

*To Be Published:*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS**

CHUN YAN DONG and LOWERY N.  
LOWERY,

Plaintiffs,

vs.

ROYAL CROWN INSURANCE  
CORPORATION,

Defendant.

Civil Case No. 09-0035

**MEMORANDUM OPINION AND  
ORDER REGARDING THE  
PARTIES' CROSS-MOTIONS FOR  
SUMMARY JUDGMENT**

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**T**his case arises from the plaintiff insureds' claims that their insurer failed to defend them against third-party claims arising from a motor vehicle accident. The insurer has filed a counterclaim for indemnity and contribution against the insured who was driving the insured vehicle at the time of the accident, because he was intoxicated. What appears to be a very simple motor vehicle accident case gives rise to many complex issues, some of first impression in the CNMI, and several where there is a substantial split in authority among those courts addressing the issues. This matter is before the court on the insureds' motion for summary judgment to the effect that the insurer had a duty to defend and indemnify them and breached that duty and on the insurer's counterclaim. It is also before the court on the insurer's motion for summary judgment on five of the insureds' seven claims, on the ground that Commonwealth law expressly preempts or precludes the common-law claims at issue and that the statutory claims are premised on an impermissible assignment, so that they are not being maintained by the real party in interest, and on the insurer's counterclaim.

## ***I. INTRODUCTION***

### ***A. Factual Background***

The court will not attempt here an exhaustive dissertation on the undisputed and disputed facts in this case. Rather, the court will set forth sufficient of the facts, both undisputed and disputed, to put in context the parties' arguments concerning their cross-motions for summary judgment.

**1. *The parties***

At the times pertinent to this litigation, plaintiff Chun Yan Dong was a citizen of Korea, a resident of Saipan, Commonwealth of the Northern Mariana Islands (CNMI), and married to plaintiff Lowery N. Lowery, a citizen of Pohnpei and also a resident of Saipan, CNMI. Dong obtained an automobile insurance policy in Saipan from defendant Royal Crown Insurance Corporation (Royal Crown), a corporation formed under the laws of the Commonwealth, for a 1987 BMW with license plate number ABK 818. Plaintiffs Dong and Lowery will be identified collectively as “the Insureds.”

**2. *The automobile insurance policy***

Dong’s policy with Royal Crown, which became effective December 17, 2003, provided coverage, *inter alia*, for “damages because of injury . . . sustained by any person caused by accident and arising out of the ownership, maintenance or use of the automobile” (Coverage A - Bodily Injury Liability); for “damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile” (Coverage B - Property Damage Liability); and for “all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person/s who sustains bodily injury . . . caused by accident, while in or upon entering or alighting from the automobile if the automobile is being used by the named insured or with his permission” (Coverage C - Medical Payments). Insureds’ Summary Judgment, Exhibit A (docket no. 26-4), 2. The policy also provided, in Section II, with respect to Coverages A and B, for defense, settlement, and supplementary payments, including an obligation to “defend any suit against the insured alleging such injury . . . or destruction and seeking damages on account thereof,

even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.” *Id.*

The Declaration Page of the policy identified Dong as “The Insured.” *Id.* at 1. However, Section III of the policy defined an “insured,” in pertinent part, as follows:

With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word “insured” includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for use thereof, provided the actual use of the automobile is by the named insured or with his permission.

Insureds’ Summary Judgment, Exhibit A, at 3. Dong and Lowery contend that Lowery was also an “insured” on the policy pursuant to this definition, because he was driving the insured vehicle with Dong’s permission at the time of the accident.

In addition to various other exclusions from coverage, listed in an “Exclusions” section, the policy included a specific “DUI Exclusion Clause,” as follows:

IT IS HEREBY UNDERSTOOD AND AGREED that company shall not be liable with respect to any accident, loss, damage or liability caused, sustained or incurred while any motor vehicle, in respect of which indemnity is provided by this policy, is being driven by any person while committing a felony or who is under the influence of intoxicating liquor or any controlled drugs or substance with respect to such accident, loss, damage or liability.

IT IS UNDERSTOOD that this Exclusion shall not apply in respect of any claim by innocent Third Parties or innocent Named Insured if not operating the insured vehicle under the conditions set out in the preceding paragraph.

IT IS FURTHER UNDERSTOOD AND AGREED that if the Company shall indemnify any Third Party for a claim which otherwise would have been excluded under the first

paragraph of this exclusion, the Company shall have the right of recovery from the operator of the insured vehicle.

Insureds' Summary Judgment, Exhibit A, at 5.

In the "Conditions" section of the policy, the policy required the insured to provide notice of accidents, claims, or suits, as follows:

1. **Notice of Accident Coverages A, B and C.** When an accident occurs written notice shall be given [sic: given by?] or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the name and address of the injured and of available witnesses.
  
2. **Notice of Claim or suit Coverages A and B.** If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

Insureds' Summary Judgment, Exhibit A, at 6.

**3. *The accident***

On December 20, 2003, that is, just days after Dong's insurance policy became effective, Lowery was driving Dong's vehicle, with her permission, with Dong as a passenger, when Dong's vehicle was involved in a car accident with a vehicle driven by Jovelyn Priest in Garapan, Saipan, CNMI. Ms. Priest was seriously injured and her car was damaged. As a result of this accident, Lowery was issued a ticket for driving under the influence of alcohol and reckless driving. The Insureds apparently do not dispute that Lowery failed all field sobriety tests administered by the police at the accident scene or that his Blood Alcohol Content (BAC) at the time of the accident was determined to be .218%.

#### 4. *The claims and the litigation*

Ms. Priest gave timely notice of her claim for property damage to Royal Crown, her car was repaired with the approval of Royal Crown, and she signed a release prepared by Royal Crown for her property damage. Royal Crown did not pay Ms. Priest's claim for third-party liability coverage for her injuries, however, on the ground that Lowery was intoxicated while driving the vehicle at the time of the accident. After Ms. Priest's claim was denied, Ms. Priest filed suit in the CNMI Superior Court against Dong, Lowery, and Royal Crown for her personal injury claims.<sup>1</sup> The parties do not dispute that Ms. Priest made more than one settlement offer, within Dong's policy limits, to Royal Crown for her personal injury claims, both prior to and after bringing suit, but Royal Crown either did not respond to or rejected those settlement offers.

At least initially, Royal Crown did not provide a defense for the Insureds and did not appear on their behalf in the lawsuit brought by Ms. Priest. Instead, Royal Crown filed an answer on its own behalf. The Insureds did not otherwise appear and answer. Royal Crown was eventually dismissed from the lawsuit with prejudice, without paying anything in settlement, to prevent a continuance of the trial date arising from a conflict in Royal Crown's counsel's schedule. The Superior Court entered a default against the Insureds based on their failure to file an answer in the lawsuit. Royal Crown contends that neither of the Insureds tendered the defense of Ms. Priest's lawsuit to Royal Crown, and neither informed or advised Royal Crown that they had been served with a summons and complaint, so that Royal Crown did not become aware that the Insureds had been served until sometime after the entry of default against them.

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<sup>1</sup>The parties agree that, at the time of Ms. Priest's lawsuit, the Commonwealth had a "direct action" statute that allowed an injured party to sue the alleged tortfeasor's insurer as well as or instead of the alleged tortfeasors.

After Ms. Priest dismissed Royal Crown from the suit and the court entered default against the Insureds, Royal Crown hired an attorney, Ms. Viola Alepuyo, to represent the Insureds in proceedings to determine damages. Royal Crown did not inform the Insureds that it had hired Ms. Alepuyo to represent them, and Ms. Alepuyo refused to disclose who her true employer was. Royal Crown contends that, whether or not all the prerequisites for its defense of the Insureds were met, it did, indeed, provide a defense for the Insureds by hiring Ms. Alepuyo.

After an evidentiary hearing, the court awarded Ms. Priest damages of almost \$80,000, amounting to more than four times Dong's policy limits, holding the Insureds jointly and severally liable.<sup>2</sup> The Superior Court denied the Insureds' post-trial motion, and they appealed. Royal Crown did not pay the liability judgment obtained by Ms. Priest against the Insureds.

While their appeal was pending, the Insureds reached an agreement with Ms. Priest to satisfy their obligations to Ms. Priest created by her judgment against them. More specifically, that agreement provided, as follows:

The parties hereby agree that the Defendants, Lowery N. Lowery and Chun Yan Dong, will hire the law firm of O'Connor Berman, Dotts, and Banes, on a contingency fee agreement basis to represent them in a bad faith and unfair settlement process, and a consumer protection act lawsuit brought by Lowery N. Lowery and Chun Yan Dong, against Royal Crown Insurance Company, and/or other affiliated companies or individuals associated with Royal Crown

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<sup>2</sup>The damages awarded to Ms. Priest were for past medical costs, interest on medical costs, pain and suffering for the two weeks following the accident, past pain and suffering for the first six months following the accident, pain and suffering for the first six months following the accident up until the date of hearing, lost wages following the accident, and loss of enjoyment of life since the accident until the date of hearing.

Insurance Company. Defendants hereby represent that they will be advised if they have a good faith basis for bringing such claims before any complaint is filed against Royal Crown Insurance Company.

The Defendants will fully cooperate in the prosecution of the lawsuit against Royal Crown Insurance until a judgment is obtained against Royal Crown Insurance Company for its failure to defend the lawsuit in which judgment was obtained against the Defendants, to settle the lawsuit within the policy limits, or to settle the case with Plaintiff as mutually agreed. The defendants further agree not to have any contact with Royal Crown Insurance Company or Royal Crown Insurance Company's counsel and they agree this agreement has not been reviewed by Royal Crown Insurance Company's legal counsel.

Any judgment obtained against and [sic] Royal Crown Insurance Company in the bad faith lawsuit to be filed by Lowery N. Lowery and Chun Yan Dong will satisfy the Defendants' obligation to the Plaintiff, Jovelyn Priest. Any sum in excess of the judgment amount in this action shall be divided pursuant to a contingency retainer agreement entered into between Lowery N. Lowery and Chun Yan Dong and the law firm of O'Connor, Berman, Dotts, and Baner.

If the defendants cooperate in the prosecution of a bad faith lawsuit to be filed against Royal Crown Insurance Company, and judgment in that matter is not in their favor or in their favor but not sufficient to satisfy the judgment in this case, neither defendant shall be further liable to Plaintiff Jovelyn Priest under the Judgment in this case.

If either or both of the Defendants violate this Stipulation or otherwise breach any term or condition, including the duty to cooperate, it is understood that Plaintiff may proceed with her Aid in Judgment to enforce the Judgment.

Declaration Of Eric Smith In Opposition To Summary Judgment Motion (docket no. 45), Exhibit A, 6-7. The Insureds contend that they were forced to negotiate with Ms. Priest

and to agree to pursue this litigation to keep from being bankrupted by the judgment that Ms. Priest had obtained against them. Royal Crown contends that this agreement is an assignment of the Insureds' claims and that Ms. Priest controls this litigation.

This lawsuit followed.

## ***B. Procedural Background***

### ***1. The pleadings***

In a Complaint (docket no. 1), filed September 16, 2009, the Insureds assert various claims against Royal Crown.<sup>3</sup> Their first two claims are common-law claims. Specifically, their first cause of action, denominated breach of contract, alleges that Royal Crown breached the insurance policy contract by failing to defend or represent them, resulting in a default judgment against them in excess of policy limits, and by failing to pay the liability of the Insureds under the default judgment. Their second cause of action, denominated breach of covenant of good faith and fair dealing in violation of fiduciary duties, alleges that Royal Crown acted in bad faith in the following ways: unreasonably refusing and failing to deal fairly with Dong and Lowery; unreasonably failing and refusing to represent or defend Dong and Lowery; making false and misleading statements as to coverage; refusing to investigate Ms. Priest's claims properly and adequately; unreasonably refusing and failing to consider in good faith settlement offers from Ms. Priest; failing to settle within policy limits; and failing and refusing to give adequate explanations as to why it did not represent or defend Dong and Lowery in the suit against them by Ms. Priest.

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<sup>3</sup>The Insureds asserted diversity jurisdiction pursuant to 28 U.S.C. § 1332 and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

The Insureds' third through sixth causes of action are statutory claims. Specifically, their third cause of action, denominated unfair settlement practice, alleges that Royal Crown has not attempted in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear within the meaning of 4 CMC § 7302(g). Their fourth cause of action, denominated unfair competition, alleges that the conduct alleged in prior claims constitutes unfair business practices and unfair competition as defined by CNMI law. Their fifth cause of action, denominated violation of the Consumer Protection Act, alleges that Royal Crown was a merchant conducting trade and commerce in the CNMI as an insurer, that it represented to Dong that it was going to provide her with automobile insurance coverage and defense against third-party claims, which she believed and relied on, but Royal Crown failed to do so, thus engaging in an unfair or deceptive business practice in violation of the Consumer Protection Act. Their sixth cause of action, denominated failure to pay insurance loss, alleges that Royal Crown's conduct, as alleged in prior claims, constitutes failure to pay an insurance loss as defined by 4 CMC § 7505(h).

The Insureds' seventh and final cause of action is for declaratory judgment. It seeks declarations that Dong is entitled to protection under the insurance policy in question.

The Insureds seek general, special, and statutory damages; punitive damages; attorney fees; statutory fees and costs; 12 percent damages upon the amount of loss; declaration of the parties' rights with respect to coverage under the insurance policy; pre- and post-judgment interest; and such other, further, and additional relief as the court may find to be appropriate.

On October 7, 2009, Royal Crown filed an Answer (docket no. 2), and later that same day, filed an Amended Answer And Counterclaim (docket no. 3). In its Amended Answer, Royal Crown denies the Insureds' claims and asserts various affirmative defenses.

In addition, Royal Crown asserts a Counterclaim seeking indemnification and contribution from Lowery for any sum that Royal Crown must pay to Dong or any third person as a result of the accident, because Lowery was operating the vehicle in question under the influence of alcohol, in violation of the insurance policy issued by Royal Crown to Dong, and a declaration that Lowery is precluded from recovering any sum from Royal Crown. In addition, Royal Crown seeks the costs of this suit, including reasonable attorney fees, and such other and further relief as the court deems just and proper.

On October 16, 2009, Lowery filed an Answer To Counterclaim (docket no. 5), denying Royal Crown's counterclaim and asserting various affirmative defenses.

Pursuant to a Case Management Scheduling Order (docket no. 10), dated December 1, 2009, trial in this matter was originally set for July 12, 2010, before Chief Judge Alex R. Munson. However, Chief Judge Munson took senior status in February 2010. Pursuant to a Stipulation (docket no. 17), filed April 23, 2010, and an Order (docket no. 19), filed May 4, 2010, the trial was reset for November 15, 2010. This case and the November 15, 2010, trial were eventually assigned to the undersigned during his second scheduled visit to Saipan as a visiting judge.■<sup>4</sup>

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<sup>4</sup>The Insureds moved to continue the trial date on September 16, 2010, owing to a potential conflict in their counsel's schedule involving a criminal case set in Commonwealth Superior Court. *See* docket no. 42. By Order (docket no. 42), filed September 20, 2010, the court reserved ruling on the motion to continue, taking a "wait-and-see" approach, to determine if the anticipated conflict actually arose, promising to revisit the motion to continue not later than October 29, 2010. In the interim, the court required the parties to adhere to the deadlines and other requirements set forth in an Order Setting Jury Trial, Final Pretrial Conference, And Requirements For The Proposed Final Pretrial Order (docket no. 44), also filed September 20, 2010. At the oral arguments on the parties' cross-motions for summary judgment, the court requested that the Insureds' counsel e-mail the court by October 15, 2010, on the status of his conflicting criminal  
(continued...)

## *2. The cross-motions for summary judgment*

On August 30, 2010, the Insureds filed the first of the motions now before the court, their Motion For Summary Judgment (docket no. 26), seeking summary judgment to the effect that Royal Crown had a duty to defend and indemnify them and dismissing Royal Crown's counterclaim against Lowery. On August 30, 2010, Royal Crown also filed Motions For Summary Judgment (docket no. 27), seeking summary judgment on the Insureds' first, second, third, fourth, and fifth claims for relief and on Royal Crown's counterclaim against Lowery. The motions were duly resisted on September 16, 2010. *See* docket nos. 36 and 37. The Insureds filed a Reply (docket no. 47) in further support of their Motion For Summary Judgment on September 21, 2010, and Royal Crown filed Replies (docket nos. 48 and 49) in support of its motions on September 23, 2010.

By Order (docket no. 33), dated September 2, 2010, the court set telephonic oral arguments on the parties' motions for summary judgment for October 7, 2010. Subsequently, in an Order (docket no. 51), dated September 30, 2010, the court authorized the Insureds to file a surreply to address Royal Crown's argument, in its Reply (docket no. 48), that the Insureds had purportedly failed to tender the defense of the underlying lawsuit by Ms. Priest to Royal Crown Insurance, which Royal Crown argued defeated their "bad faith" claims as a matter of law. Royal Crown filed a Response (docket no. 53) to that Order, asserting that it had raised the issue of the Insureds' failure to tender the defense of Ms. Priest's lawsuit to Royal Crown in its opposition to the Insureds' motion for

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<sup>4</sup>(...continued)

case, so that the court could determine whether or not to continue the trial in this civil matter. The Insureds' counsel did e-mail the court on October 15, 2010, to advise the court that his conflicting criminal trial had been continued until January 10, 2011, so that there is no need to continue the November 15, 2010, trial in this matter to accommodate his schedule.

summary judgment, as well as in its Reply (docket no. 48) in support of its own motion for summary judgment. In response to the court's Order, the Insureds filed a Sur-Opposition (docket no. 54) on October 6, 2010, and a Corrected Sur-Opposition (docket no. 57) on October 7, 2010, concerning the tender of defense issue.

At the oral arguments on October 7, 2010, plaintiff Insureds, Dong and Lowery, were represented by David G. Banes of O'Connor, Berman, Dotts & Banes, in Saipan, MP. Defendant Royal Crown was represented by G. Anthony Long of the Law Offices of G. Anthony Long in Saipan, MP. The oral arguments were particularly vigorous and informative.

## ***II. STANDARDS FOR SUMMARY JUDGMENT***

Any party may move for summary judgment at any time regarding "all or any part" of the claims asserted in a case. FED R. CIV. P. 56(a), (b) (allowing a claimant to move for summary judgment "at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party," and allowing a defending party to move for summary judgment "at any time"). Motions for summary judgment essentially "define disputed facts and issues and . . . dispose of unmeritorious claims [or defenses]." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1982 (2007); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . . .").

Somewhat more specifically, summary judgment is only appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no *genuine* issue of *material* fact and that the moving party is entitled to a judgment as a matter of law." *Id.* 56(c) (emphasis added). The

moving party does not have to disprove matters on which the non-moving party bears the burden of proof; rather, “[t]he moving party need only point out to the Court that there is an absence of evidence to support the non-moving party’s case.” *Sluimer v. Verity, Inc.*, 606 F.3d 584, 586 (9th Cir. 2010) (citing *Celotex*, 477 U.S. at 325). “Where the movant has shown that there is a basis for judgment in its favor, “[i]t bec[o]me[s] [the non-movant’s] burden, in order to defeat the motion, to “set out specific facts showing a genuine issue for trial.”” *Sullivan v. Dollar Tree Stores, Inc.*, \_\_\_ F.3d \_\_\_, \_\_\_, 2010 WL 3733576, \*6 (9th Cir. Sept. 27, 2010) (quoting *Gelinger v. Amazon.com, Inc.*, 526 F.3d 1253, 1256 (9th Cir. 2008), in turn quoting FED. R. CIV. P. 56(e)). “[A]t the margins there is some room for debate as to how “specific” must be the “specific facts” that Rule 56(e) requires in a particular case,” but “general allegations” are “too vague” to defeat summary judgment. *Id.* at \*5 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990)). Similarly, “‘some metaphysical doubt as to the material facts’” is not enough to defeat summary judgment. *Sluimer*, 606 F.3d at 586 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 575, 255 (1986)). To put it another way, the court “has no independent duty ‘to scour the record in search of a genuine issue of triable fact,’ and may ‘rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment.’” *Simmons v. Navajo County, Arizona*, 609 F.3d 1011, 1017 (9th Cir. 2010) (quoting *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996), with internal quotation marks omitted).

Most recitations of summary judgment standards focus on the question of whether or not genuine issues of material fact are present in the record. Nevertheless, where only a question of law is presented, a district court’s resolution of the matter on summary judgment is also procedurally proper. *Asuncion v. District Director of U.S. INS*, 427 F.2d 523, 524 (9th Cir. 1970); *see also Han v. Mobil Oil Corp.*, 73 F.3d 872, 874 (9th Cir.

1995) (when a mixed question of fact and law involves undisputed underlying facts, summary judgment may be appropriate).

The court may also grant summary judgment *sua sponte*, if the losing party has “had a full and fair opportunity to ventilate the issues involved in the matter.” *Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 553 (9th Cir. 2003) (citation and internal quotation marks omitted).

With these standards in mind, the court turns to the parties’ motions for summary judgment on the Insureds’ claims and Royal Crown’s counterclaim. Notwithstanding the order in which the parties moved for summary judgment, the court finds it appropriate—at least where the parties’ motions for summary judgment are not “mirror images,” addressing the same arguments on the same issues—to consider the question of whether any claim or counterclaim is defeated as a matter of law before considering the question of whether that claim succeeds as a matter of law. Therefore, the court will begin its consideration of the cross-motions for summary judgment on the Insureds’ claims with the question of whether Royal Crown is entitled to summary judgment on those claims, and only if it is not will the court consider whether the Insureds are entitled to summary judgment on the question of Royal Crown’s duty to defend. On the other hand, the court finds that the parties’ motions for summary judgment on Royal Crown’s counterclaim are truly “cross-motions” or “mirror image motions,” so that the court will consider all of the motions on those claims simultaneously rather than consecutively.

### ***III. THE INSUREDS’ CLAIMS***

#### ***A. Royal Crown’s Motion For Summary Judgment***

Royal Crown has moved for summary judgment on the Insureds' first through fifth claims, that is, their common-law claims of breach of contract and breach of covenant of good faith and fair dealing in violation of fiduciary duties, and their statutory claims of unfair settlement practice; unfair business practices; and violation of the Consumer Protection Act. Royal Crown contends that Commonwealth law expressly preempts the Insureds' common-law claims and that their statutory claims are barred by improper assignment of those claims to Ms. Priest, so that the Insureds are not the real parties in interest. The Insureds resist summary judgment on all of the claims at issue.

***1. Certification of questions***

Royal Crown asserts, at least in passing, that the issues presented in its motion, which it contends are issues of first impression under CNMI law, should be certified to the Commonwealth Supreme Court. Royal Crown did not make a separate request for certification of questions. The Insureds did not address the issue of certification of questions to the Commonwealth Supreme Court in their response.

Rule 5 of Commonwealth Rules of Appellate Procedure provides the Commonwealth Supreme Court with jurisdiction to answer certified questions from a federal court "concerning a local law of the Commonwealth where the local law has not been clearly determined, and it is necessary or desirable to ascertain the local law in order to dispose of the federal court's proceeding." CNMI R. App. 5(a); *see also United States v. Borja*, 6 N.M.I. 558, 559 n.3, 2003 WL 24267673, \*1 & n.3 (recognizing the Commonwealth Supreme Court's jurisdiction to answer certified questions from a federal court, quoting Rule 5). The certification of open questions of state or local law to the jurisdiction's supreme court can "in the long run save time, energy, and resources and helps build a cooperative judicial federalism," but "[i]ts use in a given case rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391

(1974); *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) (quoting *Lehman Bros.*). Here, where the parties do not press the issue of certification of questions, trial is only weeks away, and the court finds itself capable of predicting how the Commonwealth Supreme Court would decide the issues presented, the court will not certify any questions.

Because the court will not certify questions presented, the court will consider Royal Crown's grounds for summary judgment in turn.

## **2. *Preemption***

### **a. *Arguments of the parties***

Royal Crown argues that Commonwealth law expressly preempts or precludes the common-law claims at issue. More specifically, Royal Crown contends that a "first-party bad faith" claim, however denominated, is preempted by the Commonwealth's comprehensive statutory scheme for insurance regulation. First, Royal Crown points to 4 CMC § 7302 and, in particular, § 7302(g), as governing an insurance company's unfair settlement practices. Royal Crown characterizes that provision as directly addressing an insurance company's failure to act in good faith to settle a claim. Royal Crown also argues that the Commonwealth Insurance Code establishes specific damages and remedies when an insurer fails to pay a claim in 4 CMC § 7505(h) and that an amendment to that provision, in P.L. No. 14-70 § 4, makes clear that § 7505(h) pertains to rights and remedies between insurers and their insureds. These "written laws," Royal Crown argues, preclude resort to the common law in cases involving disputes between an insurer and its insured arising from an insurance policy. Royal Crown argues that such preclusion is not unique to Commonwealth jurisprudence. Royal Crown argues that the Insureds' first and second claims fall neatly within the parameters of § 7302(g)(1), and indeed, that the Insureds plead exactly the same facts in their claim for relief pursuant to § 7302(g) as they do in their common-law "bad faith" claims. In short, in Royal Crown's view, because

§ 7302(g)(1) governs the conduct that the Insureds complain about, and because § 7505(h) provides for the amount that can be recovered for an insurer's failure to pay, the Insurance Code preempts or precludes the Insureds' common-law bad faith claim.

In response, the Insureds contend that there is no statutory preemption of their common-law claims. They contend that the legislature did not expressly or clearly abrogate common-law claims for breach of contract or bad faith; that the CNMI Supreme Court has held that there is no private cause of action pursuant to 7 CMC § 7302; and that Royal Crown fails to cite any authority that, in fact, supports its argument. More specifically, they argue that the "genius" of the CNMI system is that it expressly makes the common law its rule of decision, unless there is "contrary" written law, citing 7 CMC § 3401. They assert that the court must presume that no preemption was intended in the absence of a clear and plain expression of the legislature. Here, they argue that § 7302 does *not* contain such a clear and plain expression of intent to preempt common law, because the statute actually reads as a confirmation of the duty underlying a bad faith claim, assumes a breach-of-contract claim will be brought, and establishes the measure of damages to be applied if such a claim is brought. While the Insureds admit that § 7505(h)(1) prohibits so-called third-party bad faith claims and assignments to third-party claimants, they contend that neither prohibition is applicable here. They also contend that the CNMI Supreme Court may have ruled on this issue already, by stating, in a footnote in its unpublished order denying a petition for rehearing of its published decision in *Ishimatu v. Royal Crown Ins. Corp.*, 2010 MP 8, that, even if the court ruled on the merits of Royal Crown's preemption argument in that case, the court would deny Royal Crown's petition. They note that the Commonwealth Supreme Court has also expressly ruled that the Unfair Claims Settlement Practices Act (UCSPA) does not provide a private cause of action to insureds, because the statute has a government enforcement scheme, including

possible criminal penalties, but does not place a mandatory duty on the Insurance Commissioner to investigate and prosecute complaints. The Insureds argue that Royal Crown's position would leave insureds with no remedy at all, if the Commissioner fails to investigate or prosecute.

In reply, Royal Crown disputes the Insureds' conclusion that, because there is no private cause of action under 4 CMC § 7302, they have a common-law claim for bad faith. Royal Crown argues that the amendment of 4 CMC § 7502, in P.L. No. 14-70, to add subsection (j), acknowledges the implied covenant of good faith and fair dealing between an insurer and its insured, thus displacing any reliance on the common law claims based on the implied covenant of good faith and fair dealing. Royal Crown argues that the remedies for breach of the statutory good faith provision are in 4 CMC § 7505(h). Royal Crown contends that, even to the extent that § 7505(h) is deemed not to apply to claims of breach of duty to defend, § 7502(j) authorizes recovery limited to damages, excluding other relief, such as attorney fees, sought by the Insureds in this case.■<sup>5</sup>

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<sup>5</sup>In its opening brief on its motion for summary judgment on the Insureds' first five claims, Royal Crown cited the amendment to § 7502 adding subsection (j) in support of its argument that the statutory claims have been improperly assigned, but did not cite that provision as preempting a common-law first-party "bad faith" claim. Thus, the argument for summary judgment on the Insureds' common-law claims on the basis of preemption by § 7502 is offered for the first time in Royal Crown's Reply. The court could simply disregard an argument raised for the first time in a Reply. *See, e.g., United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 n.1 (9th Cir. 2009) (the appellate court does not consider arguments raised for the first time on appeal); *Katie A. v. Los Angeles County*, 481 F.3d 1150, 1162 (9th Cir. 2007); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). However, the court chooses to address this argument on the merits, *infra*, because the court finds it to be, at best, completely unpersuasive.

Royal Crown asserts in its Reply other arguments that it made in opposition to the Insureds' motion for summary judgment, including its contention that the Insureds never  
(continued...)

*b. Analysis*

Royal Crown has previously asserted the arguments that it raises here about the preemptive effect of 4 CMC §§ 7302 and 7505(h) before the Commonwealth Supreme Court. In *Ishimatu v. Royal Crown Ins. Corp.*, 2010 M.P. 8, 2010 WL 2219348, Royal Crown argued, for the first time on appeal, that the insured’s “first party common law bad faith claim is preempted by 4 CMC § 7302(g), his claim for punitive damages is preempted by 4 CMC § 7505(h), and his common law breach of contract claim is preempted by both 4 CMC §§ 7302(g) and 7505(h).” *Ishimatu*, 2010 M.P. 8, ¶ 6 (footnotes omitted).<sup>6</sup> The Commonwealth Supreme Court ultimately concluded that it would not address these arguments, because none of the exceptions to its rule that it would not consider issues raised for the first time on appeal applied. *Id.* at ¶¶ 7-11. Thus, while the question at issue here was presented in the *Ishimatu* case, it was not resolved in the court’s published ruling.

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<sup>5</sup>(...continued)

tendered the defense of Ms. Priest’s claims to Royal Crown, so that Royal Crown had no duty to defend, and that Royal Crown did, in fact, hire an attorney to defend the Insureds after Royal Crown was dismissed from Ms. Priest’s lawsuit. These arguments were also raised for the first time in a reply, at least in the context of Royal Crown’s motion for summary judgment on the Insureds’ first five claims. The court authorized the Insureds to file a surreply to address the argument that they failed to tender the defense of Ms. Priest’s lawsuit to Royal Crown. Moreover, the arguments that the Insureds failed to tender a defense and that Royal Crown did, indeed, provide a defense, are more properly considered as responses to the Insureds’ motion for summary judgment on whether or not Royal Crown had a duty to defend and indemnify them and whether Royal Crown breached that duty. The court will consider those arguments in that context.

<sup>6</sup>Royal Crown was represented in *Ishimatu* by the same counsel it has in this case, and the insured was represented by the same counsel who represents the Insureds in this case. *Ishimatu*, 2010 M.P. 8, Attorneys and Law Firms.

The Insureds contend that, subsequently, in an order in *Ishimatu* denying Royal Crown’s petition for rehearing, the court appeared to reject Royal Crown’s preemption arguments on the merits. In the Order Denying Petition For Rehearing in *Ishimatu*,<sup>7</sup> the Commonwealth Supreme Court noted that Royal Crown had conceded in its reply brief that it had not challenged the common law claims on preemption grounds in the trial court. Order Denying Petition For Rehearing, ¶ 4. The Commonwealth Supreme Court also reiterated its conclusion that no exceptions were present to its rule that it would not consider an issue raised for the first time in a reply brief. *Id.* at ¶ 5. More importantly, for present purposes, in a footnote, the court also noted, “[E]ven if we ruled on the merits of [Royal Crown’s] argument [that the good faith and fair dealing claim and the breach-of-contract claim are barred as a matter of law because of statutory preemption] we would still deny the petition. . . .” *Id.* at ¶ 5, n.3. Thus, it appears that the Commonwealth Supreme Court would reject—and, indeed, has rejected—an argument that common-law bad faith and breach-of-contract claims based on failure to settle or defend are preempted by the Commonwealth’s statutory scheme of insurance law.

Such a conclusion is also consistent with this court’s reading of the applicable law. A provision of the Commonwealth Code provides as follows:

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<sup>7</sup>This court was not initially provided with a full copy of this Order, nor was the court able to obtain one from any online source, such as Westlaw or the website of the CNMI Commonwealth Law Revision Commission, [www.cnmilaw.org](http://www.cnmilaw.org). However, at the conclusion of the oral arguments on the parties’ cross-motions for summary judgment, the court requested that the parties provide the court with a copy of the order in *Ishimatu* on Royal Crown’s petition for rehearing, and the Insureds’ counsel promptly provided the court with a copy of that order.

### § 3401. Applicability of Common Law.

In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary; provided, that no person shall be subject to criminal prosecution except under the written law of the Commonwealth.

7 CMC § 3401. The Commonwealth Supreme Court has explained that, in light of this statute, its “ability to formulate the common law of this jurisdiction is constrained by the statutory mandate to apply the common law as enunciated in the Restatements.” *Castro v. Hotel Nikko Saipan, Inc.*, 4 N.M.I. 268, 1995 WL 1943012, \*7 (1995). Similarly, “[a]bsent an indication that the legislature intends a statute to supplant common law, the courts should not give it that effect.” *Commonwealth of the Northern Mariana Islands v. Hasinto*, 1 N.M.I. 179, 181, 1990 WL 291961, \*2 (quoting N. Singer, *Sutherland Stat. Const.* § 50.01 (4th ed., 1986)).

Royal Crown asserted in its opening brief in support of its motion for summary judgment on the Insureds’ first five claims that, when the Commonwealth legislature has enacted a statute on a subject, that statute is controlling, and resort to the Restatement or common law is improper, citing *Villanueva v. City Trust Bank*, 2002 M.P. 1, ¶ 15 n.4, 6 N.M.I. 346, 349 n.4 (2002); *Mundo v. Superior Court*, 4 N.M.I. 392, 396 (1996), and *In Re Estate of Seman*, 4 N.M.I. 129, 131-132 (1994). In its oral arguments, Royal Crown reiterated this contention, asserting that simply passing a statute is enough to supplant common law, again citing *Villanueva*. This court does not agree.

First, none of the cases cited by Royal Crown can be read to support the broad proposition that merely passing a statute supplants the common law: They stand for the proposition that the statute must be “contrary” to common law to supplant it. *See Villanueva*, 2002 M.P. 1, n.4 (recognizing that the common law only applies where there is no written or local customary law “to the contrary,” and finding that the “lien theory” of mortgage law in the statute was contrary to the “title theory,” even if the latter was the common law theory of mortgage law); *Mundo*, 4 N.M.I. at 396 (noting that the statutory law must be “contrary” to common law, citing 7 CMC § 3401, and that, “[b]ecause the Commonwealth has applicable written law in the form of the election contest statute” with no such provision, cases holding that it is improper to correct an election result by asking a small number of voters to vote after the impact of their votes is known were inapplicable); *see also In re Estate of Seman*, 4 N.M.I at 131-32 (noting that, “only in the absence of local written law or customary law may we consider the common law as enunciated in the Restatements,” and finding that local law existed regarding the effectuation of *partida*).

Second, in *Hasinto*, the Commonwealth Supreme Court explained that, “[i]n the absence of a *clear indication* that the NMI legislature sought to supplant the common law . . . , we are not persuaded that it intended to do so.” *Hasinto*, 1 N.M.I. at 181 (emphasis added). The court also explained that, in determining the legislature’s intent, the court may look to both the language of the statute and the recorded legislative history. *Id.* at n.4. Requiring a “clear indication” of intent to supplant common law and requiring courts to examine the language of a statute and the recorded legislative history to determine whether or not a statute supplants common law demonstrates that mere passage of a statute on the same subject does not preempt the common law.

Thus, to supplant common law, the existence of a statute on the same subject is not enough; there must be a clear indication, in the language or recorded legislative history of the statute, that the NMI legislature sought to supplant the common law by enacting the statute. *Hasinto*, 1 N.M.I. at 181.

The statutory provisions on which Royal Crown's preemption argument initially relied are 4 CMC §§ 7302(g) and 7505(h). Section 7302(g) provides as follows:

**(g) Claim Settlement Practices.**

(1) No insurer doing business in the Commonwealth shall engage in unfair claim settlement practices. *Any of the following acts by an insurer, if committed without just cause and performed with such frequency as to indicate a general business practice, shall constitute unfair claim settlement practices:*

(A) Misrepresenting to claimants pertinent facts or policy provisions relating to coverages at issue;

(B) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;

(C) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under its policies;

*(D) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear; or*

(E) Compelling policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amount ultimately recovered in suits brought by them.

(2) Evidence as to numbers and types of complaints to the Insurance Commissioner against an insurer, and Insurance Commissioners complaint experience with other insurers writing similar lines of insurance, shall be admissible in an administrative or judicial proceeding brought under this division; provided, no insurer shall be deemed in violation of this section solely by reason of the number and types of such complaints.

(3) If it is found, after notice and an opportunity to be heard, that an insurer has violated this section, each instance of noncompliance may be treated as a separate violation of this section for purpose of 4 CMC § 7509.

4 CMC § 7302(g) (emphasis added). Section 7505(h) provides as follows:

**(h) Failure to Pay Loss: Recovery of Amount Due and Damages.**

In all cases where loss occurs and the insurer liable therefor fails to pay the same within the time specified in the policy, after demand made therefor, the insurer shall be liable to pay the holder of the policy, in addition to the amount of the loss, 12 percent damages upon the amount of the loss, together with all reasonable attorney's fees for prosecution and collection of the loss; the attorney's fees to be taxed by the court where the same is heard on original action, by appeal or otherwise, and to be taxed as a part of the costs therein, and collected as other costs are or may be by law collected; and writs of attachment or garnishment filed or issued after proof of loss or death has been received by the insurer shall not defeat the provisions of this section; provided, the insurer desiring to pay the amount of the claim as shown in the proof of loss or death may pay the amount into the registry of the court after issuance of writs of attachment and garnishment, in which event there shall be no further liability on the part of the insurer.

4 CMC § 7505(h).

In *Ishimatu*, the Commonwealth Supreme Court concluded that §§ 7302(g) and 7505(h) do not provide for a private cause of action for unfair settlement practices. The court first noted,

A full reading of the act seems to envision a government enforcement scheme, the penalties have a criminal component, and the only support for a private cause of action, if any can be found, is under a particular interpretation of 4 CMC § 7505(h) that is inconsistent with the rest of the act. On the other hand, the language of these provisions is permissive, and does not create a mandatory duty that the Commissioner investigate and prosecute complaints; this lack of mandatory enforcement and claim investigation renders the statute less effective without a private right of action.

*Ishimatu*, 2010 M.P. 8, ¶ 42. Because the court could not “definitively determine” whether a private cause of action exists on the basis of the class of persons benefitted by the statute and any indications of legislative intent to create or deny a private remedy, the court examined the law of other jurisdictions with similar insurance acts for guidance and concluded that they supported the conclusion that § 7302(g), part of the Unfair Claim Settlement Practices Act (UCSPA), and the Insurance Act generally do not provide for a private cause of action. *Id.* at ¶ 47.

The court then explained the nature of the administrative scheme established by the Insurance Act

Our statute creates an extensive regulatory scheme, and it envisions a robust administrative process to sanction offending insurers. Individuals with a complaint can file it with the Insurance Commissioner, and the grounds for appeal from a hearing held by the Commissioner as the result of alleged bad acts are broad and include any aggrieved party. The Commissioner’s authority includes awarding damages to insured parties harmed by a violation of the statute. The Act

also provides for stiff penalties; each violation can result in a separate fine, and if the offender is an individual, jail time is a possibility. Additionally, the above authority indicates that a majority of states with a UCSPA similar to our own have not found a private right of action. All of these considerations indicate that our legislature intended for the Insurance Act to not create a private right of action. Jurisdictions with a private right of action in their statutes either have enabling language or fail to provide an adequate administrative system for parties to seek redress of their grievances.

*Ishimatu*, 2010 M.P. 8, at ¶ 48.

Just as the court in *Ishimatu* found no legislative intent to create a private cause of action in either § 7302(g) or § 7505(h), this court finds no clear indication of legislative intent to preempt a common law private cause of action by an insured for an insurer's bad faith failure to settle from the creation of even a "robust" administrative regulatory scheme. *Hasinto*, 1 N.M.I. at 181, 1990 WL 291961, \*2 (for a statute to supplant the common law, there must be clear legislative intent). This is so, in part, because § 7302(g)(1)(D) defines failure to attempt to settle a claim on which liability has become reasonably clear, and the other identified practices, as unfair claim settlement practices only when "performed with such frequency as to indicate a general business practice." 4 CMC § 7302)(g)(1). Thus, the statute provides no hint of an intent to supplant a common-law claim for bad faith failure to settle in a *particular* case. Also conspicuous by its absence from § 7302(g) is any definition of bad faith failure to defend as an unfair claim settlement practice, so that there is absolutely no hint that the Commonwealth legislature intended to preempt a common-law bad faith or breach-of-contract claim for failure to defend. *See* 4 CMC § 7302(g)(1)(A)-(E). Moreover, the court in *Ishimatu* recognized that the lack of mandatory enforcement and claim investigation renders the statute less effective without a private right of action. *Ishimatu*, 2010 M.P. 8, ¶ 42. This,

too, signals that the legislature did not intend to preempt common-law causes of action for bad faith failure to settle or defend. Thus, Royal Crown is not entitled to summary judgment on the Insureds' common-law claims on the ground that they are preempted by § 7302(g) and § 7505(h).

In its Reply in support of its motion for summary judgment on the Insureds' first five claims, Royal Crown asserted for the first time that the Insureds' common-law claims are preempted by the amendment to 4 CMC § 7502 that added subsection (j). The amended provision provides as follows:

**§ 7502. The Policy.**

\* \* \*

*(j) Implied Covenant of Good Faith and Fair Dealing.*

It is recognized that, in every policy of insurance, there is an implied covenant of good faith and fair dealing that exists between the insurer and the insured, the breach of which can give rise to a cause of action for damages legally caused by such breach. However, the implied covenant of good faith and fair dealing does not, and shall not, exist between an insurer and any third party who is not an insured under the insurance agreement and there shall be no cause of action for breach of the insurance agreement, breach of the covenant of good faith and fair dealing or bad faith by any person or entity that is not an insured under the insurance agreement. A person who asserts a claim for damages against a person who is insured, or claims to be insured, under a policy of insurance is not, and shall not be considered, a third party beneficiary of such insurance policy. It is intended by this provision that there shall be no cause of action for third party bad faith.

P.L. No. 14-70, § 3 (2005). As noted above, notwithstanding that Royal Crown asserted this argument for the first time in a reply, the court will consider it on the merits. Contrary to Royal Crown's contentions, new § 7502(j), added by P.L. No. 14-70, § 3, does *not* contain any clear indication of legislative intent to preempt or supplant a common-

law claim by an insured for bad faith failure to settle or defend against an insurer, *i.e.*, a first-party bad faith claim.

If anything, new § 7502(j) reads as an express recognition of a common-law first-party bad faith claim. *Id.* (new § 7502(j) begins, “It is recognized that, in every policy of insurance, there is an implied covenant of good faith and fair dealing that exists between the insurer and the insured, the breach of which can give rise to a cause of action for damages legally caused by such breach.”). Had the legislature intended to establish a statutory claim as the exclusive remedy for first-party bad faith, the language of this statute, “recognizing” the existence of an implied covenant of good faith and fair dealing and a cause of action for its breach, would be a most peculiar way to do so. *Hasinto*, 1 N.M.I. at 181 (there must be a “clear indication” of legislative intent to supplant common law). Royal Crown points to absolutely nothing in the statutory language used that is *contrary* to the common-law conception of a first-party bad faith claim. 7 U.S.C. § 3401 (common law is supplanted only when there is written law “to the contrary”). Nor can the court reasonably read a reference to “a cause of action for damages legally caused by such breach” of the covenant of good faith and fair dealing as limiting or clearly demonstrating an intent to limit the recovery for such a claim, by statute, to “damages” to the exclusion of punitive damages or attorney fees, as Royal Crown would have it.

What the amended statutory language plainly does do, is abrogate a common-law *third-party* bad faith claim, by an injured party against an insured. P.L. No. 14-70, § 3 (new § 7502(j) concludes, “However, the implied covenant of good faith and fair dealing *does not, and shall not, exist* between an insurer and any third party who is not an insured under the insurance agreement and *there shall be no cause of action* for breach of the insurance agreement, breach of the covenant of good faith and fair dealing or bad faith by any person or entity that is not an insured under the insurance agreement. A person who

asserts a claim for damages against a person who is insured, or claims to be insured, under a policy of insurance *is not, and shall not be considered, a third party beneficiary* of such insurance policy. *It is intended by this provision that there shall be no cause of action for third party bad faith.*” (emphasis added)). Similarly, while the “findings” in P.L. No. 14-70, § 1, expressly state that the legislature intended to clarify “whether a third party claimant may assert a cause of action for ‘bad faith’ against an insurer, or whether a third party claimant has any right to assert a claim pursuant to 4 CMC § 7505(h) or 4 CMC § 5112,” there is absolutely no reference in the “findings” to an intent to abrogate or supplant a common-law claim for first-party bad faith. P.L. No. 14-70, § 1; *Hasinto*, 1 N.M.I. at 181 n.4 (the court may look to the language of the statute and the recorded legislative history to determine legislative intent). Thus, new § 7502(j) stands as no bar to a common-law claim of bad faith failure to settle or defend by an insured against an insurer, and Royal Crown’s motion for summary judgment on the basis of preemption of common-law claims by that statute will also be denied.

**3. *Improper assignment of statutory claims***

**a. *Arguments of the parties***

Royal Crown also argues that it is entitled to summary judgment on the statutory claims, which Royal Crown identifies as the Insureds’ third, fourth, and fifth causes of action, because those claims are not being prosecuted by the real party in interest. Royal Crown argues that there is no dispute that the Insureds brought suit pursuant to an agreement with Ms. Priest that they would do so and use the proceeds to pay the judgment she had obtained against them, which constitutes an assignment of their interests to Ms. Priest. Royal Crown argues that the Consumer Protection Act has been amended to prohibit assignment of claims to a third-party and that the Insurance Act has been amended to prohibit causes of action for third-party bad faith and assignment of claims to a third

party, thus precluding an insured from assigning any interest or claim under 4 CMC § 7505(h) or the Consumer Protection Act.

The Insureds deny that they have assigned their claims to Ms. Priest or that they are not the real parties in interest. They argue that their agreement to sue Royal Crown and to satisfy Ms. Priest's judgment against them from any recovery in such a suit is not an assignment, because the lawsuit they agreed to bring is to assert their own claims against Royal Crown. They also argue that 4 CMC § 7502(j) does not prohibit assignment of a third-party bad faith claim, it simply clarifies that there is no right to third-party bad faith actions, and this action is not for third-party bad faith, but first-party bad faith. They acknowledge that 7 CMC § 7505(h)(1) is a prohibition on the assignment of third-party bad faith claims as part of the Unfair Claim Settlement Practices Act (UCSPA), but because the Commonwealth Supreme Court held that there is no private right of action under the UCSPA, the bar on assignment of third-party bad faith claims is not applicable here. They also point out that Ms. Priest never had a Consumer Protection Act claim to assign.

In reply, Royal Crown reiterates its contention that this litigation is an assignment of claims, because an assignment of recovery from an action is indistinguishable from an assignment of a cause of action. Here, Royal Crown argues that Ms. Priest caused the institution of this litigation, controls all aspects of this litigation, mandates payment of the proceeds of this case to her, and selected the present Insureds' counsel, who was also counsel for Ms. Priest in the Superior Court case. Royal Crown argues that these facts show that the statutory bad faith and Consumer Protection Act claims involve prohibited assignments.

***b. Analysis***

***i. Statutory bars to assignments.*** The court readily agrees with the Insureds that new § 7502(j) does not, itself, bar assignment of claims under the Insurance Act to

third parties; it simply bars any third-party claims. *See* P.L. No. 14-70, § 3 (adding new § 7502(j)). However, Royal Crown also cites P.L. No. 14-70, § 4, which amends § 7505 to add (h)(1).<sup>8</sup> That provision *does* contain an express prohibition on assignments of claims to third parties, as follows: “No right, claim or remedy pursuant to this section shall be assignable to any person or entity that is not an insured under the policy of insurance that provides coverage for the loss.” P.L. No. 14-70, § 3. Thus, Royal Crown is correct that there is a statutory prohibition on assignments to third parties of claims pursuant to § 7505 of the Insurance Act. Royal Crown is also correct that there is a statutory prohibition on assignment to a third party of claims pursuant to the Consumer Protection Act effected by the amendment in P.L. No. 14-70, § 2, to 4 CMC § 5112 to add subsection (d). That amended provision provides, in pertinent part, “No right, cause of action or remedy against an insurer pursuant to this Article shall be assignable to any such third party-claimant.” 4 CMC § 5112(d). Thus, the Insureds’ claims in their third, fourth, and fifth causes of action cannot be assigned to third parties.

*ii. Whether there was an assignment.* The question, of course, is whether the Insureds have, indeed, assigned those claims to a third party, specifically, Ms. Priest. In its opening brief, Royal Crown asserts baldly that the Insureds have assigned these claims (and all of the others in their Complaint) to Ms. Priest. Royal Crown relies on the Insureds’ answers to interrogatories stating that, after judgment was entered against them, they were forced to negotiate with Ms. Priest and that, to keep from becoming bankrupt by the judgment, they agreed that any judgment they obtained against Royal Crown in this lawsuit would satisfy their obligation to Ms. Priest, while any excess judgment would be

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<sup>8</sup>Royal Crown cites §§ 2, 3, and 4 of P.L. No. 14-70 in its opening brief as prohibiting assignments to third parties, but only §§ 2 and 4 in its reply.

divided according to a retainer agreement with their attorney. *See* Declaration Of Royal Crown's Counsel (docket no. 31), Exhibit G, 43-44 (Dong's answer to Interrogatory No. 11), 49 (Lowery's answer to Interrogatory No. 8). In response, the Insureds assert that this lawsuit is their own, involving their own claims against Royal Crown, even if it was instituted to pay their judgment to Ms. Priest. In its Reply, Royal Crown, for the first time, cites authority that litigation instituted for the benefit of, and controlled by, a third party is an assignment of that litigation to the third party, and that the distinction between an assignment of a cause of action and an assignment of recovery from such an action is meaningless, particularly where, as here, there is evidence that the third-party assignee, Ms. Priest, caused the institution of this litigation, controls all aspects of it, including the choice of counsel, and requires payment of the proceeds of the case to her.

In the primary case cited by Royal Crown, *Edens Technologies, L.L.C. v. Kile Goekjian Reed & McManus, P.L.L.C.*, 675 F. Supp. 2d 75 (D.D.C. 2009), the court held that the plaintiff had improperly assigned its claims of legal malpractice to a third party, Golf Tech, its former adversary in patent litigation, notwithstanding that the agreement between Edens and Golf Tech was purportedly only an assignment of the proceeds of the lawsuit. The court explained,

Although this suit is brought in Edens' name, Golf Tech wields all of the decision-making power. Golf Tech "controls" this litigation, selected the attorneys, and can compel Edens' cooperation. In *Weston [v. Dowty]*, 163 Mich.App. 238, 414 N.W.2d 165, 167 (1987)], on the other hand, there is nothing to indicate that the plaintiff in the underlying negligence action retained any decision-making power over the malpractice action. Moreover, *Weston* did not implicate concerns about parties taking inconsistent and illogical positions because the allegations of malpractice had nothing to do with the merits of the underlying case. The

assignment between Edens in Golf Tech is much more than a mere assignment of the proceeds, and thus, this [\*84] Court believes that under Michigan law, it would be found to be invalid.

*Edens*, 675 F. Supp. 2d at 83-84. In a footnote, the court opined, further,

Because Golf Tech has complete control over this litigation and would benefit from any recovery, this case is analogous to those which “have identified the ‘meaningless distinction’ between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments.” *Gurski [v. Rosenblum and Filan, L.L.C.]*, 885 A.2d [163,] 178 [(Conn. 2005)] (quoting *Town & Country Bank of Springfield v. Country Mutual Ins. Co.*, 121 Ill. App. 3d 216, 76 Ill. Dec. 724, 459 N.E.2d 639, 641 (1984)); *see also Tate [v. Goins, Underkofler, Crawford & Langdon]*, 24 S.W.3d [627,] 633 [(Tex. App. 2000)] (rejecting assignee’s argument that it had merely been assigned the proceeds of a malpractice action because the assignor gave the assignee “absolute control over the litigation, including the unfettered right to settle the malpractice suit on terms as [the assignee] determines” and the arrangement created the “same evils” as other invalidated assignments).

*Edens*, 675 F. Supp. 2d at 84 n.8.

The law is by no means as one-sided as Royal Crown suggests. For example, in *Wilson v. Bristol West Ins. Group*, 2009 WL 3105602 (D. Nev. Sept. 21, 2009) (slip op.), the court held that a third-party claimant, an injured party, had not been assigned the insured’s rights against an insurance company, where the purported assignment was only an agreement to share proceeds of the insured’s suit against the insurer—the scenario that the Insureds assert exists here:

Cromer [the injured third party] also asserts that he has an assignment of Wilson’s [the insured’s] rights arising from

the Agreement. An assignment is a “transfer of rights or property”. *Black’s Law Dictionary* 115 (7th ed. 1999). For an assignment to be effective, it must terminate the assignor’s interest in the property and transfer it to the assignee. *See id.* Here, the Agreement does not contain an assignment of any rights. Instead, Wilson agrees to pursue his rights and share the proceeds of any action with Cromer. Cromer agrees not to execute on his judgment against Wilson. Wilson’s rights to pursue his claims are neither terminated, nor transferred to Cromer. Accordingly, Cromer does not have an effective assignment of rights. Nevada does not recognize a right of action by a third-party claimant against an insurance company for bad faith without a proper assignment of rights. *Hall v. Enterprise*, 122 Nev. 685, 137 P.3d 1104 (Nev. 2006) (specifically limiting holding of case allowing liability to short term rental insurance contemplated by NRS §§ 482.295, 482.305); *Pasina v. Cal. Cas. Indem. Exch.*, 2008 WL 508381 (D. Nev. 2008); *Hunt v. State Farm Ins.*, 655 F. Supp. 284 (D. Nev. 1987) (citing *Tweet v. Webster*, 610 F. Supp. 104 (D. Nev. 1985)). Therefore, Cromer lacks standing as a real-party-in-interest and must be dismissed from this action.

*Wilson*, 2009 WL 3105602 at \*2; *see also Achrem v. Expressway Plaza Ltd. Partnership*, 917 P.2d 447, 449 (Nev. 1996) (finding that “a meaningful legal distinction exists between assigning the rights to a tort action and assigning the proceeds from such an action,” because the assignor of proceeds retains control of the lawsuit and the assignee cannot pursue the action independently, so that an assignment of proceeds was not void as against public policy).

Other courts are split on whether an assignment of proceeds of a lawsuit (sometimes called equitable assignment) is distinct from an assignment of a cause of action (sometimes called legal assignment), such that assignment of proceeds does not run afoul of public policy or statutory prohibitions on assignments of causes of action. *Compare A. Unruh*

*Chiropractic Clinic v. De Smet Ins. Co. of South Dakota*, 782 N.W.2d 367 (S.D. 2010) (recognizing the difference between equitable assignments and legal assignments, but concluding that an equitable assignment in violation of public policy is not enforceable); *Midtown Chiropractic v. Illinois Farmers Ins. Co.*, 847 N.E.2d 942, 947-48 (Ind. 2006) (declining to permit an assignment of proceeds from a personal injury claim as distinguished from the prohibited assignment of the personal injury claim itself, owing to a long-standing prohibition on the assignment of personal injury actions and the legislative creation of limited liens for certain medical providers); *Quality Chiropractic, P.C. v. Farmers Ins. Co. of Arizona*, 51 P.3d 1172 (N.M. App. 2002) (declining to abrogate the common-law rule prohibiting the assignment of personal injury claims and rejecting any distinction between an assignment of the proceeds of a claim and an assignment of the claim itself); *Lingel v. Olbin*, 8 P.3d 1163, 1168-70 (Ariz. App. Div. 2, 2000) (concluding wrongful death proceeds are not assignable); *with Lee v. State Farm Mut. Auto. Ins. Co.*, 57 Cal. App. 3d 458, 465-466 (1976) (recognizing a legal distinction between a nonassignable cause of action arising from a personal wrong and the assignment of the proceeds from any recovery in a lawsuit over that injury, and finding an assignment of proceeds was valid, as to an insurance policy provision assigning the proceeds of an insured's recovery against third parties to the insurer); *Alaimo Family Chiropractic v. Allstate Ins. Co.*, 574 S.E.2d 496, 499-500 (N.C. App. 2002) (North Carolina common law recognizes the difference between assignment of a claim, which is prohibited, and assignment of proceeds of that claim, which is permitted); *Charlotte-Mecklenburg Hosp. Auth. v. First of Georgia Ins. Co.*, (455 S.E.2d 655, 657 (N.C. 1995) (distinguishing between an assignment of a claim for personal injury and assignment of a claim for proceeds, which does not give the assignee control of the case and, hence, provides no public policy reason to invalidate the assignment); *J.E. Dunn Jr. and Assocs., Inc. v. Total*

*Frame Contractors, Inc.*, 787 S.W.2d 892, 896 (Mo. App. W.D. 1990) (“An assignment of the proceeds of a claim is not an assignment of the claim.”); *Fontenot v. Hanover Ins. Co.*, 465 So. 2d 678 (La. 1985) (an instrument in which an insured purportedly assigned all of his rights, title, and interest in injury proceeds from an action against an insurer constituted a pledge, not an assignment); *see also Kippenhan v. Chaulk Servs., Inc.*, 697 N.E.2d 527, 532-33 (Mass. 1998) (finding that the parties did not adequately brief the possible significance of the fact that any assignment involved in the settlement in question is of the proceeds of an action and not of a claim itself, but citing courts that have thought the distinction significant, allowing an assignment of proceeds but not of a claim, citing *Hernandez v. Suburban Hosp. Ass’n*, 319 Md. 226, 233-234, 572 A.2d 144 (1990); *Achrem v. Expressway Plaza Ltd. Partnership*, 112 Nev. 737, 917 P.2d 447, 449 (1996); Annot., *Assignability of Proceeds of Claim for Personal Injury or Death*, 33 A.L.R.4th 82, § 3[a] (1984 & Supp. 1997)).

This court has not found any definition of “assignment” in Commonwealth statutes or case law generally that is helpful to determine whether or not an “assignment” of proceeds would violate the prohibition on “assignments” of causes of action to third parties in 4 CMC §§ 5112(d) and 7505(h)(1). Nevertheless, the court finds sufficient guidance from the case law of other jurisdictions and the policy concerns that motivated the 2005 amendments to decide the question of whether the assignment of proceeds here is a prohibited “assignment” within the meaning of those amendments. Both of the amendments prohibit assignment of a “right, cause of action or remedy,” *see* 4 CMC §§ 7505(h)(1) (as amended) & 5112(d) (as amended). The assignment of a share of the proceeds here, however, is not such a prohibited assignment, because the agreement does not assign or terminate any rights that the Insureds have against Royal Crown. *See Wilson*, 2009 WL 3105602 at \*2. This court believes that there is “a meaningful legal

distinction . . . between assigning the rights to a tort action and assigning the proceeds from such an action,” in that the assignor of proceeds, the Insureds here, retain control of the litigation against Royal Crown, and Ms. Priest cannot pursue the action independently. *Achrem*, 917 P.2d at 449; *Charlotte-Mecklenburg Hosp. Auth.*, 455 S.E.2d at 657 (distinguishing between an assignment of a claim for personal injury and assignment of a claim for proceeds, which does not give the assignee control of the case and, hence, provides no public policy reason to invalidate the assignment); *Lee*, 57 Cal. App. 3d at 465-466; *J.E. Dunn Jr. and Assocs., Inc.*, 787 S.W.2d at 896. As a matter of law, the agreement between the Insureds and Ms. Priest does not, as Royal Crown contends, grant Ms. Priest control over all aspects of this litigation. Rather, apart from requiring that the Insureds use any judgment obtained from Royal Crown to satisfy her judgment against them on her personal injury claims and agreeing with the Insureds as to who would represent them in this litigation, Ms. Priest has no control over this litigation. Rather, the agreement provides that the Insureds “will be advised *if* they have a good faith basis for bringing such claims before any complaint is filed against Royal Crown Insurance Company,” and grants Ms. Priest no control or veto power over any litigation strategy or settlement or voluntary dismissal of all or some of the lawsuit, even if it requires the Insureds’ “cooperation” in this litigation. Declaration Of Eric Smith In Opposition To Summary Judgment Motion (docket no. 45), Exhibit A, 6 (emphasis added). Also, much as Royal Crown attempts to equate the Insureds’ bad faith claims with Ms. Priest’s claims, the allegations of bad faith in this litigation have nothing to do with the merits of Ms. Priest’s underlying claims; indeed, whether there was any merit to Ms. Priest’s claims against the Insureds is all but irrelevant to whether or not the Insureds have a bad faith claim against Royal Crown. In this respect, the purported assignment is distinguishable from the one in *Edens*, and much more like the one in *Weston*, which the court in *Edens*

distinguished. *Edens*, 675 F. Supp. 2d at 83 (the purported assignee “wield[ed] all of the decision-making power” concerning the assignee’s suit, whereas the assignee in *Weston* did not retain any decision-making power over the malpractice action, and the allegations of malpractice in *Weston* had nothing to do with the merits of the underlying case). Thus, unlike the situation in *Edens*, the agreement between the Insureds and Ms. Priest is little, if anything, more than a mere assignment of the proceeds. *Compare id.*

The court also finds that the public policy interests that the 2005 amendments were intended to advance will not be impeded by treating a mere equitable assignment of future proceeds, if any, of a subsequent lawsuit against an insurer that is litigated by the assignor, the insureds, for the assignor’s *own claims* differently from a legal assignment of a cause of action itself for prosecution by the assignee. While the avowed purpose of the 2005 amendments is to clarify whether a third party claimant may assert a cause of action for ‘bad faith’ against an insurer, or whether a third party claimant has any right to assert a claim pursuant to 4 CMC § 7505(h) or 4 CMC § 5112, and, in fact, to bar such claims, P.L. No. 14-70, § 1 (Findings), ” there is absolutely no reference in the “findings” to an intent to abrogate or limit claims for first-party bad faith. P.L. No. 14-70, § 1; *Hasinto*, 1 N.M.I. at 181 n.4 (the court may look to the language of the statute and the recorded legislative history to determine legislative intent). An agreement that simply assigns to an injured third party the future proceeds, if any, of an insureds’ lawsuit against an insurer does not run afoul of these purposes or somehow expand the scope of liability of insurers that might “dissuade insurers from discontinuing the provisions of liability insurance in the Commonwealth,” *id.*, where first-party bad faith claims were expressly “recognized” as already existing. *Id.* at § 3 (amending § 7502 to add subsection (j)).

Therefore, the court concludes that, as a matter of law, the Insureds’ agreement with Ms. Priest, an injured third party, to share the proceeds of the insured’s lawsuit

against the insurer to satisfy the injured third party's judgment against the insured is not a prohibited "assignment" of an insured's claims against an insurer under the Insurance Act and the Consumer Protection Act within the meaning of 2005 amendments to 4 CMC §§ 5112(d) and 7505(h)(1) in P.L. No. 14-70. Moreover, Ms. Priest, the injured third party in this case, does not retain or exercise sufficient control over the Insureds' lawsuit against the insurer, Royal Crown, by virtue of the agreement to share proceeds to make the agreement an impermissible assignment within the meaning of 2005 amendments to 4 CMC §§ 5112(d) and 7505(h)(1) in P.L. No. 14-70.

That part of Royal Crown's Motion For Summary Judgment concerning the Insureds' fourth and fifth causes of action will be denied, because there is no statutory bar on the assignment of proceeds of those claims that has occurred in this case. The court's disposition of Royal Crown's Motion For Summary Judgment concerning the Insureds' third cause of action, however, rests on different grounds.

**4. Summary judgment sua sponte on the § 7302(g) claim**

Royal Crown did not move for summary judgment on the Insureds' third cause of action—denominated unfair settlement practice, which alleges that Royal Crown has not attempted in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear within the meaning of 4 CMC § 7302(g)—on the ground that the statute on which it is based does not provide a private cause of action. The decision in *Ishimatu* makes clear that the Insureds' third cause of action is untenable as a matter of law, and must be dismissed, because there is no private cause of action to assert such a claim. *Ishimatu*, 2010 M.P. 8, at ¶ 48 (because the UCSPA did not provide for a private cause of action, "the judgment as a matter of law dismissing the 4 CMC § 7302(g) claim is upheld, not for insufficient evidence, but because no private cause of action exists under the statute").

Because the Insureds have expressly conceded that § 7302(g) does not authorize a private cause of action, and relied heavily on the holding in *Ishimatu* to that effect, albeit in their attempt to use that fact as a ground for holding that their common-law claims based on bad faith failure to settle are not barred or supplanted by § 7302, and because this court finds that the viability of a private cause of action pursuant to § 7302(g) is not dependent upon any factual circumstances, because no private cause of action exists under § 7302(g) as a matter of law, the court will *sua sponte* grant summary judgment in favor of Royal Crown on the Insureds' third cause of action on this ground. *See Gospel Missions of Am.*, 328 F.3d at 553 (the court may grant summary judgment *sua sponte*, if the losing party has "had a full and fair opportunity to ventilate the issues involved in the matter" (internal quotation marks omitted); *see also Asuncion*, 427 F.2d at 524 (where only a question of law is presented, a district court's resolution of the matter on summary judgment is also procedurally proper).

##### **5. Summary**

Royal Crown's Motion For Summary Judgment on the Insureds' first through fifth causes of action will be denied as to the Insureds' first and second causes of action, because those common-law claims are not preempted by statute, and as to the Insureds' fourth and fifth causes of action, because those statutory claims are not barred by the prohibition on assignment of causes of action to third parties in the 2005 amendments to § 5122(d) and § 7505(h)(1). The court will grant summary judgment *sua sponte* on the Insureds' third cause of action, however, because that cause of action cannot be maintained as a matter of law pursuant to *Ishimatu v. Royal Crown Ins. Corp.*, 2010 M.P. 8, at ¶ 48.

## ***B. The Insureds' Motion For Summary Judgment***

### ***1. Arguments of the parties***

For their part, the Insureds contend that they are entitled to summary judgment to the effect that Royal Crown had a duty to defend them against Ms. Priest's claims and that Royal Crown breached that duty. They contend that Royal Crown improperly relied on the DUI Exclusion Clause in Dong's automobile insurance policy to assert that it had no duty to pay Ms. Priest's injury claim or to defend the Insureds against or settle Ms. Priest's claims. They argue that the DUI Exclusion Clause is invalid against innocent third parties, such as Ms. Priest, and named insureds, such as Dong, who did not operate their respective vehicles while under the influence of alcohol, so that exclusion cannot be used as a ground to refuse to defend or settle Ms. Priest's claim against them. Indeed, they point out that the CNMI's compulsory auto liability insurance program is intended to protect innocent third parties from uninsured drivers. They also point out that the CNMI Attorney General has interpreted P.L. No. 11-55, the Mandatory Liability Auto Insurance Act," to mean that the DUI exclusion clause is legally invalid as to third parties. They contend that exclusions cannot be used to defeat mandatory insurance laws. Thus, the Insureds contend that Royal Crown violated its own policy language and prevailing law when it refused to defend or indemnify them when they were sued by Ms. Priest.

In response, Royal Crown does not attempt to defend its pre-litigation assertions that the DUI Exclusion Clause relieved it of any duty to pay or settle Ms. Priest's claims or to defend the Insureds against those claims.■<sup>9</sup> Instead, Royal Crown reiterates its arguments that the Insureds' common-law claims are preempted or precluded as a matter of law,

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<sup>9</sup>Royal Crown quotes the DUI Exclusion Clause in its opposition brief, but makes no attempt to explain how it relieved Royal Crown of any duty in this case.

apparently assuming that such bars to *claims* precludes any duty to defend. Royal Crown also argues that it owed no duty to the Insureds based on *res judicata* and collateral estoppel. More specifically, Royal Crown argues that Ms. Priest's "direct action" against Royal Crown in the Superior Court, and Royal Crown's dismissal with prejudice, precludes anyone from seeking payment on Priest's behalf as a result of the accident. Royal Crown also argues that there are genuine issues of material fact as to whether it breached any duty to the Insureds, because there are genuine issues of material fact as to whether or not the Insureds ever tendered the defense of Ms. Priest's claims against them to Royal Crown, as well as evidence that Royal Crown did provide a defense to them, when it hired an attorney to represent them after it was dismissed from Ms. Priest's lawsuit.

In their reply, the Insureds assert that they are entitled to summary judgment on the ground that "Royal Crown had a duty to defend Insureds in the Superior Court Lawsuit at the inception of the lawsuit and it breached that duty by waiting until liability was established via an entry of default and it breached its duty to indemnify by not accepting an offer within the policy limits of \$15,000." Insureds' Reply Memorandum Of Law In Support Of Insureds' Motion For Partial Summary Judgment (docket no. 47), 1. They argue that dismissal of Royal Crown from Ms. Priest's lawsuit did not relieve Royal Crown of its obligation to defend and indemnify them. They contend that nothing about disposition of Ms. Priest's negligence claims acts as an adjudication on the merits barring *them* from suing their insurer for bad faith. They also contend that 4 CMC § 7502, which permitted a "direct action" by the injured party against the insurer at the time of Ms. Priest's lawsuit, required Royal Crown to defend them and that Royal Crown had actual knowledge of the suit against them, because it was also a party to that action, which triggered the duty to defend. They argue that the "direct action" statute made any tender

of their defense to Royal Crown unnecessary and that Royal Crown was not prejudiced by any lack of tender.

**2. *Royal Crown's duty to defend***

The Commonwealth Supreme Court recently explained the standards to determine whether an insurer has a duty to defend against a claim, as follows:

When determining if a duty to defend against a claim exists, the policy must be examined against the claims made in the complaint. *Montrose [Chem. Corp. v. Superior Court]*, 6 Cal.4th [287,] 295, [861 P.2d 1153, 1157 (1993)]. This comparison is known as the “eight-corners rule.” *Am. Nat'l Gen. Ins. Co. v. Ryan*, 274 F.3d 319, 324 (5th Cir. 2001)) (citing *Nat'l Union Fire Ins. Co. v. Merchs. Fast Motor Lanes, Inc.*, 939 S.W.2d 139, 141 (Tex.1997); *Am. Ins. Co. v. Bailey*, 133 F.3d 363, 369 (5th Cir. 1998)). Under “[t]he eight-corners rule, . . . ‘[r]esort to evidence outside the four corners of these two documents is generally prohibited.’” *Gore Design Completions, Ltd.*, 538 F.3d at 368 (quoting *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 307 (Tex. 2006)). When evaluating a claim under this rule, this Court assesses “whether the complaint, properly construed, alleges conduct covered by the policy.” *St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.*, 539 F.3d 809, 815 (8th Cir. 2008) (citing *GuideOne Elite Ins. Co.*, 197 S.W.3d at 308). The accuracy of the facts alleged in the claim is not taken into account in making this determination. *GuideOne Elite Ins. Co.*, 197 S.W.3d at 308 (citing *Argonaut Sw. Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973); *Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 24 (Tex. 1965)). If there is no potential for coverage, there is no duty to defend or to indemnify.

*Century Ins. Co., Ltd. v. Hong Kong Entertainment (Overseas) Investments, Ltd.*, 2009 M.P. 4, ¶ 16. The court will apply these standards to Royal Crown’s proffered reasons for refusing to defend the Insureds against Ms. Priest’s injury claims.

**a. *The contractual duty to defend***

The court begins by noting that the insurance policy in question expressly placed a duty on Royal Crown to defend, despite any doubts about the merits of the claim. Specifically, the policy provided, in Section II, with respect to Coverages A and B, for defense, settlement, and supplementary payments, including an obligation to “defend any suit against the insured alleging such injury . . . or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.” Insureds’ Summary Judgment, Exhibit A (docket no. 26-4), 2. Thus, the question is whether the policy elsewhere establishes that there is no potential for coverage, such that there is no duty to defend. *Century Ins. Co., Ltd.*, 2009 M.P. 4 at ¶ 16.

**b. *The DUI Exclusion Clause***

Royal Crown initially premised its refusal to pay Ms. Priest’s claim, and its further refusal to settle that claim or to defend the Insureds against it, on the “DUI Exclusion Clause” in Dong’s insurance policy. Such a contention turns on the interpretation of the exclusion.

In *Ishimatu*, the Commonwealth Supreme Court also summarized the rules on interpretation for an insurance policy as follows:

An insurance contract is construed liberally in favor of the insured and strictly against the insurer. *Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166, 1172 (D.C. Cir. 2003). The interpretation of language in an insurance policy is a question of law, *Century Insurance Co. v. Hong Kong Entertainment*

*Investments Ltd.*, 2009 MP 4 ¶ 15, and “[a] policy will be enforced according to its terms by reading it as a whole.” *Ito v. Macro Energy, Inc.*, 4 NMI 46, 77 (1993). The exception to this rule is where there is an ambiguity, in which case the ambiguous term is interpreted in favor of coverage. *Id.*

*Ishimatu*, 2010 M.P. 8 at ¶ 19. Applying these rules, the conclusion that Royal Crown has misconstrued and improperly relied on the DUI Exclusion Clause in Dong’s policy is inescapable.

Again, the DUI Exclusion Clause provided as follows:

IT IS HEREBY UNDERSTOOD AND AGREED that company shall not be liable with respect to any accident, loss, damage or liability caused, sustained or incurred while any motor vehicle, in respect of which indemnity is provided by this policy, is being driven by any person while committing a felony or who is under the influence of intoxicating liquor or any controlled drugs or substance with respect to such accident, loss, damage or liability.

*IT IS UNDERSTOOD that this Exclusion shall not apply in respect of any claim by innocent Third Parties or innocent Named Insured if not operating the insured vehicle under the conditions set out in the preceding paragraph.*

IT IS FURTHER UNDERSTOOD AND AGREED that if the Company shall indemnify any Third Party for a claim which otherwise would have been excluded under the first paragraph of this exclusion, the Company shall have the right of recovery from the operator of the insured vehicle.

Insureds’ Summary Judgment, Exhibit A, at 5 (emphasis added).

There is simply no ambiguity here. *See Ishimatu*, 2010 M.P. 8 at ¶ 19. The first paragraph of the exclusion states that Royal Crown “Shall not be liable,” if the vehicle involved in the accident “is being driven by any person . . . who is under the influence of intoxicating liquor. . . .” Insureds’ Summary Judgment, Exhibit A, at 5. Admittedly,

*read in isolation*, this paragraph would exclude coverage for the accident in question, because Lowery, the driver of the insured vehicle, was “under the influence of intoxicating liquor,” where there is no dispute that Lowery failed field sobriety tests and was shown to have a BAC of .218%. That paragraph cannot be read in isolation, however. *See Ishimatu*, 2010 M.P. 8 at ¶ 19 (stating, “[a] policy will be enforced according to its terms by reading it as a whole” (quoting *Ito*, 4 NMI at 77)). The second paragraph of the exclusion makes plain that the exclusion of coverage in the first paragraph “shall not apply with respect to any claim by [an] innocent Third Part[y],” such as Ms. Priest, if she was “not operating the insured vehicle” while under the influence of intoxicating liquor. Insureds’ Summary Judgment, Exhibit A, at 5. Thus, under the plain terms of the first and second paragraphs, the DUI Exclusion Clause provided no excuse for Royal Crown to refuse to pay Ms. Priest’s injury claims.

Finally, the third paragraph of the exclusion cannot be read to take away the duty to pay, or at least to defend against, Ms. Priest’s claims imposed by the second paragraph. Rather, it simply provides that if Royal Crown pays Ms. Priest’s claim, pursuant to the second paragraph, which it would not otherwise have to do, if the first paragraph stood alone, Royal Crown “shall have the right of recovery from the operator of the insured vehicle,” Lowery. *Id.* Nothing about Royal Crown’s right of recovery against Lowery can possibly be construed to make it unnecessary for Royal Crown to pay, or defend against, Ms. Priest’s injury claim in the first place.

Thus, as a matter of law, the DUI Exclusion Clause did not excuse Royal Crown from its duty to pay or defend against Ms. Priest’s injury claims. *Ishimatu*, 2010 M.P. 8 at ¶ 19 (interpretation of an insurance contract is a matter of law). To put it another way, examining the policy, and particularly Coverage A (bodily injury) and Coverage C (medical payments) of the policy, against Ms. Priest’s injury claims, pursuant to the “eight

corners” rule, Ms. Priest’s complaint alleged conduct covered by the policy, and Royal Crown had a duty to defend, because it could not possibly—let alone reasonably—be believed that there was no potential for coverage. *Century Ins. Co., Ltd.*, 2009 M.P. 4 at ¶ 16.■<sup>10</sup>

**c. Res judicata and collateral estoppel**

Perhaps recognizing the tenuousness of its argument that the DUI Exclusion Clause excused it from its duty to pay Ms. Priest’s claims or to defend against them, offered as the reason for denying Ms. Priest’s claims prior to litigation, Royal Crown also contends that it owed no duty to the Insureds based on *res judicata* and collateral estoppel, because any litigation of its duty to defend is foreclosed by its dismissal from Ms. Priest’s direct action against it. This is not properly an argument that Royal Crown had no duty to defend the Insureds in Ms. Priest’s lawsuit, but a claim that the Insureds’ cannot now complain about Royal Crown’s failure to do so. Even then, this argument fails as a matter of law.

The Commonwealth Supreme Court has explained,

*Res judicata*, in its most basic form, stands for the proposition that once a valid judgment has been entered, the parties may not relitigate those claims actually decided or which should have been brought. RESTATEMENT [SECOND] TORTS, §§ 18, 19. Additionally, in any subsequent litigation, parties are bound by each issue decided if the determination of

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<sup>10</sup>This being so, the court finds it unnecessary to consider the Insureds’ arguments about the purpose of the CNMI’s compulsory automobile liability insurance to protect innocent third parties, the Commonwealth Attorney General’s interpretation of P.L. No. 11-55, or whether CNMI or other courts have recognized that exclusions cannot be used to defeat mandatory insurance laws. Moreover, where Royal Crown has grossly misconstrued the DUI Exclusion Clause, Royal Crown’s contention that other insurance companies have such clauses in their policies is totally irrelevant.

that issue was necessary to the previous action's outcome. *Id.*  
at § 27.

*Sik Chang v. Norita*, 2006 M.P. 2, ¶ 16, 2006 WL 344809, \*4 (per curiam). Similarly, “collateral estoppel,” also called “issue preclusion,” one of two preclusion concepts of which *res judicata* consists, “refers to the effect of a judgment in foreclosing relitigation of a matter that has been already litigated and decided.” *Del Rosario v. Camacho*, 2001 M.P. 3, ¶ 62, 6 N.M.I. 213, 226, 2001 WL 34883245, \*10. “Issue preclusion requires that the issue in the previous action be identical to the one raised in the pending action, and that it was actually litigated, directly determined, and essential to the judgment in the prior action.” *Id.* “*Res judicata* does not apply where an issue was not previously litigated.” *Id.*

As the Insureds point out, the claims actually at issue and actually decided in Ms. Priest's lawsuit were negligence claims, not the first-party bad faith and other claims now at issue in this lawsuit. Royal Crown's contention that its dismissal from Ms. Priest's lawsuit precludes anyone from seeking payment on Ms. Priest's behalf as a result of the accident, even if true, is irrelevant. No claim in this case seeks payment on Ms. Priest's behalf as a result of the accident, but payment of damages to the Insureds for Royal Crown's failure to pay Ms. Priest's claims and failure to defend the Insureds.<sup>11</sup> Royal Crown cites no authority for the proposition that prior judicial determination of negligence claims against an insured, or even against an insurer under a “direct action” statute, bars the insureds from subsequently bringing first-party bad faith or other claims against the

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<sup>11</sup> Even supposing that the Insureds have “assigned” their bad faith and other claims to Ms. Priest, by entering into an agreement to share the proceeds, if any, of this lawsuit to fulfill their obligation to Ms. Priest pursuant to her judgment against them, their claims are still not for payment on Ms. Priest's behalf as a result of the accident, but for Royal Crown's failure to pay claims as the result of its own conduct.

insurer for failure to defend and settle the lawsuit, on the ground that such claims should have been brought by the insured against the insurer in the injured party's direct action against the insured and the insurer. *See Del Rosario*, 2001 M.P. 3 at ¶ 62 (defining "claim preclusion," another component of *res judicata*, as "foreclosing litigation of a matter that has not been litigated, because it should have been raised in an earlier suit"). No claims at issue here are *res judicata*, where none were actually decided in Ms. Priest's lawsuit. *Id.*

Thus, *res judicata* and collateral estoppel do not establish either that Royal Crown had no duty to the Insureds or that the Insureds cannot now complain about Royal Crown's breach of that duty.

*d. The insureds' failure to tender the defense to the insurer*

Finally, Royal Crown contends that the Insureds are not entitled to summary judgment on its duty to defend, because there are at least genuine issues of material fact as to whether or not the Insureds ever tendered the defense of Ms. Priest's claims to Royal Crown. The Insureds counter that Royal Crown had actual notice of Ms. Priest's claims, because it was joined in a "direct action" by Ms. Priest, the "direct action" statute imposed a duty to defend on Royal Crown regardless of other notice from an insured, and Royal Crown was not prejudiced by any failure on their part to give notice or to demand a defense.

As mentioned above, the policy contains the following "notice" provisions:

1. **Notice of Accident Coverages A, B and C.** When an accident occurs written notice shall be given [sic: given by?] or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the

accident, the name and address of the injured and of available witnesses.

2. **Notice of Claim or suit Coverages A and B.** If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

Insureds' Summary Judgment, Exhibit A, at 6. Thus, pursuant to the terms of the policy, for Coverage A (bodily injury), Coverage B (property damage), and Coverage C (medical payments), the insured or someone else must give notice to the insurer of the accident, but for Coverage A (bodily injury) and Coverage C (medical payments), the insured must forward notices of claims (specifically, every demand, notice, summons, or other process received by the insured) to the insurer.

Royal Crown has not pointed to, and the court has not found, any provision of the insurance policy that required Dong or Lowery to make an express demand for a defense. Nevertheless, Royal Crown contends that, in addition to complying with the notice provisions, the insureds were required to demand a defense, even if Royal Crown otherwise had notice of Ms. Priest's claims against the Insureds. In support of its contention that an insured's tender of a defense to the insurer is a condition precedent to the duty to defend, Royal Crown cites the following cases: *Pedro Cos. v. Sentry Ins.*, 518 N.W.2d 49, 51 (Minn. App. 1994); *E & L Chipping Co., Inc. v. Hanover Ins. Co.*, 962 S.W.2d 272, 278 (Tex. App. 1998); *Detroit Automobile Inter-Insurance Exchange v. Higginbotham*, 290 N.W.2d 414, 417 (Mich. Ct. App. 1980); *Manny v. Estate of Anderson*, 574 P.2d 36, 38 (Ariz. Ct. App. 1977). Royal Crown also cites *Hudson v. City of Houston*, --- S.W.3d ----, 2010 WL 3212137 (Tex. App. 2010) (unpublished op.), for the proposition that a demand for a defense is required, even if the insurer actually knows

that the insured is being sued, defends another insured in the same litigation, or is aware of an interlocutory default judgment against the insured.

In contrast, the Insureds contend that the former “direct action” statute, 4 CMC § 7502(e), required an insurer to defend an insured, whether or not the insured had been served and whether or not the insured tendered defense of the action to the insurer. They also cite the following cases in support of their contention that actual notice of the suit, alone, is enough to trigger the insurer’s duty to defend, even in the absence of notice and a demand for a defense from the insured, for example, because insureds are generally unsophisticated: *Garcia v. Underwriters at Lloyd’s London*, 182 P. 3d 113, 114, 117 (N.M. 2008); *Thomas v. Atlanta Cas. Co.*, 558 S.E. 2d 432 (Ga. App. 2001); *Cincinnati Companies v. West American Ins. Co.*, 701 N.E. 2d 499, 502 (Ill. 1998); *Towne Realty, Inc. v. Zurich Ins. Co.*, 201 Wis. 2d 260, 548 N.W.2d 64, 67 (1996); *Federated Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 282 Ill. App. 3d 716, 218 Ill. Dec. 143, 668 N.E.2d 627, 632–33 (2d Dist. 1996); *Institute for Shipboard Educ. v. Cigna Worldwide Ins. Co.*, 22 F.3d 414, 419 n.6 (2d Cir. 1994); *California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal. App. 3d 1, 221 Cal. Rptr. 171, 189 (4th Dist. 1985); *Samson v. Transamerica Ins. Co.*, 636 P.2d 32, 44 (Cal. 1981). They contend that, even under the line of cases on which Royal Crown relies, an insurer only escapes liability for failure to defend, if it was prejudiced by the lack of a demand for a defense, and that, if the insurer has actual notice of and was a party to the lawsuit before default judgment was entered, there is no prejudice, citing *Clarke v. Allianz Global Risks U.S. Insurance*, 639 F. Supp. 2d 751, 756 (N.D. Tex. 2009).

Again, predicting the resolution by the Commonwealth Supreme Court, if confronted with these arguments and this split in authority, this court concludes that the better reasoned rule is that, whether or not an insured complies with notice provisions of

the insurance policy or expressly demands a defense by the insurer to an injured third party's claim, the insurer is nevertheless subject to a duty to defend, if the insurer has actual notice of the accident or claim and is not prejudiced by the insured's failure to provide notices and demand a defense. Adopting the opposing rule simply makes an insurance policies' provisions concerning notice and the "unwritten" rule that the insured must demand a defense, even if the insured otherwise complies with the notice provisions, a trap for the unwary and unsophisticated. See *Garcia*, 182 P. 3d at 114 & 117; *Thomas*, 558 S.E. 2d 432; *Cincinnati Companies*, 701 N.E. 2d at 502; *Towne Realty, Inc.*, 548 N.W.2d at 67; *Federated Mut. Ins. Co.*, 668 N.E.2d at 632-33; *Institute for Shipboard Educ.*, 22 F.3d at 419 n.6; *California Shoppers, Inc.*, 221 Cal. Rptr. at 189; *Samson*, 636 P.2d at 44. A principal canon of interpretation for insurance policies is "[a]n insurance contract is construed liberally in favor of the insured and strictly against the insurer." *Ishimatu*, 2010 M.P. 8 at ¶ 19. Refusing to recognize artificial barriers to defense by the insurer of claims against an insured is consistent with such a canon of interpretation.

Moreover, Royal Crown cannot show that it was prejudiced by the failure to demand a defense, or even by the failure to give notice of suit, in this case. *Clarke*, 639 F. Supp. 2d at 756 (an insurer only escapes liability for failure to defend, if it was prejudiced by the lack of a demand for a defense, and that, if the insurer has actual notice of and was a party to the lawsuit before default judgment was entered, there is no prejudice). As the Insureds note, at the time of Ms. Priest's suit, the Commonwealth permitted "direct actions" against an insured, joined with or even in the absence of an insured. Royal Crown's assertions that it simply did not become aware that the Insureds had been served until sometime after the entry of default against them, and that this somehow excused Royal Crown from its duty to defend, are absurd. Royal Crown knew about Ms. Priest's injury in an accident involving an insured, because Royal Crown paid

Ms. Priest's property damage claim, knew about her demands for settlement of her injury claims within policy limits, knew about the litigation that she brought, and that the Insureds were also defendants in that lawsuit.

Therefore, as a matter of law, Royal Crown has a duty to defend the Insureds against Ms. Priest's claims. That part of the Insureds' Motion For Summary Judgment concerning Royal Crown's duty to defend will be granted.

### ***3. Royal Crown's breach of duty***

Because the court concludes that, as a matter of law, Royal Crown had a duty to defend the Insureds, the court must also consider whether the Insureds are entitled to summary judgment that Royal Crown breached that duty. The record demonstrates, beyond dispute, that Royal Crown did nothing to defend the Insureds prior to Royal Crown's dismissal from Ms. Priest's lawsuit and entry of default against the Insureds. Royal Crown has not met its burden "to set out specific facts showing a genuine issue for trial,"" *Sullivan*, \_\_\_ F.3d at \_\_\_, 2010 WL 3733576 at \*6, as to any attempt to defend prior to that point. The only genuine issue of material fact is what damage, if any, to the Insureds flowed from that failure to defend.

The record presents a different, more confused picture after Royal Crown's dismissal from Ms. Priest's lawsuit and entry of default against the Insureds. This is so, because there is no dispute that an attorney appeared for the Insureds, after default was entered, to attack the damages award against them on Ms. Priest's negligence claims. On the other hand, there are genuine issues of material fact as to whether that attorney was, in fact, employed by Royal Crown pursuant to its duty to defend, and whether Royal Crown's mounting of a defense of the Insureds at that point, if indeed Royal Crown did so, was sufficient or simply too little too late to have any effect on the injury to the Insureds resulting from Royal Crown's prior refusal or failure to defend.

Upon the present record, that part of the Insureds' Motion For Summary Judgment seeking judgment that Royal Crown breached its duty to defend as a matter of law will be denied.

**4. Summary**

In short, the Insureds' Motion For Summary Judgment will be granted as to Royal Crown's duty to defend, but denied as to Royal Crown's breach of that duty.

***IV. ROYAL CROWN'S COUNTERCLAIM***

Royal Crown has asserted a Counterclaim seeking indemnification and contribution from Lowery for any sum that Royal Crown must pay to Dong or any third person as a result of the accident, because Lowery was operating the vehicle in question under the influence of alcohol, in violation of the insurance policy issued by Royal Crown to Dong. In that Counterclaim, Royal Crown also seeks a declaration that Lowery is precluded from recovering any sum from Royal Crown. The parties have filed cross-motions for summary judgment on Royal Crown's counterclaim. These motions for summary judgment are more precisely "mirror images" of each other than the parties' motions for summary judgment on the Insureds' claims.

***A. Arguments Of The Parties***

The Insureds contend that Royal Crown's Counterclaim violates the "anti-subrogation rule," which provides that an insurer has no right of recovery from an insured for damages that it has paid for injury to a third party caused by an insured. The Insureds argue that the "anti-subrogation rule" applies to Lowery, because he is an "insured" within the meaning of the insurance policy, where he was driving Dong's vehicle with her permission at the time of the accident. They also argue that the DUI Exclusion Clause

simply does not apply, but if it does, it is contrary to public policy. Moreover, the Insureds argue that, because Royal Crown breached its duty to defend, it cannot rely upon its contractual right to recover against an intoxicated driver in the DUI Exclusion Clause, if that clause is enforceable over their public policy objections. Furthermore, they contend that Royal Crown's claim against Lowery, if any, pursuant to the DUI Exclusion Clause is premature, because Royal Crown has thus far paid nothing at all on Ms. Priest's claims. Finally, they assert that, if Royal Crown can recover from Lowery at all, it can only recover up to the policy limits of \$15,000.

In contrast, Royal Crown asserts that the DUI Exclusion Clause expressly provides for its right of recovery against Lowery, where there is no dispute that Lowery was intoxicated while driving at the time of the accident. Moreover, Royal Crown asserts that there is a well-settled principle that an insurer may recover from an insured for damages paid for conduct ascribable to an unlawful act, and that this principle is recognized in 4 CMC § 7505(b), which provides that an insurer is not liable for loss caused by the willful act of the insured.

### ***B. Analysis***

The parties' arguments raise issues concerning whether Royal Crown's Counterclaim is authorized by the DUI Exclusion Clause, a statute, or common law, and whether, if authorized, it is barred by public policy.

#### ***1. The basis for the Counterclaim***

Royal Crown suggests that its Counterclaim is authorized, first, by the DUI Exclusion Clause and, second, by statutory or common law. The Insureds assert that the DUI Exclusion Clause is inapplicable here, that there is no statutory authorization for the

claim, and that a claim pursuant to the DUI Exclusion Clause or the common-law would be contrary to public policy.

*a. The DUI Exclusion Clause*

As explained above, the first paragraph of the DUI Exclusion Clause excludes coverage for an accident in which the driver of the insured vehicle was “under the influence of intoxicating liquor”; the second paragraph, an exception to the exclusion, makes plain that the exclusion of coverage in the first paragraph “shall not apply with respect to any claim by [an] innocent Third Part[y],” such as Ms. Priest, or an “innocent Named Insured,” such as Dong, if she was “not operating the insured vehicle” while under the influence of intoxicating liquor; and the third paragraph, the right of recovery paragraph, provides that, if Royal Crown pays the claim of “any Third Party,” pursuant to the second paragraph, which it would not otherwise have to do pursuant to the first paragraph, Royal Crown “shall have the right of recovery from the operator of the insured vehicle,” Lowery. Insureds’ Summary Judgment, Exhibit A, at 5.

More specifically, the third paragraph of the exclusion establishes a condition precedent to any recovery from the intoxicated “operator of the insured vehicle.” Specifically, the right of recovery provided unambiguously applies only “if the Company shall indemnify any Third Party for a claim which otherwise would have been excluded under the first paragraph of this exclusion.” *Id.*; *see also Ishimatu*, 2010 M.P. 8 at ¶ 19 (a policy will be enforced according to its terms by reading it as a whole). The only “Third Party” that Royal Crown has indemnified is Ms. Priest; as the policy holder, Dong is not a “Third Party.” Furthermore, any recovery Dong may obtain in this lawsuit is *not* as the result of a claim that Royal Crown would not have had to pay under the first paragraph of the DUI Exclusion Clause, but a separate claim for Royal Crown’s bad faith conduct.

Furthermore, Royal Crown has indemnified the pertinent “Third Party,” Ms. Priest, only to the extent of her *property damage claim*. Royal Crown has *not* indemnified Ms. Priest for a personal injury claim for which coverage otherwise would have been excluded under the first paragraph of the DUI Exclusion Clause, where Royal Crown declined to pay Ms. Priest’s personal injury claim, resulting in Ms. Priest’s suit against Royal Crown and the Insureds.

Thus, the DUI Exclusion Clause provides, at most, for recovery by Royal Crown from Lowery only for Ms. Priest’s *property damage claim*, not for her personal injury claim, and not for any claim by Dong.

Moreover, even if the Insureds recover against Royal Crown in this litigation, and even if the Insureds use the proceeds of this litigation to satisfy Ms. Priest’s judgment against them on her personal injury claim, Royal Crown *still* will not have indemnified Ms. Priest for her personal injury claim. Rather, Royal Crown will have paid the Insureds damages for Royal Crown’s own misconduct. In short, until and unless Royal Crown actually indemnifies Ms. Priest *for her personal injury claims*, Royal Crown will have no right of recovery against Lowery for any sum beyond the amount that Royal Crown has indemnified Ms. Priest for her property damage claim.

***b. Section 7505(b) and the common law***

Royal Crown contends that its Counterclaim is also consistent with 4 CMC § 7505(b), which excuses an insurer from paying damages for an insured’s willful acts, and is authorized by common-law decisions, which hold that an insurer may recover from an insured for damages paid as the result of the insured’s unlawful conduct. The court finds that, as a matter of law, neither the cited statute nor the common law would provide a broader right of recovery than the DUI Exclusion Clause in the policy, if, indeed, either the statute or common law provides any basis for Royal Crown’s Counterclaim.

First, a statutory or common-law claim for recovery would also be limited to the damages that Royal Crown paid to Ms. Priest for her property damage claim. Royal Crown is correct that driving while intoxicated is a crime under Commonwealth law, so that Royal Crown has paid damages as the result of Lowery's unlawful conduct to the extent of Ms. Priest's damages on her property damage claim. However, Royal Crown has not paid Ms. Priest any damages for her personal injury claim, and any damages that Royal Crown may pay to the Insureds in this lawsuit would not be damages for Lowery's willful or unlawful conduct, but damages for Royal Crown's misconduct.

The court also concludes that, as a matter of law, 4 CMC § 7505(b) does not provide a sufficient basis for Royal Crown's counterclaim and is not consistent with the common-law principle on which Royal Crown relies to justify application of that principle. As the Commonwealth Supreme Court recently explained,

Under the Commonwealth Code, “[a]n insurer is not liable for a loss caused by the willful act of the insured; but the insurer is not exonerated by the negligence of the insured or of the insured's agents or others.” 4 CMC § 7505(b). Accordingly, the term “accidental” does not include intentional acts within the insurance context of the Commonwealth Code. This interpretation of accidental has also been used in other jurisdictions. *See Royal Globe Ins. Co. v. Whittaker*, 181 Cal. App. 3d 532, 537 (1986); *St. Paul Fire & Marine Ins. Co. v. Superior Court*, 161 Cal. App. 3d 1199, 1202 (1984).

*Century Ins. Co., Ltd.*, 2009 M.P. 4 at ¶ 25. Royal Crown has pointed to nothing, and the court has found nothing, in Commonwealth statutory or common law—or for that matter, the law of other jurisdictions—defining driving while under the influence of alcohol as a “willful act” that causes a loss for which an insurer is not liable pursuant to § 7505(b). Thus, § 7505(b), standing alone, would not authorize a claim by an insurer to recover from an intoxicated insured benefits paid for a third party's loss caused by the intoxicated

insured. Nor does the statute necessarily encompass any and all criminal conduct, even where driving while under the influence of alcohol is a crime, because criminal conduct does not necessarily require “willful” conduct. Thus, the court has considerable doubt that § 7505(b) is even consistent with the common-law principle that Royal Crown insists exists.

The court turns, next, to the common-law basis for Royal Crown’s claim. Royal Crown has cited only one case, *Ambassador Ins. Co. v. Montes*, 388 A.2d 603, 606-07 (N.J. 1978), as holding that it is equitable and just for an insurer to be indemnified by an insured, if the insurer pays an innocent third party for liability of the insured ascribable to criminal conduct. That decision does state that, where an insurer has paid an innocent person monetary damages to any liability of the insured that is “ascribable to a criminal event,” then “under most circumstances it is equitable and just that the insurer be indemnified by the insured for the payment to the injured party.” *Ambassador Ins. Co.*, 388 A.2d at 606. However, that decision elsewhere refers to “willful wrongdoing in violation of a criminal statute” and “intentional wrongdoing,” *see Ambassador Ins. Co.*, 388 A.2d 606-07, not to any and all criminal conduct, such as driving while intoxicated. Thus, it is not altogether clear whether that decision would support Royal Crown’s Counterclaim for recovery against Lowery.

Nevertheless, the Counterclaim here is authorized by the DUI Exclusion Clause, at least to the extent that the court has limited the Counterclaim above to recovery for Ms. Priest’s property damage claim, which Royal Crown has actually paid. Thus, the court turns to the question of whether the DUI Exclusion Clause authorizes such a claim against an “insured” and whether it is barred by the “anti-subrogation rule” or other public policy, as the Insureds contend.

2. *Bars to the Counterclaim*

a. *No authorization in the DUI Exclusion to recover from an insured*

The Insureds argue that the DUI Exclusion Clause does not allow recovery from Lowery, because he was an insured under the policy, while the DUI Exclusion Clause allows recovery from “the operator of the insured vehicle.” The Insureds argue that a common sense reading of this language does not imply that it is intended to apply against the insured, but only against a person who does not qualify as an “insured” under the terms of the policy.

It is true that, because he was operating the vehicle with Dong’s permission, Lowery was an “insured” within the meaning of the policy. *See* Insureds’ Summary Judgment, Exhibit A, at 3 (Policy, § III, definition of “insured”). It does not follow, however, that a common sense reading of the DUI Exclusion Clause does not permit Royal Crown to recover from him. The Insureds contend that, for the DUI Exclusion Clause unambiguously to permit recovery against Lowery, the DUI Exclusion Clause would have to permit recovery from the “operator of the insured vehicle *including any Insured.*” The court finds no ambiguity. “Operator of the insured vehicle” means just what it says, and plainly includes any insured. To have the meaning that the Insureds advocate, the DUI Exclusion Clause would have to limit recovery from “the operator of the insured vehicle *who did not have the Named Insured’s permission,*” because the only operator who would not be an “insured” within the meaning of the policy would be an operator using the vehicle without the Named Insured’s permission.

Therefore, the Insureds are not entitled to summary judgment on Royal Crown’s Counterclaim on the ground that the DUI Exclusion Clause does not authorize recovery from an intoxicated operator of the vehicle who was an “insured” within the meaning of

the policy. Instead, the DUI Exclusion Clause unambiguously *does* authorize recovery against such a person.

***b. The “anti-subrogation rule” and public policy bars***

The Insureds also argue that Royal Crown’s Counterclaim is barred by the “anti-subrogation rule,” which they contend bars an insurer from recovering from its own insured damages that the insurer has paid to an innocent third party. The cases that the Insureds cite stand for the broad proposition that, *generally*, an insured cannot recover from its own insured. The court concludes that the “anti-subrogation rule” is not so absolute as the Insureds contend, however.

First, there are sound public policy reasons for allowing an insurer to recover from its own insured damages paid to an innocent third party *resulting from the criminal conduct of the insured*. As the court in *Ambassador Insurance Company* recognized,

In subrogating the insurer to the injured person's rights so that the insurer may be reimbursed for its payment of the insured's debt to the injured person, the public policy principle to which we adhere, that the assured may not be relieved of financial responsibility arising out of his criminal act, is honored. The insurer's discharge of its contractual obligations by payment to an innocent injured third person [\*\*607] will further the public interest in compensating the victim. *See Burd v. Sussex Mutual Ins. Co.*, 56 N.J. 383, 398, 267 A.2d 7 (1970).

This application of subrogation is consonant with its traditional usage as an equitable mechanism to force the ultimate satisfaction of an obligation by the person who in good conscience should pay.

*Ambassador Ins. Co.*, 388 A.2d at 606-07. The court recognized that, in addition to allowing subrogation to the injured person’s rights, “[i]nsurers have also been permitted to recover from their insureds.” *Id.* at 607. The court explained,

Appleman has declared that “(t)he right of subrogation, or more properly called indemnification where sought from its own insured, is enforced where it would be inequitable to deny such remedy.” 8 Appleman, [Insurance Law and Practice] § 4935 at 461 (1973). . . .

Here the comprehensive general liability insurance policy expressly and clearly obligated the plaintiff insurance company to pay on Satkin's behalf those sums which Satkin was legally indebted to pay as damages because of personal injury to and the death of Marilyn Ortega Perez. The plaintiff insurance company cannot and should not escape from that duty on the ground that the damages were due to its assured's criminal act. However, Satkin should not receive or be entitled to the benefit of the insurer's payment and the insurer's right of subrogation should accomplish that end.

*Ambassador Ins. Co.*, 388 A.2d at 607. Similarly, here, the automobile policy clearly obligated Royal Crown to pay on the Insureds' behalf the sums necessary to compensate Ms. Priest for her property damage and personal injury, up to policy limits, and Royal Crown cannot and should not escape from that duty on the ground that the damages were due to Lowery's, an insured's, criminal act of driving while intoxicated. However, Lowery should not receive or be entitled to the benefit of Royal Crown's payment (which has only been for Ms. Priest's property damages), and Royal Crown's right of subrogation should accomplish that end. Royal Crown's Counterclaim is not barred by the “anti-subrogation rule” or public policy. Instead, public policy is forwarded by allowing an insurer to recover against its own insured for damages paid to an injured third party as a result of the insured's criminal conduct.

Moreover, as the Washington Supreme Court cogently recognized, an insurer's right of recovery against its insured for damages paid in circumstances in which the insured was at least partly at fault should be subjected to certain specific limitations:

An insurer has no subrogation-like rights against its own insured *unless provided for by contract*. See *Barney v. Safeco Ins. Co.*, 73 Wash. App. 426, 431, 869 P.2d 1093 (1994) (citing 8A John A. Appleman & Jean Appleman, Insurance Law and Practice § 4902.65, at 282 (1981) *overruled in part on other grounds by Price v. Farmers Ins. Co.*, 133 Wash. 2d 490, 946 P.2d 388 (1997)); *see also Mahler*, 135 Wash. 2d at 419, 957 P.2d 632 (quoting *Stetina*, 243 N.W.2d at 346); *Frontier Ford, Inc. v. Carabba*, 50 Wash.App. 210, 212, 747 P.2d 1099 (1987) (citing *Pendlebury v. W. Cas. & Sur. Co.*, 89 Idaho 456, 406 P.2d 129 (1965)). Nor does an insurer have a right of offset, setoff, or reimbursement *without an authorizing contract provision*. See *Barney*, 73 Wash. App. at 431-32, 869 P.2d 1093 (citing 8A Appleman & Appleman, *supra*, §§ 4902.65, 5128.75; 12A George J. Couch, Couch Cyclopedia of Insurance Law § 45:652 (Mark S. Rhodes & Ronald A. Anderson, 2d rev. ed.1981)). Thus, there is a two step approach. An insurer is entitled to an offset, setoff, or reimbursement when both: (1) the contract itself authorizes it and (2) the insured is fully compensated by the relevant “applicable measure of damages.” *Barney*, 73 Wash. App. at 429-31, 869 P.2d 1093.

*Sherry v. Financial Indem. Co.*, 160 P.3d 31, 35 (Wash. 2007). The “fully compensated” requirement “means the insured has made a complete recovery of the actual losses he or she suffered as a result of an automobile accident.” *Id.*

Here, the DUI Exclusion Clause plainly authorizes recovery by Royal Crown of damages it paid to Ms. Priest as a result of Lowery’s operation of Dong’s motor vehicle while under the influence of alcohol. *Id.* What is not yet established here, and what is therefore subject to genuine issues of material fact, is whether Lowery has been “fully compensated,” that is, that he “has made a complete recovery of the actual losses he . . . suffered as a result of [the] automobile accident.” *Id.* The parties have not put at issue

whether that loss includes all or any part of the judgment obtained by Ms. Priest against the Insureds for which the Insureds are jointly and severally liable.

**3. Summary**

Therefore, Royal Crown's motion for summary judgment on its Counterclaim will be denied, but the Insureds' motion for summary judgment on the Counterclaim will be granted only to the extent that the court concludes that, as a matter of law, any recovery on that Counterclaim is limited to the property damage claim by Ms. Priest that Royal Crown has actually paid.

**V. CONCLUSION**

Upon the foregoing,

1. The Insureds' August 30, 2010, Motion For Summary Judgment (docket no. 26) is **granted in part and denied in part**, as follows:

a. The motion is **granted** to the extent that the court concludes that, as a matter of law, Royal Crown has a duty to defend the Insureds against Ms. Priest's claims;

b. The motion is **denied** to the extent that the court concludes that the Insureds have not established that Royal Crown breached that duty as a matter of law;

c. The motion is **denied** as to Royal Crown's Counterclaim.

2. Royal Crown's August 30, 2010, Motions For Summary Judgment (docket no. 27) are also **granted in part and denied in part**, as follows:

a. The motion is **denied** as to the Insureds' first and second causes of action, because those common-law claims are not preempted by statute;

b. The motion is **denied** as to the Insureds' fourth and fifth causes of action, because those statutory claims are not barred by the prohibition on assignment of causes of action to third parties in the 2005 amendments to § 5122(d) and § 7505(h)(1);

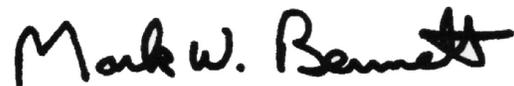
c. The motion is **denied** as moot as to the Insureds' third cause of action, for the reasons stated in paragraph 3 below.

d. The motion is **denied** as to Royal Crown's Counterclaim.

3. The court *sua sponte* **grants summary judgment** on the Insureds' third cause of action, because that cause of action cannot be maintained as a matter of law pursuant to *Ishimatu v. Royal Crown Ins. Corp.*, 2010 M.P. 8, at ¶ 48.

**IT IS SO ORDERED.**

**DATED** this 18th day of October, 2010.



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MARK W. BENNETT  
U. S. DISTRICT COURT JUDGE  
NORTHERN DISTRICT OF IOWA  
VISITING JUDGE