SC97623

IN THE SUPREME COURT OF MISSOURI

STATE ex rel. KEY INSURANCE COMPANY, Relator,

v.

THE HONORABLE MARCO A. ROLDAN, Respondent.

Proceeding in Prohibition from the Circuit Court of Jackson County, Missouri
Case No. 1816-CV12271

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules, Statutes & Other Authorities

Statement of Facts

Key Insurance is an automobile liability insurance company in the business of investigating insurance claims to determine its insured's liability and the claimant's injuries and to make payments to resolve claims against its insured. As a part of that business, Key employs claims adjusters who investigate insurance claims, interview witnesses and claimants, and investigate damages in order to determine the amount of money to pay out on a claim. If Key does not or cannot resolve a claim, Key agrees to defend its insured in a court against a claimant's lawsuit.[1]

Key issued an insurance policy to Takesha Nash who resided in Kansas City, Kansas. Key's policy covered a 2002 Kia Optima. That policy covered Takesha Nash and any permissive user of the vehicle. Takesha's father, Phillip Nash, was involved in a motor vehicle collision while driving that vehicle in Jackson County, Missouri. Josiah Wright was the other motorist involved in that collision, and he made claims against Nash.

In February 2017, Josiah Wright lived in Jackson County, Missouri.[2] On February 17, 2017, Key's adjuster, Halley Dean, called Wright at his home in

[1] Exhibit 5 to Answer to Writ, (Key's insurance policy, Key000011).

[2] Exhibit 1 to Answer to Writ (paragraphs 4 and 5).

Jackson County, Missouri to discuss Wright's claim against Nash and to discuss Wright's injuries.[3] Around this time, Wright had retained Garrett Tuck at Dipasquale Moore to represent him.[4] On or around February 17, 2017, Dean called Tuck at his offices in Jackson County, Missouri to inform him that Key was investigating coverage and liability. She asked him about his client's injuries. Tuck informed her that Wright was suffering from a traumatic brain injury.[5]

On February 20, 2017, Key sent a letter to Tuck at his Jackson County, Missouri offices asking for certain information to assist in her "investigation into this matter." Key's letter to Tuck stated that for Key to complete its investigation into this liability and damages on this claim, Tuck would need to submit several forms and authorizations. Key's letter also asked to coordinate a recorded statement for his client and to allow Key to inspect the vehicle in Missouri. Key's letter told Tuck that this information was needed to "expedite final resolution of this claim."[6] Around this same time, Key requested that its appraiser, Jeff Freeman, go to Kansas City, Missouri to appraise the damage on Wright's vehicle.[7] Upon information and

[3] Exhibit 1 (paragraph 4).

[4] Exhibit 1 (paragraph 3).

[5] Exhibit 2 (paragraph 4).

[6] Exhibit 2 (paragraphs 5 and 6 and exhibit B attached to exhibit 2).

[7] Exhibit 3 (Key000057).

belief, Dean printed off and sent a check to the Kansas City Police Department to request a copy of the police report.[8]

On March 3, 2017, Wright and Dean again discussed Wright's claims. At the time of the phone call, Wright was in Jackson County, Missouri.[9] On or around March 3, 2017, Dean called Tuck's offices in Jackson County, Missouri to ask for a copy of the police report.[10] Tuck sent the police report to Dean.[11] On March 8, 2017, Dean sent an email and letter to Tuck in which Key informed Tuck that Key was denying coverage for the collision. That email was received and read at Tuck's offices in Jackson County, Missouri.[12]

On March 14, 2017, Key sent a letter to Truman Medical Center in which Key acknowledged that Truman Medical Center had made claims (presumably for medical bills) but that Key was denying coverage for the claims.[13] Upon information

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[8] Exhibit 3 (Key000058).

[9] Exhibit 1 (paragraph 5).

[10] Exhibit 2 (paragraph 7); see also Exhibit 3(Key000058).

[11] Exhibit 2 (paragraph 8).

[12] Exhibit 2 (paragraph 9).

[13] Exhibit 4 (Key's letter to Truman Medical Center at PO Box 957973, St. Louis, Missouri 65195-7973).

and belief, Key had other correspondence with Truman Medical Center or other medical providers that asserted liens on any settlement proceeds.

Tuck filed suit against Nash in the circuit court of Jackson County, Missouri.[14] At the time that Tuck filed suit, Nash lived in Jackson County, Missouri. Tuck had a process server serve him at his residence at 3987 Topping Avenue, Kansas City, Missouri 64129. Tuck's background investigation revealed that Nash never lived in Kansas during the relevant period.[15] The process server served Nash in Missouri on August 5, 2017.[16]

The court scheduled a scheduling conference for August 21, 2017.[17] At that time, Nash appeared at the conference without an attorney.[18] On September 1, 2017, Tuck sent another letter to Key confirming that it would not entertain any settlement offers to settle Wright's claim.[19] That same day, Tuck received another email from Key informing Tuck that Key had received his letter and that it would not consider his client's claims. Tuck received that email in Jackson County, Missouri.[20]

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[14] Exhibit 2 (paragraph 10).

[15] Exhibit 2 (paragraph 11); Exhibit C attached to Exhibit 2.

[16] Exhibit 2 (paragraph 12).

[17] Exhibit 2 (paragraph 13).

[18] Exhibit 2 (paragraph 14).

[19] Exhibit 2 (paragraph 15); Exhibit D attached to Exhibit 2.

In response to this denial letter, Tuck sent another certified letter to Key informing it because Key had denied coverage, Nash and his client had agreed to arbitrate the claims in Missouri.[21] On February 15, 2018, the arbitrator conducted a full evidentiary hearing in which he found in favor of Wright. The circuit court of Jackson County confirmed the arbitration award. Wright filed an equitable garnishment under section 379.200 against Key and Nash, and Nash filed claims for bad faith and breach of contract.

Argument

The circuit court did not err in overruling Key's motion to dismiss for a lack of personal jurisdiction because Key transacted business or committed a tort in Missouri in that 1) Key's policy requires it to defend claims brought anywhere in the U.S.; 2) Key had notice of Wright's claim against Nash, a Missouri resident, for a collision arising in Missouri; 3) Key investigated and adjusted that claim in Missouri; 4) Wright filed a lawsuit against Key in Missouri, which alleged various acts of negligence occurring in Missouri; 5) Wright's lawsuit triggered Key's duty to defend Nash in Jackson County Circuit Court and Key's duty to engage in good faith in an attempt to settle the claim; 6) Key made a conscious decision not to defend Nash or settle his claim;

[20] Exhibit 2 (paragraph 16); Exhibit E attached to Exhibit 2.

[21] Exhibit 2 (paragraph 17); Exhibit F attached to Exhibit 2.

7) Key sent various letters into Missouri to Missouri residents informing them that it would not defend or settle Wright's claim against Nash; and 8) a Missouri court entered judgment against Nash.

Bryant v. Smith Interior Design Group, Inc., 310 S.W.3d 227, 234 (Mo. banc 2010).

Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co., 907 F.2d 911 (9th Cir. 1990)

Rossman v. State Farm Mut. Auto. Ins. Co., 832 F.2d 282, 287 (4th Cir. 1987)

Samelko v. Kingstone Ins. Co., 329 Conn. 249, 261–62, 184 A.3d 741, 751 (2018)

RSMo § 375.786 (West)

Introduction

Key issued an automobile policy to Nash's daughter in which Key agreed to defend and settle claims brought against Nash's daughter or anyone using the vehicle with her permission. Nash, a Missouri resident, was involved in a motor vehicle collision with Wright in Jackson County, Missouri. Wright notified Key of the claims. Key investigated and adjusted the claim in Missouri, which ultimately led it to deny coverage for the incident. As a result of its denial, Key refused to defend Nash or settle the claims against him. Wright filed suit in Missouri, and Key did not defend Nash. Wright and Nash arbitrated their claims in Missouri, and the circuit court of Jackson County entered judgment confirming the award. Wright has now sued Key in Missouri to collect on that judgment, and Nash filed claims against Key

for Key's failure to defend him and settle the claims. Does the circuit court have personal jurisdiction over Key?

Yes. The Jackson County circuit court has specific jurisdiction over Key. Key investigated and adjusted Wright's claims. Missouri statute 375.786 classifies that investigation and adjustment as the transaction of business. Wright's claims against Nash triggered Key's duty to defend Nash in Missouri and its duty to settle the claim. Instead of defending the Missouri resident, Nash, Key abandoned him and left Nash standing alone on the courthouse steps in Missouri. Nash's injury occurred in Missouri, and the current claims arise directly from Key's unilateral and conscious business transaction to abandon its alleged insured in Missouri. Having abandoned Nash in Missouri and subjected him to a Missouri judgment, Key cannot be surprised that another Missouri court would now bring Key into court to explain that decision. Virtually every court to examine the issue including the 1st, 4th, 6th, 8th, 9th, and 11th circuit courts, the United States Court of Appeals for the District of Columbia, and either the federal or state courts in 28 states have all held that a court has specific jurisdiction over a non-resident insurance company when the insurance company fails to defend or settle a lawsuit filed in that state even though the policy was issued in another state. This rule has been called unanimous and the consensus among the courts. Consistent with those proclamations, Key does not cite one case in which a court held that it did not have specific jurisdiction over an insurance company's

failure to defend its insured in the forum. Furthermore, Key offers no compelling reason to this court for why Missouri should go against this overwhelming body of case law.

Legal Analysis

This Court has discretion to issue original remedial writs.[22] The court may enter a writ of prohibition if the circuit court lacks personal jurisdiction over the defendant.[23] Yet, prohibition is proper only when it is "clearly evident" that the court lacks jurisdiction.[24] Missouri courts employ a two-part test to evaluate specific personal jurisdiction over a non-resident defendant. First, the defendant's conduct must fall within Missouri's long-arm statute.[25] Second, the defendant must have minimum contacts with Missouri to satisfy due process.[26]

The plaintiff has the burden to establish that the defendant's contacts with the forum state meet due process.[27] In determining whether the plaintiff met his or her

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[22] Mo. Const. art. V, § 4.1.

[23] *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 45 (Mo. Banc 2017), reh'g denied (Apr. 4, 2017).

[24] *Id.*

[25] *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 225 (Mo. banc 2015).

[26] *Id.*

[27] *Id.* at 224.

burden, the court takes the plaintiff's allegations as true to determine whether they establish facts adequate to subject the defendant to jurisdiction in the forum state.[28]

A court may also consider affidavits and depositions properly filed in support of the motion to dismiss. But such consideration does not convert the motion to dismiss into a summary judgment motion and the court's review of the petition and supporting affidavits is still limited to determining the narrow question of personal jurisdiction. In reviewing this information, the court does not consider or determine the merits of the underlying claims.[29]

The Long-Arm Statute

Missouri's long-arm statute states that:

> 1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this state;

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[28] *Id.*

[29] *Id.*

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) The contracting to insure any person, property or risk located within this state at the time of contracting[.][30]

The court construes the Missouri long-arm statute as extending the jurisdiction of the courts of this state over a non-resident defendant to the fullest extent permissible under the Due Process clause.[31]

Key's conduct falls within subsection 1 (transaction of any business), subsection 3 (tortious act), or subsection 5 (contracting to insure any person, property or risk located within the state at the time of contract. Yet, the court need only find that Key's conduct falls within one subsection to justify this court's exercise of personal jurisdiction over Key.

[30] RSMo § 506.500 (West).

[31] *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 225 (Mo. banc 2015).

1. **Key transacted business in Missouri by investigating and adjusting the claim and refusing to perform its obligations to defend a Missouri resident in a Missouri court.**

The Missouri long-arm statue does not define "transaction of business." Under Missouri law, the court construes the "transaction of business" provision broadly so that even a single transaction can confer jurisdiction if that transaction gives rise to the lawsuit.[32] A corporation may transact business under the long-arm statute even though the corporation would not otherwise qualify to do business as a foreign corporation.[33] Missouri courts have interpreted the words "transaction of any business within this state" so as not to deny jurisdiction under situations in which the due process clause would permit the assertion of personal jurisdiction.[34]

Key is a foreign automobile liability insurance company. In exchange for a stipulated premium, Key agrees to defend its insured against any court action resulting from a collision covered by the policy. Key also agrees to "pay all sums" arising from a settlement or verdict that the insured legally must pay as a result of

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[32] *Sloan-Roberts v. Morse Chevrolet, Inc.*, 44 S.W.3d 402, 407–08 (Mo. App. W.D. 2001), as modified on denial of reh'g (May 29, 2001).

[33] *State ex rel. Metal Serv. Ctr. of Georgia, Inc. v. Gaertner*, 677 S.W.2d 325, 327 (Mo. banc 1984).

[34] *State ex rel. Newport v. Wiesman*, 627 S.W.2d 874, 876 (Mo. banc 1982).

an injury to which the policy applies. A notice of a claim also triggers its obligation to attempt to adjust the claim, resolve it, and not subject its insured to an excess judgment.[35]

The Missouri General Assembly has enacted statute section 375.786, which lists actions that constitute a foreign insurance company's transaction of business in this state and that lists includes the investigation and adjustment of claims:

> 2. Any of the following acts in this state *effected by mail or otherwise by* or on behalf of an unauthorized insurance company is deemed to constitute the transaction of an insurance business in this state:
>
> . . .
>
> (6) Directly or indirectly acting as an agent for or otherwise representing or aiding on behalf of another any person or insurance company in the . . . *investigation or adjustment of claims or losses or in the transaction of matters subsequent to effectuation of the contract* and arising out of it[.][36]

The plain and ordinary language of section 375.786 establishes that an insurance company transacts business when it either by mail or otherwise

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[35] *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 826 (Mo. banc 2014).

[36] RSMo § 375.786 (Emphasis added).

investigates or adjusts a claim. Missouri's statute is consistent with numerous courts that have held that an insurance company does business or transacts business by adjusting a claim in a state.[37] The United States Supreme Court has held that an insurance company does business in a state when it adjusts or attempts to settle a claim.[38] Another court has stated that it is "well-settled" that an insurance company engages in the transaction of business or is otherwise doing business when it investigates and adjusts a loss in a state even though the policy was issued in another state."[39]

The record establishes that Key investigated and adjusted the claim, which resulted in it denying coverage to Nash. As part of Key's investigation, Key's adjuster, Dean, made repeated contact with both the Missouri claimant and his Missouri lawyer. Specifically, on or around February 17, 2017, Dean called the plaintiff's attorney at his offices in Jackson County, Missouri to inform him that Key was investigating coverage and liability.[40]

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[37] *McClanahan v. Trans-Am. Ins. Co*., 307 P.2d 1023 (1957).

[38] *Commercial Mut. Acc. Co. v. Davis*, 29 S. Ct. 445, 448 (1909) (holding that a foreign life insurance company was doing business in Missouri when it sent someone to Missouri to investigate the decedent's death).

[39] *Isaac Fass, Inc., v. Pink*, 17 S.E.2d 379, 381 (1941).

[40] Exhibit 2 (paragraph 4).

On February 20, 2017, Dean sent a letter to Tuck at his Jackson County, Missouri offices asking for certain information to assist in her "investigation into this matter." Key's letter to Tuck stated that Tuck would need to submit several forms and authorizations so that Key could complete its investigation into liability and damages on this claim. Key's letter also asked Tuck to coordinate a recorded statement for his client and to allow Key to inspect the vehicle in Missouri. Key's letter told Tuck that this information was needed to "expedite final resolution of this claim."[41]

Around this same time, Key requested that its appraiser, Jeff Freeman, go to Kansas City, Missouri to appraise the damage on Wright's vehicle.[42] Upon information and belief, Ms. Dean sent a check to the Kansas City Police Department to request a copy of the police report.[43] On March 3, 2017, Wright and Dean again discussed the collision and Wright's injuries. At the time of the phone call, Wright was in Jackson County, Missouri.[44] On or around March 3, 2017, Dean called Tuck's

[41] Exhibit 2 (paragraphs 5 and 6 and exhibit B attached to exhibit 2).

[42] Exhibit 3 (Key000057).

[43] Exhibit 3 (Key000058).

[44] Exhibit 1 (paragraph 5).

offices in Jackson County, Missouri to ask for a copy of the police report.[45] Tuck sent the police report to Dean.[46]

On March 8, 2017, Dean sent an email and letter to Tuck in which Key informed Tuck that Key was denying coverage for the collision. That email was received and read at Tuck's offices in Jackson County, Missouri.[47] On March 14, 2017, Key sent a letter to Truman Medical Center in which Key acknowledged that Truman Medical Center had made claims for reimbursement of medical expenses, but that Key was denying coverage for the claims.[48] Key also sent denial letters to the plaintiff's attorney in September 2017.[49]

Key's actions—interviewing the claimant about the incident and his injuries, discussing the case with the claimant's attorney, asking the claimant for authorizations and other information, inspecting the vehicle, ordering the police report, discussing liens with the hospitals—are all standard actions that an insurance company takes in the ordinary course of its business to investigate and adjust an

[45] Exhibit 2 (paragraph 7); see also Exhibit 3(Key000058).

[46] Exhibit 2 (paragraph 8).

[47] Exhibit 2 (paragraph 9).

[48] Exhibit 4 (Key's letter to Truman Medical Center at PO Box 957973, St. Louis, Missouri 65195-7973).

[49] Exhibit 2 (paragraph 16); Exhibit E attached to Exhibit 2.

insurance claim. This evidence establishes that Key investigated and adjusted the claim by making repeated inquiries and contact into this state. Under section 375.786, Key's actions constitute the transaction of business in this state. This is true even though Key did most of these actions either by phone or mail. Section 375.786 states that the transaction of business under the statute can be "effected by mail or otherwise." That statute is consistent with this court's own holding that a business can transact business in this state or otherwise subject itself to jurisdiction by sending correspondence through the mail even if it does not physically step foot inside the state.[50]

Furthermore, Key's own insurance policy required it to transact additional business in Missouri. In exchange for a premium, Key's promises to defend and indemnify its insured apply to any location within its selected coverage territory. By requiring Key to provide a defense and indemnify the insured nationwide, the contract expressly contemplated that Key would transact business and perform contractual obligations in Missouri if its insured was involved in an accident in the state. Indeed, courts have held that the place of performance for an automobile insurance policy is the state where the alleged insured is sued and the insurance

[50] *Bryant v. Smith Interior Design Group, Inc.,* 310 S.W.3d 227, 234 (Mo. banc 2010).

company is required to provide a defense.[51] The duty to provide a defense requires the engagement of counsel to undertake such tasks as interviewing and deposing Missouri witnesses, meeting with opposing Missouri counsel, and appearing in a Missouri court-room.[52] Key even reluctantly concedes that this obligation would have required it to hire Missouri counsel.[53] Key's contractual obligation to indemnify the insured would include reimbursing a Missouri citizen injured in this state for damages suffered in this state. In other words, when the contract expressly contemplates providing a defense and indemnification in Missouri, it anticipates a host of unavoidable performances in Missouri.[54]

These contemplated performances are not "incidental" to the contract since defending and indemnifying the insured are the primary purposes of an insurance

[51] *Samelko v. Kingstone Ins. Co.,* 329 Conn. 249, 261–62, 184 A.3d 741, 751 (2018); *Gov't Employees Ins. Co. v. Grounds*, 332 So. 2d 13, 14–15 (Fla. 1976).

[52] *Samelko*, 184 A.3d 751.

[53] See Key's brief, page 17.

[54] *Samelko*, 184 A.3d 751.

contract.[55] Courts have explained that the central value an automobile insurance policy provides to its insured is that the insurance company will provide a defense and indemnity in the event of a claim within the coverage territory.[56]

Instead of performing its obligations, Key made a business decision to deny coverage to Nash, a Missouri resident. Wright's and Nash's claims against Key arise out of Key's unilateral business decision to deny a defense and coverage to a Missouri resident. These allegations arise out of Key's transaction of business in this state by making a business decision to deny coverage instead of expending additional money and resources to resolve the claim or otherwise defend Nash against the claim.

Although Missouri has not spoken on the issue in the context of its long-arm statute, other courts have held that an insurance company transacts business or does business in a state for the purposes of the long arm statute when it adjusts a claim and denies coverage even when the policy is written in another state. For example, Illinois has interpreted the transaction of business provision in two different long-

[55] *Id.*

[56] *Id.*

arm statutes as covering an insurance company's decision not to defend its insured or settle its insured's case.[57]

In *Bevins,* the plaintiffs and Edward Chrisman were involved in a car accident in West Virginia that resulted in injuries to the plaintiffs.[58] Chrisman had automobile insurance through the defendant, Comet Casualty Company (Comet), which was an Illinois corporation.[59] Comet was not licensed to do business in West Virginia and had never solicited insurance applications or issued insurance contracts to West Virginia residents.[60] The plaintiffs obtained judgments against Chrisman and Comet in the West Virginia courts. Comet did not pay the judgment amounts and so the plaintiffs filed a petition to register the judgments in Illinois. In response, Comet argued, among other things, that the judgment was void because West Virginia lacked personal jurisdiction over it.

In deciding whether the West Virginia courts had jurisdiction over Comet, the Illinois court looked to West Virginia's long-arm statute, which allowed jurisdiction for "any other transaction of business" in the state. The *Bevins* court stated explained

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[57] *Pace Communications Services Corp. v. Express Products, Inc.*, 945 N.E.2d 1217, 1222–23 (2011); *Bevins,* 333, 390 N.E.2d 500.

[58] *Bevins,* 390 N.E.2d 500, 502.

[59] *Id*. at 501-502.

[60] *Id.*

that Comet agreed to insure Chrisman against all liability regarding personal injury and property damage as a result of the use of the automobile in any State without limitation. Thus, the court held that the reasonable expectation raised from this policy is that Comet would provide coverage wherever the insured would be located and in any State in which the automobile was used.

The court stated that Comet performed acts in West Virginia, such as writing letters to parties in that state and seeking information concerning the occurrence and injuries.[61] The court concluded that those acts constituted the transaction of business even though those actions were done through mail.[62] The court noted that West Virginia's long-arm statute stated that the transaction of business could be "effected by mail or otherwise" and thus the actual physical presence of the insurance company's agents or offices in the state was not required.[63] The court held that the West Virginia court had specific jurisdiction over Comet.[64] A few years later, relying in part on *Bevins*, the Illinois court interpreted its own long-arm statute, which also had a transaction of business provision, as granting its specific jurisdiction over an

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

insurance company for that company's investigation and adjustment of a claim and for its failure to defend an insured in an Illinois court.[65]

Missouri also modeled its long-arm statute after the Illinois statute, and Missouri courts have looked to the Illinois court's interpretation of its long-arm statute when interpreting its own.[66] This court should follow Illinois's lead by holding that an insurance company transacts business for the purposes of the long-arm statute when it denies coverage and a defense to an insured and refuses to settle his or her claim.

Furthermore, as Respondent notes in his introduction and explains in greater detail in the minimum contacts section of his brief, dozens of states have concluded that due process allows a state to maintain jurisdiction over a foreign insurance company for its failure to defend an insured in that state or resolve the claims against the insured even if the policy was issued in another state. Many of those states,

[65] *Pace Communications Services Corp. v. Express Products, Inc.*, 945 N.E.2d 1217, 1222–23 (2011).

[66] *Adams Dairy Co. v. Nat'l Dairy Products Corp.*, 293 F. Supp. 1135, 1158 (W.D. Mo. 1968).

including Georgia,[67] Hawaii,[68] Idaho,[69] Minnesota,[70] South Carolina,[71] Tennessee,[72] and Washington[73] have long-arm statutes like Illinois's long arm statute. In each of those cases, the court did not separately examine the state's long-arm statute because the state had already held that the long-arm statute allowed the court to assert jurisdiction to the extent that due process clause allowed.[74] Yet, in each of those cases, the court held that due process allowed the court to maintain jurisdiction over

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[67] Ga. Code Ann. § 9-10-91 (West).

[68] Haw. Rev. Stat. Ann. § 634-35 (West).

[69] Idaho Code Ann. § 5-514 (West).

[70] Minn. Stat. Ann. § 543.19 (West).

[71] S.C. Code Ann. § 36-2-803 (West).

[72] Tenn. Code Ann. § 20-2-214 (West).

[73] Wash. Rev. Code Ann. § 4.28.185 (West).

[74] *McGow v. McCurry*, 412 F.3d 1207, 1214 (11th Cir. 2005); *Robinson Corp. v. Auto-Owners Ins. Co.,* 304 F. Supp. 2d 1232, 1238 (D. Haw. 2003); *Wells Cargo, Inc. v. Transp. Ins. Co.,* 676 F. Supp. 2d 1114, 1121 (D. Idaho 2009); *Domtar, Inc. v. Niagara Fire Ins. Co.,* 533 N.W.2d 25, 30 (Minn. 1995); *Leggett v. Smith,* 686 S.E.2d 699, 704 (Ct. App. 2009); *Payne v. Motorists' Mut. Ins. Companies*, 4 F.3d 452, 455 (6th Cir. 1993); *Hawthorne v. Mid-Continent Cas. Co*., C16-1948RSL, 2017 WL 1233116, at *2 (W.D. Wash. Apr. 4, 2017).

the foreign insurance company. Thus, these courts have implicitly found that an insurance company's denial of a defense and denial of coverage constitutes the transaction of business in their state.

Although Missouri court cases often analyze the long-arm statute and the minimum contacts separately, this court construes both the long arm statute and the transaction of business provision as extending the jurisdiction of this court to the fullest extent permissible under the due process clause.[75] Since dozens of courts have held that due process allows a court to maintain jurisdiction over an foreign insurance company, this court should construe the transaction of business provision as applying to an insurance company's investigation, adjustment, and denial of a claim arising in Missouri.

Respondent's analysis is also consistent with both the Missouri Supreme Court and the Court of Appeals, which have held that the failure to perform a

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[75] *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 225 (Mo. banc 2015); *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 232 (Mo. 2010); *State ex rel. Newport v. Wiesman*, 627 S.W.2d 874, 876 (Mo. banc 1982) (stating that Missouri courts have interpreted the words "transaction of any business within this state" or "commission of a tortious act within this state" broadly so as not to deny jurisdiction under s 506.500 in situations in which the due process clause would permit the assertion of personal jurisdiction).

contractual obligation in Missouri can constitute the transaction of business for the purposes of the long-arm statute.[76] The 8th Circuit has also held that a state has personal jurisdiction over a non-resident defendant who allegedly fails to perform a contractual obligation in the state.[77]

Key cites no cases holding that an insurance company's investigation, adjustment, and denial of a claim constitutes something besides the transaction of business. Rather, Key alleges that Nash and Wright cannot establish personal jurisdiction because they cannot make a *prima facie* showing that Key owed any duties to Nash or that Nash can maintain claims against Key.[78] Key argues that Nash cannot assert claims for bad faith or breach of contract because he was a stranger to the insurance policy and because the policy was void due to material misrepresentations made by Nash's daughter.

Both Missouri and Kansas law require an insurance company to provide certain coverages to a permissive user.[79] And even outside the compulsory insurance

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[76] *State ex rel. Metal Service Center of Georgia, Inc. v. Gaertner,* 677 S.W.2d 325, 327 (Mo. banc 1984); *Wilson Tool & Die, Inc. v. TBDN-Tennessee Co.*, 237 S.W.3d 611, 615 (Mo. App. E.D. 2007).

[77] *Mid-Am., Inc. v. Shamaiengar*, 714 F.2d 61, 62 (8th Cir. 1983).

[78] See Key's suggestions, page 11, 12, 13, and 15.

[79] Missouri statute section 303.190.2(2); Kansas statute section 40-3107(b).

context, an insurance company will often agree to defend and indemnify people besides the person who signed or purchased the insurance, or besides people who are listed as the named insured.[80] The policy or agreement will often identify other non-signatories by class and agree to protect them.[81] And, Key's own policy defines insured person to include "any other person while using **YOUR insured car** with **YOUR** permission."[82] The policy also requires Key to pay its policy limits for any insured person and defend any insured person in court.[83] Key cites no cases limiting claims against an insurance company to the named insured only. Thus, Key cannot seriously argue that Nash, merely because he was not the named insured, cannot maintain a claim for bad faith or breach of contract. Rather, Key's real argument is that this specific user, Nash, cannot maintain these claims because Key could void the insurance policy under the Kansas Fraudulent Insurance Act due to misrepresentations.

In that regard, Key concedes that Nash and Wright allege that Nash was an insured under the policy. Key also concedes that Nash and Wright allege that Key

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[80] See e.g. *Cobb v. State Sec. Ins. Co.*, 576 S.W.2d 726, 736 (Mo. banc 1979).

[81] *Desmond v. Am. Ins. Co.*, 786 S.W.2d 144, 147 (Mo. Ct. App. 1989).

[82] R107.

[83] *Id.*

waived its right to rescind coverage due to material misrepresentations. Specifically, Nash and Wright allege that:

> In addition, even assuming that Kansas law applies, Nash asserts that Defendant Key's waived its right to rely on the Fraudulent Insurance Act or any insurance provision regarding cancellation by affirmatively informing Takesha Nash in its January 25, 2017 cancellation notice that despite her alleged material misrepresentations Key's insurance policy would remain in effect and provide coverage until "one minute after midnight (12:01 am) on 2/27/2017." *Iron Horse Auto, Inc. v. Lititz Mut. Ins. Co.*, 156 P.3d 1221, 1226 (2007). Key's letter constitutes its voluntarily relinquishment of any known right to cancel the policy for misrepresentation or fraud before February 27, 2017.[84]

Wright's and Nash's allegations regarding waiver is consistent with Kansas law and the Kansas Supreme Court's interpretation of the Kansas Fraudulent Insurance Act. The Kansas Supreme Court has held that the statute merely indicates an intent to relieve an insurance company from any obligation, separate from the policy's terms to provide coverage or pay any claim involving a fraudulent act.[85]

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[84] Exhibit A Nash's reply, paragraph 2.

[85] *Iron Horse Auto, Inc. v. Lititz Mut. Ins. Co.,* 156 P.3d 1221, 1226 (2007).

The Kansas Supreme Court has held that the Act does not void coverage when an insurance company chooses to voluntarily offer coverage to an insured even with knowledge of a fraudulent act.[86]

Nevertheless, Key argues that Wright and Nash cannot rely on these allegations but instead must prove them in order to establish personal jurisdiction. Key repeatedly argues that Key did not owe Nash any contractual obligations.[87] In another place, Key asserts that Nash cannot make a *prima facie* showing of a valid bad faith failure to settle claim because Nash's daughter made material misrepresentations in her application.[88]

Key cites various cases for the proposition that the plaintiff must make a *prima facie* showing of the validity of its claim in order to survive a motion to dismiss for lack of jurisdiction.[89] Under Key's interpretation, Nash and Wright must prove the merits of their underlying claims in order to establish personal jurisdiction. Key, however, misunderstands what the court means by a *prima facie* showing of the validity of the claim.

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[86] *Id.*

[87] Key's brief, page 17.

[88] *Id.*

[89] *Id.*

This court has explained that in determining whether to grant a motion to dismiss based on personal jurisdiction, the court considers the plaintiff's allegations to determine whether, if true, they support a recognized cause of action and support the plaintiff's claim for jurisdiction.[90] And even when the defendant uses affidavits, the court's review of the petition and supporting affidavits is still limited to determining the narrow question of personal jurisdiction and does not allow the court to review or decide the merits of the underlying case.[91] In this context, the requirement that the plaintiff make a *prima facie* showing of the validity of the claim just requires that the plaintiff's allegation, if believed, state a recognized cause of action. This prohibits the plaintiff from making up an unrecognized cause of action simply to get jurisdiction in this state.[92]

For example, in *Bryant*, the parties disputed whether Missouri had jurisdiction over a non-resident defendant who was alleged to have made material misrepresentations to a Missouri resident.[93] Under Key's theory, the court should

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[90] *Angoff v. Marion A. Allen, Inc.*, 39 S.W.3d 483, 487 (Mo. banc 2001).

[91] *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 225 (Mo. banc 2015).

[92] *State ex rel. William Ranni Associates, Inc. v. Hartenbach*, 742 S.W.2d 134, 140 (Mo. 1987) (court had no jurisdiction over claim because plaintiff could not as a matter of law sue agent in tort for causing a breach of the insurance contract).

[93] *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 232 (Mo. banc 2010).

have found no personal jurisdiction because the plaintiff did not prove the misrepresentations. Yet, this court held that Missouri had personal jurisdiction over the non-resident defendant because the plaintiff's *allegations* of directed action into this state were "sufficient to demonstrate the commission of a tortious act within this state and to place [the defendant] within the reach of Missouri's long-arm statute."[94]

Under Missouri Supreme Court precedent, Wright and Nash need only to allege facts, which, if believed, establish personal jurisdiction for a recognized cause of action. This standard of review makes even more sense in this case. Under Missouri law, misrepresentation is an affirmative defense that Key must plead and prove.[95] Under Key's theory, Wright and Nash could only establish personal jurisdiction over Key by proving their allegations and refuting Key's affirmative defense before the parties started discovery. Unsurprisingly, Key cites no cases in which a court evaluated the merits of a defendant's affirmative defense and then used that affirmative defense to establish that the defendant was not subject to personal jurisdiction in Missouri. Key's standard is unworkable, and Key does not explain how Nash and Wright would be able to prove their claims and refute Key's

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[94] *Id.* (emphasis added).

[95] *Smith ex rel. Stephan v. AF & L Ins. Co.,* 147 S.W.3d 767, 774 (Mo. App. E.D. 2004).

affirmative defense before commencing discovery. Furthermore, Key does not explain why the court should adopt that standard.

Thus, contrary to Key's assertions, Wright and Nash do not need to prove their claims or refute Key's affirmative defense. Rather, they need only allege facts, which, if believed, establish personal jurisdiction for a recognized cause of action. In that regard, Nash has certainly alleged the elements of both a breach of contract and bad faith failure to settle claim against Key and those are recognized causes of action in both Missouri and Kansas. Wright and Nash have also alleged that Key waived its right to void the policy even if someone made material misrepresentations. Key may be ultimately correct that the policy is void because of material misrepresentations but that does deprive the court of jurisdiction to decide the case.

2. <u>Key committed a tort in Missouri.</u>

Key concedes that Nash has asserted a claim for bad faith failure to settle. Key argues that Nash cannot assert a tort claim because the insurance policy has a choice of law provision requiring the application of Kansas law and Kansas law states that a bad faith claim is a contract action. Key does not cite the choice of law provision in its brief. That provision states that "[t]he provisions of this policy shall be interpreted in accordance with the laws of the State of Kansas." Key just assumes that this provision applies to Nash's bad faith case.

Missouri, however, will not construe a choice of law provision as governing tort actions unless the language is clear that the parties intended it to govern tort actions.[96] Other courts have explained that the express language of the provision must be 'sufficiently broad' as to encompass the entire relationship between the parties.[97] And, various courts have held that a choice of law provision in an insurance policy does not govern the separate bad faith claim.[98]

Missouri uses the most significant relationship test to determine choice of law issues. Under that test, Missouri examines the following factors: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of

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[96] *Taxes of Puerto Rico, Inc. v. Tax Works, Inc.*, 14-00279-CV-W-GAF, 2014 WL 6604056, at *4 (W.D. Mo. June 16, 2014); *Flynn v. CTB, Inc.*, 1:12-CV-68 SNLJ, 2013 WL 28244, at *3 (E.D. Mo. Jan. 2, 2013).

[97] *Krock v. Lipsay,* 97 F.3d 640, 645 (2d Cir.1996).

[98] *Frazer Exton Dev., LP v. Kemper Envtl., Ltd.*, 03 CIV. 0637 (HB), 2004 WL 1752580, at *10 (S.D.N.Y. July 29, 2004), aff'd sub nom. Frazer Exton Dev., L.P. v. Kemper Envtl., Ltd., 153 Fed. Appx. 31 (2d Cir. 2005); see also *Martin v. Gray*, 385 P.3d 64, 65 (Okla. 2016).

the parties, and (4) the place where the relationship, if any, between the parties is centered.[99]

The 8th Circuit has held that the injury for the purposes of a bad faith case is the economic harm suffered by the insured from the excess verdict in the underlying suit.[100] In this case, Nash's economic harm is the Missouri verdict. The place of injury is where the insured feels the economic impact of the excess judgment. Nash lived in Missouri when the court entered judgment. Thus, the injury and place where Nash felt the injury both occurred in Missouri. This factor favors the application of Missouri law.

The second factor is the place where the conduct causing the injury occurred. The injurious conduct in a bad faith failure to settle case occurs where the settlement negotiations took place or should have taken place.[101] In that regard, Key committed bad faith when it failed to defend him in Missouri and settle his claim before the case

[99] *Am. Guarantee & Liab. Ins. Co. v. U.S. Fid. & Guar. Co.*, 668 F.3d 991, 996–97 (8th Cir. 2012).

[100] *Id* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell,* 123 S.Ct. 1513 (2003) (discussing the harm arising from a bad faith failure-to-settle claim as the economic injury suffered by the insureds).

[101] *Id.* at 999.

was filed in Missouri. Key sent letters into Missouri denying coverage and refusing to make any offers to settle. This factor favors the application of Missouri law.

The third factor is the domicile, residence, nationality, place of incorporation and place of business of the parties. Key is a Kansas corporation. At all relevant times, Nash lived in Missouri. At best, this factor is neutral.

The fourth factor is the place where the relationship of the parties is centered.[102] In a bad faith case, Missouri courts have held that the center of the relationship is where the tort involved in the underlying action occurred and where the conduct giving rise to the alleged tort of bad faith failure to settle occurred.[103] In holding that the parties' relationship centered at the place of the underlying tort and lawsuit, the courts have discounted the place where the insurance policy was issued because the policy was an auto policy and the parties to that contract would be on notice that dispute could arise in other states.[104] In this case, the collision, lawsuit, and trial occurred in Missouri. This factor favors the application of Missouri law.

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[102] *Id.* at 1000.

[103] *Am. Guarantee & Liab. Ins. Co.,* 668 F.3d at 1001.; *Sentry Select Ins. Co. v. Hosmer*, 08-4254-CV-C-NKL, 2009 WL 2151557, at *4 (W.D. Mo. July 17, 2009) (Court concludes that Missouri has the most significant and relevant contacts to Hosmer's tort claims, which relate to Sentry's actions or inactions with respect to litigation in Missouri.).

[104] *Id.* at 1002.

Finally, Missouri courts have also held that the application of Missouri law is consistent with the policy concerns in section 6 of the restatement.[105] Missouri has a great interest in ensuring that parties to litigation in its courts attempt to settle in good faith.[106] Missouri also has a strong interest in regulating bad faith conduct by an insurance company in this state. This policy concerns also favor the application of Missouri law. Under this test, Missouri should apply Missouri law to Nash's bad faith claim. All the parties agree that bad faith is a tort claim in Missouri.[107]

The Missouri courts interpret the "commission of a tortious act" provision broadly.[108] A single tortious act can support the exercise of personal jurisdiction consistent with due process standards.[109] Commission of a tortious act within this state includes extraterritorial acts of negligence that produces actionable consequences in Missouri.[110]

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[105] *Id.*

[106] *Id.*

[107] *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 829 (Mo. 2014).

[108] *State ex rel. William Ranni Associates, Inc. v. Hartenbach*, 742 S.W.2d 134, 139 (Mo. banc 1987).

[109] *Id.*

[110] *Id.*

The defendant need not intend for his or her acts to produce consequences in Missouri.[111] Rather, the defendant need only reasonably foresee that his or her acts or omissions might have injurious consequences in the forum state.[112] The test, then, is not whether the defendant committed the injurious act in Missouri but whether the defendant committed an act outside the forum and did or should reasonably have foreseen that the action would likely result in injury to someone in Missouri.

As Respondent explains early, under these principles, the Missouri Supreme Court in *Bryant* held that a plaintiff's allegations that a company sent false and misleading documents to him while he lived in Missouri were sufficient to demonstrate the commission of a tortious act within the state for the purpose of Missouri's long-arm statute.[113] In *Bryant*, the parties disputed whether Missouri had jurisdiction over an out-of-state defendant who was alleged to have made material misrepresentations to a Missouri resident. This court held that Missouri had personal jurisdiction over a non-resident defendant that sent allegedly fraudulent documents to a Missouri resident.[114] This court held that the allegations of directed action into

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[111] *Noble v. Shawnee Gun Shop, Inc.*, 316 S.W.2d 364, 371 (Mo. App. W.D. 2010).

[112] *Id.* at 373.

[113] *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 232 (Mo. banc 2010).

[114] *Id.*

this state were "sufficient to demonstrate the commission of a tortious act within this state and to place [the defendant] within the reach of Missouri's long-arm statute."[115] In doing so, the court explained that:

> We would be closing our eyes to the realities of modern business practices were we to hold that a corporation subjects itself to the jurisdiction of another state by sending a personal messenger into that state bearing a fraudulent misrepresentation but not when it follows the more ordinary course of employing the United States Postal Service as its messenger. ... *Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state.*[116]

The Missouri Supreme Court reaffirmed this principle in *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216 (Mo. 2015) and the Missouri Court of Appeals followed it in *Good World Deals, LLC. v. Gallagher*, 554 S.W.3d 905 (Mo. App. W.D. 2018).

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[115] *Id.*

[116] *Id* (emphasis added).

This case is similar. Wright and Nash have alleged that Key sent numerous letters into this state investigating, adjusting and ultimately denying coverage and a defense to Nash. If sending a fraudulent letter creates specific jurisdiction for a misrepresentation claim than sending letters and making numerous inquires into Missouri to investigate, adjust, and deny a claim, which results in a Missouri court entering judgment against a Missouri resident, should create specific jurisdiction for a bad faith claim.

Wright and Nash have already explained that for conflict of law purposes the courts have held that the place of injury and the place of conduct for a bad faith claim is the state where the underlying trial occurred, and judgment was entered. The court should apply the same reasoning for the purposes of jurisdiction. The conduct and injury giving rise to all claims in this case occurred in Missouri. Wright's and Nash's claims arise directly from Key's investigation, adjustment, and denial of the claim. Regardless of where Key operated when it denied coverage, it was foreseeable to Key that its denial of coverage would result in a Missouri court entering a judgment against Nash who is a Missouri resident. The Missouri judgment meets any definition of "injurious actionable consequence." The court should conclude that Key committed a tort in Missouri and that Wright's and Nash's claim arise from the commission of that tort.

Furthermore, even if Key is correct that Nash's bad faith is a contract action, this analysis would still show that Missouri has jurisdiction over this case. The place of performance, the place of conduct, and the place of injury would still have all been Missouri.

3. Key contracted to insure a risk in Missouri.

Subsection (5) of the long-arm statute states that this court has jurisdiction over a defendant who contracts to insure any person, property, or risk located within this state at the time of contracting. Wright's judgment concludes that Nash was negligent in the operation of a motor vehicle in Jackson County, Missouri. That negligence is precisely the kind of "risks" that Key insured against.

Furthermore, Key's insurance policy insures against the risk of litigation. Key's insurance policy confirms that Key's coverage obligations extend to and apply in any jurisdiction (i.e., any State or Federal forum) in which there is a proceeding seeking to impose liability on the insured for professional negligence or other tortious conduct. Hence, the "risk" insured against is not merely the risk that the insured will engage in negligence but also that the insured will be called into the forum to account for his or her negligence.

Key sold a policy to a resident on the border of Missouri and Kansas. Key should have foreseen that an insured could drive into Missouri and cause a collision in this state. Key should have also foreseen that its insured could be sued in this state.

This court should conclude that it has jurisdiction under the long arm statute because Key agreed to insure the risk that its insured would be involved in a collision and litigation in Missouri.

Minimum Contacts

Key then argues that Wright and Nash cannot meet the second part of Missouri's personal jurisdiction test because they cannot establish that Key has sufficient minimum contacts with Missouri to satisfy due process.[117] For a court to assert personal jurisdiction over a non-resident defendant, the "defendant's conduct and connection with the forum [must be] such that he should reasonably anticipate being hailed into court there."[118] Key concedes that the underlying collision occurred here and that Wright filed his lawsuit against Nash in Missouri. Nevertheless, Key argues that the court cannot base personal jurisdiction over Key on the unilateral contacts of third parties like Wright and Nash. In other words, Key argues that since it had no control over where Nash collided with Wright, the court cannot say that Key availed itself to personal jurisdiction in Missouri.

Wright and Nash, however, do not seek personal jurisdiction merely because the collision occurred here. Rather, Wright and Nash base their assertion of personal

[117] See Key's suggestions, page 6.

[118] *Andra v. Left Gate Prop. Holding, Inc.,* 453 S.W.3d 216, 231 (Mo. banc 2015).

jurisdiction on Key's unilateral response to the underlying collision and Wright's claim. If Key would have agreed to defend Nash, Nash would not now be able to sue him for breach of contract. Similarly, if Key would have settled Wright's claim then Wright would not have a garnishment claim and Nash would not have a bad faith claim. Neither Wright nor Nash forced Key to decide not to defend Nash in Jackson County and Wright did not force Key to deny all obligations to settle the claim.

Wright and Nash's position is consistent with the general law that the mere fact that someone else initiated the first contact does not mean that the entire course of conduct is considered unilateral for the purposes of jurisdiction.[119] While Wright's and Nash's conduct may have started the chain of events leading to this current lawsuit, Key's unilateral response to Wright's and Nash's conduct gives Missouri personal jurisdiction over Key. Thus, the Jackson County Circuit Court has personal jurisdiction over Key because: 1) Key's policy requires it to defend claims brought anywhere in the U.S.; 2) Key had notice of Wright's claim against Nash, a Missouri resident, for a collision arising in Missouri; 3) Key investigated and adjusted that claim in Missouri; 4) Wright filed a lawsuit against Key in Missouri, which alleged various acts of negligence occurring in Missouri; 5) Wright's lawsuit triggered Key's duty to defend Nash in Jackson County Circuit Court and Key's duty to

[119] *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 235 (Mo. banc 2010).

engage in good faith in an attempt to settle the claim; 6) Key made a conscious decision not to defend Nash or settle his claim; 7) Key sent various letters into Missouri to Missouri residents informing them that it would not defend or settle Wright's claim against Nash; and 8) a Missouri court entered judgment against Nash.

Respondent's research reveals that the courts have universally held that a court's exercise of jurisdiction over an insurance company under these circumstances is consistent with due process and the minimum contacts standards. The 1st, 4th, 6th, 8th, 9th, 11th Circuits and the United States Court of Appeals for the District of Columbia have reached this conclusion in the exact fact pattern as this case.[120]

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[120] *McGow v. McCurry*, 412 F.3d 1207, 1215 (11th Cir. 2005); *Ferrell v. W. Bend Mut. Ins. Co.*, 393 F.3d 786 (8th Cir. 2005); *Payne v. Motorists' Mut. Ins. Companies*, 4 F.3d 452, 457 (6th Cir. 1993); *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.*, 907 F.2d 911 (9th Cir. 1990); *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987); *Eli Lilly & Co. v. Home Ins. Co.,* 794 F.2d 710, 720 (D.C. Cir. 1986) (insurance company of product manufacturer subject to jurisdiction where the manufacturer is sued); *Am. & Foreign Ins. Ass'n v. Commercial Ins. Co.*, 575 F.2d 980, 982 (1st Cir. 1978) (insurance company of product manufacturer subject to jurisdiction where the manufacturer is sued).

The state or federal court in 28 states have analyzed this issue and either have held or written dictum agreeing with the proposition that due process and the minimum-contracts standard are satisfied against an insurance company for claims of bad faith and breach of its duty to defend when a foreign insurance company fails to defend its insured in that forum even if the policy was issued in a different state and the company has no offices or agents in the forum. These states are Alaska,[121]

[121] *Washington Ins. Guar. Ass'n v. Ramsey*, 922 P.2d 237, 242 (Alaska 1996).

Arizona,[122] Arkansas,[123] California,[124] Connecticut,[125] Florida,[126] Georgia,[127] Hawaii,[128] Idaho,[129] Illinois,[130] Indiana,[131] Kansas,[132] Kentucky,[133] Louisiana,[134]

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[122] *Batton v. Tennessee Farmers Mutual*, 736 P 2d 2, 6 (1987) (distinguishing a first party claim from third party claim for purposes of jurisdiction).

[123] *Ferrell v. W. Bend Mut. Ins. Co*., 393 F.3d 786 (8th Cir. 2005).

[124] *Se. Express Sys. v. S. Guar. Ins. Co.,* 40 Cal. Rptr. 2d 216, 219 (1995) (holding that "it neither unreasonable nor unfair to require an insurer who has assumed the responsibility of defending its insured in California to defend itself when it refuses its insured's defense in a suit brought in California.").

[125] *Samelko v. Kingstone Insurance Company*, 329 Conn. 249 (2018) (insurer had minimum contacts with Connecticut to justify Connecticut court's exercise of personal jurisdiction under Due Process Clause).

[126] *Erie Ins. Exch. v. Larose*, 202 So. 3d 148, 156 (Fla. Dist. Ct. App. 2016) (distinguishing first party claims from third party claims for jurisdictional purposes); *Virginia Farm Bureau Mutual Insurance Co. v. Dunford,* 877 So.2d 22 (Fla. 4th DCA 2004) (state had personal jurisdiction over foreign insurance company on breach of contract claim and failure to settle claim).

[127] *McGow v. McCurry*, 412 F.3d 1207, 1216 (11th Cir. 2005).

[128] *Robinson Corp. v. Auto-Owners Ins. Co.,* 304 F. Supp. 2d 1232, 1238 (D. Haw. 2003) (holding that Michigan insurer purposefully availed itself of benefits of Hawaii, as forum state, in order for Hawaii court to exercise specific personal jurisdiction over insurer under

long arm statute, on allegations that coverage territory in policy included Hawaii, and insured event resulted in litigation in Hawaii).

[129] *Wells Cargo, Inc. v. Transp. Ins. Co.,* 676 F. Supp. 2d 1114, 1121 (D. Idaho 2009) (holding that Ohio insurer purposefully availed itself of right to do business in Idaho as required for exercise of specific jurisdiction in action brought in Idaho district court by insured Nevada corporation to determine parties' obligation with respect to underlying Idaho environmental liability action, where policy coverage area extended into Idaho and underlying action was an event which occurred in Idaho).

[130] *Pace Communications Services Corp. v. Express Products, Inc*., 945 N.E.2d 1217 (2011).

[131] *Leech v. Nat'l Interstate Ins. Co*., 2:17-CV-0508-WTL-MJD, 2018 WL 3737926, at *7 (S.D. Ind. Aug. 7, 2018), report and recommendation adopted, 2:17-CV-508-WTL-MJD, 2018 WL 4003628 (S.D. Ind. Aug. 22, 2018).

[132] *Camico Mut. Ins. Co. v. J.D. Rosen C.P.A., P.A.,* 17-2228-JWL, 2017 WL 3839412, at *2 (D. Kan. Sept. 1, 2017).

[133] *Auto Owners Ins. Co. v. Consumers Ins. USA, Inc*., 323 S.W.3d 781, 784 (Ky. Ct. App. 2010) (holding that Kentucky had jurisdiction over a Tennessee insurance company).

[134] *Louis Dreyfus Corp. v. McShares, Inc.*, CIV. A. 88-5489, 1989 WL 147535, at *2 (E.D. La. Nov. 22, 1989) (insurance company of product manufacturer subject to personal jurisdiction where insured sued).

Maryland,[135] Minnesota,[136] Montana,[137] Nevada,[138] New Jersey,[139] New York,[140] North Carolina,[141] Ohio,[142] Oklahoma,[143] Rhode Island,[144] South Carolina,[145]

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[135] *Bahn v. Chicago Motor Club Ins. Co.*, 634 A.2d 63, 70 (1993) (stating that the majority rule seems to be that adopted in *Rossman;* the courts of a state in which an automobile accident occurs have personal jurisdiction over a nonresident insurer of the motorist who is liable to another driver for damages resulting from the accident, when sued by the other driver, if the insurance policy provides for coverage in all fifty states).

[136] *Domtar, Inc. v. Niagara Fire Ins. Co.,* 533 N.W.2d 25 (Minn. 1995) (following *Farmers* to find that court had jurisdiction over Canadian insurance company in breach of contract lawsuit).

[137] *Maldonado v. Safeway Ins. Co*., CV 15-01-GF-BMM, 2015 WL 12734159, at *4 (D. Mont. Sept. 3, 2015) (court had jurisdiction over insurance company for insurance company's failure to defend him and for its failure to settle the case).

[138] *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 134 P.3d 710, 715 (2006); *Evanston Ins. Co. v. W. Cmty. Ins. Co.*, 13 F. Supp. 3d 1064, 1070 (D. Nev. 2014).

[139] *New Jersey Auto. Full Ins. Underwriting Ass'n v. Indep. Fire Ins. Co.,* 600 A.2d 1243 (Ch. Div. 1991).

[140] *Labruzzo v. State Wide Ins. Co*., 353 N.Y.S.2d 98, 102 (Sup. Ct. 1974).

[141] *Forshaw Indus., Inc. v. Insurco, Ltd.,* 2 F. Supp. 3d 772, 782 (W.D.N.C. 2014).

Tennessee,[146] Virginia, [147] and Washington. [148] In discussing these cases, the Maryland Court of Appeal has labeled this the majority rule.[149] The Connecticut Supreme Court has stated that this rule is the "consensus" among courts.[150] The District Court of Kansas recently stated that the federal circuit courts "appear to be unanimous" in this opinion.[151]

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[142] *Sparks v. First Miami Ins. Co*., L-91-222, 1992 WL 105021, at *4 (Ohio Ct. App. May 15, 1992), cause dismissed, 66 Ohio St. 3d 1409, 607 N.E.2d 9 (1993).

[143] *Melvin v. Farm Bureau Prop. & Cas. Ins. Co.,* No. CIV-14-927-R, 2014 WL 12730319, at *2-3 (W.D. Okla. Nov. 5, 2014).

[144] *Verri v. State Auto. Mut. Ins. Co.,* 583 F. Supp. 302, 305 (D.R.I. 1984).

[145] *Leggett v. Smith,* 686 S.E.2d 699, 704 (Ct. App. 2009).

[146] *Payne v. Motorists' Mut. Ins. Companies*, 4 F.3d 452, 457 (6th Cir. 1993).

[147] *Rossman v. State Farm Mut. Auto. Ins. Co.,* 832 F.2d 282 (4th Cir. 1987).

[148] *Hawthorne v. Mid-Continent Cas. Co*., C16-1948RSL, 2017 WL 1233116, at *6 (W.D. Wash. Apr. 4, 2017).

[149] *Bahn v. Chicago Motor Club Ins. Co.*, 634 A.2d 63, 70 (1993).

[150] *Samelko v. Kingstone Insurance Company*, 329 Conn. 249, 267 (2018).

[151] *Camico Mut. Ins. Co. v. J.D. Rosen C.P.A., P.A.,* 17-2228-JWL, 2017 WL 3839412, at *2 (D. Kan. Sept. 1, 2017).

Most of these cases are indistinguishable from this case. For example, in *Farmers*, the 9th Circuit held that the district court had personal jurisdiction over a Canadian insurance company because the underlying accident occurred in Montana and the policy required the insurance company to defend the insured in that forum. In that case, a single accident collision occurred in Montana. Both Farmers and Portage provided coverage for the accident. Farmers was a California insurer doing business in Montana, while Portage was a Canadian insurer that issued no policies in Montana and had no agents there. In that case, Farmers sued Portage as a third-party beneficiary to the promise to provide coverage in Montana and for bad faith refusal to settle. Like Key in this case, Portage argued that it committed no act that would bring it within the scope of the Montana long-arm statute.[152]

The 9th Circuit disagreed, however, and found that the exercise of personal jurisdiction over Portage was consistent with due process because: 1) Portage performed some act by which it purposefully availed itself of the privilege of conducting activities in the forum; 2) the claim arose out of Portage's forum-related activities; and 3) the exercise of jurisdiction was reasonable. Specifically, the court held that Portage had purposefully availed itself by issuing a policy that extended

[152] *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.*, 907 F.2d 911 (9th Cir. 1990).

coverage into Montana.[153] The court explained that an automobile liability insurance company like Portage could anticipate that its insured would travel into a different state and become involved in litigation there.[154] The court explained that the insurance company should have foreseen being called into a foreign court to defend itself because the company had written its policy to provide coverage throughout the entire United States:

> Unlike the automobile sellers in *World–Wide Volkswagen,* automobile liability insurers contract to indemnify and defend the insured for claims that will foreseeably result in litigation in foreign states. Thus litigation requiring the presence of the insurer is not only foreseeable, but it was purposefully contracted for by the insurer. Moreover, unlike a product seller or distributor, an insurer has the contractual ability to control the territory into which its "product"—the indemnification and defense of claims—will travel.[155]

[153] *Id*.

[154] *Id*. at 914.

[155] *Id* (footnotes and citations omitted).

Of course, if the insurance company wanted to avoid jurisdiction in a certain forum, it could have excluded that state from the coverage territory defined in the policy.[156] The company likely did not do so because that type of limitation would make its policy less marketable.[157] But having derived a benefit from its nationwide coverage, the insurance company could not complain about being hauled into court in a particular state.

The court also explained that the claim arose out of Portage's contacts with Montana. An action arises out of contacts with the forum if, "but for" those contacts, the cause of action would not have arisen.[158] The 9th Circuit court explained that but for Portage's breach of its promise to defend its insured in Montana, the current

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[156] *Id; see also Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987) (stating that "[p]resumably, [the insurance company] offers this type of broad coverage to induce customers to buy its policies and to pay higher premiums for them. The benefits thereby accruing to [the insurance company] are neither fortuitous nor incidental").

[157] *Id.*

[158] *Id.* at 915.

lawsuit would not have arisen.[159] The court also held that it was reasonable for Portage to be sued in Montana because Portage had agreed to defend its insured in any state in the country and Montana had a significant interest in regulating bad faith by insurance companies in its state.[160] The 9th Circuit held that personal jurisdiction over Portage satisfied the Due Process Clause because the insurance company had purposefully and voluntarily contracted to defend its insured in any state and could reasonably be expected to be sued in that state for failing to do so.[161]

The 8th Circuit has followed *Farmers*.[162] In *Ferrell*, certain farmers sued Hi–Tech in federal court in Arkansas. West Bend, Hi–Tech's commercial general liability insurance provider, defended Hi–Tech under a reservation of rights.[163] The court entered judgment for the farmers.

After receiving the judgment, the farmers instituted an action against the insurance company in federal court in Arkansas seeking payment of the insurance proceeds. The insurance company argued that it was not subject to personal jurisdiction for the same reasons that the insurance company gave in *Farmers* and

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[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Ferrell v. W. Bend Mut. Ins. Co.*, 393 F.3d 786, 789–90 (8th Cir. 2005).

[163] *Id.* at 789–90.

that Key makes in this case: that the insurance company did not do business in Arkansas, that it had no offices in Arkansas, and that the policy was issued in another state.[164]

Relying on *Farmers*, the 8th Circuit held that the District Court had personal jurisdiction over the insurance company because the insurance company had purposefully contracted with the insured to provide coverage within foreign states including Arkansas. Thus, the insurance company had purposefully contracted to defend its insured in any state and could reasonably be expected to be sued in that state for failing to do so.[165] Dozens of other federal and state courts have followed *Farmers* and *Ferrell* when dealing with similar factual situations.[166]

In these cases, the courts expressly rejected the insurance company's argument that a state does not have personal jurisdiction over an insurance company merely because the policy was not issued in that state. Based on *Ferrell*, *Farmers*, and numerous other cases, this court should conclude that the circuit court has jurisdiction over Key.

Like the insurance companies in those cases, Key issued a policy to its insured in which it agreed to defend claims against him in any state. Thus, not only was it

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[164] *Id.*

[165] *Id.*

[166] See footnotes 121-149.

foreseeable that Key might be sued in Missouri in connection with a dispute relating to its policy, but the "'expectation of being hauled into court in a foreign state is an express feature of its policy.'"[167] If Key wished to avoid a lawsuits by a third party in Missouri, then it could have excluded Missouri from its territory-of-coverage clause, although such an exclusion likely would have made its policies less marketable.

And, contrary to Key's assertions, this expectation was not some general or abstract expectation. Rather, Key was faced with a claim against a Missouri resident who was claiming insurance coverage under the policy. Key investigated that that claim and denied all responsibility for it. Having denied a defense to Nash and having refused to settle the claim against him, Key knew that Wright could foreseeably obtain a judgment against Nash. Key should reasonably have anticipated that by denying a defense to an individual in a Missouri action, that another Missouri court would someday require Key to appear to answer for that decision.[168]

Key's conscious decision to deny defense and coverage to Nash and its failure to perform its obligations to defend Nash in Missouri court has resulted in Wright having a Missouri judgment against Nash for negligence. Wright's garnishment and

[167] *Ferrell*, 393 F.3d at 789–90 (citation omitted).

[168] *Id*; *Payne*, 4 F.3d at 457; *Farmers Insurance Exchange*, 907 F.2d at 913-14.

Nash's cross-claims arise out of Key's decision to deny a defense to Nash in the underlying Missouri action and Key's failure to settle the underlying claim.[169]

Furthermore, Missouri also has a legitimate interest in providing a forum for this lawsuit because Missouri, like all states, has a significant interest in regulating bad faith by an insurance company in this state.[170] This interest extends to determining whether an insurance company should have offered a defense in a lawsuit filed in Missouri. And, Missouri undoubtedly has an interest in determining whether a Missouri judgment is enforceable.

Key concedes that numerous courts have held that a state has specific jurisdiction under a state's long-arm statute and under the Due Process Clause over a foreign insurance company when the insurance company fails to defend or settle a lawsuit filed in that state.[171] Yet, Key argues that these cases predate this court's

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[169] *Ferrell*, 393 F.3d at 789–90; *Payne*, 4 F.3d at 457; *Farmers Insurance Exchange*, 907 F.2d at 913-14.

[170] *Farmers Insurance Exchange*, 907 F.2d at 915.

[171] See Key's brief, pages 24-29; see also e.g. *Ferrell v. W. Bend Mut. Ins. Co.*, 393 F.3d 786, 789–90 (8th Cir. 2005); *Payne v. Motorists' Mut. Ins. Companies*, 4 F.3d 452, 457 (6th Cir. 1993); *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.*, 907 F.2d 911 (9th Cir. 1990); *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282,

ruling in *Norfolk* and the United States Supreme Court's holding in *Bristol Meyers, Daimler, Walden,* and *Goodyear.*[172] Key asserts that these cases were "sea changing" and imply that these cases overturned this precedent. Of course, Key does not explain how any of these cases affect this overwhelming body of law. A quick review of those the cases cited by Key establish that none of them concerned specific jurisdiction over an insurance company for its failure to defend or settle a claim. In both *Daimler* and *Goodyear* the parties conceded that specific jurisdiction did not apply and the issue on appeal was whether the court could maintain general jurisdiction.[173] This court's opinion in *Norfolk* mostly concerned general jurisdiction and whether or not a party consents to jurisdiction by appointing a registered agent in Missouri.[174] Both *Bristol Meyers* and *Walden* concerned some issues regarding

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287 (4th Cir. 1987); see also *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 509, 513, 134 P.3d 710, 713 (2006).

[172] Key's suggestions, page 21.

[173] *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2849 (U.S. 2011).

[174] *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41 (Mo. 2017), reh'g denied (Apr. 4, 2017).

specific jurisdiction.[175] Neither of those cases cite—much less—the cases that Wright and Nash rely on. And, Key does not explain how any principle in those opinions is relevant to this issue of specific jurisdiction. One would think that if these cases were so "sea changing" to affect the outcome of this case then Key would explain that in its suggestions. Nor does Key even cite any other case claiming that these Supreme Court cases changed the law regarding specific jurisdiction over an insurance company. Furthermore, various states including Connecticut,[176] Florida,[177] Idaho,[178] and Kansas[179] have all reaffirmed this holding in the last three years.

Key does cite a few cases in which a court held that it did not have specific jurisdiction over a foreign insurance company. Key cites to *Repwest Ins. Co. v.*

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[175] E.g. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 1781, 198 L. Ed. 2d 395 (2017).

[176] *Samelko v. Kingstone Ins. Co.,* 184 A.3d 741, 756 (2018).

[177] *Erie Ins. Exch. v. Larose*, 202 So. 3d 148, 156 (Fla. Dist. Ct. App. 2016).

[178] *Leech v. Nat'l Interstate Ins. Co.,* 2:17-CV-0508-WTL-MJD, 2018 WL 3737926, at *9 S.D. Ind. Aug. 7, 2018), report and recommendation adopted, 2:17-CV-508-WTL-MJD, 2018 WL 4003628 (S.D. Ind. Aug. 22, 2018).

[179] *Camico Mut. Ins. Co. v. J.D. Rosen C.P.A., P.A.,* 17-2228-JWL, 2017 WL 3839412, at *2 (D. Kan. Sept. 1, 2017).

Country-Wide Ins. Co., 166 A.D.3d 61, 85 N.Y.S.3d 24 (N.Y. App. Div. 2018) and *State ex rel. Illinois Farmers Ins. Co. v. Koehr*, 834 S.W.2d 233, 234 (Mo. App. E.D. 1992) for the general proposition that a world-wide territorial clause is insufficient to confer personal jurisdiction over an insurance company.[180] In neither of these cases, however, was an insured suing an insurance company for its failure to defend the insured or settle the case.

In *Repwest*, a New York resident rented a vehicle from U-Haul.[181] At the time U-Haul was insured by Repwest. And at the time, the resident had other insurance with Country-Wide. The New York resident was involved in a motor vehicle collision in North Carolina. Repwest made certain payments to the injured claimants and then sought reimbursement from Country-Wide.

Repwest instituted an equitable subrogation action against Country-Wide in North Carolina. Country-Wide never appeared and the court entered a default judgment. Repwest then filed an action in New York against Country-Wide attempting to collect the default judgment. Country-Wide argued that the North Carolina judgment was void because North Carolina did not have jurisdiction over it. Country-Wide conceded that North Carolina's long arm statute was satisfied but

[180] Key's brief, page 26.

[181] *Repwest Ins. Co. v. Country-Wide Ins. Co.,* 85 N.Y.S.3d 24 (N.Y. App. Div. 2018).

argued that the Country-Wide lacked minimum contacts with North Carolina. Repwest argued that Country-Wide's world-wide territorial clause provided a basis for Country-Wide to reasonably foresee being sued in North Carolina.[182]

The court found that the clause alone was insufficient to confer jurisdiction. But in doing so, the court explained that Country-Wide did not have any duty to participate in any litigation in North Carolina:

> In contrast to *Rossman* and *Farmers* where the underlying automobile accidents involved residents of the forum state who brought litigation within the state, here, neither Ms. Ancrum nor Mr. Rodriguez nor Mr. Wade had any connection with North Carolina. Ms. Ancrum was a New York resident, while Mr. Rodriguez and Mr. Wade were Maryland residents. Notably, Mr. Rodriguez and Mr. Wade received reimbursements from Repwest, without resorting to litigation in North Carolina. On this record, we find that North Carolina does not have a compelling interest to adjudicate a dispute between foreign insurers over equitable subrogation.[183]

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[182] *Id.*

[183] *Id.*

Similarly, in *State ex rel. Illinois Farmers Ins. Co. v. Koehr*, Illinois residents filed an action in Missouri against their insurance company for uninsured motorist coverage.[184] The insurance company filed a motion to dismiss for lack of jurisdiction. The court held that Missouri did not have jurisdiction over Illinois Farmers under the long-arm statute because Illinois Farmers did not commit a tort in Missouri.[185] The court also held that Illinois Farmers' world-wide territorial clause was insufficient to provide minimum contacts with Missouri.

Yet, in that case, Illinois Farmers did not have an obligation to defend anybody in the underlying lawsuit or settle the lawsuit. No party sued Illinois Farmers for bad faith or failing to defend an insured. Thus, the Illinois residents could not make any allegations that Illinois Farmers was obligated to come into Missouri to take any action or that Illinois Farmers took in action in this state. That fact distinguishes *Illinois Farmers* from all the cases holding that an insured can sue his or her insurance company in the state where he or she is sued when the insurance company denies coverage and fails to settle his or her claim. And,

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[184] *State ex rel. Illinois Farmers Ins. Co. v. Koehr*, 834 S.W.2d 233, 234 (Mo. App. E.D. 1992).

[185] *Id.* at 235.

Other states have distinguished a first-party claim for uninsured or underinsured motorist coverage with a third-party claim for bad faith for the purposes of personal jurisdiction.[186] For example, the Connecticut Supreme Court has explained that:

> Uninsured and underinsured motorist coverage is fundamentally different from liability coverage because of the location of the performance due under the contract. We agree with the defendant that, most likely, an insurer's promise under an uninsured motorist policy is *not* "to be performed" under § 33–929 (f) (1) in the state where an accident occurs because that type of policy promises only to make the insured whole. Therefore, it does not necessarily require the insurer to perform in the foreign jurisdiction; performance can take place where the insured resides or where the insurer is domiciled. Put another way, the nature of an uninsured motorist claim eliminates much, if not all, of the contemplated activities the insurer otherwise would have to perform in the forum where the collision occurred. By contrast, a liability claim requires the insurer to provide a defense for its insured, in addition to

[186] *Samelko v. Kingstone Ins. Co.*, 329 Conn. 249, 263–64, 184 A.3d 741, 752 (2018); *Erie Ins. Exch. v. Larose*, 202 So. 3d 148, 156 (Fla. Dist. Ct. App. 2016).

its indemnification obligation, unavoidably compelling performance in the jurisdiction in which the collision occurs.[187]

Finally, Key urges this court to follow *OMI Holdings*.[188] In that case, the 10th Circuit found that a nationwide territory clause was insufficient to support the district court's exercise of personal jurisdiction.[189] In doing so, the court did criticize *Farmers* and *Rossman* for basing their holdings on the concept of foreseeability.[190] The court did acknowledge that, by including a nationwide territory of coverage clause, the insurance company did create some showing of minimum contacts with Kanas but held that those contacts were qualitatively low on the due process scale. The court then held that that subjecting the insurers to litigation in Kansas, which did not have a genuine interest in the dispute and with which the insurers had only tenuous contacts, would be unreasonable. Accordingly, it reversed the district court's decision denying the insurers' motion to dismiss for lack of personal jurisdiction.

The 10th Circuit, however, toned down its criticism of *Rossman* and *Farmers* in *TH Agriculture & Nutrition, LLC v. Ace European Group Ltd.,* 488 F.3d

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[187] *Samelko*, 184 A.3d at 752.

[188] Key's brief, page 28.

[189] *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1092 (10th Cir. 1998).

[190] *Id.*

1282 (10th Cir. 2007). In that case, the 10th Circuit agreed that insurance company established minimum contacts with a state by affirmatively choosing to include the forum in its territory of coverage.[191] The court further stated an insurance company purposefully avails itself of the privilege of conducting business in the state by including the state in the coverage area:

> By reserving the right to defend insured entities and by agreeing to make indemnity payments within the territory of coverage, the Insurers have purposefully availed themselves of the privileges and benefits of conducting business in any forum state within the covered territory. These actions are neither incidental nor accidental; the Insurers have explicitly contracted for them and have received higher premiums in exchange for them.[192]

The court decided *OMI Holdings* in 1998. Since that time, numerous courts have examined this issue and either refused to follow that case or have distinguished it.[193] And, in fact, by 2017, a district court in the 10th Circuit opined that the federal circuit

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[191] *TH Agriculture & Nutrition, LLC v. Ace European Group Ltd.,* 488 F.3d 1282 (10th Cir.2007).

[192] *Id*. at 1291.

[193] *Ferrell v. W. Bend Mut. Ins. Co.*, 393 F.3d 786, 789–90 (8th Cir. 2005).

courts "appear to be unanimous"[194] that due process is satisfied in these circumstances.

As shown above, 7 circuit courts and state or federal district courts in 28 states have all found that due process and the minimum-contacts standard are satisfied against an insurance company for claims of bad faith and breach of its duty to defend when a foreign insurance company fails to defend its insured in that forum even if the policy was issued in a different state and the company has no offices or agents in the forum. Based on these cases and employing the Missouri and U.S. Supreme Court analysis applicable to determine whether specific personal jurisdiction exists over a non-resident corporate defendant, the Jackson County Circuit Court has personal jurisdiction over Key.

Conclusion

Key investigated and adjusted Wright's claims. Missouri statute 375.786 classifies that investigation and adjustment as the transaction of business. Furthermore, Key's policy required it to defend and indemnify Nash. Wright brought claims against Nash in a Missouri court. Yet, Key decided to deny coverage. Because of Key's conscious decision to deny defense and indemnity (coverage) to Nash and

[194] *Camico Mut. Ins. Co. v. J.D. Rosen C.P.A., P.A.,* 17-2228-JWL, 2017 WL 3839412, at *2 (D. Kan. Sept. 1, 2017).

its failure to perform its obligations to defend Nash in Missouri court, Wright has obtained a Missouri judgment against Nash for Nash's conduct in Missouri. Wright's garnishment and Nash's claims arise out of Key's decision to deny a defense to Nash in the underlying Missouri action and Key's failure to settle the underlying claim. Key cannot now be surprised that another Missouri court may make it answer for its decision to deny a defense to a person in a Missouri courthouse. The federal and state courts appear unanimous in holding that these circumstances satisfy the Due Process Clause's minimum contact standard. Key cites no cases holding that a state lacks jurisdiction over a non-resident insurance company when that insurance company refuses to defend a Missouri resident in a Missouri courthouse and refuses to settle the claim. And, Key offers no policy rationale for why this court should go against this overwhelming body of case law. The court should deny the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I, Tom Hershewe, of lawful age, first being duly sworn, states upon his oath that on May 22, 2019 a copy of Respondents' Brief was submitted for filing through the use of Missouri's electronic filing service and was served by electronic mail upon all counsel of record. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 12,214 words, excluding the cover, the certification, and table of authorities as determined by Microsoft Word.

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