IN THE SUPREME COURT OF IOWA

No. 18-1227

SAMUEL DE DIOS,

Plaintiff-Appellant,

vs.

INDEMNITY INSURANCE OF NORTH AMERICA and
BROADSPIRE SERVICES, INC.,
Defendants-Appellees.

CERTIFIED QUESTION FROM FEDERAL DISTRICT COURT
Northern Dist. County No. C 18-4015-MWB

APPELLEES' FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES 4

CERTIFIED QUESTION SUBMITTED FOR REVIEW BY THE IOWA SUPREME COURT.....5

ROUTING STATEMENT 6

STATEMENT OF THE CASE 6

STATEMENT OF FACTS 7

ARGUMENT.....9

I. A Third-Party Administrator Cannot Be Held Liable For Bad Faith.....9

A. The Framework of Iowa Law Requires An Insurer-Insured Relationship For Bad Faith Liability.....9

B. An "Insurer" Assumes Financial Responsibility For A Loss And Broadspire Had No Financial Responsibility Regarding Plaintiff's Claim.....11

C. *Bremer* Reinforces Requirement Of Financial Responsibility And Insurer-Insured Relationship.....14

D. Plaintiff's "Factor Test" Should Be Disregarded.....16

II. Third-Party Administrators Are Not The "Substantial Equivalent" Of Insurers For Bad Faith.....18

A. A New Southern District Of Iowa Case Found That Third-Party Administrators Cannot Be Liable For Bad Faith.....20

B. In Assessing Liability For Bad Faith Against A Third-Party Administrator, The Critical Relationship Is With The Insured.....21

C. Plaintiff Would Still Have An Adequate Remedy Even If He Cannot Assert A Bad Faith Claim Against Broadspire.....23

1. Plaintiff May Still Seek Remedies Against The Insurer.....23

2. Plaintiff's Contention That Broadspire Would Suffer "Minimal Consequences" Is Outweighed By The Harm Of Permitting Bad Faith Without An Insurer-Insured Relationship.....26

D. Plaintiff Admits That Broadspire Was An Agent Of IINA, Which Is Insufficient For Bad Faith Liability.....27

1. Any Authority Broadspire Had Over Plaintiff's Claim Is Derived From The Insurer And Broadspire Had No "Discretionary Power" To Impact Plaintiff's Claim.....29

III. Supplemental Authority Supports The Finding That Third-Party Administrators Cannot Be Liable For Bad Faith.....31

A. Other States Within The Eighth Circuit Have Held That Bad Faith Claims Cannot Be Asserted Against Third-Party Administrators.....31

B. The Supplemental Authority Relied Upon By Plaintiff Is Distinguishable.....33

1. Broadspire Had No Financial Risk Of Loss And Did Not Perform The Tasks Of The

Administrator In *Cary*.....33

2. The Bad Faith Claim Against The Administrator In *Wathor* Was Dismissed Because It Had No Financial Risk And Assumed No Risk Of Loss.....33

CONCLUSION.....34

REQUEST FOR ORAL SUBMISSION.....35

CERTIFICATE OF COMPLIANCE.....36

CERTIFICATE OF COST 36

CERTIFICATE OF SERVICE 37

CERTIFICATE OF FILING.....37

TABLE OF AUTHORITIES

Cases

Bell Atl. Corp. v. Twombly, 550 U.S. 544 2007).....27-28

Bremer v. Wallace, 728 N.W2d 803, 806 (Iowa 2007).....10, 14-16, 24

Cary v. United of Omaha Life Ins. Co., 68 P.3d 462 (Colo. 2003).....31-32

Dolan v. Aid Ins. Co., 431 N.W. 2d 790, 794 (Iowa 1998).....10, 22, 26

Garien v. Schneider, 546 N.W.2d 606, 608 (Iowa 1996).....12-13

Holst v. Gordon, 2008 Iowa App. LEXIS 312 (Iowa Ct. App. May 14, 2008).....10-11, 24

Ihm v. Crawford & Co., 254 Neb. 818 (Neb. 1998).....30

Kent v. United Heartland, 2012 U.S. Dist. LEXIS 146752 (N.D. Iowa Oct. 11, 2012)..... 10

Klasi v. Gallagher Bassett Servs., 2005 Neb. App. LEXIS 112 (Neb. App. May 24, 2005)..... 30

Lindvall v. Travelers, Inc., 2018 U.S. Dist. LEXIS 175582 (S.D. Iowa Sept. 25, 2018).....20

McIlravy v. N. River Ins. Co., 653 N.W.2d 323, 329 (Iowa 2002)....29

Raymie v. Ins. Co., 2009 U.S. Dist. LEXIS 131996, Case No. 4:09-cv-00222-JAJ (S.D. Iowa Sept. 29, 2009)..... 18-19, 21-23

Reedy v. White Consol. Inds., Inc., 503 N.W.2d 601 (Iowa 1993).....12-13

Riccatone v. Colo. Choice Health Plans, 315 P.3d 203, 207 (Colo. App. 2013).....32

Wathor v. Mut. Assur. Adm'rs., Inc., 87 P.3d 559 (Okla. 2004).....33-34

Zimmer v. Travelers Ins. Co., 521 F. Supp. 2d 910 (S.D. Iowa 2007).....24, 28

Statutes, Rules and Other Authorities

Iowa Code § 87.4.....10

Iowa Code § 87.11.....13, 14

Iowa Code § 87.21.....12

CERTIFIED QUESTION PRESENTED FOR REVIEW TO THE IOWA SUPREME COURT

1. In what circumstances, if any, can an injured employee hold a third-party claims administrator liable for the tort of bad faith for failure to pay workers' compensation benefits?

ROUTING STATEMENT

The Supreme Court should retain this case Pursuant to Iowa R. App. P. 6.1101(2)(c) and (d) because the case involves unique issues of first impression and/or presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court.

STATEMENT OF THE CASE

On January 4, 2018, Plaintiff-Appellant Samuel De Dios ("Plaintiff") filed this lawsuit in the Iowa District Court for Woodbury County, Civil Case No. LACV179021. The case was subsequently removed to the United States District Court for the Northern District of Iowa by Defendants-Appellees Broadspire Services, Inc. ("Broadspire") and Indemnity Insurance Company of North America ("IINA"). On March 20, 2018, Plaintiff filed his Amended and Substituted Complaint (the "Complaint").

Plaintiff's allegations arise out of an April 8, 2016 motor vehicle accident and resulting workers' compensation claim. Plaintiff has asserted counts of bad faith against Broadspire and IINA and a cause of action against IINA for vicarious liability related to the handling of Plaintiff's workers' compensation claim.

Broadspire moved to dismiss Plaintiff's Complaint on the grounds that other Iowa courts have held that a third-party insurance administrator cannot be liable to a claimant for bad faith. On June 13, 2018, Judge Bennett denied Broadspire's Motion to Dismiss without prejudice and certified a question to this Court.

STATEMENT OF THE FACTS

This case arises out of an April 8, 2016 motor vehicle accident and resulting workers' compensation claim filed by Plaintiff, Samuel De Dios ("Plaintiff"). *See* (App. 35-36, 39, Complaint, ¶¶ 23-35, 60). At the time of the accident, Plaintiff alleges that he was employed by Brand Energy & Infrastructure Services ("Brand"). (App. 34-35, *Id.* at ¶¶ 21-25). Plaintiff also alleges that Brand contracted with IINA to pay benefits pursuant to Iowa's workers' compensation laws. (App. 32, *Id.* at ¶ 3). Plaintiff further alleges that Broadspire assisted IINA and Brand in administering Plaintiff's workers' compensation claim. (App. 32, *Id.* at ¶¶ 4-5). Plaintiff admits that Broadspire was an agent of IINA. (App. 49, *Id.* at ¶ 113). Broadspire is not an insurance company and Plaintiff has not alleged any contractual relationship with Broadspire. *See generally* Complaint.

Plaintiff alleged a single cause of action of bad faith against Broadspire. (App. 46-49, *Id.* at ¶¶ 99-111). Plaintiff does not contend that he ever had any contract of insurance with Broadspire or that Broadspire had insured the loss at issue in this case. Plaintiff's Complaint also does not allege that Broadspire agreed to undertake any financial responsibility with respect to Plaintiff's claim. Instead, Plaintiff bases his claim on the conclusory allegation that Broadspire "performed the tasks of a workers' compensation company in Iowa" as "an agent of [IINA]." (App. 33, 49, *Id.* at ¶¶ 11, 113). Based upon this, Plaintiff contends that Broadspire and IINA "are essentially one and the same entity" in this matter. (App. 32, *Id.* at ¶ 6). Broadspire is not Plaintiff's insurer and has no relationship with IINA other than acting as a third-party administrator.

Brand's workers' compensation policy with IINA was subject to a $1,000,000 self-insured retention.[1] *See* IINA Answer and Affirmative Defenses to Plaintiff's Amended Complaint (the "Answer"), (App. 2-3, Answer ¶ 2). Broadspire, acting as a third-party administrator for

[1] Plaintiff contends in his Proof Brief that "Defendants do not claim that Brand is "self-insured." *See* Proof Brief, p. 13. Although Brand maintained a workers' compensation policy with IINA, the policy contained a $1,000,000 self-insured retention for Brand.

IINA, administered claims under Brand's policy within the $1,000,000 self-insured retention limits. (App. 53, *Id.* at ¶ 4). Pursuant to Brand's policy with IINA, Brand did not have an obligation to notify IINA of any potential workers' compensation claims with exposure below $500,000.[2] *Id.* Plaintiff's workers' compensation claim exposure was determined to be less than Brand's $500,000 reporting threshold. (App. 53-54, *Id.* at ¶ 7).

ARGUMENT

I. A Third-Party Administrator Cannot Be Held Liable For Bad Faith.

A. The Framework of Iowa Law Requires An Insurer-Insured Relationship For Bad Faith Liability.

Over the last 20 years, Iowa courts have established a clear precedent that liability for bad faith requires one essential element: an insurer-insured relationship. Absent this requirement, there can be no liability for bad faith -- including by third-party administrators.

[2] Plaintiff's Proof Brief also claims that Broadspire did not have an obligation to notify IINA of any claim with exposure below $500,000. *See* Proof Brief, p. 12. This is incorrect as IINA's Answer and Affirmative Defenses stated that "Brand did not have any obligation to notify IINA of any potential workers' compensation claims with exposure below $500,000." *See* IINA's Answer.

This Court has established two considerations for recognizing a bad faith claim in Iowa: (1) "traditional damages for breach of contract will not always adequately compensate an insured for an insurer's bad faith conduct" and (2) that "insurance policies are contracts of adhesion ... due to the inherently unequal bargaining power between the insurer and insured." *Dolan v. Aid Ins. Co.*, 431 N.W. 2d 790, 794 (Iowa 1998). Following *Dolan*, this Court elaborated that bad faith tort liability for failing to impose workers' compensation benefits **cannot be imposed absent an insurer/insured relationship**. *See Bremer v. Wallace*, 728 N.W2d 803, 806 (Iowa 2007) (holding that an uninsured employer is not subject to bad faith liability) (emphasis added); *see also Kent v. United Heartland*, 2012 U.S. Dist. LEXIS 146752 (N.D. Iowa Oct. 11, 2012) (granting motion to dismiss bad faith claim where defendant was neither an insurer or self-insured employer of plaintiff); *Holst v. Gordon*, 2008 Iowa App. LEXIS 312 (Iowa Ct. App. May 14, 2008).

In *Holst*, an employee sought workers' compensation benefits from his employer following a work-related injury. *See Holst* at *1. Although the employer had workers' compensation insurance, it did

not submit a claim to the insurance carrier. *Id.*[3] After the employee obtained a workers' compensation award against the employer, the employer failed to pay any of the awarded benefits. *Id.* at *3. The employee filed a bad faith lawsuit against the employer and obtained a default judgment. *Id.* On appeal, the bad faith judgment against the employer was reversed on the basis that liability for bad faith required the "common thread" of an insurer-insured relationship. *Id.* at *5-6.

Based on over two decades of case law, it is apparent that the imposition of bad faith under Iowa law mandates an insurer-insured relationship. That relationship does not exist between Plaintiff and Broadspire and, therefore, Broadspire cannot be liable for bad faith.

B. An "Insurer" Assumes Financial Responsibility For A Loss And Broadspire Had No Financial Responsibility Regarding Plaintiff's Claim.

There is one marked distinction for why insurance carriers and self-insured employers can be held liable for bad faith, and third-party administrators cannot: financial responsibility. In specifically parsing

[3] The employer in *Holst* was not a self-insured employer. The term "self-insured employer" refers to an employer who has met precise requirements under the Iowa Workers' Compensation Act. *See generally* Iowa Code § 87.4. "[S]elf-insured employers are not simply employers who declare they will be responsible for paying workers' compensation benefits owed to their employees." *Bremer*, 728 N.W.2d at 805.

the reason for why a self-insured employer may be held liable for bad faith, just like an insurance carrier, this Court has noted that it is because a self-insured employer agrees to undertake the financial obligations of an insurance company and meet the statutory requirements to insure a loss:

> To be a qualified self-insured employer under the act, it is necessary to voluntarily assume a recognized status under the workers' compensation laws as an insurer. Iowa Code § 87.4 (1987). For purposes of a bad-faith tort claim, we see no distinction between a workers' compensation insurance carrier for an employer and an employer who voluntarily assumes self-insured status under the act.

Reedy v. White Consol. Inds., Inc., 503 N.W.2d 601, 603 (Iowa 1993). Without undertaking the statutory obligations of an insurer, an employer "merely waives the protection of the act against common-law claims. Iowa Code § 87.21 (1993)." *Id.*

This point was reiterated by this Court three years later in a case where an uninsured employer that had not complied with the statutory requirements to be self-insured actually "performed the tasks of a workers' compensation insurance company in Iowa," by making "arrangements with an independent workers' compensation administrator to administer its workers' compensation claims on a self-insured basis in several states, including Iowa." *Garien v.*

Schneider, 546 N.W.2d 606, 608 (Iowa 1996). As the employer's agent, the administrator "filed a first report of injury with the Iowa Industrial Commissioner, computed temporary and total disability benefits, and issued payments of those benefits that were accepted by [the employee]. In addition, it made payments to medical suppliers on [the employee's] behalf." *Id.*

The Supreme Court of Iowa concluded:

> [T]he acts of the independent administrator . . . fall short of qualifying the employer for self-insured status. As we observed in *Reedy v. White Consolidated Industries, Inc.*, 503 N.W.2d 601 (Iowa 1993),
>
> > [a] self-insured employer under the Workers' Compensation Act is not an employer who fails to secure insurance against workers' compensation liability. . . . To be a qualified self-insured employer under the act, it is necessary to voluntarily assume a recognized status under the workers' compensation laws as an insurer.
>
> *Id.* at 603 (citing Iowa Code § 87.4 (1987)). Among other requirements necessary to gain self-insured status under the act, an employer must file proof of financial ability and furnish a bond approved by the industrial commissioner. Iowa Code § 87.11 (1993).

Garien, 546 N.W.2d at 608.

If the tasks performed by a third-party administrator at the direction of an uninsured employer are insufficient to qualify the

employer as an insurer, then surely a third-party administrator's performance of those tasks as the agent of an insurer would not qualify the third-party administrator as an "insurer" either. *Garien* illustrates that in order to be deemed an "insurer", a party must assume the financial obligations of an insurer and satisfy the statutory requirements to ensure a loss.[4]

C. *Bremer* Reinforces Requirement of Financial Responsibility and Insurer-Insured Relationship.

After *Reedy* and *Garien*, this Court reaffirmed that status as an insurer can only be created where there is an affirmative undertaking of the financial and statutory obligations of the insurer. *See Bremer v. Wallace*, 728 N.W.2d 803 (Iowa 2007). In *Bremer*, this Court stated:

> A self-insured employer must meet precise requirements to acquire that standing. Under section 87.4, "groups of employers by themselves or in an association with any or all of their workers, may form insurance associations," as

[4] In addition to demonstrating financial solvency and responsibility to the Iowa Workers' Compensation Commissioner, the requirements of becoming self-insured under Iowa's workers' compensation statutes are arduous. The requirements include (a) payment of fees to the insurance division of the department of commerce; (b) being subject to an examination at least once every three years; and (c) producing for inspection all books, documents, papers, and other information concerning the company's affairs. *See* IA Code §§ 87.11, 87.11A-C. Therefore, by requiring an insurer-insured relationship for bad faith liability, Iowa has made it clear that such liability is limited to insurers who have complied with rigorous regulatory requirements and not to third-party administrators.

> provided in that statute "[f]or the purpose of complying with [chapter 87]." Iowa Code § 87.4. These "self-insurance associations" must submit a plan to the insurance commissioner for approval. *Id.* Approval is conditioned on meeting rigorous financial requirements. *See* Iowa Admin. Code r. 191-56.3. Once a certificate of approval has been issued by the insurance commissioner, "the workers' compensation self-insurance association" is authorized "to provide workers' compensation benefits." *Id.* r. 191-56.8(1). Thereafter, the association is subject to the continuing supervision of the insurance commissioner. *Id.* rs. 191-56.9, 191-56.13.
>
> As this regulatory scheme shows, self-insured employers are not simply employers who declare they will be responsible for paying workers' compensation benefits owed to their employees. Self-insured employers are members of a highly regulated formal insurance association that is responsible for paying workers' compensation benefits owed to employees of association members. When the true nature of self-insured status is examined, it is apparent why this court held in Reedy that there was "no distinction between a workers' compensation insurance carrier for an employer and an employer who voluntarily assumes self-insured status." 503 N.W.2d at 603.
>
> The defendant in this case stands in a much different position. He did not purchase workers' compensation insurance or join a self-insurance association. Thus, he is not an insurer, nor is he the substantial equivalent of an insurer.

Bremer v. Wallace, 728 N.W.2d 803, 805-806 (Iowa 2007).

In addition to reinforcing the requirement of financial responsibility to be an insurer, *Bremer* also clarified the question which was at the heart of the dispute regarding bad faith liability. The

parties in *Bremer* originally presented the question of: "Does Iowa recognize a common-law claim for bad-faith refusal to pay workers' compensation benefits by an uninsured employer?" *Bremer*, 728 N.W.2d at 804. However, the Supreme Court of Iowa concluded that a different question was really at the heart of the dispute in *Bremer*: "**Consequently, the actual issue in this case is whether bad-faith tort liability for failing to pay workers' compensation benefits should be imposed under circumstances that do not involve an insurer/insured relationship**." *Id.* at 806 (emphasis added). The answer to that question was no. *Id.*

Iowa has been uniformly consistent in finding that an insurer-insured relationship is necessary to impose liability for bad faith. An entity is either (1) an insurance company which issued a workers' compensation policy or (2) a self-insured employer which voluntarily undertakes the financial and statutory obligations under Iowa law to ensure a loss. As a third-party administrator, Broadspire does not fall into either of these categories and cannot be held liable for bad faith.

D. Plaintiff's "Factor Test" Should Be Disregarded.

Plaintiff submits in his Proof Brief that the Court should adopt a "factor test" for evaluating bad faith liability. *See* Plaintiff's Proof Brief, p. 14. This proposed "test" should be disregarded for multiple reasons.

First, Plaintiff's proposition goes beyond the scope of the certified question posed to this Court. Plaintiff had an opportunity to propose suggested revisions to the certified question and elected not to do so.

Next, such a test would contradict the decades of law created by Iowa courts at the state and federal level requiring a contractual relationship in order to impose bad faith. As discussed *supra*, courts in Iowa have addressed situations where entities who were not insurers engaged in the handling of workers' compensation claims and declared that such entities could not be liable for bad faith due to the lack of this contractual relationship. This Court should not ignore this precedent.

Finally, the record is clear that Broadspire did not have full authority regarding the handling of Plaintiff's claim. The claim at issue was being directed by Brand, who decided that the exposure was under the $500,000 reporting threshold and, therefore, the claim was not reported to IINA. Moreover, as the claim was within Brand's self-insured retention, Brand was the entity with the full authority to accept

or deny the claim. This is evidenced by Plaintiff's addition of Brand as a defendant to this case. For these reasons, Plaintiff's proposed "test" should be ignored.

II. Third-Party Administrators Are Not The "Substantial Equivalent" Of Insurers For Bad Faith.

Plaintiff contends that Broadspire is liable for bad faith as a third-party administrator because it "acted sufficiently like an insurer such that there was a substantial relationship between Broadspire and Plaintiff." Plaintiff's Proof Brief, p. 3. However, the issue of bad faith liability against third-party administrators, including whether third-party administrators are the "substantial equivalent" of insurers, was addressed directly by the Southern District of Iowa in *Raymie v. Ins. Co.*, 2009 U.S. Dist. LEXIS 131996, Case No. 4:09-cv-00222-JAJ (S.D. Iowa Sept. 29, 2009).

In *Raymie*, an individual injured on the job filed a lawsuit against her employer, the insurer, and two third-party administrators alleging claims of bad faith and breach of fiduciary duty. *See Raymie*, 2009 U.S. Dist. LEXIS 131996 at *1. The plaintiff alleged that the third-party administrators handled "the administration and investigation" of the workers' compensation claim, failed to "properly investigate her workers' compensation claim", and acted unreasonably in denying the

claim. *Id.* The court in *Raymie* directly addressed Plaintiff's "one and the same" argument raised in this matter stating:

> The question here is whether third-party administrators who are responsible for the investigation and administration of workers' compensation claims on behalf of insurance carriers are the "substantial equivalent" of an insurer for the purposes of the tort of bad faith.

Raymie at *7.

In granting the motions to dismiss filed by the third-party administrators, *Raymie* analyzed the two considerations established by *Dolan* for bad faith claims. First, the court noted that the plaintiff did not allege any contractual relationship with the third-party administrators and neither of the third-party administrators had issued an insurance policy to the plaintiff. *Id.* at *8. Second, the court found that, even without recourse against the third-party administrators, the plaintiff could still seek remedies against the insurer and, therefore, plaintiff could be adequately compensated if liability was warranted. *Id.* Based upon this rationale, the court found that the two considerations for evaluating bad faith claims as established in *Dolan* were absent and the bad faith claims against the third-party administrators were dismissed. *Id.*

Although Plaintiff's allegations attempt to shoehorn the argument that Broadspire was acting as an insurer, the case law in Iowa has explicitly held that third-party administrators performing the same duties as Broadspire are not the "substantial equivalent" as insurers and, as such, the tort of bad faith does not apply.

A. A New Southern District Of Iowa Case Found That Third-Party Administrators Cannot Be Liable For Bad Faith.

In addition to *Raymie*, a recent case from the Southern District of Iowa held that a third-party administrator cannot be liable for bad faith. *See Lindvall v. Travelers, Inc.*, 2018 U.S. Dist. LEXIS 175582 (S.D. Iowa Sept. 25, 2018). In *Lindvall*, the injured employee filed a bad faith claim against the third-party administrator which provided "administrative claims-adjusting services" for the insurance carrier[5] regarding the employee's workers' compensation claim. *Lindvall*, 2018 U.S. Dist. LEXIS 175582 at *3. The claims against the third-party administrator included bad faith and breach of fiduciary duty. *Id.* In granting summary judgment to the third-party administrator, the court found that the third-party administrator "contracted with the

[5] The insurance carrier in *Lindvall* was Indemnity Insurance Company of North America, the same insurance carrier in Plaintiff's matter.

workers' compensation insurer for Plaintiff's employer . . . but did not have a contractual relationship with Plaintiff. As such, [the third-party administrator] cannot be held liable for any of the claims as alleged by Plaintiff in this matter." *Id.* at *5. This case further reinforces the view from Iowa courts which requires an insurer-insured relationship in order to be liable for bad faith and no bad faith claim should be recognized against Broadspire.

B. In Assessing Liability For Bad Faith Against A Third-Party Administrator, The Critical Relationship Is With The Insured.

Plaintiff is trying to impose bad faith liability against Broadspire by concentrating its allegations on the relationship between Broadspire and IINA. *See generally* Complaint. However, the duties and responsibilities between Broadspire and IINA are entirely irrelevant to the consideration of whether Broadspire can be liable for bad faith, which it cannot. The court in *Raymie* explained that it is the relationship between the *insured* and the third-party administrator that must be considered in order to evaluate whether a third-party administrator is liable to a workers' compensation claimant for bad faith:

> The Iowa Supreme Court recognized the tort of bad faith based on two considerations: (1) 'traditional damages for

> breach of contract will not always adequately compensate an insured for an insurers bad faith conduct', and (2) the fact that 'insurance policies are contracts of adhesion...due to the inherently unequal bargaining power between the insurer and insured'. *Dolan, 431 N.W.2d at 794.* **The question becomes whether these considerations are strong enough in the relationship between an insured and a third-party administrator of the insured's claims to warrant recognition of the tort of bad faith in this context.**
>
> They are not.

Raymie at *3 (emphasis added). The court further relied upon an additional statement in *Dolan* that "the focus is on the recompense available to the affected insured, not the extent to which the insurer may be subject to [punishment] for its misconduct." *Id.* at *9 (quoting *Dolan*, 431 N.W.2d at 794).

The *Raymie* court found that absent a contractual relationship between the insured (i.e. the workers' compensation claimant) and the third-party administrator, the first consideration for imposing bad faith could not be satisfied. *Id.* Likewise, the second consideration could not be satisfied because, although the claimant did not have another remedy against the third-party administrator, he did have a remedy against the insurer. Any focus upon the duties and relationships between Broadspire and IINA is misplaced and not

relevant to whether bad faith liability may be imposed against a third-party administrator.

This conclusion falls in line with the well-established law from this Court addressing what constitutes an insurer/insured relationship for the purposes of bad faith and supports a finding that Broadspire cannot be held liable to Plaintiff for bad faith.

C. Plaintiff Would Still Have An Adequate Remedy Even If He Cannot Assert A Bad Faith Claim Against Broadspire.

The primary argument presented by Plaintiff to be able to assert a bad faith claim against Broadspire is that he would lack an adequate remedy if such a claim would not apply. *See* Plaintiff's Proof Brief, pp. 18-20. This argument has been refuted by Iowa courts at both the state and federal level.

1. Plaintiff May Still Seek Remedies Against The Insurer.

In *Raymie*, the court reasoned that even though a third-party administrator cannot be liable for bad faith, a party may still seek remedies against the insurer for the actions of the third-party administrator. *See Raymie*, 2009 U.S. Dist. LEXIS 131996 at *9. The issue of adequate remedies for refusing to extend bad faith liability outside the insurer-insured context was also addressed in *Holst* v.

Gordon. *See Holst*, 2008 Iowa App. LEXIS 312 at *6. In *Holst*, the court held that the employee was not without adequate remedies when he was prevented from asserting a bad faith claim against his employer because he is "in no different position than any other plaintiff who has an unsatisfied judgment against a person legally responsible for the plaintiff's injuries." *Id*. at *7. The factual situation of *Holst* is analogous to the current case as the insurer in both cases were not involved in the handling of the workers' compensation claim.[6] Finally, in denying an employee the ability to sue an uninsured employer for bad faith, the court in *Bremer* noted that the employee had the benefit of foregoing workers' compensation benefits altogether and suing his employer in a civil action for damages. *See Bremer*, 728 N.W.2d 803, 806.

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[6] In support of his argument that he lacks inadequate remedies, Plaintiff relies upon *Zimmer v. Travelers Ins. Co.*, 521 F. Supp. 2d 910 (S.D. Iowa 2007). In *Zimmer*, an insurer was held vicariously liable for the conduct of a third-party administrator when it was determined that they were "the same entity for purposes of the present action." *Id*. at 937. However, the plaintiff was precluded from pursuing punitive damages against the insurer. *Id*. at 938. *Zimmer* is easily distinguishable from the current case as the insurer in *Zimmer* also owned the third-party administrator who handled the claim and employees from the insurer were farmed out to the third-party administrator to handle the workers' compensation claim. *Id*. at 937. That is clearly not the case here.

Plaintiff is attempting to conflate two separate issues: (1) whether he has a direct claim for bad faith against Broadspire and (2) whether he has a remedy for Broadspire's alleged conduct. The two issues are entirely distinct. Based upon Iowa law, Plaintiff has no direct claim for bad faith against Broadspire as a third-party administrator. However, that does not leave Plaintiff without adequate remedies against other parties for Broadspire's alleged conduct. Plaintiff has asserted claims for bad faith and vicarious liability against IINA and bad faith against Brand. *See generally* Complaint.[7] The fact that IINA may have pled an affirmative defense that Plaintiff's claims fail to state a claim as a matter of law is irrelevant to whether a bad faith claim may be pursued against Broadspire. Plaintiff may still seek recourse against IINA, but a bad faith claim against Broadspire is prohibited.

2. Plaintiff's Contention That Broadspire Would Suffer "Minimal Consequences" Is Outweighed By The Harm Of Permitting Bad Faith Without An Insurer-Insured Relationship.

[7] Following the issuance of the certified question to this Court, Plaintiff filed a motion to add Brand as a defendant to the case. The motion was granted and Brand is now a defendant in the litigation.

Plaintiff contends that Broadspire would suffer "minimal consequences" if Plaintiff is unable to assert a claim of bad faith. However, as illustrated in *Dolan*, the imposition of bad faith was "**justified by the nature of the contractual relationship between the insurer and insured**" and "the inherently unequal bargaining power between the insurer and insured, which persists throughout the parties' relationship and becomes particularly acute when the insured sustains a physical injury or economic loss for which coverage is sought." *Dolan*, 431 N.W.2d 790, 794 (emphasis added). As outlined *supra*, Plaintiff still has the ability to seek recourse against the insurer.

The harm of extending bad faith to third-party administrators, such as Broadspire, far outweighs any "minimal consequences" cited by Plaintiff. There is no contractual relationship between a third-party administrator and an insured employee. Therefore, there is no contract of adhesion which would create the unequal bargaining power which is the cornerstone of why bad faith claims were permitted against workers' compensation insurers. The extension of bad faith into this realm would ignore why the tort was created in the first place and serve to create its own contract of adhesion between the third-

party administrator and the injured employee where one never existed. Therefore, bad faith claims against Broadspire or third-party administrators in general should be prohibited.

D. Plaintiff Admits That Broadspire Was An Agent Of IINA, Which Is Insufficient For Bad Faith Liability.

Plaintiff's factual allegations establish only that Broadspire acted as an agent for IINA regarding his claim. Specifically, Plaintiff alleges that **"[A]t all times material to Plaintiff's causes of action, BROADSPIRE was an agent of the INSURANCE COMPANY."** (App. 49, Complaint, ¶ 113 (emphasis added)). All of Plaintiff's allegations are consistent with the acts of an independent third-party administrator acting as a mere agent for IINA.

Plaintiff's allegations are parallel to the allegations which were found inadequate in the Supreme Court's decision in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). There, the plaintiff alleged that the defendants had conspired to restrain trade in violation of the antitrust laws but had not alleged any facts that indicated anything more than parallel conduct.

> [W]e hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability

> requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.. . . . Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

550 U.S. at 556-557.

By Plaintiff's own admission, Broadspire was only the agent of IINA. Although Plaintiff further alleges that Broadspire and IINA were "one and the same", Iowa courts have only imposed vicarious liability upon the insurer in similar situations. *See Zimmer v. Travelers Ins. Co.*, 521, F. Supp. 2d 910 (S.D. Iowa 2007). It is clear from the record that Broadspire was not Plaintiff's insurer and there are no allegations that Broadspire formally undertook the statutory obligations of becoming an insurer in Iowa. As a result, Plaintiff cannot establish a claim for bad faith against Broadspire.

1. Any Authority Broadspire Had Over Plaintiff's Claim Is Derived From The Insurer and Broadspire Had No "Discretionary Power" To Impact Plaintiff's Claim.

Broadspire rejects Plaintiff's argument that Broadspire should be liable for bad faith because it had the "discretionary power" over Plaintiff's claim. *See* Plaintiff's Proof Brief, p. 21. Plaintiff relies upon *McIlravy v. North River Ins. Co.* which stated that "[B]ad faith claims are **applicable to workers' compensation insurers** because they hold the discretionary power to affect the statutory rights of workers ...". *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 329 (Iowa 2002) (emphasis added). The distinguishing factor between this case and *McIlravy* is that Broadspire is not an insurer and, therefore, has no statutory duties to Plaintiff.

The record shows that Plaintiff's claim was within Brand's self-insured retention limits. *See* (App. 53, IINA Answer, ¶ 4). Therefore, any authority or duties Broadspire had in providing services on Plaintiff's claim were derived either from Brand or IINA, two entities which had statutory duties to Plaintiff under Iowa law. As Plaintiff can seek recourse against IINA and Brand, there is nothing which would warrant the extension of bad faith claims to entities which have no statutory duties to Plaintiff, such as Broadspire.

III. Supplemental Authority Supports The Finding That Third-Party Administrators Cannot Be Liable For Bad Faith.

A. Other States Within The Eighth Circuit Have Held That Bad Faith Claims Cannot Be Asserted Against Third-Party Administrators.

Jurisdictions within the Eight Circuit have supported the finding that bad faith claims cannot be asserted against third-party administrators or agents of insurers, such as Broadspire.

In *Ihm v. Crawford & Co.*, an employer filed a bad faith claim alleging that the insurer and third-party administrator violated a duty of good faith in "processing and administering [plaintiff's] workers' compensation claim. *Ihm v. Crawford & Co.*, 254 Neb. 818, 819 (1998). In denying the employee's bad faith claims, the court held that Nebraska precluded common law bad faith claims and that the Nebraska Workers' Compensation Act provided the exclusive remedy for a workers' compensation claim. *Id.* at 827; *see also Klasi v. Gallagher Bassett Servs.*, 2005 Neb. App. LEXIS 112 (Neb. App. May 24, 2005) (holding that employer could not maintain a bad faith claim against employer or insurer regarding the processing and administration of his workers' compensation claim).

B. The Supplemental Authority Relied Upon By Plaintiff Is Distinguishable.

1. Broadspire Had No Financial Risk Of Loss And Did Not Perform The Tasks Of The Administrator In *Cary*.

Plaintiff relies heavily on the Colorado case of *Cary v. United of Omaha Life Ins. Co.* for the argument that an administrator who had a "special relationship" with the insured has a duty to act in good faith. *See Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462 (Colo. 2003). However, in addition to not being a workers' compensation case, the administrator in *Cary* can be distinguished from Broadspire as it was required to perform a litany of duties that are not alleged against Broadspire and also had a financial risk of loss, which Broadspire did not have regarding Plaintiff's claim.

The contract between the administrator and the insured in *Cary* obligated the administrator to perform an expansive set of tasks including:

> provide claim handling facilities; furnish claim handling personnel; establish claim handling procedures; including claim files and systems; verify claimant eligibility for the Plan; receive all claim forms and related materials from Plan members; process submitted claims; send "explanation of benefits" letters to claimants when it acts on a claim; prepare claim payments; provide actuarial services to the Trust to project estimated Plan benefit costs; provide underwriting services whereby it analyzes Plan

> benefits and makes recommendations to the Trust about modifying the benefits; print and pay the cost of all Plan claim forms and benefit checks; develop and print Plan benefit booklets and identification cards; evaluate the health histories of "late" applicants and determine whether they should have Plan coverage; provide a toll-free number for Plan claimants; and periodically audit the claims processing system to determine the quality of claim administration. [The administrator] even established an appellate procedure for denials coverage (though the Trust was the entity of last resort for appeals).

Cary, 68 P.3d 462, 464. In addition to these requirements, the administrator entered into a reimbursement agreement with the Trust where it "agreed to reimburse the Trust for payments in excess of $75,000, but less than $1 million for any one Arvada employee. It also agreed to reimburse the Trust for aggregate claims in excess of a certain dollar amount." *Id*. In finding that there was a "special relationship" between the administrator and the insurer, the court specifically noted the administrator's "financial liability for claims" and excess liability insurance agreement with Trust. *Id*. at 468.[8]

Those elements are not present in the current case. Broadspire had no financial liability with respect to Plaintiff's claim and, unlike the

[8] After *Cary*, Colorado courts reiterated that "absent a financial incentive to deny an insured's claims or coerce a reduced settlement, a third-party that investigates and processes an insurance claim does not woe a duty of good fair dealing to the insured." *Riccatone v. Colo. Choice Health Plans*, 315 P.3d 203, 207 (Colo. App. 2013).

administrator in *Cary*, Broadspire did not enter into a reinsurance agreement with any party and did not have any obligation to reimburse any party for payments made on Plaintiff's claim. The allegations against Broadspire do not give rise to a "special relationship" which would trigger a duty of good faith. Accordingly, Plaintiff's reliance upon *Cary* is misguided.

2. The Bad Faith Claim Against The Administrator In *Wathor* Was Dismissed Because It Had No Financial Risk And Assumed No Risk Of Loss.

Plaintiff also relies upon the Oklahoma Supreme Court case of *Wathor v. Mut. Assur. Adm'rs, Inc.* to support its argument that a duty of good faith existed for administrators where there was a "special relationship" with the insured. *See Wathor v. Mut. Assur. Adm'rs., Inc.*, 87 P.3d 559 (Okla. 2004). However, Plaintiff's reliance upon *Walthor* is incorrect as the court held that the administrator in that case could not be held liable for bad faith. *Id.* at 563. Specifically, the court reasoned that the administrator in *Wathor* did not underwrite any risk, did not assume any financial risk, and did not share in the risk of loss with the insurer. *Id.* Accordingly, the court dismissed the bad faith claim. *Id.* The facts of *Wathor* are similar to Broadspire in this matter. Broadspire assumes no risk of loss and had no financial risk

regarding Plaintiff's claim. And, like the holding in *Wathor*, Plaintiff should be prohibited from asserting a bad faith claim against Broadspire.

CONCLUSION

WHEREFORE, Defendants-Appellees pray that this Court rule that an injured employee cannot hold a third-party administrator liable for the tort of bad faith for the alleged failure to pay workers' compensation benefits.

REQUEST FOR ORAL SUBMISSION

Pursuant to Rule 6.908 of the Iowa Rules of Appellate Procedure, Defendants-Appellees respectfully request oral argument.

DATED: November 27, 2018

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The undersigned certifies that this Appellee's Proof Brief was served and filed on the 27th day of November, 2018, upon the following persons and upon the Clerk of the Supreme Court by electronic filing and electronic delivery to the parties via the EDMS system, pursuant to Iowa R. App. P. 6.902(2) and Iowa Ct. R. 16.1221(2) to the following:

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