

## CHAPTER 25

### BAD FAITH BREACH OF INSURANCE CONTRACT

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## 25:1 ELEMENTS OF LIABILITY — THIRD-PARTY CLAIMS

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of bad faith breach of insurance contract, you must find all the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant acted unreasonably in (*insert appropriate description, e.g., “failing to settle the claim [name of third party] made against the plaintiff”*); and
3. The defendant’s unreasonable (conduct) (position) was a cause of the plaintiff’s (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant’s affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff’s claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. Omit any numbered paragraph involving facts that are not in dispute, and modify this instruction to include additional numbered paragraphs covering any other disputed preliminary matters upon which liability may depend (e.g., whether a valid insurance contract was in effect at the time).

2. Use whichever parenthesized words are appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

3. This instruction is for use in third-party situations such as that in **Farmers Group, Inc. v. Trimble**, 691 P.2d 1138 (Colo. 1984) (liability claims by third parties against insured). See also **Goodson v. Am. Standard Ins. Co.**, 89 P.3d 409, 414 (Colo. 2004) (“Third-party bad faith arises when an insurance company acts unreasonably in investigating, defending, or settling a claim brought by a third person against its insured under a liability policy.”); **Silva v. Basin W., Inc.**, 47 P.3d 1184 (Colo. 2002) (discussing distinction between third-party and first-party claims

for bad faith breach of insurance contract); **Olson v. State Farm Mut. Auto. Ins. Co.**, 174 P.3d 849 (Colo. App. 2007) (same).

4. Instruction 25:2 should be used in first-party cases where an insured brings a common-law direct action for bad faith breach of insurance contract against an insurer. *See* **Travelers Ins. Co. v. Savio**, 706 P.2d 1258 (Colo. 1985) (requiring insurer knowledge or reckless disregard of its unreasonable conduct).

5. Instruction 25:4 should be used in first-party cases where an insured brings a statutory claim against an insurer based on section 10-3-1116(1), C.R.S., for unreasonable delay in paying or denial of benefits. **Kisselman v. Am. Family Ins. Co.**, 292 P.3d 964 (Colo. App. 2011) (requiring only proof of insurer unreasonable conduct in denying or delaying payment of a claim without a reasonable basis).

6. See also section 10-3-1113(2) and (3), C.R.S. (permitting trier of fact to consider conduct of insurer prohibited by statute as evidence of unreasonable delay or denial of payment of insurance benefits), and sections 10-3-1115 and 10-3-1116, C.R.S. (permitting certain statutory first-party claims).

7. This instruction should be appropriately modified when the alleged bad faith breach of insurance contract relates to insurer conduct other than denial of or delay in paying indemnity benefits. The duty of an insurer to act in good faith toward its insured extends to the entire relationship between insurer and insured and is not limited to claims handling payment decisions. *See* **Ballow v. PHICO Ins. Co.**, 875 P.2d 1354 (Colo. 1993); *see also* **Dale v. Guar. Nat'l Ins. Co.**, 948 P.2d 545 (Colo. 1997); **Dunn v. Am. Family Ins.**, 251 P.3d 1232 (Colo. App. 2010) (good-faith duty includes adjustment of claim and all aspects of investigation and handling); **Bankruptcy Estate of Morris v. COPIC Ins. Co.**, 192 P.3d 519 (Colo. App. 2008) (tort encompasses all dealings between parties, including conduct occurring before, during, and after trial).

8. Appropriate instructions defining the terms used in this instruction must also be given. **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995) (failure to define standard of care in terms of reasonableness was reversible error); *see* Instruction 25:3 (defining “unreasonable conduct” and “unreasonable position”); *see also* Instructions 9:18 – 9:21 (relating to causation). Instruction 25:6 may also be given with this instruction.

9. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

10. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, *see* the Notes on Use to Instruction 4:20 (model unified verdict form).

## Source and Authority

1. This instruction is supported by **Trimble**, 691 P.2d at 1141, and section 10-3-1113(2). *See also* **Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139 (Colo. 2007); **Goodson**, 89 P.3d at 414; **Olson v. State Farm Mut. Auto. Ins. Co.**, 174 P.3d 849 (Colo. App. 2007).

2. In **Trimble**, the court noted that an insurer must act in good faith and deal fairly with its insured, and that in third-party cases, the insurer “stands in a position similar to that of a fiduciary.” **Trimble**, 691 P.2d at 1141. *See also* § 10-1-101, C.R.S. (“[A]ll persons having to do with insurance services to the public [shall] be at all times actuated by good faith in everything pertaining thereto . . .”). Insurers owe their insureds a quasi-fiduciary duty in the third-party context.

3. An entity that self-insures through a captive insurance company “functions like a traditional insurance company.” *See* **Compton v. Safeway, Inc.**, 169 P.3d 135, 137 (Colo. 2007) (granting motion to compel discovery of statements withheld under work product doctrine).

4. Self-insurance pools for special districts are separate entities “created by intergovernmental contract” and are thus “public entities” immune from tort liability for bad faith breach of insurance contract under the Colorado Governmental Immunity Act. **Colo. Special Dists. Prop. & Liab. Pool v. Lyons**, 2012 COA 18, ¶¶ 28-29, 277 P.3d 874 (citing **City of Arvada v. Colo. Intergovernmental Risk Sharing Agency**, 19 P.3d 10 (Colo. 2001)). A nonprofit intermediary formed by various counties to provide technical services to self-insurance pools is also immune from liability under the CGIA as an “instrumentality” of the Pool, and alternatively, as a separate public entity created by intergovernmental cooperation. *Id.* at ¶¶ 45-47.

5. Following denial of coverage by its CGL insurer for losses associated with the tear-out and replacement of non-defective work performed by a third-party, a pool subcontractor brought claims against the carrier, an outside claims adjusting company, and an adjuster employee. Finding a covered occurrence, the court of appeals, without discussion, held that the negligent misrepresentation claim based upon allegations that the adjuster stated that the policy would cover the losses presented fact issues as to justifiable reliance that required remand for trial. A conflict between a confirmation of coverage by an insurer’s agent and a policy term will not defeat, as a matter of law, an insured’s assertion of justifiable reliance when the representation involves an ambiguous policy term. **Colo. Pool Sys., Inc. v. Scottsdale Ins. Co.**, 2012 COA 178, ¶ 61, 317 P.3d 1262. *See* 25:2, Source & Authority 11.

### **Liability Insurer’s Duty to Defend**

6. Several cases discuss an insurer’s duty to defend against third-party claims. *See* **Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.**, 90 P.3d 814 (Colo. 2004); **Thompson v. Md. Cas. Co.**, 84 P.3d 496 (Colo. 2004); **Compass Ins. Co. v. City of Littleton**, 984 P.2d 606 (Colo. 1999); **Bohrer v. Church Mut. Ins. Co.**, 965 P.2d 1258 (Colo. 1998); **Constitution Assocs. v. N.H. Ins. Co.**, 930 P.2d 556 (Colo. 1996); **Hecla Mining Co. v. N.H. Ins. Co.**, 811 P.2d 1083 (Colo. 1991); **TCD, Inc. v. Am. Family Mut. Ins. Co.**, 2012 COA 65, ¶ 11, 296 P.3d 255; **Fire Ins. Exch. v. Sullivan**, 224 P.3d 348 (Colo. App. 2009); **Miller v. Hartford Cas. Ins. Co.**, 160 P.3d 408 (Colo. App. 2007) (duty to defend broader than duty to indemnify); **Bainbridge, Inc. v.**

**Traveler's Cas. Co.**, 159 P.3d 748 (Colo. App. 2006); **Leprino v. Nationwide Prop. & Cas. Ins. Co.**, 89 P.3d 487 (Colo. App. 2003); **Fire Ins. Exch. v. Bentley**, 953 P.2d 1297 (Colo. App. 1998); **Horace Mann Ins. Co. v. Peters**, 948 P.2d 80 (Colo. App. 1997).

7. A liability insurer's duty to defend and its duty to indemnify are separate and distinct. **Hecla Mining Co.**, 811 P.2d at 1086 n.5. Therefore, a bad faith claim for their breach may accrue at different times. **Daugherty v. Allstate Ins. Co.**, 55 P.3d 224 (Colo. App. 2002) (claim based on failure to defend accrues when insured is named in a complaint and is aware of insurer's refusal of coverage; claims based on liability insurer's failure to indemnify accrue when judgment enters against the insured).

8. The ultimate determination of a liability insurer's duty to defend differs as between those insurers that provide a defense under a reservation of rights until completion of the underlying litigation and those that refuse to defend. **Cotter Corp.**, 90 P.3d at 827. Whether an insurer ultimately has a duty to indemnify ordinarily presents a fact issue to be determined based upon evidence extrinsic to the complaint after the insured's liability is fixed through trial or settlement. **Cyprus Amax Minerals Co. v. Lexington Ins. Co.**, 74 P.3d 294, 301 (Colo. 2003) (while the duty to defend under a standard liability policy is triggered when allegations of a complaint, liberally construed, state an arguably covered claim, the duty to indemnify arises "only when the policy actually covers the harm and typically cannot be determined until the resolution of the underlying claims"; construing a pure indemnity policy); *see also* **Thompson**, 84 P.3d at 502 (duty to defend against specified causes of action is determined by comparing factual allegations in the complaint, without regard to claim labels, with legal elements of covered claims as defined by case law); **Lafarge N. Am., Inc. v. K.E.C.I. Colo., Inc.**, 250 P.3d 682 (Colo. App. 2010) (under indemnification clause of construction contract, duty to indemnify not triggered until fault determined, while duty to defend triggered by mere allegation of fault).

9. An insurer defending an insured under a reservation of rights "does not ordinarily waive its policy defenses by payment of settlement proceeds to a claimant." **Mt. Hawley Ins. Co. v. Casson Duncan Constr., Inc.**, 2016 COA 164, ¶ 8, 409 P.3d 619 (citing **Nikolai v. Farmers All. Mut. Ins. Co.**, 830 P.2d 1070, 1073 (Colo. App. 1991)). Indemnity coverage issues between insurer and insured when the insurer settles a third-party claim defended under a reservation of rights may be determined in a declaratory judgment or garnishment proceeding. *Id.* (citing **Bohrer**, 965 P.2d at 1261-67 & n.7).

10. **Hecla Mining Co.**, 811 P.2d at 1083, 1089, held that an insurer that defends the insured under a reservation of rights may seek reimbursement of defense costs after settlement or following trial if the facts at trial or determined in a declaratory judgment action prove that the claim was not covered.

11. The **Hecla** remedy seeking reimbursement of defense costs does not extend to costs taxed against an insured paid by the insurer unless expressly provided in the policy. "Defense costs" are different from "taxable costs" in liability policies that contains a separate supplementary payments section providing that the insurer will pay taxable costs for "any claim" that the insurer defends or settles. **Mt. Hawley Ins. Co.**, 2016 COA 164, ¶¶ 10-25 (rejecting insurer's argument that the policy supplemental payment provision was "superseded" by its reservation of rights letter).

12. A liability insurer's refusal to defend an action brought against the insured arises in the third-party context and is governed by the standard of reasonableness under the circumstances. **Nunn v. Mid-Century Ins. Co.**, 244 P.3d 116 (Colo. 2010) (citing **Trimble**, 691 P.2d at 1142); **Goodson**, 89 P.3d at 415 (same); **Wheeler v. Reese**, 835 P.2d 572 (Colo. App. 1992) (same). *But see* § 13-20-808(b)(II), C.R.S. (the legislature has declared that the duty to defend under a liability policy issued to a construction professional is a "first-party benefit to and claim on behalf of the insured").

### **Assignments of Insured's Claims**

13. In **Bashor v. Northland Insurance Co.**, 29 Colo. App. 81, 480 P.2d 864 (1970), *aff'd*, 177 Colo. 463, 494 P.2d 1292 (1972), a jury trial resulted in a judgment in excess of insurance policy limits against an insured whose liability insurer failed to settle a third-party claim within those limits. After the judgment creditor attempted to execute on the judgment, the insured agreed to pay the injured party only a portion of the judgment and to pursue claims against the insurer and share any recovery with the plaintiff in return for an agreement that plaintiff would cease further efforts to execute on the judgment. Based on the wording of the contract specifying that there would be no satisfaction of the judgment until the insured exhausted his remedies against the insurer, the court rejected the insurer's argument that the agreement not to execute was a satisfaction of the remaining judgment that limited its liability to the payment made by the insured.

14. In **Old Republic Insurance Co. v. Ross**, 180 P.3d 427 (Colo. 2008), the supreme court addressed, as a matter of first impression, the enforceability of a **Bashor**-type agreement based on a stipulated judgment entered into without a trial. The court held that, "where the insurer has conceded coverage and defended its insured, and where there has been no finding of bad faith against the insurer, the insurer cannot be bound by a pretrial settlement agreement and stipulated judgment to which it was not a party." *Id.* at 437. The court stated, however, "we decline to hold that pretrial stipulated judgments are per se unenforceable under **Bashor**," *id.* at 433, concluding that enforceability depends upon the circumstances of each case.

15. In **Nunn**, 244 P.3d at 117, the supreme court held that, for purposes of summary judgment, pretrial entry of a stipulated judgment in excess of policy limits against an insured established actual damages sufficient to support a claim in an assigned action against the liability insurer for bad-faith failure to settle a third-party claim within the policy limits. The insured's nonpayment of the judgment and receipt of a covenant not to execute on that judgment did not negate the damages element of the bad-faith claim. The court rejected the "prepayment rule" on which the lower court relied as inconsistent with **Bashor** and **Old Republic** and adopted the majority "judgment rule." However, because it recognized that pretrial stipulated judgments present concerns of fraud or collusion, the court also held that a confessed judgment will not be binding on an insurer until after the insurer is allowed to defend itself in an adversarial proceeding before a neutral fact finder.

16. In **Auto Owners Insurance Co. v. Bolt Factory Lofts Owners Ass'n**, 2021 CO 32, 487 P.3d 276, the supreme court held that where the insured entered into a **Nunn** agreement with a third-party claimant, but rather than agreeing to a stipulated judgment, the parties proceeded to an uncontested trial to determine liability and damages, the insurer defending its insured under a reservation of rights was not entitled to intervene as of right under C.R.C.P. 24(a)(2). The court

concluded that the insurer's interest in the litigation was not impaired because the insurer may sufficiently protect its interest in a later proceeding.

17. In **State Farm Auto Ins. Co. v. Goddard**, 2021 COA 15, 484 P.3d 765, the court of appeals declined to adopt a blanket rule that an insured cannot, as a matter of law, breach an insurance policy by entering into an agreement like the one contemplated by the supreme court in **Nunn**. Instead, the court held that, before an insured is justified in stipulating to a judgment and assigning its claims against its insurer to a third-party claimant, it must first appear that the insurer has unreasonably refused to defend the insured or to settle the claim within policy limits. Whether an insurer appears to have acted unreasonably and whether an insured has breached an insurance contract by entering into such an agreement are questions of fact.

18. The logic of **Nunn** applies to a claim against an insurance broker for failure to obtain appropriate coverage or inform the insured that its policy would not cover a risk for which coverage was sought. **DC-10 Entm't, LLC v. Manor Ins. Agency, Inc.**, 2013 COA 14, ¶ 14, 308 P.3d 1223. In that case, the insurer of a nightclub denied coverage for a fight between patrons based on an exclusion for assault and battery. The injured patron and the club entered into a pre-judgment assignment of proceeds agreement with damages to be determined by an arbitration judge. The trial court dismissed the case for lack of damages due to the absence of an enforceable judgment. The court of appeals reversed, concluding that, from the perspective of an insured, there was no practical difference between an insurer and a broker when expected coverage was denied and found, as a matter of first impression, that the assignment was valid.

### **Failure of Conditions**

19. An insured's failure to provide a liability insurer with notice of a claim before settlement with a third party will forfeit coverage based on a presumption of prejudice to the insurer unless the insured rebuts the presumption and the insurer is unable to prove actual prejudice to its interests from lack of notice. **Friedland v. Travelers Indem. Co.**, 105 P.3d 639 (Colo. 2005) (overruling **Marez v. Dairyland Ins. Co.**, 638 P.2d 286 (Colo. 1981) (holding that insured's unexcused failures to provide liability insurer with timely notice of accident and to forward suit papers forfeited coverage without insurer's need to show prejudice)).

20. The supreme court held that an insured's violation of a policy's no-voluntary-payments clause by settling with a claimant without suit and without advance notice to or the consent of its liability insurer bars coverage. **Travelers Prop. Cas. Co. of Am. v. Stresscon Corp.**, 2016 CO 22M, ¶¶ 13-15, 370 P.3d 140. The court, refusing to apply the notice-prejudice rule, held that a no-voluntary-payments clause, like the notice provision in a claims-made policy, *see* **Craft v. Philadelphia Indem. Ins. Co.**, 2015 CO 11, 343 P.3d 951, is a fundamental term of the contract that defines the scope of the policy's coverage, and monies voluntarily paid to avoid suit are outside the scope of that coverage. **Stresscon**, ¶ 12.

21. The court of appeals applied the notice-prejudice rule to violation of an occurrence policy clause requiring notice of incidents within 60 days of their occurrence. **MarkWest Energy Partners, L.P. v. Zurich Am. Ins. Co.**, 2016 COA 110, ¶ 31, 411 P.3d 1080. In doing so, the court distinguished **Stresscon**, 2016 CO 22M, and **Craft**, 2015 CO 11, as dealing with policy terms that defined the scope of coverage. **MarkWest Energy Partners**, ¶¶ 24-26. Even though the 60-day notice provision was phrased as a condition precedent to coverage, the court

stated that the purpose of the notice provision — avoidance of prejudice — is lacking if the insurer is unable to show prejudice from a failure to give required notice. *Id.* at ¶¶ 29-30.



## 25:2 ELEMENTS OF LIABILITY — FIRST-PARTY COMMON-LAW CLAIMS

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of bad faith breach of insurance contract, you must find all the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant acted unreasonably in (*insert appropriate description, e.g., “denying payment of the plaintiff’s claim”*);
3. The defendant knew that its (conduct) (position) was unreasonable or the defendant recklessly disregarded the fact that (his) (her) (its) (conduct) (position) was unreasonable; and
4. The defendant’s unreasonable (conduct) (position) was a cause of the plaintiff’s (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant’s affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff’s claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. This instruction should be used for common-law first-party claims when an insured brings a direct action for policy benefits against the insurer. **Travelers Ins. Co. v. Savio**, 706 P.2d 1258 (Colo. 1985); *see also* **Goodson v. Am. Standard Ins. Co.**, 89 P.3d 409, 414 (Colo. 2004) (“First-party bad faith cases involve an insurance company refusing to make or delaying payments owed directly to its insured under a first-party policy such as life, health, disability, property, fire, or no-fault auto insurance.”).

2. Appropriate instructions defining the terms used in this instruction must also be given. **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995) (failure to define standard of care in terms of reasonableness was reversible error); *see* Instruction 25:3 (defining “unreasonable conduct” and “unreasonable position”); Instruction 25:7 (defining “reckless disregard”); *see also* Instructions 9:18 – 9:21 (relating to causation). Instruction 25:6 may also be given with this instruction.

3. In first-party, common-law claims, in contrast to third-party claims covered under Instruction 25:1, the insurer must not only have acted unreasonably, but must also have known or have recklessly disregarded the fact that its conduct was unreasonable. *See Am. Family Mut. Ins. Co. v. Allen*, 102 P.3d 333 (Colo. 2004).

4. Certain first-party claimants may also seek statutory remedies pursuant to sections 10-3-1115 and 10-3-1116, C.R.S., which have a lesser burden of proof, requiring that the insurer's denial of or delay in paying an insurance claim was unreasonable ("without a reasonable basis"). *See* Instruction 25:4 and its Notes on Use.

5. This instruction, appropriately modified, is also applicable to a claim by an obligee against its surety for a bad faith breach of a surety contract. *Transamerica Premier Ins. Co. v. Brighton Sch. Dist. 27J*, 940 P.2d 348 (Colo. 1997); *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472 (Colo. App. 2003).

6. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form).

#### Source and Authority

1. This instruction is supported by *Savio*, 706 P.2d at 1274-75, and section 10-3-1113(3), C.R.S. *See also Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139 (Colo. 2007); *Pham v. State Farm Mut. Auto. Ins. Co.*, 70 P.3d 567 (Colo. App. 2003); *Hyden v. Farmers Ins. Exch.*, 20 P.3d 1222 (Colo. App. 2000); *Novell v. Am. Guar. & Liab. Ins. Co.*, 15 P.3d 775 (Colo. App. 1999); *Munoz v. State Farm Mut. Auto. Ins. Co.*, 968 P.2d 126 (Colo. App. 1998); *Herod v. Colo. Farm Bureau Mut. Ins. Co.*, 928 P.2d 834 (Colo. App. 1996); *South Park Aggregates, Inc. v. Nw. Nat'l Ins. Co.*, 847 P.2d 218 (Colo. App. 1992); *Burgess v. Mid-Century Ins. Co.*, 841 P.2d 325 (Colo. App. 1992); *Martin v. Principal Cas. Ins. Co.*, 835 P.2d 505 (Colo. App. 1991), *rev'd on other grounds sub nom. Budget Rent-A-Car Corp. v. Martin*, 855 P.2d 1377 (Colo. 1993); *Pierce v. Capitol Life Ins. Co.*, 806 P.2d 388 (Colo. App. 1990); *Southerland v. Argonaut Ins. Co.*, 794 P.2d 1102 (Colo. App. 1990); *Bucholtz v. Safeco Ins. Co. of Am.*, 773 P.2d 590 (Colo. App. 1988); *Bolz v. Sec. Mut. Life Ins. Co.*, 721 P.2d 1216 (Colo. App. 1986).

2. The 1991 amendment to section 8-43-304(1), C.R.S., did not abrogate the common-law tort of bad faith breach of insurance contract in the context of a workers' compensation claim. *Vaughan v. McMinn*, 945 P.2d 404 (Colo. 1997); *accord Brodeur*, 169 P.3d at 147.

3. An insurer's decision to deny benefits must be evaluated according to the information it had before it at the time of the denial. *Schultz v. GEICO Cas. Co.*, 2018 CO 87, ¶ 28, 429 P.3d 844, 849 (original proceeding striking the trial court's order allowing a post-ligation C.R.C.P. 35 examination as an attempt "to create new evidence to justify a previous benefits decision"); *Peiffer v. State Farm Mut. Auto. Ins. Co.*, 940 P.2d 967 (Colo. App. 1996), *aff'd*, 955 P.2d 1008 (Colo. 1998).

4. An insurer's duty of good faith and fair dealing "extends to the advertisement and purchase" of its insurance policies. *Estate of Casper v. Guar. Tr. Life Ins. Co.*, 2016 COA

167, ¶ 74, 421 P.3d 1184 (citing **Ballow v. PHICO Ins. Co.**, 875 P.2d 1354 (Colo. 1993)), *aff'd in part, rev'd in part on other grounds*, 2018 CO 43, 418 P.3d 1163. The court of appeals affirmed the trial court's giving of an instruction based on Insurance Regulation 4-2-3 governing industry advertising as valid, but not conclusive, evidence of insurer bad faith based on the conduct of the insurer's producers (the claims against whom settled prior to trial) in misrepresenting the nature of the policy purchased by plaintiff. *Id.* at ¶ 77.

5. Both a self-insured employer under the Workers' Compensation Act and an independent insurance adjuster acting on behalf of a self-insured employer owe a duty of good faith and fair dealing to an employee asserting a worker's compensation claim. **Scott Wetzel Servs., Inc. v. Johnson**, 821 P.2d 804 (Colo. 1991). A third-party administrator that makes benefit determinations, assumes some of the insured risk, and undertakes many of the insurer's obligations with the power, motive, and opportunity to act unscrupulously in handling claims has a special relationship with insureds from which liability for bad faith breach of insurance contract may arise despite lack of contractual privity with the insureds. **Cary v. United of Omaha Life Ins. Co.**, 68 P.3d 462 (Colo. 2003) (third-party administrator of city's health insurance plan owed duty of good faith to persons insured under plan); *see also* **Compton v. Safeway, Inc.**, 169 P.3d 135, 137 (Colo. 2007) (entity that self-insures through captive insurance company "functions like a traditional insurance company"). *But see* **Riccatone v. Colo. Choice Health Plans**, 2013 COA 133, ¶ 45, 315 P.3d 203 (holding, without addressing the foregoing authorities, that third-party administrator and plan advisor may not be held liable for common law first-party bad faith).

6. Plaintiff, awarded damages for breach of contract, common law and statutory bad faith, and punitive damages, died after the verdicts were rendered but before final judgment, the entry of which had to await determination of section 10-3-1116(1) attorney fees and court costs and calculation of prejudgment interest and allowable punitive damages. **Estate of Casper**, 2016 COA 167, ¶¶ 7-14. Decedent's estate was substituted as plaintiff, and insurer moved under the survival of claims statute to set aside the verdict and limit damages to the breach of contract award. The trial court denied the motion, finding that because the plaintiff was alive when the verdict entered, the claims were not abated. After determining the total amount of actual damages, including prejudgment interest, the court reduced the punitive damage award to the amount of actual damages and entered final judgment nunc pro tunc to the verdict date. The supreme court affirmed the denial of the insurer's motion, holding that the jury awards of noneconomic and punitive damages did not abate but reversed entry of judgment nunc pro tunc. **Guar. Tr. Life Ins. Co. v. Estate of Casper**, 2018 CO 43, ¶¶ 26-27, 418 P.3d 1163.

7. A UM/UIM claimant may recover section 13-21-101(a), C.R.S., prejudgment interest on benefits due only if all following elements are satisfied: (a) suit is filed for recovery of benefits; (b) prejudgment interest on damages is claimed in the complaint; (c) damages are awarded by the fact finder; and (d) final judgment is entered. **Munoz v. Am. Family Mut. Ins. Co.**, 2018 CO 68, ¶ 20, 425 P.3d 1128 (prejudgment interest does not apply to claims resolved by settlement).

8. An employee injured in the scope of employment while a passenger in a vehicle driven by a co-employee and owned by another co-employee is barred from asserting a UM/UIM claim on the owner's policy benefits "because he is not 'legally entitled to recover damages' from [the

driver] by virtue of the co-employee immunity rule.” **Ryser v. Shelter Mut. Ins. Co.**, 2019 COA 88, ¶ 37 (*cert. granted* Apr. 13, 2020). Employer and co-employee immunity from suit by fellow employees under Colorado’s Workers’ Compensation Act is not a bar to an injured employee’s claim for UM/UIM insurance benefits on the employee’s personal policy in excess of benefits due under the Act for damages caused by an at-fault co-employee driver. **Am. Family Mut. Auto. Ins. Co. v. Ashour**, 2017 COA 67, ¶¶ 66-73, 410 P.3d 753 (interpreting the phrase “legally entitled to recover” in section 10-4-609, C.R.S., to require only proof of tortfeasor fault and extent of damages to further the purposes of the UM/UIM statute).

9. A UIM policy provision requiring exhaustion of the at-fault driver’s liability coverage as a condition precedent to UIM coverage is void and unenforceable. **Tubbs v. Farmers Ins. Exch.**, 2015 COA 70, ¶ 11, 353 P.3d 924 (UIM insurer is liable for damages in excess of the tortfeasor’s liability limit regardless of whether the UIM insured exhausted or recovered any amount from the at-fault driver); *see* **Fisher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 57, ¶¶ 19-20, 419 P.3d 985 (same), *aff’d on other grounds*, 2018 CO 39, 418 P.3d 501.

10. A UM/UIM insurer does not “step into the shoes” of the at-fault tortfeasor on the issue of liability. **State Farm Mut. Auto. Ins. Co. v. Brekke**, 105 P.3d 177 (Colo. 2004); **Parsons ex rel. Parsons v. Allstate Ins. Co.**, 165 P.3d 809 (Colo. App. 2006). A claim for bad faith failure to pay UM/UIM benefits is a first-party cause of action. **Brekke**, 105 P.3d at 188-89. “[A] bad faith claim for nonpayment of UIM benefits cannot accrue until the insured has obtained a judgment against or . . . settled with the underinsured driver.” **Cork v. Sentry Ins.**, 194 P.3d 422, 428 (Colo. App. 2008); *accord* **Sanderson v. Am. Family Mut. Ins. Co.**, 251 P.3d 1213 (Colo. App. 2010).

11. In **Clementi v. Nationwide Mut. Fire Ins. Co.**, 16 P.3d 223 (Colo. 2001), the supreme court adopted the notice-prejudice rule in the context of UIM claims; where notice is untimely, insurer has the burden to prove by a preponderance that it was prejudiced by the delay. *See also* **Lauric v. USAA Cas. Ins. Co.**, 209 P.3d 190 (Colo. App. 2009) (applying notice-prejudice rule to violation of notice and “consent-to-settle” clauses in UM/UIM policies, and holding that a settlement in breach of such clauses gives rise to a rebuttable presumption that the insurer was prejudiced).

12. Nothing in the language of section 10-4-109, C.R.S., prevents an agent of a named insured from exercising either implied or apparent authority to reject UM/UIM coverage on behalf of its principal, and one named insured may effectively reject that coverage on behalf of another named or additional insured. **State Farm Mut. Auto. Ins. Co. v. Johnson**, 2017 CO 68, ¶¶ 18, 24, 396 P.3d 651.

13. Section 10-4-517, C.R.S., immunizes the Colorado Insurance Guaranty Association from liability for bad faith breach of insurance contract. **Mosley v. Indus. Claim Appeals Office**, 119 P.3d 576 (Colo. App. 2005).

14. A private insurance company acting in an independent-contractor capacity as a third-party administrator of retirement disability claims for the Public Employees Retirement Association, an instrumentality of the state, is not protected by governmental immunity. **Moran v. Standard Ins. Co.**, 187 P.3d 1162 (Colo. App. 2008). A bad faith claim against a self-insured

municipality is barred by governmental immunity, but an independent adjusting company acting on behalf of the municipality may be sued for bad faith. **Jordan v. City of Aurora**, 876 P.2d 38 (Colo. App. 1993). A nonprofit intermediary formed by public entities to provide insurance services to an immune self-insurance pool, on the other hand, is immune from liability as an “instrumentality” of a public entity and as a separate entity created by intergovernmental cooperation. **Colo. Special Dists. Prop. & Liab. Pool v. Lyons**, 2012 COA 18, ¶ 45, 277 P.3d 874 (third-party case).

15. A claim for bad faith breach of insurance contract is a tort and is, therefore, barred under section 13-80-102, C.R.S., unless brought within two years after the date on which both the injury and the cause of the injury are known or, through the exercise of reasonable diligence, should have been known. **Brodeur**, 169 P.3d at 147 & n.8 (noting that “injury” and “damage” are not synonymous; damage flows from injury and need not be known before a claim can accrue); *see also* **Olson v. State Farm Mut. Auto. Ins. Co.**, 174 P.3d 849 (Colo. App. 2007) (UM insurer has no quasi-fiduciary relationship to insured and has no duty to advise the insured when a statute of limitations will run); **Daugherty v. Allstate Ins. Co.**, 55 P.3d 224 (Colo. App. 2002) (duty to act in good faith and deal fairly with the insured is not triggered until some contractual duty imposed by the contract arises) (third-party case); **Harmon v. Fred S. James & Co.**, 899 P.2d 258 (Colo. App. 1994).

16. A bad faith claim in tort arising out of the handling of a workers’ compensation claim and a claim for remedies available under the Workers’ Compensation Act are separate and independent actions, and accrual of the tort claim is not dependent on final resolution of the workers’ compensation claim. **Brodeur**, 169 P.3d at 149 (affirming dismissal of bad faith claim as time-barred before final adjudication of independent administrative claim; accrual of tort claim was not equitably tolled by the workers’ compensation proceeding).

17. A tort claim for bad faith breach of insurance contract does not arise under the contract of insurance, and therefore, such a claim is not subject to time limits for filing suit that are contained in the policy. **Dupre v. Allstate Ins. Co.**, 62 P.3d 1024 (Colo. App. 2002); **Daugherty**, 55 P.3d at 228; **Emenyonu v. State Farm Fire & Cas. Co.**, 885 P.2d 320 (Colo. App. 1994); **Flickinger v. Ninth Dist. Prod. Credit Ass’n**, 824 P.2d 19 (Colo. App. 1991); **Coleman v. United Fire & Cas. Co.**, 767 P.2d 761 (Colo. App. 1988).

18. Unlike arbitration, participation in a policy appraisal process to determine value of a property loss does not entitle either the insured or the insurer to a judgment or immunize the insurer from bad faith claims. **Andres Trucking Co. v. United Fire & Cas. Co.**, 2018 COA 144, ¶¶ 17-25 (affirming finding that the appraisal award was final but reversing judgment for insurer on insured’s breach and statutory bad faith claims related to property loss).

19. An arbitration panel’s finding that an insurer’s refusal to pay insurance benefits was not willful and wanton does not preclude the tort claim of bad faith when the latter is based upon additional evidence of misconduct that could not have been presented to the panel. **Dale v. Guar. Nat’l Ins. Co.**, 948 P.2d 545 (Colo. 1997) (overruling **Leahy v. Guar. Nat’l Ins. Co.**, 907 P.2d 697 (Colo. App. 1995)). However, if the separate claims are based on the same conduct and evidence of that conduct was available for presentation at the time of arbitration, a panel’s determination that there was no willful and wanton conduct may preclude a tort claim for bad

faith if all collateral estoppel elements are proven. **Guar. Nat'l Ins. Co. v. Williams**, 982 P.2d 306 (Colo. 1999).

20. The post-litigation conduct of an insurer in prosecuting or defending claims involving its insured may or may not be admissible at trial as evidence of bad faith. In **American Family Insurance Co. v. Bowser**, 779 P.2d 1376 (Colo. App. 1989), the court of appeals observed that denial of a claim by filing a declaratory judgment action against an insured without an adequate investigation may constitute bad faith. In **Tozer v. Scott Wetzel Services, Inc.**, 883 P.2d 496 (Colo. App. 1994), the court held that the reasonableness of an insurer's decision to appeal an administrative law judge's decision presented an issue for the trial court to determine. *See also Jimenez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003) (record supported ALJ's finding that a failure to brief benefits issue was not necessarily indicative of bad faith appeal); *cf. Brandon v. Sterling Colo. Beef Co.*, 827 P.2d 559 (Colo. App. 1991) (expert opinion testimony that an ALJ's decision would be difficult to challenge successfully on appeal held insufficient to show that insurer's decision to appeal was bad faith). A division of the court of appeals confined **Tozer** to its workers' compensation context and held that the "lack of substantial justification" standard set forth in the attorney fees statute, §§ 13-17-101 to -106, C.R.S., unduly limits the definition of "unreasonableness" for purposes of insurance bad faith. **Am. Guar. & Liab. Co. v. King**, 97 P.3d 161, 168 (Colo. App. 2003) (affirming trial court's finding of bad faith against workers' compensation insurer for its maintenance of subrogation claim against injured worker to recover money he received in settlement of medical malpractice case).

21. An insurer's post-litigation conduct may be considered by the court in post-trial proceedings for purposes of determining whether an award of punitive damages should be modified. *See Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59 (Colo. 2005) (authorizing trebling of punitive damages award based on defendant's behavior during pendency of case); **Tait v. Hartford Underwriters Ins. Co.**, 49 P.3d 337 (Colo. App. 2001) (affirming trial court's increase of punitive damage award based on insurer's litigation conduct).

22. An insured cannot recover for bad faith breach of insurance contract if the insurance company has grounds to rescind the contract on the basis of the insured's fraudulent misrepresentations on the application for insurance. **Abdelsamed v. N.Y. Life Ins. Co.**, 857 P.2d 421 (Colo. App. 1992), *rev'd on other grounds sub nom. Hock v. N.Y. Life Ins. Co.*, 876 P.2d 1242 (Colo. 1994).

23. An insured's failure to submit to a medical examination requested by the insurer, as required by the policy, does not preclude liability of the insurer for bad faith breach of insurance based on conduct that occurred before that request. **Hansen v. State Farm Mut. Auto. Ins. Co.**, 936 P.2d 584 (Colo. App. 1996), *rev'd on other grounds*, 957 P.2d 1380 (Colo. 1998).

24. "[T]he duty of good faith owed by the insurer to the insured requires that it not act to prevent the occurrence of conditions to its performance." **Dupre v. Allstate Ins. Co.**, 62 P.3d 1024, 1028 (Colo. App. 2002) (summary judgment for insurer reversed where issue existed as to whether insurer was equitably estopped from relying on insured's failure to fulfill a condition as defense to claim).

25. To rely on an insured's prejudicial noncooperation to avoid coverage, an insurer must plead noncooperation, whether as an affirmative defense or failure of a condition precedent, with particularity as required by C.R.C.P. 9(c). **Soicher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 46, ¶¶ 25-30, 351 P.3d 559 (an insurer's denial of an insured's allegation that all obligations of the insurance contract have been satisfied is insufficient to put an insured on notice of a noncooperation defense).

26. An insured's duty of good faith and fair dealing is broader than a contractual duty to cooperate, but the consequences of breaching those duties are not necessarily the same. While proof of prejudicial noncooperation may bar a claim for policy benefits, a violation of the implied covenant may not, and an insurer's assertion of a bad faith defense is insufficient notice of "a contract-voiding noncooperation defense. . . ." *Id.* at ¶¶ 26-27.

27. **Parsons**, 165 P.3d at 814-18, discussed the differing concerns of litigation conduct depending upon whether the conduct was that of the insurer or the insurer's attorney and whether that evidence is heard by a jury or after trial by the court. The **Parsons** Division adopted the following test for determination of whether attorney litigation conduct may be introduced as evidence of bad faith in a jury trial: "[E]vidence of an attorney's post-filing litigation conduct may be admitted if the risks of unfair prejudice, confusion of the issues, or misleading the jury, and considerations of undue delay, waste of time, or the presentation of unnecessary cumulative evidence are substantially outweighed by the probative value of the evidence." *Id.* at 818. Applying this test, the **Parsons** Division affirmed the trial court's exclusion of attorney post-filing conduct tendered as evidence of bad faith where the probative value was light and "the dangers of unfair prejudice, misleading the jury, and confusing the issues were significant." *Id.* at 819.

28. An insured may maintain claims for both bad faith breach of insurance contract and outrageous conduct arising from the mishandling of a claim for insurance benefits. **McKelvy v. Liberty Mut. Ins. Co.**, 983 P.2d 42 (Colo. App. 1998). In a first-party case, a finding of fact that an insurer's conduct was outrageous necessarily implies that the conduct was willful and wanton within the meaning of section 10-4-708(1.8), C.R.S. (now repealed), and in bad faith as defined in this instruction. **Munoz v. State Farm Mut. Auto. Ins. Co.**, 968 P.2d 126 (Colo. App. 1998).

29. The Colorado Auto Accident Reparations Act (now repealed) does not preempt the common-law tort claim of bad faith breach of insurance contract. **Farmers Group, Inc. v. Williams**, 805 P.2d 419 (Colo. 1991).

### **ERISA Preemption**

30. A claim for bad faith breach of insurance contract may be preempted in cases involving insurance provided by an employer. The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 to -03 (2018) (ERISA), preempts state-law claims that "relate to" an employee benefit plan except for those state laws that are considered to "regulate" insurance. **Aetna Health Inc. v. Davila**, 542 U.S. 200, 217-18 (2004) ("[E]ven a state law that can arguably be characterized as 'regulating insurance' will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme."); **Rush Prudential HMO, Inc. v. Moran**, 536 U.S. 355 (2002) (state statute permitting independent medical review of HMO's denial of health insurance benefits for lack of medical necessity

regulated insurance and was not preempted where relief sought was available under ERISA); **UNUM Life Ins. Co. v. Ward**, 526 U.S. 358 (1999) (state notice-prejudice rule applicable only to insurance contracts did “regulate” insurance and, thus, was saved from preemption); **Pilot Life Ins. Co. v. Dedeaux**, 481 U.S. 41 (1987) (state bad faith law that applied to breach of any contract did not “regulate” insurance and was, therefore, preempted); **Pegram v. Herdrich**, 530 U.S. 211 (2000) (in context of physician-owned-and-operated HMO, plan beneficiary’s claim for medical malpractice arising from treating physician’s decision as to eligibility for coverage that was inextricably mixed with treatment decision was held not preempted).

31. ERISA and its regulations must be consulted because certain employer group benefit plans are specifically excluded from ERISA in its Safe Harbor provision. *See* 29 U.S.C. § 1003 (b) (2018); 29 C.F.R. § 2510.3-1(j) (2017) (listing factors to be considered).

32. For a discussion of factors to be considered in determining whether ERISA applies, see **Peters v. Boulder Ins. Agency, Inc.**, 829 P.2d 429 (Colo. App. 1991) (employer’s purchase of insurance does not alone establish an ERISA plan); **Pierce v. Capitol Life Ins. Co.**, 806 P.2d 388 (Colo. App. 1990) (bad faith claim of business owners/insureds not preempted where plaintiffs were not plan “participants” or “beneficiaries” entitled to bring ERISA claim). State courts have limited concurrent jurisdiction with federal courts over ERISA actions. **Estate of Damon**, 915 P.2d 1301 (Colo. 1996).

33. Even though a state law may “regulate insurance” within the meaning of ERISA’s Savings Clause, it will be barred by conflict preemption if the law provides for remedies unavailable under ERISA. In **Timm v. Prudential Insurance Co. of America**, 259 P.3d 521 (Colo. App. 2011), the court determined that section 10-3-1116(1), C.R.S., which provides for double recovery of benefits that are unreasonably delayed or denied, was preempted because the statutory cause of action allowed recovery of benefits that are not available under and therefore conflict with ERISA. *See also* § 10-3-1116(2), (3).



### 25:3 UNREASONABLE CONDUCT/UNREASONABLE POSITION — COMMON-LAW CLAIMS — DEFINED

(“Unreasonable conduct” means the failure to do an act that a reasonably careful insurance company would do, or the doing of an act that a reasonably careful insurance company would not do, under the same or similar circumstances, to protect the persons insured from [injuries] [damages] [losses].)

(“Unreasonable position” means a position taken by an insurance company with respect to a claim being made on one of its policies that a reasonably careful insurance company would not take under the same or similar circumstances.)

#### Notes on Use

1. This instruction should be used in conjunction with Instruction 25:1 or 25:2 whenever the second numbered paragraph of either of those instructions is given, and in appropriate cases, Instruction 25:6 should be used, as well.

2. If appropriate, an alternative phrase to “insurance company” (e.g., “self-insurer,” “person,” “independent insurance adjuster”) should be used to describe the defendant.

#### Source and Authority

1. This instruction is supported by **Travelers Insurance Co. v. Savio**, 706 P.2d 1258 (Colo. 1985); **Farmers Group, Inc. v. Trimble**, 691 P.2d 1138 (Colo. 1984); **Bankruptcy Estate of Morris v. COPIC Insurance Co.**, 192 P.3d 519 (Colo. App. 2008); **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995); and **Pierce v. Capitol Life Insurance Co.**, 806 P.2d 388 (Colo. App. 1990).

2. The reasonableness of the insurer’s conduct is to be determined objectively, according to industry standards. **Am. Family Mut. Ins. Co. v. Allen**, 102 P.3d 333 (Colo. 2004); **Goodson v. Am. Std. Ins. Co.**, 89 P.3d 409 (Colo. 2004); **Savio**, 706 P.2d at 1275. If the industry standard at issue is one that is within the common knowledge and experience of ordinary people, expert testimony is not required to establish those standards. **Allen**, 102 P.3d at 343 (reasonableness of insurer’s investigation into underlying events of automobile insurance claim was not technical question and did not require additional professional training beyond knowledge of average juror, nor did determination of what constitutes reasonable explanation for denying claim); **Surdyka v. DeWitt**, 784 P.2d 819, 822 (Colo. App. 1989) (if the “standard of care involves questions beyond that competence of ordinary persons, expert testimony may be required,” but not if the standard is within “the knowledge and experience of the average juror”); *see also* Instruction 25:6, Source and Authority ¶ 2 . An affidavit of an insurance expert that simply states conclusory opinions cannot create an issue of material fact to avoid summary judgment. **Zolman v. Pinnacol Assur.**, 261 P.3d 490 (Colo. App. 2011) (expert affidavit did not preclude summary judgment for insurer on issue of fair debatability).

3. An insurer's implied duty of good faith and fair dealing extends to the advertisement, marketing, and purchase of insurance policies, and whether the insurer breached this duty is determined objectively based on industry standards, including administrative rules and regulations, which may assist in establishing those standards. **Estate of Casper v. Guar. Tr. Life Ins. Co.**, 2016 COA 167, ¶¶ 74, 76, 421 P.3d 1184, 1198 (approving an instruction containing excerpts from an insurance regulation governing the advertising and sale of defendant's policy that stated the "regulations are valid, but not conclusive evidence of insurance industry standards"), *aff'd in part, rev'd in part on other grounds*, 2018 CO 43, 418 P.3d 1163.

4. A claim based upon the unreasonable conduct of an insurance carrier arises at the time that conduct occurs. **Bernhard v. Farmers Ins. Exch.**, 885 P.2d 265 (Colo. App. 1994), *aff'd on other grounds*, 915 P.2d 1285 (Colo. 1996). The fact that an insurer ultimately pays the covered benefit due does not "cure" pre-payment unreasonable conduct. **Goodson**, 89 P.3d at 414 (citing **Trimble**, 691 P.2d at 1142).

5. "Unreasonable conduct" may occur before, during, or after trial. **Bankr. Estate of Morris**, 192 P.3d 524-25 (discussing factors to be considered in assessing whether liability insurer failed to protect its insured by settling a third-party claim before or during trial and after excess judgment entered against its insured). "Each bad faith act constitutes a separate and distinct tortious act, on which the statute of limitation begins to run anew when the plaintiff becomes aware of the injury and its cause." **Cork v. Sentry Ins.**, 194 P.3d 422, 427 (Colo. App. 2008).

6. In claims arising under sections 10-3-1115 and -1116, C.R.S., "fair debatability," alone, cannot establish that an insurer's delay or denial in paying a covered benefit was reasonable, as a matter of law. **Vaccaro v. Am. Family Ins. Grp.**, 2012 COA 9M, ¶¶ 42-44, 275 P.3d 750. First party claims that are "fairly debatable" are subject to challenge by an insurer, even if the decision to deny coverage ultimately turns out to be mistaken. **Savio**, 706 P.2d at 1275; **Schuessler v. Wolter**, 2012 COA 86, ¶ 37, 310 P.3d 151; **Zolman**, 261 P.3d at 497. "If an insurer does not know that its denial of a claim is unreasonable and does not act with reckless disregard of a valid claim, the insurer's conduct would be based upon a permissible, albeit mistaken, belief that the claim is not compensable." **Pham v. State Farm Mut. Auto. Ins. Co.**, 70 P.3d 567, 572 (Colo. App. 2003) (affirming summary judgment for uninsured motorist insurer on claims for bad faith and willful and wanton tortious breach of contract where coverage issues were complicated, debatable, undecided under state law, and reliance on statutory language and existing case law was reasonable). "[A]n insurer will be found to have acted in bad faith only if it has intentionally denied, failed to process, or failed to pay a claim without a reasonable basis." **Zolman**, 261 P.3d at 497 (affirming summary judgment for workers' compensation insurer and holding that various bases existed to support reasonableness of insurer's denial of claimant's requests for change of physician and additional treatment).

7. That a claim is "fairly debatable" weighs against a finding of bad faith; however, without more, this factor is not outcome-determinative and, thus, is not "necessarily sufficient to defeat a bad faith claim as a matter of law." **Sanderson v. Am. Family Mut. Ins. Co.**, 251 P.3d 1213, 1217 (Colo. App. 2010) (disagreeing with trial court's conclusion that the presence of a "fairly debatable" issue, alone, justified summary judgment for insurer as a matter of law, but applying that standard to affirm the judgment below); *accord* **Schuessler**, 2012 COA 86, ¶ 38.

8. If an insurer lacks a “reasonable basis” to deny a claim, the claim is not “fairly debatable.” **Geiger v. Am. Std. Ins. Co.**, 192 P.3d 480 (Colo. App. 2008) (citing **Savio**, 706 P.2d at 1275). Where an insurance policy clearly and unambiguously defines an insured’s rights, an insurer may not disregard the plain meaning of contract terms, read additional “common sense” terms into the policy, or claim that an interpretation of an unambiguous terms is a “novel” theory of coverage to create a “fairly debatable” issue defense. *Id.* at 484. Likewise, a trial court’s ruling that disregards the plain meaning of the insurance policy and controlling rules of law cannot create a “fairly debatable” issue as to coverage. *Id.*

## 25:4 ELEMENTS OF LIABILITY — FIRST-PARTY STATUTORY CLAIMS

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of unreasonable (denial of) (delay in) payment of benefits, you must find all the following have been proved by a preponderance of the evidence:

1. The defendant (denied) (delayed) payment of benefits to the plaintiff; and
2. The defendant's (denial) (delay) of payment was without a reasonable basis.

If you find that either of these statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that both statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. If this instruction is given, then Instruction 25:10 must also be given.
2. If there are multiple claims, see section 10-3-1116(4), C.R.S.
3. Use whichever parenthesized portions of the instruction are appropriate.
4. If there are affirmative defenses, additional instructions should be given.
5. Sections 10-3-1115 and -1116, C.R.S., provide an insured whose claim for insurance benefits has been unreasonably delayed or denied a private right of action in addition to and separate from a common-law claim for first-party bad faith breach of insurance contract. **Kisselman v. Am. Family Mut. Ins. Co.**, 292 P.3d 964 (Colo. App. 2011). Unlike the common-law first-party claim recognized in **Travelers Insurance Co. v. Savio**, 706 P.2d 1258 (Colo. 1985), which requires proof of both unreasonable conduct and knowing or reckless disregard of unreasonableness, liability under this statutory claim requires only proof that the insurer acted unreasonably in delaying or denying payment (defined as “without a reasonable basis”); knowing or reckless disregard of unreasonableness need not be shown.
6. The statutory definition of “first-party claimant” set forth in section 10-3-1115(1)(b)(I), C.R.S., includes entities that assert an entitlement to benefits “on behalf of an

insured,” and is not limited to consumer insureds or their subrogee. In **Kyle W. Larson Enters., Inc. v. Allstate Ins. Co.**, 2012 COA 160M, ¶ 1, 305 P.3d 409, the court held that a roofing contractor that was accorded full authority by the insured to deal with the insurer on a roof damage claim was a “first-party claimant” entitled to bring an action under sections 10-3-1115 and -1116.

### Source and Authority

1. This instruction is supported by sections 10-3-1115 and -1116; **Hansen v. American Family Mutual Insurance Co.**, 2013 COA 173, ¶¶ 46-48, 383 P.3d 28, *rev'd on other grounds*, 2016 CO 46, 375 P.3d 115; **Hall v. American Standard Insurance Co.**, 2012 COA 201, ¶ 17, 292 P.3d 1196; and **Kisselman**, 292 P.3d at 972-73.

2. “[T]he ‘fairly debatable’ issue is not relevant to a statutory delay claim pursuant to section 10-3-1116.” **Nibert v. GEICO Cas. Co.**, 2017 COA 23, ¶ 15 (agreeing with cases limiting relevancy of the fair debatability concept to first-party common law bad faith claims).

3. An insured’s lack of cooperation may be considered by the jury in determining whether an insurer’s delay in payment was reasonable. **Fisher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 57, ¶ 42, 419 P.3d 985, *aff'd on other grounds*, 2018 CO 39, 418 P.3d 501.

4. An insurer’s unreasonable delay or denial of payment as to part of a UIM claim (medical expenses) may subject it to liability even though a reasonable dispute existed as to other components of the claim. **Fisher**, 2015 COA 47, ¶ 36 (insurance contract contained no requirement that insured establish all damages as a prerequisite to the insurer’s obligation to pay any damages, and any provision that did limit statutorily mandated UIM coverage would be unenforceable).

5. UIM benefits are owed to the extent that the insured’s damages exceed the amount of the at-fault driver’s liability limits up to the UIM limit of coverage, and the amount of damages the insured is entitled to collect from the underinsured driver need not be established as a condition to UIM coverage. **Fisher**, 2015 COA 47, ¶¶ 19 & 20.

6. Sections 10-3-1115 and -1116 apply prospectively to insurer conduct occurring after their August 5, 2008, effective date, even if the insured’s original claim was made before that date. **Kisselman**, 292 P.3d at 976 (distinguishing Colorado’s refusal to recognize continuing acts of bad faith as giving rise to new claims); *see* **Dale v. Guar. Nat’l Ins. Co.**, 948 P.2d 545 (Colo. 1997) (while ongoing bad faith is relevant to a common-law claim, it does not give rise to additional bad faith claims).

7. Conflict preemption precludes a claim under this statute brought in connection with a policy governed by ERISA because the double-benefit remedy provided by section 10-3-1116(1) supplements and therefore conflicts with remedies available under ERISA. **Timm v. Prudential Ins. Co. of Am.**, 259 P.3d 521 (Colo. App. 2011).

8. Insureds’ entitlement to de novo judicial review and trial by jury under section 10-3-1116(3), C.R.S., is not subject to arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-16

(2018). **Meardon v. Freedom Life Ins. Co.**, 2018 COA 32, ¶¶ 15-20, 417 P.3d 929. The provisions of section 10-3-1116(3) incorporated into the insurance contract by the policy's conformity to state law provision invalidate a mandatory arbitration clause in a health insurance policy for claims within the ambit of the statute. *Id.*

## 25:5 UNREASONABLE DELAY OR DENIAL

**An insurer’s delay or denial in authorizing payment of a covered benefit is unreasonable if that action is without a reasonable basis.**

### Notes on Use

This instruction relates to statutory claims provided by sections 10-3-1115 and -1116, C.R.S., and should be given with Instruction 25:4.

### Source and Authority

1. This instruction is supported by section 10-3-1115(2), which provides that an insurer’s delay or denial in authorizing payment of a covered benefit is “unreasonable” if that conduct is without a reasonable basis. **Am. Family Mut. Ins. Co. v. Hansen**, 2016 CO 46, ¶ 32, 375 P.3d 115; **Fisher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 57, ¶¶ 53-54, 419 P.3d 985, *aff’d on other grounds*, 2018 CO 39, 418 P.3d 501; *see* § 10-3-1113(1), (4), C.R.S.; *see also* § 10-3-1104(1)(h)(I)–(XIV), C.R.S.

2. Section 10-3-1113(1) provides that an insurer acts in breach of its duty of good faith and fair dealing if it “delays or denies payment without a reasonable basis.”

3. Expert testimony is not required to establish the standard of insurer unreasonableness under section 10-3-1115 when the insurer’s conduct is determined by legislative enactment or when the standard is within the common knowledge and experience of ordinary people. **Fisher**, ¶¶ 15 & 54.

4. Exclusion of industry standard expert testimony that consisted of bare assertions and conclusory opinions that the insurer’s conduct was consistent with industry standards, without description of those standards or how the insurer’s conduct comported with those standards, was not so prejudicial as to require a new trial. **Fisher**, ¶ 60.

5. CRE 408 precludes admission of evidence of an insurer’s refusal to pay the amount of a rejected initial offer to settle a UIM claim as proof of the amount of undisputed benefits owed. **Fisher**, ¶ 15.

6. “Whether the insurer has acted reasonably in denying or delaying approval of a claim will be determined on an objective basis, requiring proof of the standards of conduct in the industry.” **Travelers Ins. Co. v. Savio**, 706 P.2d 1258, 1275 (Colo. 1985) (addressing first-party common-law claim).

7. The fact that a claim may be “fairly debatable” in the context of a first-party common law claim for bad faith does not establish, as a matter of law, that an insurer’s delay or denial of benefits was reasonable under section 10-3-1115(2). **Vaccaro v. Am. Family Ins. Grp.**, 2012 COA 9M, ¶ 42, 275 P.3d 750 (citing **Sanderson v. Am. Family Mut. Ins. Co.**, 251 P.3d 1213, 1217 (Colo. App. 2010)).

8. In **Hansen**, 2016 CO 46, ¶ 32, the court held that an insurer's denial of a claim in reliance on an unambiguous insurance contract term was reasonable and could not establish liability under section 10-3-1115(2).



**25:6 UNREASONABLE CONDUCT/UNREASONABLE POSITION — STATUTORY VIOLATIONS — DEFINED**

**The statutes of Colorado prohibit an insurance company from willfully:** *(Insert from § 10-3-1104 (1)(h)(I) through (XIV), C.R.S., using separately numbered subparagraphs for each, a suitable description of any relevant “unfair claims settlement practice” of which there is sufficient evidence).*

**You may consider any such conduct in determining whether the defendant acted unreasonably in (denying) (or) (delaying) payment if you find that:**

- 1. The defendant (*name*) willfully engaged in such conduct;**
- 2. Such conduct caused or contributed to the defendant’s (denial) (or) (delay) of payment of the plaintiff’s insurance claim; and**
- 3. Such conduct caused or contributed to any of the plaintiff’s claimed (injuries) (damages) (losses).**

**Notes on Use**

1. Under section 10-3-1113(4), C.R.S., this instruction should be used only in cases in which there is sufficient evidence of a willful violation of one or more subparagraphs (I) through (XIV) of section 10-3-1104(1)(h), C.R.S., Colorado’s version of the Unfair Claim Settlement Practices Act (UCSPA). This instruction does not apply, however, to violations of more recently added subparagraphs (XV) through (XVII) of section 10-3-1104(1)(h), because those subparagraphs are not included in the cross reference made in section 10-3-1113(4) to section 10-3-1104(1)(h)(I)-(XIV).

2. When this instruction is given, additional instructions should also be given, if necessary, defining any legal terms in any applicable subparagraph that might not otherwise be understandable to the jury.

3. Section 10-3-1113, which authorizes admission of evidence that the insurer violated section 10-3-1104(1)(h), refers only to the delay or denial of payment. Caselaw, however, has established that an insurer’s duties of good faith and fair dealing are broader than the obligation not to delay or withhold payment unreasonably and extend to the entire relationship between the parties. *See Ballow v. PHICO Ins. Co.*, 875 P.2d 1354 (Colo. 1993). Whether this instruction may be modified for use when the alleged misconduct at issue is other than denial of or delay in payment of a claim has not yet been expressly decided. *See Dale v. Guar. Nat’l Ins. Co.*, 948 P.2d 545 (Colo. 1997) (insurance practices prohibited by statute illustrate conduct that legislature has determined to be unreasonable).

4. If this instruction is given and there is a dispute as to whether payment was denied or otherwise delayed, appropriate modifications should be made in the last paragraph of the instruction.

## Source and Authority

1. This instruction is supported by section 10-3-1113(4), which specifically incorporates subparagraphs (I) through (XIV) of section 10-3-1104(1)(h), but which does not incorporate later-added subparagraphs (XV) through (XVII) of section 10-3-1104(1)(h). *See also Peiffer v. State Farm Mut. Auto. Ins. Co.*, 940 P.2d 967 (Colo. App. 1996) (in determining whether insurer's delay in paying benefits or its denial of benefits was reasonable, jury may consider evidence that insurer's conduct violated any of the applicable subparagraphs of section 10-3-1104(1)(h)), *aff'd*, 955 P.2d 1008 (Colo. 1998).

2. Where plaintiff relied on statutory violations and a failure to investigate his claim, proof of industry standards through expert testimony was unnecessary to establish a bad faith breach of insurance contract. *Giampapa v. Am. Family Mut. Ins. Co.*, 919 P.2d 838 (Colo. App. 1995). In *American Family Mutual Insurance Co. v. Allen*, 102 P.3d 333, 344 (Colo. 2004), the supreme court observed that the UCSPA regulates insurers' conduct, but does not create a private right of action; nonetheless, the court held that the Act's standards "may be used as valid, but not conclusive, evidence of industry standards . . . ."

3. In *Parsons ex rel. Parsons v. Allstate Insurance Co.*, 165 P.3d 809, 817 (Colo. App. 2006), the court recognized that certain practices that violate the UCSPA, "such as not attempting in good faith to effectuate a prompt, fair, and equitable settlement once liability has become reasonably clear," might implicate conduct occurring after litigation is commenced. Those factors may be considered as evidence of an insurer's post-filing litigation conduct if the evidence satisfies the test established in *Parsons*. *See id.*

4. Reversing summary judgment in favor of an insurer that proved its compliance with a Department of Insurance regulation that declares non-compliance a presumptive violation of section 10-3-1104(1)(h)(III) and (IV), the court held that compliance meant, at best, the absence of a presumptive statutory violation, not a right to judgment in favor of the insurer. *Reyher v. State Farm Mut. Auto. Ins. Co.*, 171 P.3d 1263 (Colo. App. 2007).

## **25:7 RECKLESS DISREGARD — DEFINED**

**An insurance company recklessly disregards the unreasonableness of its (conduct) (position) when it (acts) (takes a position) with knowledge of facts that indicate that its (conduct) (position) lacks a reasonable basis or when it is deliberately indifferent to information concerning the claim.**

### **Notes on Use**

1. This instruction relates only to common-law first-party claims and must be given with Instruction 25:2 but must not be given in relation to a statutory claim provided by sections 10-3-1115 and -1116, C.R.S. **Vaccaro v. Am. Family Ins. Co.**, 2012 COA 9M, ¶ 21, 275 P.3d 750 (citing **Kisselman v. Am. Family Mut. Ins. Co.**, 292 P.3d 964 (Colo. App. 2011)).

2. If appropriate, an alternative phrase to “insurance company” (e.g., “self-insurer,” “surety,” “person,” “independent insurance adjuster”) should be used to describe the defendant.

### **Source and Authority**

This instruction is supported by **Travelers Insurance Co. v. Savio**, 706 P.2d 1258 (Colo. 1985), and section 10-3-1113(3), C.R.S.

## 25:8 DUTY OF GOOD FAITH AND FAIR DEALING

**An insurance company owes to those it insures the duty of good faith and fair dealing. That duty is breached if the company unreasonably (delays payment) (denies payment) (fails to communicate promptly and effectively) (*insert description of other conduct or position that may constitute bad faith breach of insurance contract*)(,) (.) (and the company knows that its [delay] [denial] [*insert description of other conduct or position that may constitute bad faith breach of insurance contract*] is unreasonable or it recklessly disregards whether its [conduct] [position] is unreasonable).**

### Notes on Use

1. This instruction should be given in conjunction with Instruction 25:1 or 25:2. *See Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995) (failure to define standard of care in terms of reasonableness was reversible error).
2. For the definition of “reckless disregard,” see Instruction 25:7.
3. When appropriate, an alternative phrase to “insurance company” (e.g., “self-insurer,” “surety,” “person,” “independent insurance adjuster”) should be used to describe the defendant.
4. The last parenthesized clause of this instruction must be included when this instruction is given in a common-law first-party case with Instruction 25:2 but must be omitted when this instruction is given in a common-law third-party case with Instruction 25:1. *See* § 10-3-1113(1)–(3), C.R.S.
5. The last parenthesized clause must also be omitted in a statutory first-party claim based on section 10-3-1116(1), C.R.S. **Kisselman v. Am. Family Mut. Ins. Co.**, 292 P.3d 964, 973 (Colo. App. 2011) (The statutory claim “expressly deletes [this] requirement.”).

### Source and Authority

1. This instruction is supported by **Travelers Ins. Co. v. Savio**, 706 P.2d 1258 (Colo. 1985); **Farmers Group, Inc. v. Trimble**, 691 P.2d 1138 (Colo. 1984); and section 10-3-1113(2) & (3). *See also* Source and Authority to Instructions 25:1 and 25:2.
2. An insurer’s duties of good faith and fair dealing arise from the special nature of insurance (to provide financial and emotional security against calamity) and the special relationship between insurer (superior in economic power and having control over decision to provide benefits) and insured. **State Farm Mut. Auto. Ins. Co. v. Brekke**, 105 P.3d 177 (Colo. 2004); **Transamerica Premier Ins. Co. v. Brighton Sch. Dist. 27J**, 940 P.2d 348 (Colo. 1997); **Scott Wetzel Servs., Inc. v. Johnson**, 821 P.2d 804 (Colo. 1991).
3. Whether an insurer has breached its duties of good faith and fair dealing presents a question of “reasonableness under the circumstances.” **Trimble**, 691 P.2d at 1142.

4. The term bad faith breach of insurance contract is a misnomer insofar as it may suggest a requirement to prove bad motive or evil intent on the part of the insurer. In light of the nature of insurance and the special relationship between insurer and insured, insurers in the third-party context owe their insureds duties that are “quasi-fiduciary” in nature. **Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139 (Colo. 2007) (citing **Trimble**, 691 P.2d at 1141) (quasi-fiduciary duty owed to insureds in third-party context because insurer has absolute right control defense of insured); **Goodson v. Am. Std. Ins. Co.**, 89 P.3d 409 (Colo. 2004) (quasi-fiduciary relationship exists between insurer and insured in third-party context because insurer stands in position of trust with regard to its insured); **Bankr. Estate of Morris v. COPIC Ins. Co.**, 192 P.3d 519 (Colo. App. 2008) (citing **Trimble**, 691 P.2d at 1141-42, in discussing insurer’s duties to insured in third-party context); **Olson v. State Farm Mut. Auto. Ins. Co.**, 174 P.3d 849 (Colo. App. 2007) (citing **Brodeur** and **Goodson**, and rejecting argument that quasi-fiduciary duty required insurer to inform insured in first-party context about when statute of limitations would expire).

5. The quasi-fiduciary relationship is limited to “areas in which the insurer exercises a strong degree of control over the insured’s interests.” **Bernhard v. Farmers Ins. Exch.**, 915 P.2d 1285, 1289 (Colo. 1996) (discussing difference between quasi-fiduciary and true fiduciary duties); *see also* **Brodeur**, 169 P.3d at 152 (holding that the relationship between the insured and the workers’ compensation insurer is neither a fiduciary nor a quasi-fiduciary relationship). *But see* **Brekke**, 105 P.3d at 189 (aspect of quasi-fiduciary relationship that is significant in uninsured motorist context is insurer’s duty to investigate and adjust in good faith); **Peterman v. State Farm Mut. Auto. Ins. Co.**, 961 P.2d 487 (Colo. 1998) (even though insurer almost adversary to insured in uninsured motorist context, insurer still owes contractual and quasi-fiduciary duties to insured). Neither **Brekke** nor **Peterman** has been expressly overruled.

6. The insurer’s duty to act in good faith is not limited to the failure to provide policy benefits, but permeates the entire relationship between the insurer and insured. **Ballow v. PHICO Ins. Co.**, 875 P.2d 1354 (Colo. 1993); *see* § 10-1-101, C.R.S. (“[A]ll persons having to do with insurance services to the public [shall] be at all times actuated by good faith in everything pertaining thereto . . . .”); **Wagner v. Travelers Prop. Cas. Co. of Am.**, 209 P.3d 1119, 1128 (Colo. App. 2009) (describing section 10-1-101 “as a standard of care applicable to the insurance industry actionable as a private claim”).

7. Bad faith conduct is cumulative and is to be determined based upon the entire course of conduct between the insurer and the insured. **Dale v. Guar. Nat’l Ins. Co.**, 948 P.2d 545 (Colo. 1997) (overruling **Leahy v. Guar. Nat’l Ins. Co.**, 907 P.2d 697 (Colo. App. 1995)); *accord* **Pham v. State Farm Mut. Auto. Ins. Co.**, 70 P.3d 567, 572 (Colo. App. 2003) (“Bad faith breach of an insurance contract encompasses the entire course of conduct and is cumulative.”).

8. The duty of good faith and fair dealing does not arise, however, until the insurer is called upon to perform some duty imposed by the insurance contract. **Daugherty v. Allstate Ins. Co.**, 55 P.3d 224 (Colo. App. 2002). *But see* **Mullen v. Allstate Ins. Co.**, 232 P.3d 168 (Colo. App. 2009) (apparently assuming insurer’s failure to inform insured of certain characteristics of the policy at the time of issuance could be bad faith, though affirming summary judgment order that no duty to disclose was violated).

9. The fact that an insurer eventually pays all benefits due under an insurance contract is not dispositive of its liability for bad faith because it is the insurer's affirmative act of refusing to pay benefits when due and failing to act in good faith, not the condition of nonpayment, that forms the basis of its liability. **Goodson**, 89 P.3d at 414 (citing **Trimble**, 691 P.2d at 1142).

10. An insurance company owes to those it insures the duty to communicate promptly and effectively with the insured and with anyone it was reasonably aware had or needed information pertaining to the insured's claim. **Dunn v. Am. Family Ins.**, 251 P.3d 1232 (Colo. App. 2010); *see* § 10-3-1104(1)(h)(II) & (V), C.R.S.

11. Although an insurance company owes a duty to its insured to adjust a claim in good faith, an insurance company owes no such duty to a third-party making a claim against its insured. **Goodson**, 89 P.3d at 415; **Lazar v. Riggs**, 79 P.3d 105 (Colo. 2003).

## 25:9 ACTUAL DAMAGES — COMMON-LAW CLAIMS

**Plaintiff, (name), has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) (its) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff’s damages, if any, that were caused by the bad faith breach of insurance contract by the defendant(s), (name[s]) (and the [insert appropriate description, e.g., “negligence”] of any designated nonparties).**

**In determining these damages, you shall consider the following:**

**1. Any noneconomic losses or injuries that plaintiff has had or will probably have in the future, including:** *(insert any recoverable noneconomic losses for which there is sufficient evidence); and*

**2. Any economic losses that plaintiff has had or will probably have in the future, including:** *(insert any recoverable economic losses for which there is sufficient evidence).*

**(3. Any [physical impairment] [or] [disfigurement]. In considering damages in this category, you shall not include damages again for losses or injuries already determined under either numbered paragraph 1 or 2.)**

### Notes on Use

1. The Notes on Use to Instruction 6:1 are also applicable to this instruction.
2. This instruction applies only to common-law claims under Instructions 25:1 and 25:2 and may not be given in statutory first-party claims under sections 10-3-1115 and -1116, C.R.S., submitted under Instructions 25:4 and 25:10.
3. The amount of damages requested should not be stated in this instruction or in the statement of the case. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974).
4. When the insurer spotlights the insured’s preexisting mental or physical condition in an attempt to avoid or reduce liability to pay benefits, a “thin-skull” instruction should be given. **State Farm Mut. Auto. Ins. Co. v. Peiffer**, 955 P.2d 1008 (Colo. 1998).
5. An insured’s judgment for economic damages in the form of covered UM/UIM benefits may not be set off by amounts insurer paid pursuant to medical payments (MedPay) coverage. **Calderon v. Am. Family Mut. Ins. Co.**, 2016 CO 72, ¶ 17, 383 P.3d 676. However, setoff for MedPay benefits paid is permissible when it is part of a negotiated settlement agreement prior to suit or judgment. **Arline v. Am. Family Mut. Ins. Co.**, 2018 COA 82, ¶ 13, 431 P.3d 670.

### Source and Authority

1. This instruction is supported by **Farmers Group, Inc. v. Trimble**, 658 P.2d 1370 (Colo. App. 1982, *aff’d*, 691 P.2d 1138 (Colo. 1984). *See also* **Ballow v. PHICO Ins. Co.**, 878

P.2d 672 (Colo. 1994) (in action for bad faith breach of insurance contract, insured is entitled to recover damages based on traditional tort principles of compensation for injuries actually suffered, including emotional stress); **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003); **Herod v. Colo. Farm Bureau Mut. Ins. Co.**, 928 P.2d 834 (Colo. App. 1996); **Bernhard v. Farmers Ins. Exch.**, 885 P.2d 265 (Colo. App. 1994), *aff'd on other grounds*, 915 P.2d 1285 (Colo. 1996); **South Park Aggregates, Inc. v. Nw. Nat'l Ins. Co.**, 847 P.2d 218 (Colo. App. 1992) (citing instruction with approval).

2. For a comparison of damages recoverable in contract and tort for an insurer's breach of the duty to defend a third-party action, see **Bainbridge, Inc. v. Travelers Casualty Co.**, 159 P.3d 748 (Colo. App. 2006).

3. If an insurance company acts unreasonably in refusing to settle for policy limits, but later tenders those limits, the damages incurred by the insured after the tender of limits that were not caused by the insurer's conduct are not recoverable. However, the insurer may be liable for damages incurred after the policy limits have been tendered, if the refusal to accept the tender could reasonably be viewed as a natural and probable consequence of the earlier unreasonable conduct of the insurer. **Bernhard**, 885 P.2d at 270.

4. In determining economic damages under this instruction, the jury may consider the benefits the insured should have received under the policy, and this consideration is proper even in cases where the insured's claim for breach of contract is time-barred. **Herod**, 928 P.2d at 837 (“[M]erely because the damages for bad faith breach may have been the same as those for breach of contract does not mean that the jury's award was improper.”).

5. Economic damages need not be ascertainable by arithmetic formula but may be an approximation if the record shows that the fact of damages is certain and provides some evidence that allows the jury to reasonably estimate damages. **Schuessler v. Wolter**, 2012 COA 86, ¶¶ 48-57, 310 P.3d 151 (refusal to grant new trial based on sufficiency of plaintiff's damages).

6. Prejudgment interest is a form of compensatory damages and, unless the policy states otherwise, is subject to a liability policy's indemnity limits. **Old Republic Ins. Co. v. Ross**, 180 P.3d 427 (Colo. 2008) (citing **Allstate Ins. Co. v. Starke**, 797 P.2d 14 (Colo. 1990)). In a bad faith breach of contract action against a liability insurer, however, prejudgment interest is not subject to limits because “the insurer cannot use [the insurance] contract to shield itself from liability for its own wrongdoing.” **Ross**, 180 P.2d at 437.

7. In assessing prejudgment interest for contractual benefits wrongfully delayed or denied, the wrongful withholding interest statute, § 5-12-102(1)(a), C.R.S., not the personal injury interest statute, §13-21-101, C.R.S., is to be applied. **Schuessler**, 2012 COA 86, ¶ 102; *cf.* **USAA v. Parker**, 200 P.3d 350 (Colo. 2009) (Court held that a claim for UIM benefits is premised on a claim for bodily injury and sounds in tort, not contract. Therefore, the proper prejudgment interest rate to be applied to recovery in the form of UIM benefits is that provided for personal injury recoveries in section 13-21-101 (nine percent per annum)).

8. Where an insurer's conduct is proven to constitute a deceptive practice in violation of the Colorado Consumer Protection Act (CCPA), attorney fees may be recovered, § 6-1-



113(2)(b), C.R.S., and if “bad faith conduct” is established by clear and convincing evidence, treble damages may also be awarded. § 6-1-113(2). The CCPA defines “bad faith conduct” as “fraudulent, willful, knowing, or intentional conduct that causes injury.” § 6-1-113(2.3).

**Showpiece Homes Corp. v. Assurance Co. of Am.**, 38 P.3d 47 (Colo. 2001) (CCPA applies to sale of insurance and to post-sale bad faith handling of an insured’s claims). In **Coors v. Security Life of Denver Insurance Co.**, 91 P.3d 393 (Colo. App. 2003), *aff’d in part, rev’d in part on other grounds*, 112 P.3d 59 (Colo. 2005), the court of appeals stated that **Showpiece Homes** does not eliminate the requirement that plaintiff must establish defendant’s conduct constitutes a deceptive trade practice as identified in section 6-1-105, C.R.S., and also that a violation of the Unfair Claims-Deceptive Practices Act does not constitute, per se, a violation of the CCPA. However, simply asserting that an insurer acted in bad faith will not justify proceeding on a CCPA claim, because showing bad faith does not fulfill the element of significant public impact, which is one of the required elements of a CCPA claim. **Bankruptcy Estate of Morris v. COPIC Ins. Co.**, 192 P.3d 519 (Colo. App. 2008); *see also* Chapter 29 & Instruction 29:4.

9. As noted in **Goodson v. American Standard Insurance Co.**, 89 P.3d 409 (Colo. 2004), noneconomic damages enumerated in section 13-21-102.5(2)(b), C.R.S. (i.e., emotional distress, pain and suffering, inconvenience, fear and anxiety, and impairment of the quality of life) are recoverable for an insurer’s bad faith breach of insurance contract without proof of any accompanying substantial financial or property loss. **Goodson**, 89 P.3d at 416-17 (overruling in part **Farmers Group, Inc. v. Trimble**, 768 P.2d 1243 (Colo. App. 1988)).

10. Section 13-15-111.5, C.R.S., “requires apportionment of liability among negligent and intentional tortfeasors who contributed to an indivisible injury . . . .” **Slack v. Farmers Ins. Exch.**, 5 P.3d 280, 282 (Colo. 2000) (PIP insurer, against whom claims for negligence and bad faith were stated based upon negligent referral of claimant to an IME examiner who sexually assaulted claimant, permitted to designate examiner as nonparty at fault).

11. Attorney fees are recoverable as damages for common-law bad faith breach of insurance contract only when those fees are a wrongfully denied benefit of the insurance contract itself (e.g., fees incurred as a result of a liability insurer’s refusal to provide a defense); but fees incurred in prosecuting a bad faith tort action are not recoverable. **Bernhard v. Farmers Ins. Exch.**, 915 P.2d 1285 (Colo. 1996) (disapproving of **Trimble**, 768 P.2d at 1246, insofar as it allowed recovery of attorney fees incurred in obtaining benefits tortiously withheld).

## 25:10 BENEFIT AMOUNT — FIRST-PARTY STATUTORY CLAIMS

**Plaintiff, (name), has the burden of proving, by a preponderance of the evidence, the extent of (his) (her) (its) benefits that were improperly (delayed) (denied). If you find in favor of the plaintiff on (his) (her) (its) claim under Instruction No. \_\_ (insert number of instruction corresponding to Instruction 25:4), you must determine the total dollar amount of the benefits for which payment was (delayed) (denied) without a reasonable basis.**

### Notes on Use

1. Use whichever parenthesized or bracketed portions are appropriate.
2. The remedies provided by section 10-3-1116(1), C.R.S., include “reasonable attorney fees and court costs and two times the covered benefit,” both of which are imposed as statutory damages by the court post-trial. **Hall v. Am. Standard Ins. Co.**, 2012 COA 201, ¶ 20, 292 P.3d 1196. This instruction asks the jury to determine the amount of the covered benefit for which payment was unreasonably delayed or denied for use by the court in awarding the “two times” statutory damage.
3. This instruction should not be given if the amount of the covered benefit is not disputed. *See Hansen v. Am. Family Mut. Ins. Co.*, 2013 COA 173, ¶ 58, 383 P.3d 28 (affirming judgment for two times covered UIM benefit and attorney fees and costs where the jury found unreasonable delay in payment of the benefit amount paid pursuant to a pretrial settlement), *rev'd on other grounds*, 2016 CO 46, 375 P.3d 115.
4. Section 10-3-1116(4) provides that “[d]amages awarded pursuant to this section shall not be recoverable in any other action or claim.”
5. The statutory damage remedies provided by section 10-3-1116(1) are not subject to the one-year limitation of actions period in section 13-80-103(1)(d), C.R.S., as they were not intended by the legislature to operate as a penalty in the context of section 13-80-103(1)(d) applicable to “any penalty or forfeiture.” **Rooftop Restoration, Inc. v. Am. Family Mut. Ins. Co.**, 2018 CO 44, ¶ 16, 418 P.3d 1173.
6. The award of “two times the covered benefit” allowed under section 10-3-1116(1) may not be reduced by the amount of an unreasonably delayed benefit paid prior to judgment. **Am. Family Mut. Ins. Co. v. Barriga**, 2018 CO 42, ¶ 11, 418 P.3d 1181.
7. Under section 10-3-1115, C.R.S., “insurers have a duty not to unreasonably delay or deny payment of covered benefits, even though other components of an insured’s claim may still be reasonably in dispute.” **State Farm Mut. Auto. Ins. Co. v. Fisher**, 2018 CO 39, ¶ 27, 418 P.3d 501, 506.

### Source and Authority

1. This instruction is supported by section 10-3-1116(1), (4); and **Kisselman v. American Family Mutual Insurance Co.**, 292 P.3d 964 (Colo. App. 2011).

2. Until fees and costs awarded as statutory damages pursuant to section 10-3-1116(1) are reflected in a written order, judgment is not final for purposes of appeal. **Hall**, 2012 COA 201, ¶ 21.

3. Award of reasonable attorney fees under section 10-3-1116(1) is not limited by a contingent agreement between counsel and the insured, which is but one factor in trial court's determination of reasonable fees. **Melssen v. Auto-Owners Ins. Co.**, 2012 COA 102, ¶ 70, 285 P.3d 328.

4. Fees incurred in prosecuting the statutory claim for attorney fees ("fees-on-fees") are recoverable pursuant to section 10-3-1116(1). When payment of a covered benefit is delayed without a reasonable basis, two times the amount of that benefit remains recoverable despite the prior payment. **Nibert v. Geico Cas. Co.**, 2017 COA 23, ¶ 25. The statutory remedy creates an exception to the American Rule and authorizes "fees on fees" recovery because attorney fees are part of the damage calculation. *Id.* at ¶ 32; **Stresscon Corp. v. Travelers Prop. Cas. Co. of Am.**, 2013 COA 131, ¶ 120, 373 P.3d 615, *rev'd on other grounds*, 2016 CO 22M, 370 P.3d 140.

5. In determining the maximum limit on recoverable punitive damages for purposes of final judgment, attorney fees and costs awarded under section 10-3-1116(1) are a component of actual damages to be included in calculating the permissible amount of punitive damages owed to a prevailing plaintiff. **Guar. Tr. Life Ins. Co. v. Estate of Casper**, 2018 CO 43, ¶¶ 1, 25, 418 P.3d 1163.

6. Due to their shared elements, litigating a common law and statutory bad faith claim in the same case is "inescapably intertwined." A trial court has the discretion to award reasonable attorney fees without limiting them to work performed on the statutory claim. *Id.* at ¶¶ 33, 37 (citing **Fisher v. State Farm Mut. Auto. Ins. Co.**, 2015 COA 57, ¶ 23, 419 P.3d 985, *aff'd on other grounds*, 2018 CO 39, 418 P.3d 501); *see also* **Estate of Casper v. Guar. Tr. Life Ins. Co.**, 2016 COA 167, ¶ 81, 421 P.3d 1184 (overall reduction of attorney fee and cost damages more than sixty percent of amount sought not an abuse of discretion), *aff'd in part, rev'd in part on other grounds*, 2018 CO 43, 418 P.3d 1163.

7. Attorney fees and costs incurred in successfully defending appeal of the statutory award are also recoverable. **Nibert**, 2017 COA 23, ¶ 38; **Stresscon Corp.**, 2013 COA 131, ¶ 136 (allowing recovery of fees and costs incurred on appeal when party was awarded fees and costs in a prior stage of the proceedings) (citing **Melssen**, 2012 COA 102, ¶ 75; **Kennedy v. King Soopers Inc.**, 148 P.3d 385 (Colo. App. 2006)).

## 25:11 PUNITIVE DAMAGES

### Use Instruction 5:4.

#### Notes on Use

1. Instruction 5:4 (exemplary or punitive damages), along with 3:3 (reasonable doubt) or 9:30 (willful and wanton conduct), should be used in accordance with applicable Notes on Use.

2. Absent proof of actual damages flowing from an insurer's bad faith breach of insurance contract, the plaintiff is not entitled to punitive damages as a matter of law. **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003).

3. The fact that an insured's proof is sufficient to support an award for bad faith breach of insurance contract does not alone establish a claim for punitive damages. **Farmers Grp., Inc. v. Trimble**, 768 P.2d 1243 (Colo. App. 1988), *overruled on other grounds by Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409 (Colo. 2004). The insured must, as with all claims for punitive damages, establish the requisite circumstances of fraud, malice, or willful and wanton conduct before a claim for punitive damages may be properly submitted to the factfinder. **Ballow v. PHICO Ins. Co.**, 878 P.2d 672 (Colo. 1994).

#### Source and Authority

1. This instruction is supported by section 13-21-102, C.R.S.; **Ballow**, 878 P.2d at 682; and **Trimble**, 768 P.2d at 1247.

2. Punitive damages are not ordinarily recoverable in a breach of contract case, **Mortgage Fin., Inc. v. Podleski**, 742 P.2d 900 (Colo. 1987), but because bad faith breach of insurance contract is a tort, punitive damages may be awarded in an appropriate case. **Ballow**, 878 P.2d at 682; **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995); **Surdyka v. DeWitt**, 784 P.2d 819 (Colo. App. 1989).

3. An insurer's failure to conduct a reasonable investigation in its handling of a claim may be sufficient to support a punitive damages claim. **Giampapa v. Am. Family Mut. Ins. Co.**, 919 P.2d 838 (Colo. App. 1995) (punitive damages award affirmed where insurer failed to conduct any investigation into medical necessity of claim and violated statutory requirements); **Burgess v. Mid-Century Ins. Co.**, 841 P.2d 325 (Colo. App. 1992) (insurer's deviation from industry standards and failure to follow its own investigative procedures sufficient to support punitive damage award); **Brewer v. Am. & Foreign Ins. Co.**, 837 P.2d 236 (Colo. App. 1992) (same). Similarly, a liability insurer's improper handling of a settlement offer may result in a punitive damages claim being submitted to a jury. **Miller**, 916 P.2d at 580 (submission of punitive damages issue to jury was proper where insurer rejected settlement offer and made counteroffer for less than policy limits despite believing that case's value exceeded policy limits, without communicating these actions to the insured).

4. The statutory language regarding enhancement of punitive damages, § 13-21-102(3), is permissive rather than mandatory and the trial court is entrusted with sound discretion in

exercising its authority. **Harvey v. Farmers Ins. Exch.**, 983 P.2d 34 (Colo. App. 1998), *aff'd on other grounds sub nom. Slack v. Farmers Ins. Exch.*, 5 P.3d 280 (Colo. 2000).

5. Reasonable attorney fees and court costs awarded under section 10-3-1116(1), C.R.S., are actual damages that must be included in calculation of the total amount of actual damages for determination of the statutory limit of recoverable punitive damages awarded by a jury set forth in section 13-21-102(a). **Estate of Casper v. Guar. Tr. Life Ins. Co.**, 2016 COA 167, ¶ 58, *aff'd in part, rev'd in part on other grounds*, 2018 CO 43, 418 P.3d 1163.

6. Generally speaking, a punitive damages award may not exceed the amount of actual damages awarded. § 13-21-102(1)(a). However, section 13-21-102(3)(b) allows a trial court to increase any punitive damages award to a sum not to exceed three times the actual damages if, during the pendency of the action, the insurer engages in conduct that it knew or should have known would aggravate the damages to the insured. *See Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59 (Colo. 2005) (authorizing punitive damages award based on trial court's findings on different claim and determining that trebling of punitive damages award was appropriate given defendant's behavior during pendency of case); **Tait v. Hartford Underwriters Ins. Co.**, 49 P.3d 337 (Colo. App. 2001) (increase of punitive damage award under section 13-21-102(3)(a) affirmed where insurer sought removal to defeat state statute giving preferential trial dates to elderly plaintiffs, abused discovery process, and delegated to defense counsel its continuing obligations to the insured); **Harvey**, 983 P.2d at 40 (trial court acted within its discretion in declining to treble punitive damage award where insurer's continuing course of conduct was controverted and not sufficiently compelling to warrant reversal).