [www.glpattorneys.com/GLPnsltrFebMar2003.pdf](http://www.glpattorneys.com/GLPnsltrFebMar2003.pdf) [hereinafter *Colossus - Knowledge is the Key*].

<sup>41</sup>Conroy & Barney, *supra* note 30.

<sup>42</sup>*See* Merlin & Kestenbaum, *supra* note 19.

<sup>43</sup>*Colossus—Knowledge is the Key*, *supra* note 40.

<sup>44</sup>Videotape: *Secrets to Increasing Colossus Settlements* (Litigation One Publishing 2003) (available through [www.litigationone.com/Publications.htm](http://www.litigationone.com/Publications.htm) 1) (supplying personal injury attorneys with a sample "New Client Letter" to advise injured parties to document any limitations in participating in activities due to injuries suffered from the accident).

<sup>45</sup>Jones, *supra* note 31, at 8.32.

<sup>46</sup>While Colossus can evaluate over six hundred traumatic injuries, some injuries cannot be evaluated by the system. Conroy & Barney, *supra* note 30. These injuries include Post Traumatic Stress Disorder ("PTSD"), traumatic dental injuries, scarring, fatalities, and severe head injuries with cognitive defects. *Penberthy v. Caprett*, No. 77416, 2001 Ohio App. LEXIS

Furthermore, Colossus has more to offer than just the recommended settlement value. The system offers a reference system and links to Internet sites.<sup>48</sup> The reference system allows a claims professional to look up medical terms, average treatment periods for an injury, types of complications associated with certain injuries, and other medical information.<sup>49</sup> Colossus allows the user to access the Internet while entering a consultation.<sup>50</sup> An insurer can access websites such as “medicine.net,” which explains medications, or “myhealthscore.com,” which defines treatment codes provided on billing statements while evaluating an injury. The reference system and websites available in Colossus enable the claims professional to analyze medical information completely through information technology.<sup>51</sup>

Colossus also assists claims managers and supervisors by tracking the settlement and injury data.<sup>52</sup> This information can be helpful in evaluating the proper settlement value for injury claims and areas for training the claims professionals.<sup>53</sup> While courts sometimes frown upon insurers tracking claim payments,<sup>54</sup> the information assists insurers in identifying new trends.<sup>55</sup> For example, claims that continuously settle higher than the recommended value provided by Colossus may show that the value the insurer placed on that type of injury needs to be increased.<sup>56</sup> Furthermore, Colossus can track injury diagnoses, which enables the insurer to notice trends in the injuries being claimed.<sup>57</sup> For example, if the insurer notes a rise in temporomandibular joint syndrome (“TMJ”) claims, the insurer can request training for its employees in this area.<sup>58</sup> All the information available through Colossus

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247, at \*12 (Ohio Ct. App. 2001); *see also* Frey, *Putting a Price on Auto Injuries*, *supra* note 20.

<sup>47</sup>Gary Mogel, *Claims Software Cited in Bad Faith Suit*, NATL. UNDERWRITER – PROP. & CASUALTY, May 26, 2003 (“The Colossus tool is intended to support the human decision-making process, not to replace the claim representative’s experience or judgment.”).

<sup>48</sup>*See* Jones, *supra* note 31, at 8.32; Matt Damsker, *ASAP*, RISK & INS., Jan. 1, 2002.

<sup>49</sup>*See* Jones, *supra* note 31, at 8.32-33.

<sup>50</sup>*See* Damsker, *supra* note 48.

<sup>51</sup>*See id.*; Jones, *supra* note 31, at 8.32-33.

<sup>52</sup>Conroy & Barney, *supra* note 30.

<sup>53</sup>MAGARICK & BROWNLEE, *supra* note 1, at § 16.26.

<sup>54</sup>*See* State Farm Mut. Auto. Ins. Co. v. Weiford, 831 P.2d 1264, 1267-68 (Alaska 1992) (finding the insurer’s tracking of settlement data was a factor in determining the insurer put its interests above the insured’s but not the sole issue).

<sup>55</sup>MAGARICK & BROWNLEE, *supra* note 1, at § 16.26; *see also* Conroy & Barney, *supra* note 30.

<sup>56</sup>Colossus has a tuning system, which allows an insurer to update the values. Whitney, *supra* note 1.

<sup>57</sup>Damsker, *supra* note 48.

<sup>58</sup>Some attorneys have expressed concern about Colossus’ ability to track attorney information. *See* Bremer & Trollop, *supra* note 18, at 13. Many sources that explain how to evaluate claims using traditional methods recommend considering the abilities of plaintiff’s counsel. Jones, *supra* note 31, at 8.27; *see also* Voland v. Farmers Ins. Co., 943 P.2d 808, 813

assists the claims professional in determining the proper value for personal injury claims.

### III. COLOSSUS AND GOOD FAITH CLAIMS HANDLING

Congress passed the McCarran-Ferguson Act in 1945 giving each state the power to regulate its insurance industry.<sup>59</sup> Therefore, insurance law, including causes of action for bad faith, significantly differs in each state. A brief history of how bad faith originated should be reviewed to demonstrate why Colossus assists insurers in avoiding bad faith conduct.

#### A. History of Bad Faith Causes of Action

The insurance industry had noble beginnings. “It was the presence of insurance that allowed merchants to take the risks of commerce, by land and sea, in the millenniums when only frail sailing ships or horse-drawn carts were available.”<sup>60</sup> Today, insurance allows “pharmaceutical companies to create new wonder-drugs, telecommunication companies to risk the launching of multi-million dollar satellites, [and] state and local governments to build bridges and tunnels.”<sup>61</sup> However, many people have a negative attitude regarding insurance and an overall lack of trust in insurance adjusters.<sup>62</sup> While phone book, billboard and television advertisements by the plaintiffs’ bar may generate an attitude of distrust by the public,<sup>63</sup> insurance companies share the blame.

Insurers in the late 1800s began abusing their bargaining power by forcing third parties to trial to recover damages. Insurers knew the policy limits limited the insurers’ monetary damages, leaving the insured to pay for any amount a jury might award in excess of the policy limits.<sup>64</sup> Therefore, insurers had little incentive to settle.<sup>65</sup> For example, in *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*,<sup>66</sup> the plaintiff had policy limits with the insurer for \$1,500.<sup>67</sup> The injured third party

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n.3 (Ariz. 1997) (stating that the “reputation and effectiveness of counsel” is a factor to be used in evaluating a personal injury claim). However, attorney information has not been confirmed as having anything more than tracking purposes in Colossus.

<sup>59</sup>15 U.S.C. § 1011 (1945).

<sup>60</sup>MAGARICK & BROWNLEE, *supra* note 1, at § 1:18.

<sup>61</sup>*Id.*

<sup>62</sup>*See id.* The distrust of insurance companies, in general, may also explain why courts are willing to accept the tort of bad faith in insurance cases. With the exception of employment cases, insurance companies are the only ones punished by bad faith actions even “though the rationale that justifies extension of the cause of action . . . applies to ordinary commercial contract cases.” STEPHEN S. ASHLEY, *BAD FAITH ACTIONS – LIABILITY AND DAMAGES*, § 11:3 (2d ed. 1997).

<sup>63</sup>*See* MAGARICK & BROWNLEE, *supra* note 1, at § 1:18.

<sup>64</sup>*See* Rawlings v. Apodaca, 726 P.2d 565, 571 (Ariz. 1986).

<sup>65</sup>*Acquista v. New York Life Ins. Co.*, 285 A.D.2d 73, 79 (N.Y. 2001) (stating that limiting the insurer’s liability to the policy limits fails to adequately compensate the insured).

<sup>66</sup>43 A. 503 (Me. 1899).

<sup>67</sup>*Id.*

offered to settle his claim for \$1,000 before trial, but defendant refused exposing the plaintiff to liability for an excess judgment.<sup>68</sup> The trial court awarded \$1,000 over the liability limit, which plaintiff had to pay.<sup>69</sup> Plaintiff claimed that the defendant breached the contract and owed the full judgment,<sup>70</sup> but the Maine Supreme Court determined that the policy language clearly stated the insurer owed only the amount of its liability limits.<sup>71</sup> *Rumford* demonstrates “the early attitude of the courts that an insurer commits no breach of the policy when it exercises its power to control the defense and settlement of claims against . . . its insured.”<sup>72</sup>

Because courts did not allow a remedy under a breach of contract cause of action, policyholders began looking to tort causes of action.<sup>73</sup> In *Brown & McCabe, Stevedores, Inc. v. London Guarantee & Accident Co.*,<sup>74</sup> the trial judge sided with the insured.<sup>75</sup> After the injured party received a judgment in excess of the policy limits, the insured brought a tort action against the insurer.<sup>76</sup> The trial judge admitted that no case law existed to find for the insured, but ruled in his favor because the insurance company failed to “[litigate] in good faith.”<sup>77</sup> After *Brown & McCabe*, policyholders began using the tort of bad faith to obtain a remedy for insurance adjustment abuses.<sup>78</sup>

While bad faith causes of action originated in third-party policy limits cases, many states expanded the cause of action to include other claims adjustment abuses.<sup>79</sup> For example, the Texas Supreme Court held that if an insurer acted unreasonably in denying a first-party claim, the policyholder has a bad faith claim against the insurer.<sup>80</sup> The Ohio Supreme Court determined that the insurer’s

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<sup>68</sup>*Id.* at 504.

<sup>69</sup>*Id.* at 505.

<sup>70</sup>*Id.*

<sup>71</sup>*Id.* at 506 (claiming that the insurer owed the full damages since the contract stated the insurer would defend the insured “at its own cost.” The court stated the policy limits clearly limited the liability payment by the insurer to \$1500 and “its cost” meant the expenses incurred in defending the case).

<sup>72</sup>ASHLEY, *supra* note 62, at § 2:02.

<sup>73</sup>*See G. A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 546-47 (Tex. 1929).

<sup>74</sup>232 F. 298 (D. Or. 1915).

<sup>75</sup>*Id.* at 299.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>ASHLEY, *supra* note 62, at § 2:03.

<sup>79</sup>*Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 600 (Tex. 1993) (stating that an insurer is liable to an insured for damages resulting from an unreasonable denial of a claim); *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1137-38 (stating that an insurer must thoroughly investigate the insured’s claim and provide an adequate defense for the claim even if defending under a reservation of rights due to questionable coverage); *see also Penberthy*, 2001 Ohio App. LEXIS 247, at \*8-10,13-14 (holding that an insurer may owe pre-judgment interest if it fails to negotiate a settlement in good faith).

<sup>80</sup>*Lyons*, 866 S.W.2d at 601.

inadequate investigation of a fire loss amounted to an actionable bad faith claim.<sup>81</sup> In Alabama, the insurer acts in bad faith if it intentionally fails to “diligently investigate the facts, fairly evaluate the claim, and act promptly and reasonably.”<sup>82</sup> By using Colossus, or other expert systems, insurers properly evaluate and investigate claims to avoid allegations of bad faith by their insureds and claimants.

*B. How Using Colossus Demonstrates Good Faith Claims Handling Under Each Jurisdiction’s Standards*

In suing an insurer for bad faith, a plaintiff may base a cause of action against the insurer on common law, statute or both, depending on the jurisdiction. If a jurisdiction does not recognize the tort of bad faith,<sup>83</sup> an insured may have a remedy under a breach of contract claim.<sup>84</sup> If the common law fails to provide a remedy, the legislature may enact statutes to provide the insured a remedy against the insurance company.<sup>85</sup>

1. Tort of Bad Faith

States that recognize bad faith as a tort will apply one of two basic standards: negligence<sup>86</sup> or bad faith.<sup>87</sup>

*a. Negligence Standard*

A minority of jurisdictions apply a negligence standard in determining whether an insurer acted in bad faith.<sup>88</sup> Under this negligence standard, an insurer can be liable to its insured for damages resulting from the insurer’s failure to act as an ordinary prudent person would to protect the insured’s interest.<sup>89</sup> The courts state that the insurer needs to manage the claim as if the insurer’s assets are exposed

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<sup>81</sup>Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 400 (Ohio 1994).

<sup>82</sup>LeFevre v. Westberry, 590 So. 2d 154, 161 (Ala. 1991).

<sup>83</sup>See Zoppo, 644 N.E.2d at 399.

<sup>84</sup>See Beck v. Farmers Ins. Exch., 701 P.2d 795, 799 (Utah 1985).

<sup>85</sup>Jung v. Nationwide Mut. Fire Ins. Co., 949 F. Supp. 353, 360 (E.D. Pa. 1997). Both the injured party and the insurance company must determine the applicable standard for bad faith actions in the jurisdiction. This knowledge helps each party to evaluate their strategy for legal action and also to determine the applicable statute of limitations. A tort action of bad faith may have a statute of limitations of two years. Christiansen v. First Ins. Co. of Hawaii, Ltd., 967 P.2d 639, 647 (Haw. 1998). A bad faith action based on contract law may have the limitation imposed by the terms of the policy. Stahl v. Preston Mut. Ins. Ass’n, 517 N.W.2d 201, 202 (determining the one year limitation stated in the policy applied to the policyholder’s claim for bad faith). The court may impose the statute of limitations noted in the applicable statute. Schwartz v. Travelers Indem. Co., 740 N.E.2d 1039, 1044 (determining the Massachusetts legislature intended a four year statute of limitations for the claim of bad faith).

<sup>86</sup>Lyons, 866 S.W.2d at 601.

<sup>87</sup>Danner v. Auto-Owners Ins., 629 N.W.2d 159, 162 (Wis. 2001).

<sup>88</sup>ASHLEY, *supra* note 62, at § 2:04.

<sup>89</sup>See G. A. Stowers, 15 S.W.2d at 547.

instead of the insured's.<sup>90</sup> Courts reason that the insurance company owes a duty of due care to the insured because the insurer contracted with the insured to take complete control of the settlement process for third-party liability claims.<sup>91</sup> Making the insurer liable for negligent decisions by the insurance company protects the insured's assets.<sup>92</sup> The negligence standard has not been used for other first-party claims, however.<sup>93</sup> The courts generally require the bad faith standard in proving an insurer failed to adequately investigate or promptly pay a claim when the policyholder is the beneficiary of the claim payment.<sup>94</sup> The insurer no longer has the absolute control of settlement because the policyholder directly plays a role in whether it will accept the settlement or not.<sup>95</sup>

Under Texas law, the courts apply a negligence standard locally known as the *Stowers* doctrine.<sup>96</sup> An insurer acts in bad faith if it does not act with the care and diligence that a reasonable person would use in his/her own management of affairs.<sup>97</sup> In *Stowers*, the third-party claimant offered to settle her case before trial for \$4,000, \$1,000 less than the policy limits provided by defendant American Indemnity to plaintiff *Stowers*.<sup>98</sup> Defendant refused to settle the claim exposing *Stowers*' assets to an excess verdict.<sup>99</sup> The judgment exceeded the plaintiff's policy limits and plaintiff satisfied the judgment of \$14,107.15.<sup>100</sup> Plaintiff sought reimbursement for the full amount from American Indemnity.<sup>101</sup> Because American Indemnity contracted with *Stowers* to completely control the defense of the lawsuit by the third party, the Texas Supreme Court determined that American Indemnity owed *Stowers* a duty to

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<sup>90</sup>See *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 314 (Tex. 1994).

<sup>91</sup>See *G. A. Stowers*, 15 S.W.2d at 547.

<sup>92</sup>See *Great Divide Ins. Co. v. Carpenter*, 79 P.3d 599, 608-09 (Alaska 2003).

<sup>93</sup>See STEPHEN S. ASHLEY, *BAD FAITH LIABILITY: A STATE-BY-STATE REVIEW* §§ 3:01-3:51 (Callaghan & Co. 1987) (summarizing the current standard for each state for claims made by third-party beneficiaries and first-party beneficiaries) [hereinafter ASHLEY, *BAD FAITH LIABILITY*]; see also ASHLEY, *supra* note 62, at §§ 2:04-15.

<sup>94</sup>See ASHLEY, *BAD FAITH LIABILITY*, *supra* note 93, at §§ 3:01-51; see also ASHLEY, *supra* note 62, at §§ 2:04-15.

<sup>95</sup>See *Leal v. Allstate Ins. Co.*, 17 P.3d 95, 99 (Ariz. Ct. App. 2000) (holding that a third party does not have a direct cause of action against the insurer because the third party has not given up control of the claim to the insurer).

<sup>96</sup>Sam Hawthorne, Note, *Stowers Doctrine Catch-22 Resolved for Texas Insurers Faced with Multiple Claimants and Inadequate Insurance Proceeds: Texas Farmers Ins. Co. v. Soriano*, 26 TEX. TECH L. REV. 169, 170 (1995).

<sup>97</sup>*Texas Farmers*, 881 S.W.2d at 314; *G. A. Stowers*, 15 S.W.2d at 547.

<sup>98</sup>*G. A. Stowers*, 15 S.W.2d at 545.

<sup>99</sup>*Id.*

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* at 544.

exercise due care in defending the insured.<sup>102</sup> In a negligence standard jurisdiction, the insurer must act as a reasonable person would in evaluating the risk of trial.<sup>103</sup>

When an insurer uses Colossus, the insurer carefully and completely evaluates the injury. An insurer must fully appreciate the value of the injury to exercise the due care required by a negligence jurisdiction.<sup>104</sup> The “general damage elements of a personal injury claim . . . are inherently flexible and subject to differing and potentially changing evaluations . . . . [E]valuating personal injury claims . . . is no more precise or predictable than throwing darts at a board.”<sup>105</sup> The insurer, through Colossus, removes some of the guesswork from ascertaining a proper value for the claim. A properly evaluated claim can assist the insurer in determining if the insurer should pay the demand by the injured party or defend its insured. Traditional methods of evaluating a claim include calculating injuries through mathematical formulas, using a per diem calculation and reviewing jury verdicts.

The most commonly known settlement value calculation involves taking the amount of economic losses (wages, medical bills, etc.) and multiplying it by a factor of three, four, or even ten.<sup>106</sup> This outdated method of calculating injury value causes unfair and disproportionate settlements. For example, a person who is treated and released from the hospital with a diagnosis of a cervical strain likely will have about the same amount of medical bills as a person who has a diagnosis of a fractured rib. A person with a fractured rib feels pain every time she breathes but will be paid the same amount as a person who experiences pain with only certain activities.<sup>107</sup> Additionally, a person who is paid \$15.00 an hour but loses the same amount of time off work as a person who only makes \$7.50 an hour will get twice as much money in a formula that calculates special damages multiplied by a factor of three. How does the income of a person determine the amount of pain he or she experiences? While this formula provides a firm value for the claimed injury, its value is derived from the arbitrariness of where the injured party sought treatment and how much money she earns. The multiplication factor does not require an insurer to use reasonable care to evaluate the injury.

Another type of calculation used to determine the value of an injury claim is to assess dollar amount for the pain for certain time periods. A per diem calculation measures a person’s general damages “in terms of a stated number of dollars for specific periods of time.”<sup>108</sup> While this method may be popular among trial attorneys

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<sup>102</sup>*Id.* at 548.

<sup>103</sup>*See Texas Farmers*, 881 S.W.2d at 315.

<sup>104</sup>*G. A. Stowers*, 15 S.W.2d at 545.

<sup>105</sup>*Voland*, 943 P.2d at 812-13.

<sup>106</sup>MAGARICK & BROWNLEE, *supra* note 1, at §§ 16:11 17:9.

<sup>107</sup>Sally Whitney demonstrates another example of the unfairness of the multiplication factor evaluation. Whitney, *supra* note 1. “[A] person claiming a back injury could have \$5,000 worth of diagnostic tests run only to find that there is no injury and no treatment is needed. Another person with a broken leg could go to the hospital, have the leg casted and receive physical therapy, all of which could total \$5,000. Under the [multiplication . . . factor evaluation], both people would receive the same award for pain and suffering.” *Id.*

<sup>108</sup>*Beagle v. Vasold*, 417 P.2d 673, 676 (Cal. 1966).

during closing arguments,<sup>109</sup> it is not very helpful in determining a proper settlement value. An insurer may find it beneficial to evaluate the claimant's pain and suffering in smaller increments of time.<sup>110</sup> However, the insurer merely could be taking a total lump sum and dividing it up into smaller segments,<sup>111</sup> which is not the purpose of a per diem injury evaluation. Nothing in the per diem argument gives an insurer a guidepost in determining the value of certain injuries. Is \$1.00 a day sufficient for a cervical strain, or should it be \$5.00 a day? This type of arbitrary evaluation should be avoided in order to properly evaluate the insured's risk of an excess verdict against his assets.

The final common method of evaluating injury claims is jury verdict research. Reviewing jury reporters for jury awards on certain injuries can assist the insurer in determining the likely outcome of a claim that goes to trial. However, this method has two basic flaws for evaluating settlement values. First, only a small percentage of claims actually reach a jury verdict.<sup>112</sup> Second, jury verdicts are "neither rational nor predictable" making it difficult to use the verdict research obtained for a particular case.<sup>113</sup> Past jury awards provide the insurer with a worst-case and best-case scenario, but they fail to provide the average outcome of a case.<sup>114</sup> Therefore, jury verdict research is not efficient in helping the claims professional to determine if the insurer will risk the insured's assets by going to trial.

Unlike the traditional methods, Colossus provides a more solid basis for evaluating the injury. The insurance company sets the value of the claims using its top claims professionals and its closed claim settlement data. This information yields the best indicator for determining the value of a claim as insurers correctly value the claim approximately seventy percent of the time.<sup>115</sup> The claims professional uses the Colossus system to enter injury data and determine how the injury claim has been valued in the past by the insurance company. Using the medical records of each claimant provides a more individual evaluation of the injured party's claim.<sup>116</sup> The claims professional then has the confidence to make the decision to settle the claim or move forward to trial to have a jury determine the value of the claim.<sup>117</sup> If the Colossus evaluation demonstrates that the insurance

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<sup>109</sup>See STEIN, *supra* note 4, at § 22:8.

<sup>110</sup>See *Beagle*, 417 P. 2d at 681.

<sup>111</sup>See *id.* at 679.

<sup>112</sup>MAGARICK & BROWNLEE, *supra* note 1, at § 17:9; Darroch, *supra* note 1 (stating that plaintiffs often share large jury verdicts but defendants generally do not publicize their victories to keep themselves out of "the crosshairs of a new lawyer").

<sup>113</sup>Robert I. Rubin, *Remove Guesswork from Calculating Damages in Personal Injury Cases*, DEF. COUNS. J., Jan. 1991, at 16.

<sup>114</sup>See *id.* at 17.

<sup>115</sup>See *Benyo*, 1998 Extra LEXIS 82, at \*12; see also Darroch, *supra* note 1 (stating that insurers properly evaluate injury claims ninety percent of the time from his firm's statistical data).

<sup>116</sup>See *Jones*, *supra* note 31, at 8.33.

<sup>117</sup>*Attrino*, *supra* note 25.

company has paid the policy limits on this type of claim in the past, the claims professional would know that a trial could threaten the insured's assets. Using Colossus as one tool in the evaluation process, therefore, assists the insurer in assessing the risk of a verdict in excess of the insured's policy limits. Because a prudent person would generally assess the risk to his assets prior to accepting a course of action that may threaten those assets, the insurer meets the negligence standard test when using Colossus to evaluate a third party's injury claim.

*b. Bad Faith Standard*

A majority of jurisdictions that allow a cause of action for bad faith require a higher standard than negligence on the part of the insurer to allow the plaintiff a legal remedy.<sup>118</sup> Jurisdictions requiring the bad faith standard reason that it protects insureds and claimants from unequal bargaining power,<sup>119</sup> while protecting insurance companies from "extortionate lawsuits."<sup>120</sup> In applying the bad faith standard, many courts allow plaintiffs to present evidence of negligent acts by the insurer, but the jury may not find for the plaintiff based on negligence alone.<sup>121</sup> While bad faith is the favored standard, the courts are split on what conduct by the insurer constitutes a breach of its good faith duty.<sup>122</sup> The more liberal courts apply a "no reasonable justification" test while the conservative courts add an "intent to injure" test.

*i. No Reasonable Justification*

Liberal jurisdictions require the plaintiff to show the insurer did not have a reasonable justification for denying payment.<sup>123</sup> If the insurer fails to "deal *fairly and in good faith* with its insured . . . without proper cause [the insured may sue the insurer] in tort for breach of an implied covenant of good faith and fair dealing."<sup>124</sup> Courts using this standard reason that insurers should not "[unreasonably withhold] payments due under the policy."<sup>125</sup> In denying a claim, the insurer may not act in an arbitrary manner.<sup>126</sup> When deciding whether the insurer acted reasonably, the court may only use the information that the insurer knew at the time of the denial.<sup>127</sup> In other words, the insurer can only offer the evidence that it used to deny the claim.

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<sup>118</sup>ASHLEY, *supra* note 62, at § 2:15.

<sup>119</sup>*See Rawlings*, 726 P.2d at 573.

<sup>120</sup>*Anderson v. Continental Ins. Co.*, 271 N.W.2d 368, 377 (Wis. 1978).

<sup>121</sup>*Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 690 P.2d 1022, 1025 (N.M. 1984).

<sup>122</sup>ASHLEY, *supra* note 62, at § 2:15.

<sup>123</sup>*Zoppo*, 644 N.E.2d at 400; *see also Oulds v. Principal Mutual Life Ins. Co.*, 6 F.3d 1431, 1436 (10th Cir. 1993) (applying Oklahoma law).

<sup>124</sup>*Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1037 (Cal. 1973).

<sup>125</sup>*Id.* at 1037.

<sup>126</sup>*Morland v. Allstate Ins. Co.*, No. 266, 2000 Ohio App. LEXIS 511, at \*6 (Ohio Ct. App. 2000).

<sup>127</sup>*Indus. Indem. Co. v. Kallevig*, 792 P.2d 520, 526 (Wash. 1990).

The insured has the burden of showing that the insurer did not have a good faith reason for denying the claim at the time the claim was denied.<sup>128</sup>

In *Zoppo v. Homestead Ins. Co.*,<sup>129</sup> the Ohio Supreme Court held that an insured does not have to prove the insurer intentionally committed bad faith against its insured.<sup>130</sup> Homestead Insurance denied a property claim filed by Zoppo based on Homestead's determination that Zoppo had intentionally set fire to his bar.<sup>131</sup> Homestead based its conclusions upon Zoppo's inconsistent statements about his whereabouts on the night of the fire, a witness statement claiming Zoppo set the fire, and the bar's financial losses.<sup>132</sup> However, Zoppo provided evidence that the witness was paid for his statement against Zoppo.<sup>133</sup> Zoppo also showed he had made improvements to the bar and that the market value of the building exceeded the policy limit by more than \$45,000.<sup>134</sup> Furthermore, Homestead failed to follow up with other suspects that "bragged in public that they were responsible for the fire."<sup>135</sup> Due to Homestead's inadequate investigation, the court determined that a jury could have found that Homestead denied the claim in an arbitrary manner.<sup>136</sup> Homestead breached its duty to provide the insured with a good faith investigation and unjustly denied Zoppo's claim.<sup>137</sup>

Compare *Zoppo* with *Morland v. Allstate Ins Co.*<sup>138</sup> Morland alleged that Allstate acted in bad faith when it refused to pay Morland benefits under his underinsured motorist coverage.<sup>139</sup> In holding that rational minds could not disagree that Allstate had a reasonable justification for its denial, the court affirmed Allstate's motion for summary judgment, dismissing Morland's bad faith action.<sup>140</sup> Morland settled with the tortfeasor's insurance carrier for \$45,000 even though the limits were \$50,000 and requested payment of his policy limits under his underinsured motorists coverage with Allstate.<sup>141</sup> The insured claimed the auto accident caused Carpal Tunnel Syndrome ("CTS") as well as injuries to his neck and back. However, the

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<sup>128</sup>*Kosierowski*, 51 F. Supp. 2d at 588.

<sup>129</sup>644 N.E.2d 397 (Ohio 1994).

<sup>130</sup>*Id.* at 400.

<sup>131</sup>*Id.* at 397.

<sup>132</sup>*Id.* at 400.

<sup>133</sup>*Id.*

<sup>134</sup>*Id.*

<sup>135</sup>*Id.*

<sup>136</sup>*Id.*

<sup>137</sup>*Id.*

<sup>138</sup>2000 Ohio App. LEXIS 511 (Ohio Ct. App., 2000).

<sup>139</sup>*Id.* at \*3

<sup>140</sup>*Id.* at \*9-11.

<sup>141</sup>*Id.* at \*2. In Ohio, an insured does not have to obtain the full limits of the tortfeasor's policy to make a claim for underinsured benefits from his carrier. *Fulmer v. Insura Prop. & Cas. Co.*, 760 N.E.2d 392, 400 (Ohio 2002).

insured also made a claim to the Ohio Bureau of Worker's Compensation (BWC) "alleging that his CTS was a result of the repetitive hand motions that he performed in his work as a machinist."<sup>142</sup> Morland did not complain of pain in his hands or wrists at "the emergency room or during his [first] four visits to his family doctor after the accident."<sup>143</sup> Morland also told a neurologist that his CTS symptoms began prior to the accident.<sup>144</sup> Therefore, Allstate determined that Morland received adequate compensation from the tortfeasor's carrier and refused to pay anything more under the underinsured motorists coverage.<sup>145</sup> Morland sued Allstate for payment of damages and the jury awarded the policy limits.<sup>146</sup> While the jury found the accident caused the CTS, the court concluded that Allstate had the right to litigate the causation issue.<sup>147</sup> The court reasoned that insurers have the right to litigate "fairly debatable" issues.<sup>148</sup>

As both *Zoppo* and *Morland* illustrate, the insurer must thoroughly investigate the damages to demonstrate good faith claims handling. *Zoppo* illustrates how an inadequate investigation leads to bad faith damages against an insurer. *Morland* illustrates that an insurer that wrongfully denies a claim but investigates the damages properly avoids a bad faith action against it. Colossus, by encouraging the claims professional to obtain all the relevant medical records, requires the insurer to diligently investigate the claimed injuries prior to determining the proper value of the claim.<sup>149</sup>

Proper use of Colossus requires the claims professional to examine all medical records in order to determine the proper diagnosis, prognosis, treatment and period of care for each injury and the economic damages suffered.<sup>150</sup> An insurer "must diligently search for evidence which supports its insured's claim."<sup>151</sup> The medical records are the most important documents the claims professional can acquire to support the insured's injury claim.<sup>152</sup> By examining the medical records prior to determining the value of an injury, the insurer acts reasonably in its investigation of the claim.<sup>153</sup> A proper diagnosis will assist the claims professional in determining

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<sup>142</sup>*Morland*, 2000 Ohio App. LEXIS 511, at \*2.

<sup>143</sup>*Id.* at \*6.

<sup>144</sup>*Id.* at \*6.

<sup>145</sup>*Id.* at \*3.

<sup>146</sup>*Id.* at \*3-4.

<sup>147</sup>*Id.* at \*3,8-9.

<sup>148</sup>*Id.* at \*9.

<sup>149</sup>Frey, *Putting a Price on Auto Injuries*, *supra* note 20.

<sup>150</sup>*See Colossus – Knowledge is the Key*, *supra* note 40, at 1-2.

<sup>151</sup>*Great Divide*, 79 P.3d at 608. Because most jurisdictions use the reasonable justification standard for an insured making a claim against the insurer, only insured claims will be discussed in this section. *See* ASHLEY, *supra* note 62 at § 2:15.

<sup>152</sup>*See* MAGARICK & BROWNLEE, *supra* note 1, at § 6:12.

<sup>153</sup>*Oulds*, 6 F.3d at 1438.

the value of the claim.<sup>154</sup> If the injured party claims she had whiplash, the medical records will support her claim. Additionally, the medical records will also tell the claims professional if the insured injured both her neck and back or just one area. Colossus takes these specific details into account when determining the severity of the injury.<sup>155</sup> The claims professional, using Colossus as a guide, can determine the appropriate value of the injury based on the diagnosed injury.

Colossus also requires the claims professional to enter the injury's prognosis. A detailed investigation of the medical records includes determining the injured party's likely recovery and any permanency the injured party may suffer.<sup>156</sup> The medical records will support the insured's claim of continuing pain and the need for future treatment.<sup>157</sup> If the injured party has a permanent impairment, the physician will document this in the records. Using Colossus to assist in evaluating the claim, the claims professional will be able to determine if the injured party should be compensated for future pain and suffering.

Using Colossus to investigate the injury also requires the claims professional to determine the type of treatment the injured party received.<sup>158</sup> The type of treatment the injured party received helps determine the value of the injury.<sup>159</sup> By using the medical records to enter information into Colossus, the claims professional determines the treatment provided to the injured party. The claims professional then takes the type of treatment into consideration when determining a value of the claim. For example, if an injured person has his arm placed in a cast for six weeks, his inconvenience may not be as significant as a person who had surgery, a cast, and physical therapy. With Colossus, the claims professional must determine all treatments to enter the information correctly.<sup>160</sup>

The period of care entered into Colossus also assists the insurer in determining the proper value of the claim. The length of care provided to an injured party influences the value of a claim.<sup>161</sup> The medical records document the amount of time

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<sup>154</sup>See *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d at 1265 (demonstrating that State Farm increased its offer after the diagnosis was changed from a minor soft tissue injury to a more serious nerve injury).

<sup>155</sup>*Colossus – Knowledge is the Key*, *supra* note 40, at 2.

<sup>156</sup>See *MAGARICK & BROWNLEE*, *supra* note 1, at § 6:12.

<sup>157</sup>Colossus uses the following prognoses: “resolution undetermined; no complaint, resolved; complaint, no more treatment; complaint further treatment; and complaint, guarded prognosis.” *Colossus – Knowledge is the Key*, *supra* note 40, at 2.

<sup>158</sup>See *Jones*, *supra* note 31, at 8.32; *Bremer & Trollop*, *supra* note 18, at 15.

<sup>159</sup>See *Westberry*, 590 So. 2d at 161 (discussing the care required for the sustained injuries).

<sup>160</sup>Colossus does not have all conceivable treatments in the system. However, by thoroughly reviewing the records, the claims professional will know all the treatments provided to the claimant even if its not entered into the system. See *Jones*, *supra* note 31, at 8.33.

<sup>161</sup>See *Beagle*, 417 P.2d at 675 n.3 (demonstrating that the court considered the length of the injured party's hospitalization and time wearing a brace when determining the general damages awarded by the jury were too low).

it takes for the injuries to properly heal. This information obviously assists the claims professional in determining the proper value of the claim. Typically, a cervical strain that heals in six weeks has less value than a cervical strain that heals in twelve weeks. Colossus requests specific dates and/or length of care provided to the injured party. However, if a party takes longer than expected to heal from an injury, the issue of malingering may also factor into the evaluation.<sup>162</sup> “More than one-third of all auto bodily injury liability claims appeared to involve fraud’ and/or inflated claims.”<sup>163</sup> Colossus assists the claims professional in identifying extensive treatment periods by “flagging” the user.<sup>164</sup> This warning can be used by the claims professional to investigate if there were other circumstances that prolonged the recovery time.<sup>165</sup> For example, the injured party may have osteoporosis complicating his recovery. By reviewing the medical records and entering the information into Colossus, the claims professional identifies the period of care the injury required and potential complications of the healing process.

Colossus can also assist the insurer in determining the amount of economic damages. A good faith investigation requires an insurer to determine the amount of medical bills and lost wages.<sup>166</sup> Colossus allows the claims professional to enter this information into the consultation.<sup>167</sup> By comparing the medical records to the medical bills, the claims professional can determine what medical expenses relate to the injury. Also, the claims professional will know if other bills have not been submitted allowing him to request this information. Furthermore, the medical records will support the injured party’s disability period.<sup>168</sup> The court in *Benyo v. Allstate Ins. Co.* held that Allstate demonstrated a reasonable investigation when it attempted to support Benyo’s lost wage claim.<sup>169</sup> The claims professional also used Colossus to assist in evaluating the injury value.<sup>170</sup> Allstate allowed the full disability period but had trouble supporting Benyo’s full wage claim.<sup>171</sup> The claims

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<sup>162</sup>*Voland*, 943 P.2d at 813 n.3.

<sup>163</sup>Guidera, *supra* note 7 (quoting a 1999 report by the Insurance Research Council).

<sup>164</sup>Jones, *supra* note 31, at 8.32-33; Bremer & Trollop, *supra* note 18, at 13.

<sup>165</sup>Colossus brings potential malingering issues to the attention of the claims professional for him to investigate and make a determination whether this impacts the settlement value of the claim. See Jones, *supra* note 31, at 8.32 – 8.33.

<sup>166</sup>See *Benyo*, 1998 Extra LEXIS 82, at \* 9-10.

<sup>167</sup>See *Colossus – Knowledge is the Key*, *supra* note 40, at 2.

<sup>168</sup>*Id.*

<sup>169</sup>*Benyo*, 1998 Extra LEXIS 82, at \*7.

<sup>170</sup>*Id.* at \*6.

<sup>171</sup>The claims professional reviewed the information provided by Benyo and determined the lost wage information pre-dated the auto accident. *Id.* at \*2-3. Consequently, Allstate requested the self-employed Benyo to supply prior tax returns and names of customers so Allstate could confirm Benyo’s lost wage claim. *Id.* at \*3. Benyo refused, leaving Allstate no choice but to offer only \$8,400 of the \$36,200 in lost wages claimed. *Id.* at \*2,5. After offsetting the tortfeasor’s payment of \$15,000 and the medical expenses of \$4270, it appears that the arbitration panel split the difference between Allstate and Benyo on the lost wage portion with a total award of \$15,000 from Allstate. *Id.* at \*5-7.

professional likely determined the period of disability through her review of the records when entering the Colossus information. The court determined that the claims professional used Colossus as a tool and did not rely on it exclusively, which demonstrated good faith claims handling.<sup>172</sup> Therefore, using Colossus as a guide for economic damages can assist the claims professional in determining the proper value of the injury claim.

By reviewing the medical records, the claims professional identifies the proper diagnosis, prognosis, treatment, and period of care for each injury and the amount of economic damages. The claims representative then enters all of this information into Colossus. Colossus, by using the insurer's data, provides a recommended value for the injury. Then, the claims representative determines the final settlement value to conclude if the insured is owed any benefits. If the tortfeasor's carrier has already satisfied the insured's claim, the claims professional may reasonably deny the claim. Colossus assists the insurer in adequately investigating the insured's underinsured motorists claim.

#### ii. Intent to Injure

The more conservative jurisdictions add an intentional element to the bad faith standard. An insurer acts in bad faith if its conduct was unreasonable and the insurer has "knowledge of or reckless disregard for the fact that the conduct is unreasonable."<sup>173</sup> An insurer cannot intentionally injure the rights of the insured.<sup>174</sup> The insurer's intended acts or omissions causing the insured's harm also meet the intentional element.<sup>175</sup> Using the intentional element allows insurers to aggressively investigate legitimate coverage and payment disputes.<sup>176</sup>

*Kosierowski v. Allstate Ins. Co.*,<sup>177</sup> demonstrates the high burden the insured must show to obtain a remedy in an intent to injure jurisdiction. The Tenth Circuit Court of Appeals held that the insurer's delay in claim settlement may have amounted to negligence, but clearly was not bad faith.<sup>178</sup> Plaintiff Kosierowski requested policy limits of \$100,000 under her underinsured motorist coverage with defendant Allstate Insurance on October 11, 1995.<sup>179</sup> Allstate finally agreed to pay this amount on December 8, 1996.<sup>180</sup> The court determined that both Kosierowski and Allstate were

<sup>172</sup>*Id.* at \*11-12.

<sup>173</sup>*Galusha v. Farmers Ins. Exch.*, 844 F. Supp. 1401, 1404 (1994) (citing *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1275 (Colo. 1958)).

<sup>174</sup>*Rawlings*, 726 P.2d at 570; *Benyo*, 1998 Extra LEXIS 82, at \*8.

<sup>175</sup>*Anderson*, 271 N.W.2d at 376.

<sup>176</sup>*Jung*, 949 F. Supp. at 360. Proactive claims handling by the insurer combats fraud and ultimately helps the average citizen pay lower premiums. See *Bowers*, *supra* note 6 (quoting Barry Zalma, an attorney specializing in suspected fraudulent insurance claims, "If an insurer doesn't fight fraud, the word goes out on the street that they are an easy touch, and the claims count goes up.")

<sup>177</sup>51 F. Supp. 2d 583 (E.D. Pa. 1999) (applying Pennsylvania law).

<sup>178</sup>*Id.* at 593.

<sup>179</sup>*Id.* at 586.

<sup>180</sup>*Id.* at 587.

to blame for the year delay in settlement.<sup>181</sup> Kosierowski did not give Allstate sufficient documentation of the \$118,633 wage loss claim for five and a half months.<sup>182</sup> Allstate, still questioning the legitimacy of Kosierowski's wage loss claim for a minor soft tissue injury,<sup>183</sup> waited until Kosierowski's statement under oath to evaluate the claim.<sup>184</sup> Even though Allstate admitted the statement was not used in determining the settlement value,<sup>185</sup> the court rejected Kosierowski's contention that Allstate's actions constituted bad faith.<sup>186</sup> Allstate did not act unreasonably in waiting for clarification of the wage loss<sup>187</sup> as Allstate has the right to investigate legitimate coverage issues.<sup>188</sup> Although Allstate may have been negligent in delaying settlement until after the statement, it did not act in bad faith because Allstate did not intend to injure its insured.

As illustrated by *Kosierowski*, the intent to injure standard requires more culpable conduct by the insurer than the no reasonable justification standard illustrated by *Zoppo*. The insurer in this jurisdiction obviously will meet its duties of good faith by using Colossus as demonstrated under the last two sections. An insurer using Colossus to investigate and evaluate the injury claim does not act with reckless disregard or intent to injure. On the contrary, the insurer uses the system to determine the appropriate value for the injury to settle the claim. Therefore, an insurer using Colossus to evaluate and investigate the injury claim acts in good faith in a negligent or bad faith jurisdiction.

## 2. Breach of Contract

In jurisdictions that do not allow a plaintiff to recover under the tort of bad faith or statutory provisions, the court may allow a remedy for policyholders under a breach of contract claim.<sup>189</sup> Insurance contracts impose an implied duty upon the insurer to treat its insured fairly.<sup>190</sup> A breach of this good faith duty, therefore, is a

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<sup>181</sup>*Id.* at 593.

<sup>182</sup>*Id.* at 591.

<sup>183</sup>*Id.* at 590 n.6.

<sup>184</sup>*Id.* at 587. The court did not blame Allstate for the delay in obtaining Kosierowski's statement under oath. It determined the delay was "an ordinary part of legal and insurance work." *Id.* at 590.

<sup>185</sup>*Id.* at 591.

<sup>186</sup>*Id.* at 592-93.

<sup>187</sup>*Id.* at 591.

<sup>188</sup>*Hyde Athletic Indus., Inc. v. Cont'l Cas. Co.*, 969 F. Supp. 289, 307 (E.D. Pa. 1997) (applying Pennsylvania law).

<sup>189</sup>*Mesmer v. Maryland Auto Ins. Fund*, 725 A.2d 1053, 1061 (Md. 1999) (allowing a breach of contract action when an insurer incorrectly denies coverage to its insured while the insurer's duty to protect its insured in settlement of third party claims gives rise to a tort cause of action); see also *ASHLEY*, *supra* note 62, at § 2:14 (arguing that the breach of contract cause of action should be adopted by all states for pure first-party claims but not for claims arising from the insurer's failure to settle a third-party claim within the insured's policy limits).

<sup>190</sup>*Beck*, 701 P.2d at 798.

breach of the contract.<sup>191</sup> However, most courts choose not to use the breach of contract claim as it provides inadequate compensation.<sup>192</sup> Traditionally, the remedy for breach of contract is only performance of the contract.<sup>193</sup> However, the remedy under the tort of bad faith allows both emotional and punitive damages.<sup>194</sup> Courts generally prefer to use the tort cause of action to provide more incentives for the insurance company to perform the contract.<sup>195</sup> However, some jurisdictions simply apply a liberal remedy to the breach of contract claim in the insurance setting that allows compensation for an insured's damages that naturally result from the insurer's breach of its good faith duty.<sup>196</sup>

In *Beck v. Farmers Ins. Exch.*, the Supreme Court of Utah determined that an insurer that breaches its duty to investigate and evaluate a claim promptly and reasonably has breached its good faith duty implied by contract.<sup>197</sup> The court, using the remedy propositioned in *Hadley v. Baxendale*,<sup>198</sup> stated that an insurer could be liable for foreseeable damages that naturally flow from the insurer's violation of the implied covenant of good faith.<sup>199</sup> Plaintiff Beck submitted a demand for policy limits of \$20,000 to the defendant Farmers Insurance.<sup>200</sup> Within ten days, Farmers rejected the settlement offer without an explanation for its refusal.<sup>201</sup> Concluding that Farmers' failure to explain its rejection within such a short time frame raised a question of fact that Farmers failed to fully investigate and evaluate the claim, the Utah Supreme Court overruled Farmers' summary judgment motion.<sup>202</sup> The court stated that insureds purchase insurance policies to provide an insured with protection during a loss and specifically "peace of mind."<sup>203</sup> For this reason, an insurance company can foresee that the breach of its good faith duty could cause mental anguish entitling the insured to compensation for such damages.<sup>204</sup> Therefore, an insurer may owe an insured more than the amount of the policy if the insurer breaches its good faith duty imposed by the law in Utah.<sup>205</sup>

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<sup>191</sup>*Id.*

<sup>192</sup>*Acquista*, 285 A.D.2d at 79.

<sup>193</sup>*Id.* at 78.

<sup>194</sup>*See id.* at 78-80.

<sup>195</sup>*Id.* at 78-79.

<sup>196</sup>*Drop Anchor Realty Trust v. Hartford Ins. Co.*, 496 A.2d 339, 342 (N.H. 1985); *Acquista*, 285 A.D.2d at 80-81; *Beck*, 701 P.2d at 801-02.

<sup>197</sup>701 P.2d at 798.

<sup>198</sup>156 Eng. Rep. 145 (Ex. 1854).

<sup>199</sup>*Beck*, 701 P.2d at 801.

<sup>200</sup>*Id.* at 796.

<sup>201</sup>*Id.*

<sup>202</sup>*Id.* at 802-03.

<sup>203</sup>*Id.* at 802.

<sup>204</sup>*Id.* at 801.

<sup>205</sup>*Id.* at 801-02.

Colossus assists the insurer in maintaining its good faith duty to treat the insured fairly. An insurer fails to treat the insured in good faith if the claim is not evaluated fairly.<sup>206</sup> A fair evaluation includes an objective evaluation by the insurer.<sup>207</sup> The insurer, by using the medical records as discussed in the bad faith standard section, uses objectivity in evaluating the claim. Colossus, through the claims professional's diligent review of the medical records, forces the claims professional to evaluate a claim objectively.<sup>208</sup> It prevents a claims professional from drawing on personal experiences (rather than professional) by analyzing the injured party's claim through the medical records. For example, a claims professional that has had prior knee surgery may be more sympathetic to an injured party with a knee injury. This claims professional may evaluate the injury higher than his co-worker who has not had any prior knee complaints.

Furthermore, in *Christiansen v. First Ins. Co.*, the insured alleged that the insurer did not objectively evaluate the insured's damages.<sup>209</sup> The insured stated that the claims professional "did not seem very interested in the damage that caused the leaking roof. Instead, he came with the mindset that he would find that the roof was not substantially damaged."<sup>210</sup> The insurer must investigate the claim objectively without "construct[ing] a pretextual basis for denial."<sup>211</sup> Colossus requires the claims professional to use the medical records and set aside any subjective emotions the claims professional may have towards the injured party.<sup>212</sup> Colossus uses the entries made from the claims professional's review of the medical records to assist the claims professional in evaluating the claim. Therefore, Colossus promotes an objective and fair evaluation of the injury.

However, critics allege that insurance professionals who lack proper training will incorrectly value the claim and insurers manipulate the data to lower claim payments.<sup>213</sup> The objectivity in reviewing the medical documentation prevents human manipulation. Furthermore, CSC trains each insurer on the proper use of Colossus.<sup>214</sup> After this initial training, it is up to the insurers to handle the ongoing training of their employees. Since a claims professional has a supervisor and/or manager to critique his work, the insurer likely reviews the claims professional's use of Colossus. Furthermore, discovery in bad faith cases involve sharing the claims

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<sup>206</sup>*Id.* at 801.

<sup>207</sup>*See id.* at 800 (stating that an insurer must pay claims under the contract regardless of the insurer's subjective state of mind).

<sup>208</sup>Attrino, *supra* note 25.

<sup>209</sup>967 P.2d at 646.

<sup>210</sup>*Id.*

<sup>211</sup>*State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998) (using the tort of bad faith standard to enforce insurers to play fairly with its insureds).

<sup>212</sup>Kevin M. Quinley, *Boot Me Up, C3PO*, CLAIMS MAG., July 2002, at 39.

<sup>213</sup>Charles J. Mazurasky, *Insurer Bad Faith Claims Arising from "Colossus" Computerized Claims Handling*, TRIAL EXCELLENCE, Oct. 2001, at 1; Jones, *supra* note 31, at 8.33.

<sup>214</sup>Mogel, *supra* note 47.

file with the plaintiff.<sup>215</sup> Therefore, an insurer knows only an accurate evaluation will avoid a bad faith judgment against the insurer. The possibility of punitive damages certainly also deters an insurer from manipulating the data.<sup>216</sup> A study by Jury Verdict Research and General Cologne Re determined that the mean punitive damage awards ranged between \$6,800,000 and \$10,600,000 for bad faith cases.<sup>217</sup> Additionally, the compensatory awards for bad faith ranged from \$634,000 to more than \$1,000,000.<sup>218</sup> The threat of a \$1,000,000 lawsuit obviously deters an insurer from manipulating the data. Only by using the medical records to objectively review the claim will the insurer avoid bad faith actions by its insureds.

### 3. Statutory Causes of Action

In 1945, the National Association of Insurance Commissioners (NAIC) drafted the Model Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts in Practices in the Business of Insurance (Model Act) for the states to use in regulating insurance practices.<sup>219</sup> In 1971, while four bills were pending in Congress giving the Federal Trade Commission power to regulate the insurance industry, the NAIC amended the Model Act.<sup>220</sup> The amendments included an enumerated list of unfair claims settlement practices.<sup>221</sup> It also gave the insurance commissioner enforcement powers for an insurer's violation of the listed unfair claims settlement practices.<sup>222</sup> Currently, forty-eight states have enacted legislation or adopted administrative codes based on the Model Act.<sup>223</sup>

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<sup>215</sup>Gary Blake & Bob Siems, *Careless Writing and Bad Faith Law Suits*, CLAIMS MAG., Feb. 2004, at 23.

<sup>216</sup>See Tony Doris, *Lowball Settlement Offers Raise the Stakes for Insurers*, MIAMI DAILY BUS. REV., May 16, 2002 (stating "Punitives are the 'real teeth' behind bad-faith actions.")

<sup>217</sup>Blake & Siems, *supra* note 215, at 23. However, the awards can go significantly higher. A Utah jury awarded \$145,000,000 in punitive damages. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519 (2003).

Like the standard for bad faith, the jurisdictions differ on what type of conduct by the insurer constitutes an award of punitive damages. In New Mexico, the court may allow a punitive award if the jury awards compensatory damages for the tort. *Jessen v. National Excess Ins. Co.*, 776 P.2d 1244, 1246 (N.M. 1989). However, most jurisdictions require a more significant culpable conduct. *Rawlings*, 726 P.2d at 578 (requiring "aggravated, outrageous, malicious or fraudulent" conduct); *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 382 (Ky. 2000) (requiring oppressive, fraudulent or malicious conduct); *Preston v. Murty*, 512 N.E.2d 1174, 1175 (Ohio 1987) (allowing punitive damages for conduct that is "characterized by hatred, ill will, or a spirit of revenge" or for reckless conduct that consciously disregards safety of others).

<sup>218</sup>Blake & Siems, *supra* note 215, at 23.

<sup>219</sup>ASHLEY, *supra* note 62, at § 9:01.

<sup>220</sup>*Id.*

<sup>221</sup>Model Act § 4(9).

<sup>222</sup>Model Act § 8.

<sup>223</sup>ASHLEY, *supra* note 62, at § 9:01 & n.22.

A controversial issue surrounding the adoption of the Model Act by the states is whether it provides a private cause of action when an insurer violates one of the provisions.<sup>224</sup> In *State Farm Mut. Automobile Ins. Co. v. Reeder*,<sup>225</sup> the Kentucky Supreme Court held that a non-insured party may sue the insurance company directly for violation of the unfair claims settlement practices statute.<sup>226</sup> In *Reeder*, State Farm insured Hampton, who hit the Reeders' carport with his car, causing the carport to collapse.<sup>227</sup> State Farm estimated the damages at \$8,471, but the Reeders' lowest estimate was \$13,392.<sup>228</sup> A jury returned a verdict of \$11,000, but the trial court dismissed the Reeders' claim for violation of the unfair claims settlement practice statute.<sup>229</sup> The Kentucky Supreme Court held that the Reeders could pursue State Farm directly for violation of the unfair claims settlement practice statute.<sup>230</sup> The court reasoned that the legislature enacted the statute to allow a third-party remedy where the common law did not.<sup>231</sup> Also, the statute did not specifically prohibit a third party from making a claim against the insurer for breach of the unfair claims settlement statute.<sup>232</sup> Therefore, the court concluded "there is no reason why [the unfair claims settlement practices statute] should not be applied to third party claims."<sup>233</sup>

However, the majority of jurisdictions do not allow a third-party direct action.<sup>234</sup> Instead, these jurisdictions reason that the insurance commissioner has the sole enforcement power of an insurer that violates the unfair claims settlement practices.<sup>235</sup> The NAIC did not intend to create a private cause of action and in its 1991 amendment of the Model Act, the authors specifically state, "Nothing herein shall be construed to create or imply a private cause of action for violation of this Act."<sup>236</sup> Currently, only seven states have adopted the amended act, but more states will likely follow.<sup>237</sup> However, it is important to note that an insurer that adopts the 1991 amended Model Act may still allow a private cause of action by a first or third party through other statutory provisions. For example, the Washington Supreme Court stated that an insured might bring an action against its insurer for violation of

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<sup>224</sup>*See id.* at § 9:01.

<sup>225</sup>763 S.W.2d 116 (Ky. 1988).

<sup>226</sup>*Id.* at 118.

<sup>227</sup>*Id.* at 117.

<sup>228</sup>*Id.*

<sup>229</sup>*Id.*

<sup>230</sup>*Id.* at 118.

<sup>231</sup>*Id.*

<sup>232</sup>*Id.*

<sup>233</sup>*Id.*

<sup>234</sup>ASHLEY, *supra* note 62 at § 9:03.

<sup>235</sup>*See Moradi-Shalal v. Fireman's Fund Ins. Co.*, 758 P.2d 58, 68 (Cal. 1988).

<sup>236</sup>Unfair Trade Practices Act § 1.

<sup>237</sup>ASHLEY, *supra* note 62, at § 9:14.

the insurer's duty to act in good faith under the Consumer Protection Act.<sup>238</sup> Also, an insured may use the unfair claims settlement practices act as evidence of the industry standard of conduct.<sup>239</sup> Therefore, an insurance company's violation of the unfair claims settlement practices act may indirectly create private causes of action for the insured or a third-party claimant.

The use of Colossus helps insurers comply with Section 4(9) of the amended 1979 Model Act in settling both insured's and claimant's injury claims.<sup>240</sup> Specifically, the provisions that Colossus can help insurers avoid are: "(c) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies; (d) refusing to pay claims without conducting a reasonable investigation based upon all available information; . . . [and] (f) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."<sup>241</sup> While the reasonable investigation, complete evaluations, and equitable settlements have been discussed in the previous sections, the insurer's duty to adopt reasonable standards or consistency in the handling of its claims has yet to be addressed.

By using Colossus to promote consistent settlements, the insurer establishes a reasonable standard for handling its first party and third party injury claims.<sup>242</sup> The state insurance departments want insurers to pay claims consistently.<sup>243</sup> By using the insurer data entered into Colossus, the insurer bases its settlement values on past claims history. Payment based on a collection of prior claims data provides a more solid estimation of the settlement value than one person's assessment of the injuries even if the person is an experienced claims professional. As attorney Robert Darroch stated, "Ask [ten different attorneys, judges arbitrators, insurers] and you are likely to get [ten] different opinions."<sup>244</sup> However, insurers must use Colossus as a tool and avoid becoming dependent on the system. As the cases have illustrated, courts want an independent evaluation of the claim.<sup>245</sup> Using Colossus to evaluate injuries promotes a reasonable standard of consistent claims settlements in avoiding a violation of the unfair claims settlement practices.

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<sup>238</sup>*Tank*, 715 P.2d at 1140.

<sup>239</sup>*Kosierowski*, 51 F. Supp. 2d at 595 n.14.

<sup>240</sup>Under the 1991 Amendment, the unfair claims settlement practices are listed under Section 4, A through N.

<sup>241</sup>Model Act § 4(9). Under the 1991 amendments, (c) becomes C, (d) becomes F, the drafters left off "based upon all available information," and (f) becomes D. Unfair Trade Practices Act § 4.

<sup>242</sup>See William T. Barker & Ben Love, *Bad Faith Risk Reduction: Company Procedures*, 23 No. 20 & 21 Ins. Litig. Rep. 645 (Dec. 20, 2001).

<sup>243</sup>Whitney, *supra* note 1.

<sup>244</sup>Darroch, *supra* note 1.

<sup>245</sup>*Kosierowski*, 51 F. Supp. 2d at 595; *Benyo*, 1998 Extra LEXIS 82 at \*12 *cf.* *York v. Hartford Underwriters Ins. Co.*, No. 01-CV-590-B(J), 2002 U.S. Dist. LEXIS 21458 at \*5 (applying Oklahoma law); *Penberthy*, 2001 Ohio App. LEXIS 247 at \*12-13.

## VI. CONCLUSION

Because Colossus requires the insurer to have all the facts and to use the medical documentation to evaluate the injury, an insurer exercises good faith claims handling when using the system. A review of the different standards of good faith claims handling by the courts in the United States provides the following: (1) in a negligence standard jurisdiction, the insurer must “exercise such care and diligence which an ordinary, prudent person would exercise in the management of his own business;”<sup>246</sup> (2) in a bad faith jurisdiction, the insurer must have a reasonable justification in deciding not to pay a claim; (3) if a jurisdiction recognizes bad faith under a breach of contract case, the insurer has a contractual obligation to fairly evaluate claims under the contract; and (4) legislatures may enact statutes to provide a remedy for private parties if an insurer violates a provision of the unfair claims settlement practices. With the use of Colossus, insurance companies can handle the insured or third party’s injury claim with good faith under any of these standards. The use of Colossus requires the claims professional to diligently investigate the facts of the injury, completely evaluate the injury, objectively review the medical information, and pay injury claims consistently. This complete and objective review of the injury claim removes some of the guesswork of calculating the general damages to be paid on a claim. While some may view Colossus as an anti-human approach to handling claims, it simply simulates the human thought process on how a claim should be evaluated.<sup>247</sup> Furthermore, Colossus only acts as a foundation for evaluating a claim by allowing the claims professional to use other factors, such as witness credibility, venue selection and attorney capabilities, to determine the final settlement value of the claim.<sup>248</sup> Using Colossus, or a similar expert tool, demonstrates good faith claims handling by the insurance company.

Let’s return to the opening example. The example identified only one injury, a fractured leg but did you actually sustain other injuries documented by the medical records? Most people only focus on the main injury, but the medical diagnoses may have included numerous abrasions, contusions or sprains to other parts of the body. The example lists the surgery and physical therapy as treatment but nothing else. The medical records may disclose a hospitalization, injections, or potential for removal of the hardware in the leg. The example states occasional aches and pains as grounds for the recovery but the medical reports may state you have an impairment rating due to the trauma caused to the largest bone in your body. By using Colossus to assist in the evaluation of your injury, the claims professional will have an individualized assessment of your injury for your settlement meeting. Both of you will have a better idea of the value of your claim, which takes some of the guesswork takes arbitrary values out of the evaluation process.

DAWN R. BONNETT

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<sup>246</sup>Chancey v. New Amsterdam Cas. Co., 336 S.W.2d 763, 765 (Tex. Ct. App. 1960).

<sup>247</sup>Jones, *supra* note 31, at 8.34.

<sup>248</sup>*See id.* at 8.28-27 (listing factors to consider when evaluating a claim).