COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203 (720) 625-5150	
United States District Court Case No. 2015CV2560-WJM-MJW	
Plaintiff: ROOFTOP RESTORATION, INC., a Colorado corporation, v. **Defendant:** AMERICAN FAMILY MUTUAL INSURANCE COMPANY, a Wisconsin corporation.	
***Counsel for United Policyholders*:** On the Brief: Timms R. Fowler, Esq., #15983 THE FOWLER LAW FIRM, LLC 155 East Boardwalk Drive, Suite 300 Fort Collins, CO 80525 (970) 232-3322 (970) 232-3101 Fax timmsf@comcast.net Scott D. Smith, Esq., #35009 TAUSSIG, TAUSSIG & SMITH, P.C. 1873 South Bellaire Street, Suite 400 Denver, CO 80222 (303) 443-2700 Ext. 5 (720) 587-9912 Direct (303) 448-9600 Fax scott@taussiglaw.com Of Counsel: Amy R. Bach, Esq. amy.bach@uphelp.org Daniel R. Wade, Esq. dan.wade@uphelp.org United Policyholders 381 Bush Street, 8th Floor San Francisco, CA 94104 (415) 393-9990 (415) 677-4170 Fax	**▲COURT USE ONLY▲** Case No.: 2017SA31

UNITED POLICYHOLDERS' AMICUS CURIAE BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

☑ It contains 4,429 words.

☐ It does not exceed 30 pages.

C.A.R. 28(k) does not apply to amicus curiae briefs.

The brief complies with C.A.R. 28(k).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or C.A.R. 32.

/s/ *Timms R. Fowler*
Timms R. Fowler, Esq.

/s/ *Scott D. Smith*
Scott D. Smith, Esq.

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United Policyholders

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COMES NOW, United Policyholders ("UP"), by and through its counsel, Timms R. Fowler, The Fowler Law Firm, LLC, and Scott D. Smith, Taussig, Taussig & Smith, P.C., and submit their amicus curiae brief as follows:

I. CERTIFIED QUESTION ADDRESSED BY AMICUS CURIAE

Whether a claim under C.R.S. § 10-3-1116 is subject to a one-year statute of limitations and applicable to "[a]ll actions for any penalty or forfeiture of any penal statutes [under Colo. Rev. Stat. § 13-80-103]." *See* Document #69-170303-010R.

II. STATEMENT OF THE CASE AND RELEVANT FACTS

UP adopts the Statement of Facts provided by Rooftop Restorations, but includes a summary of the relevant facts for purposes of this brief. This is an insurance "bad faith" case.

The policyholders were insured with Defendant American Family Mutual Insurance Company ("American Family"). *See* Order Certifying Question of Law to the Colorado Supreme Court and Denying Summary Judgment as Premature, Martinez, J. (citing ECF No. 22 at 1). The policyholders suffered hail damage to their roof and filed an insurance claim with Defendant, who estimated the repairs to cost less than the insurance policy's deductible. *Id*. The roofing contractor, Plaintiff Rooftop Restorations, Inc. ("Rooftop") estimated the repair work to be well above the deductible. *Id*. American Family agreed to re-inspect the property

and offered more than the deductible, but significantly less than Rooftop's estimate.

Rooftop, under an assignment of benefits from the policyholder, filed suit against American Family for breach of the insurance contract, and unreasonable delay or denial of insurance benefits under C.R.S. §§ 10-3-1115 and -1116 (also referred to as "statutory bad faith"). The claim was originally filed on August 30, 2013. American Family's below-deductible estimate was provided to the policyholder on September 3, 2013. Rooftop provided its estimate in excess of the deductible on May 13, 2014. American Family re-inspected the property and offered additional money on May 28, 2014. Rooftop filed its lawsuit on September 11, 2015.

III. SUMMARY OF ARGUMENT

The certified question presents a question of Colorado law not yet addressed by this Court.[1] The General Assembly did not prescribe a statute of limitations for a statutory insurance "bad faith" claim under C.R.S. §§ 10-3-1115 and -1116. Therefore, it is subject to the two-year statute of limitations, pursuant to C.R.S.

[1] UP agrees with the recent observation of U.S. Magistrate Judge Nina Y. Wang that "the law regarding the applicable statute of limitations remains uncertain." *See* Order Certifying Question (citing *MacKinney v. Allstate Fire and Cas. Ins. Co*., 2016 WL 7034977, at *8 (D. Colo. Dec. 1, 2016) (Wang, J., collecting decisions on this issue in this Court and in Colorado trial courts)).

§ 13-80-102(1)(i), which sets forth the governing limitations period when no such period is prescribed by the General Assembly.

American Family has urged that under the test set forth in *Kruse v. McKenna*, 178 P.3d 1198, 1201 (Colo. 2008), a statutory bad faith claim is an "action for any penalty or forfeiture of any penal statutes". Thus, Rooftop's claims, or any statutory bad faith claim brought by any policyholder would be time-barred if not brought within one year from the time at which the claim accrued. This Court is presented with an issue of law. This Court, however, is also presented with a practical question: whether a statutory limitations period, which ignores the reality of the insurance claim process (and the realities of the penal and forfeiture statutes), should be applicable in an insurance-specific context.

UP maintains that a civil action pursuant to §§ 10-3-1115 and -1116 is not a penal statute in any sense and certainly not within the meaning of C.R.S. § 13-80-103(1)(d). Such an action is remedial, and the claim is based upon a liability standard of unreasonable conduct, for which statutory damages are prescribed including attorneys' fees, costs, and a damage multiplier—not a penalty.

The text, purpose, and operation of §§ 10-3-1115 and -1116 do not create a penal action or impose any penalty. House Bill 08-1407,[2] created two differing tracks to protect Colorado insureds:

First, in Section 3, the House Bill increased the amount of the monetary penalties fines that may be imposed by the State of Colorado through the Insurance Commissioner. Second, in Section 5 of the House Bill, the General Assembly separately enacted §§ 10-3-1115 and -1116 creating a remedial civil action, in favor of first party insureds, and prescribing statutory damages that are based upon proof of actual damages.

Finally, from a practical standpoint, the adjustment of an insurance claim—particularly in a disaster situation—can take well over one year to complete. It is incredibly difficult for a policyholder, absent the advice of counsel, to identify unreasonable conduct that would be encompassed by §§ 10-3-1115 and -1116 in the aftermath of a disaster, in the "fog of war"—so to speak. For many disaster victims (indeed for most insureds with first-party claims), this will be their first insurance claim and they will not necessarily know what to expect during the process. Only later, once they have retained counsel on a disputed claim, might they realize that their insurance company was in violation of §§ 10-3-1115 and

[2] 2008 Colo. Legis. Serv. Ch. 422 (H.B. 08-1407) (WEST) is attached as **Exhibit 1**.

-1116. It is likely that by that time, more than one year will have elapsed. Thus, a one-year statute of limitations is fundamentally unfair, makes these important statutes largely useless in many situations and C.R.S. § 13-80-103(1)(d) cannot reasonably apply to an insurance case.

IV. ARGUMENT

A. Enactment of §§ 10-3-1115 and -1116 created a private, remedial civil action governed by the two-year statute of limitations, prescribed by C.R.S. § 13-80-102(1)(i), discrete from enactment of the other provisions codified in C.R.S. § 10-3-1108 that do vest penal powers in Colorado's Insurance Commissioner.

1. Introduction.

"In determining whether a claim falls within the purview of a particular statute of limitations, consideration should be given to 'the nature of the right sued upon and not necessarily the particular form of action or the precise character of the relief requested.'" *Hersh Companies Inc. v. Highline Village Assoc.*, 30 P.3d 221, 223-24 (Colo. 2001) (quoting *Persichini v. Brad Ragan, Inc.*, 735 P.2d 168, 172-73 (Colo. 1987)).

There is no dispute that a common law bad faith action is subject to a two-year statute of limitations. *See Brodeur v. American Home Assurance Co.*, 169 P.3d 139, 147 (Colo. 2007). Nor is there a dispute that a statutory bad faith claim

was intended to lessen the burden of proof on a claim for bad faith. *See Vacarro v. American Family Ins. Group*, 275 P.3d 750 (Colo. App. 2012).

Within this existing legal framework, H.B. 08-1407 was enacted, containing two different and distinct tracks. Section 3 increased penalties that the Insurance Commissioner could impose (codified at C.R.S. § 10-3-1108) and Section 5 created private "remedies" in a civil action for "damages" (codified at C.R.S. §§ 10-3-1115 and -1116).

Viewing §§ 1115 and 1116 in the broader context of the law governing insurers' conduct and the statutory scheme set forth by Part 11 of Article 3, Title 10, it is clear that a Section 1115 action provides for a remedial, tort-based action authorizing recovery of "damages" and not a "penalty". This track provides for increased rights and a reduced burden of proof as opposed to a common law bad faith claim. *See Kisselman v. Am. Family Mut. Ins. Co.*, 292 P.3d 964, 973 (Colo. App. 2011). In a separate track, H.B. 08-1407 enhanced the public, penalty track in § 1108, enforced by the Insurance Commissioner who can impose various "monetary penalties".

No case cited by Defendant addresses the divergent tracks. The tracks explicitly lead to differing destinations and should require the application of differing limitations periods.

In 2008, recognizing an important need that other states had begun to recognize, the General Assembly created Colorado's first private, statutory remedial action explicitly to help first-party insureds that is separate from the penal powers vested only in the State of Colorado. At the same time, it also increased the penalties that could be enforced by the Division of Insurance. The two distinct tracks are recognized by Section 4 of H.B. 08-1407, which amended § 10-3-1114 expressly noting that §§ 1115 and 1116 created a "private cause of action" while no other provision of Part 11 did so. *See* § 10-3-1114. Consequently, there can be no legitimate argument that enactment of §§ 1115 and 1116 by H.B. 08-1407 created a private, remedial action explicitly in favor of first-party claimants that is separate from the penal powers vested only in the State of Colorado.

2. Section 10-3-1108 provides for civil "penalties" in favor of the State enforceable only by the Insurance Commissioner, but the enactment of §§ 1115 and 1116 creates a separate, private remedial action to recover the prescribed "damages" in favor of the individual insured.

a. Section 3 of H.B. 08-1407 increased the penalties that the Insurance Commissioner may impose, codified at C.R.S. § 10-3-1108, but no penalties were created or imposed by Section 5 of H.B. 08-1407 that enacted §§ 10-3-1115 and -1116.

Although Section 5 of H.B. 08-1407 enacted §§ 10-3-1115 and -1116, those provisions did not create an action for a civil penalty or increase any penalty.

Instead, a different section of H.B. 08-1407, Section 3, amended the separate penalty powers set forth by § 10-3-1108, which are vested solely in the Insurance Commissioner and increased the Commissioner's existing authority to fine insurers. *See* **Exhibit 1**, H.B. 08-1407.

Section 3 of H.B. 08-1407 amended C.R.S. § 10-3-1108(1) to explicitly increase the "monetary penalty" for unfair or deceptive practices and any violation of Title 10. *Id.* The penal powers vested in the State of Colorado are unquestionably distinct from and in addition to the private, remedial action created separately by §§ 1115 and 1116. The distinction must be honored. The Court should avoid interpretations that defeat the obvious legislative intent. *People v. Dist. Court*, 713 P.2d 918, 921 (Colo.1986). When possible, we interpret a statute to give consistent, harmonious, and sensible effect to all of its parts. *Id.* "Statutes must be construed to further the intent of the legislature as evidenced by an entire statutory scheme." *Bynum v. Kautzky*, 784 P.2d 735, 737 (Colo.1989).

One path is a penal track, where the State of Colorado's Insurance Commissioner can charge an insurer with violations of Title 10 and impose penalties. In contrast to the remedial provisions in §§ 10-3-1115 and -1116, the penal track of H.B. 08-1407 (codified in § 10-3-1108) gives the Insurance Commissioner the power to charge, issue orders and impose various "monetary

penalt[ies,]". This penal track is explicitly separate from the private, remedial track created by the enactment of §§ 10-3-1115 and -1116, which authorizes a private cause of action for damages[3] and not a monetary penalty.[4] Courts must honor that structure and "further the intent of the legislature as evidenced by an entire statutory scheme." *Bynum,* 784 P.2d at 737.

Defendant's argument fails to consider that there are two distinct tracks set forth by Part 11, of Article 3, Title 10. House Bill 08-1407 increased the penalties in favor of the State of Colorado, but §§ 1115 and 1116 created no penalty. Therefore, the penal statute of limitation applies to penalties imposed by the Commissioner, it does not apply to the remedial civil action created by §§ 1115 and 1116.

b. Sections 1115 and 1116 explicitly speak in terms of "covered benefits," "remedies," "damages," and an "action" that is "in addition" to any other action by statute or common law, but do not contain the word "penalty."

The nature of the action created by §§ 1115 and 1116 is defined by the plain text and operation of those provisions as well how that action fits within the

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[3] C.R.S. § 10-3-1116(1) (speaks in terms of "remedies" and "damages," the word penalty does not exist anywhere in Sections 1115 or 1116).

[4] C.R.S. § 10-3-1108 (this section repeatedly provides that the monetary sanction is a "penalty" and is part of the State's right to investigate, hold a hearing, and impose monetary penalties. *See* §§ 10-3-1006 through 1011).

broader statutory scheme set forth by Part 11, of Article 3, Title 10. The word "penalty" nowhere appears in the text of either § 1115 or 1116. However, penalties are mentioned and addressed in the different and discrete section of House Bill 08-1407 that gave the Insurance Commissioner increased penal powers, and gave the State of Colorado the ability to impose fines elsewhere in the statutory scheme.

Section 1115 provides, in pertinent part, as follows:

> (1)(a) A person engaged in the business of insurance *shall not unreasonably delay or deny payment of a claim for benefits* owed to or on behalf of any first-party claimant.
>
> (b) For the purposes of this section and section 10-3-1116:
>
> (I) "First-party claimant" means an *individual* . . . asserting an entitlement to benefits owed directly to or on behalf of an insured under an insurance policy. . . .
>
> . . .
>
> (2) Notwithstanding section 10-3-1113(3), for the purposes of an action brought pursuant to this section and section 10-3-1116, an *insurer's delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action*.

C.R.S. § 10-3-1115 (emphasis added).

The plain language of § 1115(1)(a) establishes a statutory liability standard based upon unreasonable conduct. An insurer "shall not unreasonably delay or deny payment of a claim for benefits owed to . . . any first-party claimant." *Id.* A "first-party claimant" is defined as "an individual . . . asserting an entitlement to benefits owed directly to . . . an insured under an insurance policy." *Id.* No penal standard is created by § 1115(1)(a).

Section 1116 speaks in terms of remedies and damages—***not*** penalties:

> ***Remedies* for unreasonable delay or denial of benefits--required contract provision--frivolous actions—severability.**
>
> (1) A first-party claimant . . . *may bring an action in a district court* to *recover reasonable attorney fees and court costs and two times the covered benefit*.
>
> . . .
>
> (4) . . . *Damages* awarded pursuant to this section shall not be recoverable in any other action or claim.

C.R.S. § 10-3-1116 (emphasis added).

No language or provision on its face creates a penal statute or imposes a penalty. The word "***damages***" is used to describe what is recoverable for unreasonable conduct, but the word "penalty" does not appear in either § 1115 or 1116. Nothing in these sections, explicitly or implicitly refers to

or creates a penal statute or imposes any penalty. Only a damage multiplier is set forth, in addition to attorney fees and costs.

Damage multipliers, however, do not constitute penalties. *See, e.g., Winstead v. Criterion Ins. Co.*, 781 P.2d 170, 173 (Colo. App. 1989) (Because the former No-Fault Act's statutory civil action to recover benefits explicitly sounded in "contract," the then existing six-year statute was held to apply.). There are other examples of damage multipliers that have been held to be damages, not penalties.

Treble damages in antitrust actions are remedial rather than penal. "The basic premise underlying the defendant's position in urging this statute is that the instant suit is one to enforce a penalty or forfeiture. However, it has been held repeatedly that private treble damage actions under the Federal antitrust laws do not fall within that category; that they are not penal, but compensatory and remedial." *Wolf Sales Co. v. Rudolph Wurlitzer Co*., 105 F.Supp. 506, 509 (D.Colo. 1952).

Here, §§ 1115 and 1116 speak only in terms of a remedial, civil action for specified damages, and the word penalty does not appear in the relevant statutory sections. Therefore, it is not within the purview of the judicial branch to subvert the text and provisions of §§ 1115 and 1116 to redefine them as a penalty statute. "The separation of powers doctrine imposes on the judiciary a proscription against

interfering with the legislative branch." *In re Marriage of Balanson*, 107 P.3d 1037, 1043 (Colo. App. 2004). "It is not the role of the court to overrule a legislative policy determination when the underlying statutory language unambiguously directs us otherwise." *Cotton Creek Circles, LLC v. Rio Grande Water Conservation Dist.*, 218 P.3d 1098, 1103 (Colo. 2009).

"[R]emedial legislation" must "be liberally construed to accomplish its object." *Mishkin v. Young*, 198 P.3d 1269, 1273 (Colo. App. 2008) (quoting *Colorado & S. Ry. v. State R. Commn. of Co.*, 54 Colo. 64, 77, 129 P. 506, 512 (1912); *Flood v. Mercantile Adjustment Bureau, LLC*, 176 P.3d 769, 773 (Colo. 2008) (federal fair debt collection practices statute "is a remedial consumer protection statute and should be liberally construed in favor of the consumer") (citing *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992)).

Consistent with the General Assembly's plain language in the statutes, §§ 1115 and 1116 must be liberally construed to promote their remedial purpose, providing a two-year statute of limitations. It should not be impaired by imposing a one-year statute as urged by Defendant. Defendant fails to articulate how a statute proposing additional remedies to consumers with a decreased statute of limitations furthers the legislature's intent to provide consumers with increased rights and lessened burdens.

B. Applying § 13-80-103 to an Insurance Case Ignores the Special Circumstances Surrounding the Nature of Insurance and the Reality of the Claims Process.

1. The Nature of Insurance.

Insurance is different.[5] Insurance spreads risk and provides financial security, making it possible for people and businesses to thrive. Insurance protection and coverage after an adverse event makes the difference between recovery and ruin. Insurance is both important and wonderful when it operates the way it should—fairly and in good faith. Because insurance is so important, it is a carefully regulated industry and imbued with the public interest.[6]

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[5] ". . . Once an insured files a claim, the insurer has a strong incentive to conserve its financial resources balanced against the effect on its reputation of a "hard-ball" approach. Insurance contracts are also unique in another respect. Unlike other contracts, the insured has no ability to "cover" if the insurer refuses without justification to pay a claim. Insurance contracts are like many other contracts in that one party (the insured) renders performance first (by paying premiums) and then awaits the counter-performance in the event of a claim. Insurance is different, however, if the insurer breaches by refusing to render the counter-performance." *E.I. du Pont de Nemours & Co. v. Pressman*, 679 A.2d 436, 447 (Del. 1996).

[6] *See, e.g., Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946) ("[insurance] business affected with a vast public interest"); *Robertson v. California*, 328 U.S. 440, 447 (1946); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 at n.14 (1944) ("evils" in the sale of insurance "vitally affect the public interest"); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) ("Government has always had a special relation to insurance*."); O'Gorman & Young, Inc. v. Hartford Fire Ins.*

Oversight agencies in every state have the authority to regulate the financial affairs of insurance companies, the rates they charge, and the way they sell their products and process claims made by policyholders. Legislatures have enacted statutes and courts have rendered decisions that help define the standards that companies must adhere to when dealing with their insureds.

While an action under § 10-3-1116 is a statutory creature, it is important to briefly revisit the duties owed by insurance companies in Colorado to their policyholders. In Colorado, insurance companies must act in good faith when investigating, negotiating and paying (or denying) claims with their policyholders.[7] Sections 10-3-1115 and -1116 build upon the common law duty of good faith and fair dealing.

In a property claim, one of the most important duties is to accurately inspect and scope the damage and provide an estimate to the policyholder that is fair and reasonable and will be sufficient to make the necessary repairs and fulfill the insurer's obligations under the insurance policy. Scoping a significant claim under

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Co., 282 U.S. 251, 257 (1931) ("The business of insurance is so far affected with a public interest that the State may Regulate the Rates").

[7] "Due to the "special nature of the insurance contract and the relationship which exists between the insurer and the insured," an insurer's breach of the duty of good faith and fair dealing gives rise to a separate cause of action arising in tort." *Goodson v. American Standard Ins. Co*., 89 P.3d 409 (Colo. 2004) (citing *Cary v. United of Omaha Life Ins. Co*., 68 P.3d 462 (Colo. 2003)).

the policy's deductible, then trying to make up for it by offering substantially less than the amount required to complete the repairs certainly runs afoul of the good faith standard. Limiting the policyholder's ability to seek recourse, by placing a square peg in a round role, that is making the § 10-3-1116 claim subject to the one-year statute of limitations set forth under § 13-80-103(1)(d), would give insurance companies an unfair advantage in any disaster.

2. Insurance Claims Take a Long Time; Often the Negotiation Process Takes More than One Year.

The reality is that insurance claims take time. By the time a policyholder notifies their insurance company of a loss or damage, files the proof of loss, has an adjuster come to inspect the property and prepare an estimate, and hires a contractor to scope the work, months have already elapsed. This does not account for the protracted time period where a policyholder and their insurance company negotiate over the scope of the loss and work to be performed, compare estimates, and checks are cut to begin the work. The need for a negotiation is almost always caused by and controlled by the insurer. Even in a one-off claim, this process can, and often does, take months, if not years. However, in a disaster scenario, where

contractors and adjusters are in short supply and insurance companies are operating at capacity, this process can take even longer and be more expensive.[8]

The significance is that disputes over the cost of repairs do not emerge until months, if not years, into the claim. The negotiation can often be endless. Sometimes a settlement is reached, other times not. In a disaster situation, simply getting a return phone call from an adjuster can be a challenge. Getting consideration of alternative estimates, usually from multiple contractors may be impossible, but is certainly time consuming. It is fairly common for insurance company software to generate estimates that are lower than what most, if any, contractors will actually charge to do the work. In a disaster situation, materials and contractor shortages—noted above and called "demand surge" further increase the actual price of repairs, but not what the insurer software "calculates" and tend to cause disputes and protracted negotiation.

Colorado experiences its fair share of natural disasters. Wildfires, floods, and hailstorms cause extensive and expensive property damage to Colorado

[8] According to the International Risk Management Institute, Inc., "demand surge" is defined as increase in the cost of repair or replacement of damaged property that may occur following a large-scale disaster when many individuals and organizations vie for a limited supply of labor and materials needed for repair.

residents each year.[9] As a result of the destructive wildfires, the state Legislature passed a series of reforms, which aimed to provide policyholders with additional protections and time during the settlement of their insurance claims.[10] Some of these reforms include a minimum of one year of additional living expenses, 180 days or six months to recover depreciation, and barring insurers from including lawsuit deadlines in their policies that are shorter than the applicable statute of limitations.[11]

The General Assembly and the Colorado Insurance Division have recognized that insurance claim settlement is a time-consuming process. The significance, in the disaster context in particular, is that it is extremely difficult for

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[9] According to the Rocky Mountain Insurance Information Institute, the June 2012 Waldo Canyon Fire in Colorado Springs – the most destructive in state history – caused an estimated $453.7 million in insured losses from a total of 6,648 claims; the June 2013 Black Forest Fire – which burned 486 structures in El Paso County – caused an estimated $420.5 million in insured losses from 4,173 home and auto claims. *See* RMIII.org, last visited May 19, 2017: http://www.rmiia.org/catastrophes_and_statistics/catastrophes.asp.

[10] *See* Colorado Department of Regulatory Agencies Bulletin B.5.28 – Equitable Payment of Claims Resulting From Natural Disasters (January 31, 2011, revised June 20, 2012) http://www.dora.state.co.us/taskforce/Documents/DOI/EquitablePaymentClaimsResulting_from_%20NaturalDisasters.pdf (undergoing revision to reflect changes from the Homeowners Insurance Reform Act of 2013 (C.R.S. § 10-4-110.8 *et seq.*).

[11] See http://uphelp.org/pubs/faq%E2%80%99s-about-colorado-homeowners-insurance-reform-act-2013 (discussing C.R.S. §§ 10-4-110.8(3)(a) and (6)(b).

a policyholder, disoriented and disadvantaged to begin with, to identify whether the insurance company's conduct is unreasonable, thus, encompassed by §§ 10-3-1115 and -1116, or merely part of the laborious claim process, soon enough to file a lawsuit within one year of the date a cause of action for statutory bad faith would accrue. For example, an insured may decide months or years later to retain counsel if they have been unable to settle a disputed claim.[12]

Working backwards, it could be the case that the unreasonable conduct encompassed by §§ 10-3-1115 and -1116, such as the insurance company's failure to conduct a reasonable investigation, occurred more than one year prior and long before an insured could begin to appreciate such misconduct. If applied, § 13-80-103 would then bar many, if not most actions under §§ 10-3-1115 and -1116. A one-year statute of limitations would immunize much of the conduct proscribed by § 1115.

Absent a clear, unequivocal statement by the General Assembly that it intended a one-year statute of limitations to apply to such claims, no court should impose such a short limitations period. "We have recognized that because statutes of limitations are in derogation of a presumptively valid claim, a longer period of

[12] It is UP's experience working with disaster victims for over 25 years, that policyholders in general do not consider retaining counsel until much later in the claim process, perhaps years after the loss occurred, only when they feel they have exhausted their resources and reached a final impasse with the insurance company.

limitations should prevail where two statutes are arguably applicable." *Reg'l Transp. Dist. v. Voss*, 890 P.2d 663, 668–69 (Colo. 1995).

V. CONCLUSION

UP respectfully urges this Court to hold that the statutory "bad faith" claim created by §§ 10-3-1115 and -1116 is subject to the two-year statute of limitations prescribed by § 13-80-102(1)(i).

RESPECTFULLY SUBMITTED this 26th day of May 2017.

THE FOWLER LAW FIRM, LLC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on this 26th day of May 2017, a true and correct copy of the foregoing **UNITED POLICYHOLDERS' AMICUS CURIAE BRIEF** was filed with this Court and served to the following via ICCES:

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