



50 State Survey of Bad Faith Laws and Remedies

October 23, 2014

Introduction

Insurance has a distinctive role in our society: It spreads risk and provides financial security, making it possible for people and businesses to thrive. It has proven so essential in our modern world that Americans who want to drive cars, operate businesses, maintain their health, and borrow money to purchase a home are now *legally required* to buy insurance. Individuals and businesses across the U.S. know from experience that insurance protection and coverage after an adverse event makes the difference between recovery and ruin.

Because insurance is so important, it is one of the most highly regulated industries. Insurance departments 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. Legislatures have enacted statutes and courts have rendered decisions that define the standards that companies must adhere to when dealing with their insureds. In the end, however, it is up to private litigants and our courts to enforce those standards.

The legal protections and remedies available to insureds who are harmed by unreasonable conduct by insurers vary widely from state to state. This UP report surveys the law in all 50 states that defines rules that apply to insurers' claim practices and the available remedies for when these rules are violated.

Background

Courts across the U.S. have traditionally recognized that "Insurers' obligations are...rooted in their status as purveyors of a vital service labeled *quasi-public* in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements...[A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary."¹

But in dealing with their policyholders insurers have a distinct upper hand. In the execution of an insurance contract and at claim time, insurers are in control. Insurers draft the policy contracts, set the rates, manage the claims, and make decisions on payments. Insurers have far greater expertise, negotiating strength, financial resources, and staying power than insureds.

This imbalance matters because insurers' overarching goals of earning profits are in conflict with the goals of their insureds in relation to coverage and claims. To an insurer, the paramount purpose of selling its product is to generate revenues to support a profitable business enterprise. To an insured, the economic safety net function of insurance is paramount. The conflict arises because the less insurers pay out in claims, the greater their profits.

¹ *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 146 (Cal. 1979).

The perennial conflict between insurers' profit motives and interests of their insureds has heightened significantly since the 1990s. Court records, media coverage, and consumer responses to surveys conducted by United Policyholders (UP) indicate that insureds are frequently compelled to file suit to collect policy benefits owing and to secure full and fair compensation for losses caused by insurer misconduct. A consumer's ability to hold an insurance company legally and financially accountable for failing to pay what it owes, promptly and fairly, is a critically important safeguard in the profit-driven but essential modern insurance system. It also is important to insurers, because the threat of damages for violation of claim practices standards should lead them to improve their performance.

Legislatures, regulators, and courts set rules that are supposed to prevent insurers from abusing their power and using their superior resources and position to increase their profits to the disadvantage of their customers. Lobbying, policy re-drafting and political and public relations strategies executed by insurers have impacted decisional law in their favor over the past two decades. Yet consumer and trial lawyer organizations, grass roots advocates, and individual attorneys are constantly working to maintain and strengthen legal protections and rights for policyholders. Despite the influence of the industry, insurance consumers have won significant victories, such as the Insurance Fair Conduct Act recently enacted in the State of Washington.²

What This Survey Contains

This Survey contains a summary of the statutes, regulations and judicial opinions in each setting the standards for insurers' claim practices—the "rules of the road" and the legal remedies available to insureds when insurers fail to meet those standards.

It includes discussion of the following elements:

- The National Association of Insurance Commissioners has promulgated a model Unfair Claims Settlement Practices Act (referred to as "UCSPA"). The UCSPA has been adopted in nearly every state, although individual states' adoptions may vary its provisions. The UCSPA specifies what constitutes fair and unfair claim practices. For example, violations of the statute include "refusing to pay claims without conducting a reasonable investigation" and "not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear." As the Survey reports, in only a few states the insured has the ability to sue the insurer directly for violating the statute. In other states, though, the UCSPA defines standards that may be enforced in other ways or provide the basis for a claim.³

² Washington State Unfair Claim Practices Regulations, Chapter 284-30 WAC, The Insurance Fair Conduct Act at RAC 48.30.015; <http://www.insurance.wa.gov/laws-rules/insurance-fair-conduct-act/ifca-laws/>

³ See, e.g., *Zhang v. Superior Court*, (2013) 57 Cal.4th 364 (Holding that "insurance practices that violate the Unfair Insurance Practices Act can support a Unfair Competition Law action where the conduct also violates *other statutes or common law*").

- Some states have adopted statutes other than the UCSPA that define claims practice standards and give insureds remedies for their violations. For example, some statutes define when an insurer has taken too long to pay a claim and prescribes a penalty for doing so.
- The National Association of Insurance Commissioners also has promulgated Model Regulations to implement the UCSPA. These regulations specify in more detail the obligations imposed on insurers. Some state insurance departments have adopted other administrative rules as well.
- Every state recognizes that an insured can sue an insurance company for failing to pay what is owed under the policy; this is an ordinary breach of contract suit. Not all states allow for recovery of consequential damages in these suits, such as financial loss beyond the policy limits, loss of business opportunity, damage to professional reputation, and emotional distress.
- Most courts also recognize that an obligation of good faith and fair dealing is embodied in every insurance policy as if it were written into the wording of the policy. The good faith obligation requires the insurer to go beyond the letter of the insurance policy and act fairly and reasonably in processing, investigating, evaluating, and paying a claim. Violation of the obligation of good faith claim practices is often referred to as “bad faith.”⁴ Some states define bad faith as conduct that is “unreasonable or without proper cause.” Other states define bad faith more narrowly holding an insurer liable bad faith only where it denies a claim that is not “fairly debatable” and it either knows that is the case or is reckless. In some states, breach of the good faith obligation is actionable as a breach of contract; in other states failing to act in good faith is a tort.
- Remedies for breach of the good faith obligation differ from state to state. In many states, an injured policyholder who proves their insurer acted in bad faith can generally recover damages flowing from that breach including consequential economic loss, tort damages such as damages for emotional distress, attorneys’ fees, and possibly punitive damages.

About UP

UP is a non-profit 501(c) (3) organization founded in California in 1991 that is a voice and an information resource for insurance consumers in all 50 states. Donations, foundation grants and volunteer labor, including pro-bono attorneys in all 50 states, support the organization’s work. UP is based in San Francisco, California but has an active outreach staff nationwide. UP does not accept funding from insurance companies.

⁴ For a history, survey, and analysis of bad faith *see* Jay M. Feinman, The Law of Insurance Claim Practices: Beyond Bad Faith, 47 TORT TRIAL AND INSURANCE PRACTICE LAW JOURNAL 693 (2012).

UP's work is divided into three program areas: *Roadmap to Recovery™* (disaster recovery and claim help), *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *Advocacy and Action* (advancing pro-consumer laws and public policy through Amicus Briefs and legislative advocacy). UP hosts a library of previous Amicus Briefs, news, tips, sample forms and articles on commercial and personal lines insurance products, coverage, and the claims process at www.uphelp.org.

State insurance regulators, academics, attorneys, and journalists routinely seek UP's input on insurance and legal matters. UP has been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners. UP is a contributor to American Association for Justice's Insurance Law Section. As part of its *Advocacy and Action* program, UP has filed more than 3000 amicus briefs on insurance issues in all 50-states, including many federal courts, state courts of appeal, and the U.S. Supreme Court.

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Attachments

- National Association of Insurance Commissioners Unfair Claims Settlement Practices Act
- National Association of Insurance Commissioners Model Regulation

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ALABAMA

Alabama has not adopted the UCSPA.⁵

Alabama has adopted claims practices regulations. ALA. ADMIN CODE r. 482-1-124 to 482-1-125 (2003/2009); 482-12-24 (1971).

Alabama recognizes a common law cause of action for bad faith against a first-party insurer for intentional misconduct in wrongfully refusing to settle. *Chavers v. Nat'l Sec. Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981).

An insured must establish four elements in order to maintain a claim for "bad faith failure to pay" insurance benefits. These are:

- (1) An insurance contract between the parties and a breach thereof by the defendant;
- (2) An intentional refusal to pay the insured's claim;
- (3) The absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason); and
- (4) The insurer's actual knowledge of the absence of any legitimate or arguable reason.

National Security Fire & Casualty Co. v. Bowen, 417 So. 2d 179, 183 (Ala.1982).

Alabama also recognizes "abnormal" bad faith where an insurer intentionally fails to determine the existence of a lawful basis for its refusal to pay insurance benefits. *Id*; see also *State Farm Fire and Casualty Company v. Brechbill*, No. 1111117 (Sept. 27, 2013), *petition for reh'g denied Jan. 17, 2014* (holding there is only one tort of bad faith and that policyholder must prove the absence of a debatable reason for both the failure to pay and the failure to investigate).

Statutory bad faith allows for recovery when an insurer, without just cause, refuses to pay or settle claims arising under coverages provided by its policies in the state and with such frequency as to indicate a general business practice. A general business practice is evidenced by:

- (1) A substantial increase in the number of complaints against the insurer received by the insurance department;

⁵ See Attachment: National Association of Insurance Commissioners, Unfair Claims Settlement Practices Act (*passim*).

(2) A substantial increase in the number of lawsuits against the insurer or its insureds by claimants; and

(3) Other relevant evidence.

ALA. ADMIN CODE r. 27-12-24 (2007).

Damages

Consequential damages are recognized in bad faith claims, particularly if those damages “include mental distress and economic loss.” *Chavers*, 405 So. 2d at 7; *Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916, 925 (Ala. 1981); *Acceptance Ins. Co v. Brown*, 832 So. 2d 1 (Ala. 2001).

Emotional Distress damages are recoverable. “The tort of bad faith had as its genesis the very idea of providing a plaintiff who had been victimized by the intentional, wrongful handling of a claim by the insurer, the right to recover not only contract damages but for the loss occasioned by emotional suffering, humiliation, and embarrassment in addition to punitive damages.” *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1073-74 (Ala. 1984). Damages of “Mental distress and economic loss” are recoverable. *Chavers* 405 So. 2d, *supra*; *Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d at 925.

Attorneys fees are not recoverable. *Green v. Standard Fire Ins. Co. of Ala.*, 477 So. 2d 333 (Ala. 1985); *Cincinnati Ins. Co. v. City of Talladega*, 342 So. 2d 331 (Ala. 1977).

Punitive damages are recoverable upon a showing of malice, willfulness, or wanton disregard for the rights of others. (*Intercontinental Life Ins. Co. v. Lindblom*, 598 So. 2d 886, 890 (Ala. 1992); *Affiliated FM. Ins. Co. v. Stephens Enters.*, 641 So. 2d 780, 784 (Ala. 1994); *Acceptance Ins. Co.*, 832 2d at 23.

ALASKA

Alaska has adopted a version of the UCSPA. Alaska Stat. § 21.36.125 (1976).

Alaska has adopted a version of the UCSPA Model Regulation.⁶ Alaska Admin. Code tit. 3, §§ 26.010 to 26.300 (1989/2011).

Alaska recognizes a cause of action for bad faith against a first-party insurer for breach of the covenant of good faith and fair dealing implied in every insurance contract. *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1156 (Alaska 1989).

In order to maintain a claim for bad faith failure to pay insurance benefits, the insured must establish that the insurer refused to honor a claim without a reasonable basis. *Hillman v. Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1324 (Alaska 1993). It does not require the insured to establish conduct that is fraudulent or deceptive. *Id.*

Alaska's Unfair Claims Settlement Practices Act forbids certain actions by insurers, but does not contain an express or implied private cause of action against an insurer. Alaska Stat. §21.36.125 (2011); *O.K. Lumber Co. v. Providence Wash. Ins. Co.* 759 P.2d 523 (Alaska 1998).

Damages

Consequential Damages are recoverable and may include, but are not limited to the following: "(1) mental and emotional anxiety; (2) impairment of credit rating; (3) impairment of reputation; (4) impairment of ability to obtain insurance and bonding; and (5) loss of earnings." *Alaska Pac. Assur. Co. v. Collins*, 794 P.2d 936, 949 (Alaska 1990).

Damages for emotional distress are recoverable. *Alaska Pac. Assur. Co. v. Collins*, 794 P.2d 936, 949 (Alaska 1990); *see also Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1249 (9th Cir. 1998).

Attorneys fees are recoverable. *Hillman v. Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1327 (Alaska 1993); *O.K. Lumber*, 759 P.2d at 528; *Schultz v. Travelers Indem Co.*, 754 P.2d 265 (Alaska 1998). Yet there is no duty to "include attorneys' fees a part of its offer" when the insured is not represented by an attorney and the insurer is offering to pay. *Maloney v. Progressive Specialty Ins.*, 99 P.3d 565, 569 (Alaska 2004).

Punitive damages are available for a showing of outrageous conduct. Alaska Stat. §09.17.020; *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1157 (Alaska 1989); *Great Divide Ins. Co. v. Carpenter*, 79 P.3d 599, 608 (Alaska 2004).

⁶ See Attachment: National Association of Insurance Commissioners, Model Regulation (*passim*).

ARIZONA

Arizona has adopted a version of the UCSPA. Ariz. Rev. Stat. Ann. § 20-461D (1981/2004).

Arizona has adopted a version of the UCSPA Model Regulation. Ariz. Admin. Code § 20-6-801 (1981).

There is no separate cause of action under statute. §20-461(D)

Arizona recognizes a cause of action for bad faith against a first-party insurer. *Noble v. National American Life Insurance Company*, 624 P.2d 866, 868 (Ariz. 1981).

In order to maintain a claim for bad faith, the insured must show:

- (1) The absence of a reasonable basis for denying, failing to process or failing to pay benefits of the policy; and
- (2) The insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.

Id. at 868; see also *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1079-80 (Ariz. 1987.), *cert. denied*, 484 U.S. 874, *reh'd denied* 484 U.S. 972 (1972) (*citing Rawlings v. Apodaca*, 726 P.2d 565 (Ariz. 1986) (an insured can recover for bad faith if the insurer intentionally breached the implied covenant of good faith and fair dealing in an insurance contract by denying the insured the security and peace of mind that is the object of the insurance relationship); see also *Zilisch v. State Farm Mut. Auto Ins. Co.*, 995 P.2d 276, 280 (2000).

The absence of a reasonable basis is measured from an objective standard, *i.e.*, whether a reasonable insurer have denied or delayed payment of the claim under the facts and circumstances. *Noble*, 624 P.2d at 868. Under this standard, an insurer's failure to pay a claim is unreasonable unless the validity of the claim is "fairly debatable" after an adequate investigation. ("an insurance company may still challenge claims that are fairly debatable."). *Id.*

An insurer can be held liable for bad faith even if it has not violated any express provision of the insurance contract. See *Rowland v. Great States Ins. Co.*, 20 P.3d 1158, 1163 (App. 2001); see also *Deese v. State Farm Mut. Auto Ins. Co.*, 838 P.2d 1265, 1269 (1992).

If an insurer makes factual assertions in defense of a claim, which expressly or implicitly incorporate the advice or judgment of its counsel, it waives application of privilege. *State Farm Mut. Ins. Co. v. Lee*, 13 P.3d 1169, 1178 (2000).

Damages

Consequential damages are recoverable. An insured is entitled to the amount due under the contract and not limited to the policy limits plus interest. *Farr v. Transamerica Occidental Life Ins. Co. of California*, 699 P.2d 376, 383 (Ct. App. 1984).

Should the claim involve a bad faith failure to pay for workers' compensation benefits, there is no bar to awarding damages for lost earnings, lost earning capacity, medical expenses, and pain and suffering. *Arizona Workers' Compensation Act*, A.R.S. § 23-1022; *Mendoza v. McDonald's Corp.*, 213 P.3d 288, 297-98, (Ariz. App.Div.1 2009).

Emotional distress damages are recoverable. *Farr*, 699 P.2d at 382.

Attorneys fees are recoverable at the Court's discretion. A.R.S. § 12-341.01; *Sparks v. Republic Nat'l Life Ins. Co.*, 647 P.2d 1127, 1142 (Ariz. 1982).

Punitive damages are available if the insurer sought to intentionally harm the insured, proven by clear and convincing evidence of a defendant's "evil mind." *Rawlings*, 726 P.2d at 578. Alternatively, a prima facie case for recovery of punitive damages may be proven by showing that the carrier acted with a desire to harm or conscious disregard for known risks of harm from bad faith conduct; *Hawkins*, 733 P.2d at 1081.

ARKANSAS

Arkansas has adopted a version of the UCSPA. Ark. Code Ann. § 23-66-206

Arkansas has adopted a version of the UCSPA Model Regulation. Ark. Code Rev. § 43 (1989/2001).

Arkansas recognizes a cause of action for bad faith against a first-party insurer. *Aetna Cas. & Sur. Co. v. Broadway Arms Corp.*, 664 S.W.2d 463, 465 (Ark. 1984).

In order to maintain a bad faith claim under Arkansas law, the insured must show:

- (1) Affirmative misconduct by the insurance company without a good faith defense; and
- (2) The misconduct must be dishonest, malicious, or oppressive in an attempt to avoid its liability under an insurance policy.

Id. at 465.

The insured must also establish that the insurer's conduct was "carried out with a state of mind characterized by hatred, ill will, or a spirit of revenge." *Id.* at 465; *see also Columbia National Ins. Co. v. Freeman*, 64 S.W.3d 720 (Ark. 2002).

Arkansas has recognized evidence of bad faith in the following cases:

- (1) failing to provide a temporary location for business and pay ongoing business expenses;
- (2) failing to comply with agreement regarding costs of repairs;
- (3) aggressive, abusive and coercive conduct by claims representative;
- (4) conversion of insured's property;
- (5) altering company records;
- (6) misplacing claim file documents;
- (7) accusing claimants of being uncooperative because insured hired an attorney; and
- (8) ordering two appraisals and then using lower of two appraisals to pay insured.

Id.

See also *S. Farm Bureau Cas. Ins. Co. v. Allen*, 934 S.W.2d 527, 530 (Ark. 1996) (bad faith conduct included agent lying to insured regarding the availability of coverage); *Viking Ins. Co. v. Jester*, 836 S.W.2d 371, 377 (Ark. 1992) (bad faith conduct when insurer applied unfair and oppressive pressure to settle); *First Pyramid Life Ins. Co. of Am. v. Stoltz*, 843 S.W.2d 842, 844-45 (Ark. 1992) (bad faith conduct when insurer concealed existence of a claim for payment under a policy); *Emp'rs Equitable Life Ins. Co. v. Williams*, 665 S.W.2d 873, 875 (Ark. 1984) (bad faith conduct when insurer refused to pay claims in the hopes that policies would lapse and when insurer altered records to make it appear that policy had lapsed). *Forrest v. Gen. Ins. Co. of Am.*, 890 S.W.2d 612 (Ark. App. 1994) (bad faith conduct when insurer attempted to force insured to accept and use repair shop with unacceptable track record of lengthy repair times and unreliable estimates).

Arkansas recognizes a limited statutory cause of action when an insurer fails to pay losses within the time specified in the policy or after demand is made. Ark. Code Ann. § 23-79-208(a)(1) (West 2010).

Damages

Consequential damages are not available under common law or statute.

Emotional distress damages are not available for recovery in Arkansas.

Attorneys fees are available expressly by statute. Ark. Code Ann. § 23-79-208(a)(1) (West 2010)

Punitive damages are available in bad faith claims where the insurers behavior is intentionally dishonest or deceitful. *Viking Ins. Co. of Wis.* 836 S.W.2d at 379.

CALIFORNIA

California has adopted a version of the UCSPA. Cal. Ins. Code § 790.03 (1959/1989).

California has adopted Fair Claims Settlement Practices Regulations, but does not recognize a private right of action. Cal. Code Regs. Tit. 10, § 2695.1 (2003/2009).

California recognizes a common law cause of action for bad faith against a first-party insurer.

An insured must show two things in order to maintain a bad faith claim under California law:

- (1) Benefits due under the policy were withheld; and
- (2) The reason for withholding the benefits was unreasonable or without proper cause.

Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (Cal. 1973).

An insurer's duty is unconditional and independent of the performance of the insured's contractual obligations. An insurer also acts in bad faith when it fails to act reasonably in processing and handling a claim. *Id*; see also *Egan v. Mutual of Omaha Ins. Co.*, 598 P.2d 452 (1979). (An insurer also commits bad faith by failing to promptly investigate a claim); *Richardson v. Employers Liability Assurance Co.*, 25 Cal. App. 3d 232, 245 (1972) (An insurer acts in bad faith when it knows there is coverage, but denies the claim anyway).

Whether an insurer acted reasonably is evaluated objectively based upon the circumstances, as they existed at the time of the action or decision in question. *R&B Auto Center, Inc. v. Farmers Group, Inc.*, 140 Cal.App.4th 327 (Cal. Ct. App. 2006).

It is important to note, however, that violations of Insurance Code § 790.03 and the Fair Claims Settlement Practices Regulations do not by themselves give rise to a separate right of action and are not bad faith per se. *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 486 Cal.3d 287, 304 (1988). Instead, such violations are evidence that can be used to prove that the carrier acted in bad faith. *Safeco Insurance v. Parks*, 170 Cal.App.4th 992, 1006-1007 (2009); *Jordan v. Allstate Insurance Co.*, 148 Cal.App.4th 1062, 1077-1078 (2007); *Neal v. Farmers Insurance*, 21 Cal.3d 910, 920 (1978).

The Judicial Council has adopted a list of factors that can be considered in deciding whether an insurer acted unreasonably. CACI No. 2337.

Damages

Consequential damages are available in California, provided they are reasonably foreseeable. *Gruenberg*, 510 P.2d at 1032; Cal. Civ. C §3300.

Emotional distress damages are recoverable in California. *Cates Const., Inc. v. Talbot Partners*, 21 Cal. 4th 28, 43-44 (1999); Cal. Civ. C. §3333.

Attorneys fees are rewarded for properly apportioned awards to insureds. *Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780 (2004); *see also Brandt v. Super Ct.*, 37 Cal. 3d 813 (1985); *McGregor v. Paul Revere Life Ins.*, 369 F.3d 1099, 1101 (9th Cir. 2004) (holding attorneys fees can be recovered in appeal of bad faith case).

Punitive damages may be awarded in California “In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.” Cal. Civ.C. § 3294(a); *Mock v. Mich Millers Mut. Ins. Co.*, 4 Cal. App. 4th 306 (1992); *Amerigraphics, Inc. v. Mercury Casualty Company*, 182 Cal. App.4th 1538 (2010). Punitive damages are not available for actions based purely on negligence and the failure of the insurer to act. *See, e.g., Profit Sharing Plan v. Tigor Title Ins. Co.*, 185 Cal. App. 3d 1149, 1154 (1986).

COLORADO

Colorado has adopted a version of the UCSPA. Colo. Rev. Stat. § 10-3-1104.

Colorado has adopted claims practices regulations. Bulletin B-6.3 (2012).

Colorado recognizes a common law cause of action for bad faith against a first-party insurer. *Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 414 (Colo. 2004)

In order to maintain a bad faith claim, an insured must prove that:

- (1) The insurer's conduct was unreasonable under the circumstances; and
- (2) The insurer either knowingly or recklessly disregarded the validity of the insured's claim.

Goodson, 89 P.3d at 415 (citing *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1275 (Colo.1985)).

An insurer will be found to have acted in bad faith only if it has intentionally denied, failed to process, or failed to pay a claim without a reasonable basis. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1275 (Colo. 1985).

In assessing a bad faith claim, the reasonableness of an insurer's conduct is measured objectively based on industry standards. *Am. Family Mut. Ins. Co. v. Allen*, 102 P.3d 333, 343 (Colo. 2004).

Colorado has codified the tort of bad faith setting forth standard of care, but does not create a private right of action based on alleged violation. Colo. Rev. Stat. Ann. §10-3-1113.

Colorado has a “prompt payment statute” that allows insured’s to maintain an action when an insurer unreasonably delays or denies payment. The statute defines “unreasonable.”

“[A]n 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 & -1116 (2008).

The statute also allows for recovery of double damages and attorneys fees. *Id.*

Damages

Consequential damages are available if the bad faith action proximately caused the insured’s loss of earnings, future earnings, etc. *D.C. Concrete Mgmt., Inc. v. Mid-Century Ins. Co.*, 39 P.3d

1205, 2001 WL 1045621 (Colo. App. 2001); *Munoz v. State Farm Mut. Auto. Ins. Co.*, 968 P.2d 126, 131 (Colo. App. 1998).

Emotional distress damages are recoverable. *Goodson v. American Std. Ins. Co.*, 89 P.3d 409, 415, 417 (Colo. 2004).

Attorneys fees are recoverable if filed under the Colorado Consumer Protection Act. C.R.S. §§ - 1-105, *et seq. Showpiece Homes Corp. v. Assurance Co. of America*, 38 P.3d 47 (Colo. 2001) but are not recoverable in a bad faith claim or in the underlying breach of contract claim. *Allstate Ins. Co. v. Huizar*, 52 P.3d 816 (Colo. 2002).

Punitive damages are awarded in Colorado and the Court has discretion to give the insured increased damages if a party acts willfully. C.R.S. § 13-21-102(3)(a); *Tait v. Harford Underwriters Ins. Co.*, 49 P.3d 337 (Colo. App. 2001). It is possible to receive three times the damages should the insured bring a claim under the Colorado Consumer Protection Act. *Showpiece Homes Corp. v. Assurance Co. of America*, 38 P.3d 47 (Colo. 2001).

CONNECTICUT

Connecticut has adopted a version of the UCSPA. Conn. Gen. Stat. §38a-816.

Connecticut recognizes a common law cause of action for bad faith against a first-party insurer. The Connecticut Supreme Court held that an insured must establish that the insurer denied policy benefits with an “improper motive” or “dishonest purpose” in order to maintain a claim for bad faith. *PSE Consulting, Inc. v. Frank Mercede and Sons, Inc.*, 838 A.2d 135 (Conn. 2004).

An insured must show more than mere negligence by the insurer. It must show that the insurer had a deceptive or dishonest motive or intent. *See, e.g., Crespan v. State Farm Mut. Auto. Ins. Co.*, 2006 WL 280009 (Jan. 13, 2006 Conn. Super.) (“plaintiff may have proven that the defendant did something wrong, [but] bad faith requires more than mere negligence”); *See also Keegan v. New London County Mut. Ins. Co.*, 2005 WL 2854006 (Oct. 11, 2005 Conn. Super.) (no bad faith where plaintiff failed to demonstrate that insurer acted with improper motive or dishonest purpose); *Bernard v. Buendia*, 2005 WL 1971238 (July 20, 2005 Conn. Super.) (striking plaintiff’s bad faith claim when plaintiff failed to allege facts demonstrating that insurer acted with improper motive or dishonest purpose); *Bepko v. St. Paul Fire & Marine Ins. Co.*, 2005 WL 3619253 (D. Conn. 2005) (bad faith requires more than “bad judgment or negligence” and “[a]llegations of a mere coverage dispute or negligence by an insurer will not state a claim”); 1049; *Asylum Ltd. v. Kinney Pike Ins., Inc.*, 2005 WL 3163931 (Oct. 26, 2005 Conn. Super.) (summary judgment to insurer was proper when there was no evidence that it was motivated by dishonest purpose or sinister motive); *Martin v. Am. Equity Ins. Co.*, 185 F. Supp. 2d 162 (D. Conn. 2002) (“bad faith claim must be alleged in terms of wanton and malicious injury, evil motive and violence”); *Acoustics, Inc. v. Travelers Ins. Co.*, 2004 WL 1559214 (May 28, 2004 Conn. Super.) (“bad faith requires more than mere negligence or unreasonable conduct”).

“Improper motive” or “dishonest purpose” may include:

- ...failing to conduct an adequate investigation of claim;
- failing to promptly notify insured that it was not paying the claim;
- renegeing on a prior agreement to pay insured’s claim;
- requiring insured to provide numerous statements to generate inconsistent statements supporting a denial;
- requiring insured to provide numerous documents when it has already determined it intends to deny the claim; failed to interpret and apply policy terms in good faith;
- wrongfully withholding payment to compel the insured to retain an attorney; and
- refusing to enter into reasonable adjustment or settlement negotiations.

PSE Consulting Inc., 838 A.2d at 155; *Bruce v. Progressive Halcyon Ins. Co.*, 2007 WL 447230 (Jan. 26, 2007 Conn. Super.).

Insureds may bring a statutory cause of action for, *inter alia*, the following actions:

- (1) misrepresenting pertinent facts or insurance policy provisions relating to coverages;
- (2) failing to act with reasonable promptness on communications regarding claims arising under insurance policies;
- (3) failing to implement reasonable standards for the prompt investigation of claims;
- (4) refusing to pay claims without conducting a reasonable investigation;
- (5) not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
- (6) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions by insureds; and
- (7) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

Conn. Gen. Stat. §38a-816.

Damages

Consequential damages are available. *Uberti v. Lincoln National Life Ins. Co.*, 144 F.Supp.2d 90 (D.Conn. 2001); *Masik v. Costa*, 2000 WL 1513789 (September 7, 2003, Skolnick, J.); *Hennessey v. Travelers Property Casualty Ins. Co.*, 1999 WL 240231 (April 14, 1999, Moraghan, J.).

Emotional distress damages are available. *Buckman v. People Express, Inc.*, 205 Conn. 166 (1987); *Uberti v. Lincoln Nat'l Life Ins. Co.*, 144 F.Supp 2d 90 (D. Conn. 2001).

Attorneys fees are available to the prevailing party for showing of bad faith as a component of compensatory damages, for work reasonably performed (i.e. no award for declaratory relief only). *ACMAT Corp. v. Greater New York Mut. Ins. Co.*, 282 Conn. 576, 923 A.2d 697 (2007); *Grand Sheet Metal Prods. Co. v. Prot. Mut. Ins. co.*, 375 A.2d 428 (Conn. Super. Ct. 1977).

Punitive damages are available only under the Unfair Trade Practices Act. Conn. Gen. Stat. §2-110g(a) and (d).

DELAWARE

Delaware has adopted a version of the UCSPA. 18 Del Admin. Code. §902 (1977/2003).

Delaware recognizes a cause of action for bad faith against a first-party insurer. *See Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 264 (Del. 1995).

An insured must show two things to establish a bad faith claim:

- (1) That the insurer denied insurance benefits to the insured; and
- (2) That the denial of insurance benefits was clearly without any reasonable justification.

Id. at 264.

Bad faith claims can be predicated on an insurer's failure to investigate, process, or pay an insurance claim, or a general business practice of denying insurance claims without a reasonable basis. *Id.* at 264 and 266.

An insurer is entitled to consequential damages that were "reasonably foreseeable at the time the [insurance] contract was made." *Id.* at 265. If an insurer's denial of insurance benefits is willful or malicious, it may also be subject to punitive damages. *Id.* at 266.

A cause of action for the bad faith delay, or nonpayment, of an insured's claim in a first-party insured-insurer relationship is cognizable under Delaware law as a breach of contract. *Maccari v. Bituminous Cas. Corp.*, No. 10-4595 (3d Cir. Oct. 11, 2011).

Damages

Consequential damages are sometimes allowed in Delaware. In a bad faith claim involving worker's compensation workers who were delayed benefits, the insurer was forced to pay consequential damages. *Pierce v. Int'l Ins. Co. of Illinois*, 671 A.2d 1361 (Del. 1996).

Emotional distress damages are not available. *Tackett*, 653 A.2d at 254.

Attorneys fees are available. *Casson v. Nationwide Ins. Co.*, 455 A.2d 361 (Del. Super. Ct. 1982). Attorneys fees may be awarded in property insurance cases. 18 Del. Code §4102.

Punitive damages are available in Delaware if the insured can show the denial of benefits was particularly egregious" (i.e. the insurer acted in a "willful or malicious manner") . *Tackett*, 653 A.2d 254; *Sommerville v. Colonial Ins. Co.*, 2001 WL 34075420 at *2 (Del. C.P. Aug 30, 2011) (citation omitted), *re-trial denied* 2001 WL 34075417 (Del. C.P. Sept. 26, 2011); *Thomas v. Harford Mut. Ins. Co.*, CIV.A. 01C-01-046HDR, 2004 WL 1102362 (Del. Super. Apr. 7, 2004).

DISTRICT OF COLUMBIA

The District of Columbia has not adopted the UCSPA.

The District of Columbia does not recognize a cause of action for bad faith against a first-party insurer. *Choharis v. State Farm Fire and Cas. Co.*, 961 A.2d 1080, 1087-88 (D.C. 2008).

Damages

Consequential damages are not available. *Id.*

Emotional distress damages are not available in the District of Columbia. *Id.*

Attorneys fees are available in exceptional circumstances (i.e. the insurer acted vexatiously, wantonly, or for oppressive reasons) *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932 (D.C. Cir. 1984). Attorneys fees are available under statute where no fault motor vehicle insurance benefits were not promptly paid and were over due. D.C. Code Ann. §31-2410 (2001).

Punitive damages are not recognized in the District of Columbia. *Fireman's Fund Ins. Co. v. CTIA*, 480 F. Supp. 2d 7 (D.D.C. 2007)

Note: An award under the Consumer Protection Act can include reasonable attorneys fees and punitive damages. D.C. Code §28-3905(k)(1)(2011).

FLORIDA

Florida has adopted a version of the UCSPA. Fla. Stat. §626.9541 (1976/1990).

Florida has adopted Fla. Stat. §626.9743-626.9744 (2004) (Motor vehicle settlements).

Florida has adopted a version of the UCSPA Model Regulation. Fla. Admin. Code Ann. Rev. 690-166.021 to 690-166.031 (1992/2004).

Florida does not recognize a common law cause of action for bad faith against a first-party insurer. *Time Ins. Co., Inc. v. Burger*, 712 So.2d 389, 391 (Fla. 1998).

However, Florida has enacted a Civil Remedy Statute, Fla. Stat. § 624.155 (CRS), which authorizes first-party bad faith actions against insurers. The CRS states:

- (1) Any person may bring a civil action against an insurer when such person is damaged. . .
 - (a) By the commission of any of the following acts by the insurer:
 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for her or his interests;
 2. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

Fla. Stat. § 624.155(1)(b).

The CRS allows individuals to bring claims for damages caused by statutorily-defined unfair claims settlement practices. Fla. Stat. § 624.155(1)(a)(1). Such unfair claims practices include:

1. Attempting to settle a claim on the basis of an application that has been altered without notice to, or knowledge or consent of, the insured;
2. Making material misrepresentations to the insured in order to settle the claim on less favorable terms than those provided for by the policy;
3. A general business practice of:

- a. Failing to adopt and implement standards for the proper investigation of claims;
- b. Misrepresenting pertinent facts or insurance policy provisions;
- c. Failing to acknowledge and act promptly upon communications with respect to claims;
- d. Denying claims without conducting reasonable investigations based upon available information;
- e. Failing to affirm or deny full or partial coverage of claims, and, as to partial coverage, the dollar amount or extent of coverage, or failing to provide a written statement that the claim is being investigated, upon the written request of the insured within 30 days after proof-of-loss statements have been completed;
- f. Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement;
- g. Failing to promptly notify the insured of any additional information necessary for the processing of a claim; or
- h. Failing to clearly explain the nature of the requested information and the reasons why such information is necessary.

Fla. Stat. § 626.9541(1)(i).

To bring a claim, an insured must provide written notice to the Department of Financial Services and the insurer at least 60 days before suit is filed. Fla. Stat. § 624.155(3)(a). The written notice must state:

- (1) The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated;
- (2) The facts and circumstances giving rise to the violation;
- (3) The name of any individual involved in the violation;
- (4) Reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request; and

(5) A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

Id. at (b).

Damages

Consequential damages are available when they are reasonably foreseeable and are natural, proximate, probable, or a direct consequence of an insurer's bad faith. *McLeod v. Cont'l Ins. Co.*, 591 So. 2d 621, 626 (Fla. 1992); *Heritage Corp. of South Florida v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 361 Fed. Appx. 986, 987 (11th Cir. 2010);

Emotional distress damages are available where an insurer fails to pay in a timely fashion. *Time Ins. Co., Inc. v. Burger*, 712 So. 2d 389 (Fla. 1998). The insured bears the burden of proving the following:

- “(1) that the bad-faith conduct resulted in the insured's failure to receive necessary or timely health care benefits;
- (2) that, based upon a reasonable medical probability, this failure caused or aggravated the insured's medical or psychiatric condition; and
- (3) that the insured suffered mental distress related to the condition or the aggravation of the condition.”

Id. at 393.

Attorneys fees are available for first party claimants under statute. Fla. Stat. §627.248

Punitive damages are not available at common law. *Fortune Ins. Co. v. Fernandez*, 560 So. 2d 239 (Fla. Dist. Ct. App. 1990). allows punitives for acts occurring with such frequency as to indicate a “general business practice” including:

- (a) Willful, wanton, and malicious;
- (b) In reckless disregard for the rights of any insured; or
- (c) In reckless disregard for the rights of a beneficiary under a life insurance contract.

Fla. Stat. § 624.155(5).

GEORGIA

Georgia has adopted a version of the UCSPA. GA. Code Ann. §§ 33-6-30 to 33-6-37 (1992).

Georgia does not recognize a common law cause of action for bad faith against a first-party insurer. Instead, insureds may bring a claim for bad faith against a first-party insurer under statute. Ga. Code § 33-4-6.

To prevail on a claim for an insurer's bad faith, the insured must prove:

- (1) That the claim is covered under the policy;
- (2) That a demand for payment was made against the insurer within 60 days prior to filing suit; and
- (3) That the insurer's failure to pay was motivated by bad faith.

Lavoi Corp., Inc. v. National Fire Ins. of Hartford, 666 S.E.2d 387 (Ga. App. 2008).

“Bad faith” is any frivolous and unfounded refusal in law or in fact to pay according to the terms of the policy. *King v. Atlanta Cas. Ins. Co.*, 631 S.E.2d 786 (Ga. App. 2006). Bad faith is shown by evidence that under the terms of the policy under which an insured's demand for payment is made, and under the facts surrounding the response to that demand, the insurer had no good cause for resisting and delaying payment. *Lawyers Title Ins. Corp. v. Griffin*, 691 S.E.2d 633 (Ga. App. 2010).

If an insurer faces a reasonable question of law or disputed issue of fact in refusing to fulfill contractual obligation, then it cannot have acted in bad faith. *American Family Life Assur. Co. of Columbus, Ga. v. U.S. Fire Co.*, 885 F.2d 826 (11th Cir. 1989)

An insured who prevails on a claim under GA. CODE § 33-4-6 may recover the following from the insurer:

- (1) The amount of the loss;
- (2) The greater of either: (a) 50% of the amount of the loss; or (b) \$5,000; and
- (3) Attorneys fees.

Id.

Damages

Consequential damages are not allowed in Georgia; the exclusive remedy is provided by GA. CODE §33-4-6(a).

Emotional distress awards are not valid in Georgia. *S. Gen. Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992).

Attorneys fees are recoverable, by statute, at the trial court's discretion. O.C.G.A. § 33-4-6.

Punitive damages may be available in Georgia. *Howell v. Southern Heritage Ins. Co.*, 214 Ga. App. 536, 448 S.E.2d 275 (1994).

HAWAII

Hawaii has adopted a version of the UCSPA. Haw. Rev. Stat. § 431:13-103 (1988/1989).

Hawaii recognizes a cause of action for bad faith against a first-party insurer. *Best Place, Inc. v. Penn America Ins. Co.*, 920 P.2d 334 (Haw. 1996).

An insured must show two things in order to maintain a bad faith claim under Hawaii law:

- (1) Benefits due under the policy were withheld; and
- (2) The reason for withholding the benefits was unreasonable or without proper cause.

Id. at 347 (adopting California's bad faith test articulated in *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973)).

An unreasonable delay in payment of benefits constitutes bad faith. *Id.* However, an insurer's denial of benefits based on a reasonable interpretation of the insurance policy does not constitute bad faith. *Id.* Nor does an erroneous decision not to pay benefits constitute bad faith. *Id.*; see also *Enoka v. AIG Hawaii Insurance Company, Inc.*, 128 P.3d 850 (Haw. 2006). The determinative factor is whether the decision not to pay the claim was made in bad faith, *i.e.*, based on unfair dealing rather than mistaken judgment. *Best Place, Inc.*, 920 P.2d 334.

An insured may recover compensatory damages in a bad faith action. An insured may also recover punitive damages if it establishes by clear and convincing evidence that the insurer acted "wantonly or oppressively," "with such malice as implies a spirit of mischief or criminal indifference to civil obligations," with "willful misconduct," or with a "conscious indifference to consequences." *Id.* at 348.

Damages

Consequential damages are available. See *Best Place*, 920 P.2d at 346.

Emotional distress damages are available. *Young v. Allstate Ins. Co.*, 119 Haw. 403, 406, 198 P.3d 666, 669 (2008)

A policyholder may be entitled to reasonable attorneys fees and the cost of suit. Haw. Rev. Stat. § 431:10-242 (West).

Punitive damages are available if the insured can show "the evidence reflects 'something more' than the conduct necessary to establish the tort. More specifically, the plaintiff must prove by clear and convincing evidence that 'the defendant has acted wantonly or oppressively or with

such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.” *Best Place*, 920 P.2d at 34.

IDAHO

Idaho has adopted a version of the UCSPA. Idaho Code Ann. §§ 41-1329.

Idaho recognizes a cause of action for bad faith against a first-party insurer. *See, e.g. White v. Unigard*, 730 P.2d 1014, 1021 (Idaho 1986); *State Farm Fire & Cas. Co. v. Trumble*, 636 F. Supp. 317, 319 (D. Idaho 1987).

In order to recover on a bad faith claim, the insured must show:

- (1) The insurer intentionally and unreasonably denied or withheld payment;
- (2) The claim was not fairly debatable;
- (3) The denial or failure to pay was not the result of a good faith mistake; and
- (4) The resulting harm is not fully compensable by contract damages.

Weinstein v. Prudential Prop. & Cas. Ins. Co., 233 P.3d 1221, 1237 (Idaho 2010), rehearing denied (July 1, 2010).

An insured may recover extra-contractual damages attributable to an insurer's bad faith conduct, including emotional distress. *See Weinstein*, 233 P.3d at 1248 (trial court did not err in denying insurer's motion for directed verdict, judgment notwithstanding the verdict, and new trial when jury awarded extra-contractual damages for emotional distress to insured).

Damages

Consequential damages are available to an insured suffers extra-contractual damages. *White v. Unigard Mut. Ins. Co.*, 730 P.2d 1014 (Idaho 1986)

Emotional distress damages are available to an insured that proves bad faith by the insurer. *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 923 P.2d 456 (1996).

Attorneys fees are recoverable by the insured if the insurer has failed to pay obligated amounts due to insured within 30 days. *Weinstein*, 233 P.3d 122.

Punitive damages are available if attributable to an insurer's bad faith conduct if he or she "prove[s], by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by [the insurer]" *Weinstein v.* 233 P.3d at 1254-55 (citing Idaho Code §6-1604(1)).

ILLINOIS

Illinois has adopted a version of the UCSPA. 215 ILL. COMP. STAT. 5/154.6 (1997).

Illinois does not recognize a common law cause of action for bad faith against a first-party insurer. However, Illinois does recognize a common law cause of action against an insurer for bad faith in the defense of a claim brought by a third party against the insured, including the insurer's bad faith failure to settle within policy limits. *Calif. Union Ins. Co. v. Liberty Mut. Ins. Co.*, 930 F. Supp. 317, 319-20 (N.D. Ill. 1996); *Nat. Union Fire Ins. Co. v. Continental Ill. Corp.*, 673 F. Supp. 267, 270-272 (N.D. Ill. 1987). Punitive damages are available for a bad faith refusal to settle. *O'Neill v. Gallant Ins. Co.*, 329 Ill. App. 3d 1166, 1176, 769 N.E.2d 100, 109. (2002).

Section 155 of the Illinois Insurance Code (ILCS 5/155) has preempted the common law bad faith claim. It provides an extra-contractual statutory remedy for policyholders who have suffered "unreasonable and vexatious" conduct by insurers with respect to a claim under the policy. *Cramer v. Ins. Exch. Agency*, 174 Ill. 2d 513, 518-519 (1996).

Section 155 states as follows: In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance for the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any of the following amounts:

- (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
- (b) \$60,000; or
- (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.

215 ILCS 5/155.

An insurer's conduct is not unreasonable and vexatious and does not entitle an insured to the extra-contractual remedy if:

- (1) there is a bona fide dispute concerning the scope and application of insurance coverage;
- (2) the insurer asserts a legitimate policy defense;
- (3) the claim presents a genuine legal or factual issue regarding coverage; or
- (4) the insurer takes a reasonable legal position on an unsettled issue of law.

Scottsdale Indem. Co. v. Village of Crestwood, 784 F.Supp.2d. 988, 998 (N.D. Ill. 2011)

Consequential damages are not available.

Emotional distress damages are not available.

The remedies under the Illinois Insurance Code are exclusive: an insured's maximum recovery is limited to *reasonable attorney fees* and costs plus a *maximum penalty of \$60,000*. *Nelles v. State Farm Fire & Cas. Co.*, 318 Ill. App. 3d 399 (2000).

Although it preempts a common law bad faith claim, section 155 does not preempt a separate and independent tort action, such as common law fraud, for insurer misconduct. *Cramer*, 174 Ill.2d at 530.

Punitive damages are not available.

INDIANA

Indiana has adopted a version of the UCSPA. Ind. Code § 27-4-1-4.5 (1983/1987).

Indiana recognizes a cause of action for bad faith against a first-party insurer. *Erie Insurance Co. v. Hickman by Smith*, 622 N.E.2d 515 (Ind. 1993); *USA Life One Ins. Co. of Ind. v. Nuckolls*, 682 N.E.2d 534, 536, 541-42 (Ind. 1997).

Poor judgment or negligence alone will not amount to bad faith; the additional element of conscience wrongdoing must also be present. *Lumberman's Mutual Casualty Co. v. Combs*, 873 N.E. 2d 692 (Ind. Ct. App. 2007). In order to establish bad faith, an insured must show that the insurer acted with a dishonest purpose, moral obliquity, furtive design, or ill will. *Johnson v. State Farm Mut. Auto. Ins. Co.*, 667 N.E.2d 802, 805 (Ind. Ct. App. 1996). This standard can be met if the insured can prove that the insurer denied liability knowing that there was no rational, principled basis for doing so. *Erie*, 622 N.W.2d at 520.

An insured may be entitled to compensatory damages for expenditures proximately caused by the insurer's bad faith. An insured may also be entitled to punitive damages if there is clear and convincing evidence that the insurer "acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing." *Erie*, 622 N.E.2d at 520.

Damages

Consequential damages are available. *Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E.2d 60 (Ind. Ct. App. 2009).

Emotional distress damages are recoverable if proximately caused by the insurer's conduct. *Patal v. United Fire and Cas. Co.*, 80 F. Supp. 2d 948, 959 (N.D. Ind. 2000).

Attorneys fees are not recoverable in Indiana where insured gave short notice to insurer and thereby prejudiced the insurer by denying it a right to make a settlement offer. *Liberty Mut. Ins. Co. v. OSI Indus., Inc.*, 831 N.E.2d 192 (Ind. Ct. App. 2005). Further, Indiana uses the "American Rule," whereby absence of a statute or an agreement, attorneys fees are not allowable. *Id.*

Punitive damages are available "only if there is clear and convincing evidence that the defendant acted with malice, fraud, gross negligence, or oppressiveness which was not the result of mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing, in the sum that the jury believes will serve to punish the defendant and to deter it and others from that conduct in the future." *Erie Ins. Co.* 622 N.E.2d at 515.

IOWA

Iowa has not adopted the UCSPA.

Iowa recognizes a common law cause of action for bad faith against a first-party insurer. *Dolan v. Aid Insurance Company*, 431 N.W.2d 790 (Iowa 1988).

In order to recover on a bad faith claim, the insured must show:

- (1) The insurer had no reasonable basis for denying the plaintiff's claim; and
- (2) The insurer knew or had reason to know that its denial or refusal was without reasonable basis.

Id. at 794; *see also Chadima v. Nat'l. Fid. Lif Ins. Co.*, 55 F.3d 345, 3470348 n.6 (8th Cir. 1995).

An insurer has a reasonable basis for denying a claim if the insured's claim is "fairly debatable" on either a matter of fact or law. *Niver v. Travelers Indem. Co. of Illinois*, 412 F. Supp. 2d 966, 977 (N.D. Iowa 2006).

Damages

In Iowa, consequential damages are available. *Nassen v. National States Ins. Co.*, 494 N.W.2d 231 (Iowa 1992).

Emotional distress damages are awarded in Iowa with a showing of severe mental suffering. *Id.*

Attorneys fees are recoverable. *Clark-Petersen Co., Inc., v. Indep. Ins. Assoc., LTD.*, 514 N.W.2d 912, 915 (Iowa 1994).

Punitive damages are available for a showing of malice, fraud, gross negligence, or an illegal act. *Dolan*, 431 N.W.2d at 794; *Bradley v. W. Bend Mut. Ins. Co.*, 796 N.W.2d 455 (Iowa Ct. App. 2003).

KANSAS

Kansas has adopted a version of the UCSPA. Kan. Stat. Ann. §§ 40-2404.

Kansas has adopted a version of the UCSPA Model Regulation Kan. Admin. Regs. §§ 40-1-34 (1981/2003).

Kansas does not recognize a common law cause of action for bad faith against a first-party insurer. *Spencer v. Aetna Life & Cas. Ins. Co.*, 611 P.2d 149, 158 (Kan. 1980).

However, Kansas has enacted Kan. Stat. §40-256, which permits an insured to recover extra-contractual damages for first-party claims under certain circumstances. Specifically, the statute states:

40-256. Attorney fees in actions on insurance policies; exception

That in all actions hereafter commenced, in which judgment is rendered against any insurance company as defined in K.S.A. 40-201, ... if it appear from the evidence that such company... has refused without just cause or excuse to pay the full amount of such loss, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorneys fee for services in such action, including proceeding upon appeal, to be recovered and collected as a part of the costs: *Provided, however*, That when a tender is made by such insurance company, society or exchange before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed.

Kan. Stat. §40-256.

In refusing to pay a claim, an insurance company has a duty to make a good faith investigation of the facts surrounding the claim. *Brown v. Combined Ins. Co. of America*, 597 P.2d 1080 (Kan. 1979). If there is a bona fide and reasonable factual ground for contesting the insured's claim, there is no failure to pay without just cause or excuse. *Koch, Administratrix v. Prudential Ins. Co.*, 470 P.2d 756 (1970). Whether an insurance company's refusal to pay is without just cause or excuse is determined on the facts and circumstances in each case. *Smith v. Blackwell*, 791 P.2d 1343 (Kan. App. 1989).

Damages

Consequential damages, such as lost profits and lost income, are recoverable where an insurer refuses to pay. *Mo. Med. Ins. Co. v. Wong*, 676 P.2d 113, 124 (Kan. 1984). An insurer that acts negligently or in bad faith by failing to settle a case is liable for the full amount of the insured's resulting loss. *Sours v. Russell*, 967 P.2d 348, 351 (Kan Ct. App. 1998) (citing *Levier v. Koppenheffer*, 879 P.2d 40, 47 (Kan Ct. App. 1994)).

Emotional distress damages are available if:

- (1) the conduct of the insurer was intentional or in reckless disregard of the insured;
 - (2) the conduct was extreme and outrageous;
 - (3) there was a casual connection between the insurer's conduct and the insured's mental distress;
- and
- (4) the insured's mental distress was extreme and severe.

Smith v. Welch, 265 Kan. 868, 876, 967 P.2d 727 (1998).\; *Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman*, 267 Kan. 245, 257, 978 P.2d 922, 930 (1999).

Attorneys fees are recoverable to “allow the plaintiff a reasonable sum as an attorneys fee for services in such action, including proceeding upon appeal, to be recovered and collected as a part of the costs: *Provided, however*, That when a tender is made by such insurance company, society or exchange before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed.” See *Hofer v. UNUM Life Ins. Co. of Am.*, 338 F. Supp. 2d 1252, 153 (D. Kan. 2004); § 40-256, *supra*.

Punitive damages are not recoverable in Kansas, unless the insured can prove the insurer committed an independent tort accompanied by malice, fraud, or wanton disregard of others. *Guarantee Abstract & Title Co., Inc. v. Interstate Fire & Cas. Co., Inc.*, 652 P.2d 665 (1982).

KENTUCKY

Kentucky has adopted a version of the UCSPA. Ky. Rev. Stat. Ann. §§304.12-230.

Kentucky has adopted a version of the UCSPA Model Regulation. 806 Ky. Admin. Regs. §§ 12:095 (1992/2001); 12:092 (1990).

Kentucky recognizes a common-law cause of action for bad faith against a first-party insurer in *Curry v. Fireman's Fund Ins. Co.*, 784 S.W.2d 176 (Ky. 1989); *see also Allstate Ins. Co. v. Coffey*, 796 F. Supp. 1017, 1018 (E.D. Ky. 1992; *Deaton v. Allstate Ins. Co.*, 548 S.W.2d. 162 (Ky. Ct. App. 1977).

In order to recover on a common-law bad faith claim, the insured must show:

- (1) That the insurer is obligated to pay under the policy;
- (2) That the insurer lacked a reasonable basis for denying the claim; and
- (3) That the insurer either knew there was no reasonable basis to deny the claim or acted with reckless disregard for whether such a basis existed.

Id.

Insureds may bring a claim against their insurers under Kentucky's Consumer Protection Act (KCPA). *Stevens v. Motorist Mutual Insurance*, 759 S.W.2d 819 (Ky. 1988). The KCPA prohibits and makes unlawful any "unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce." KRS 367.170(1). The KCPA permits a person injured as a result of such conduct to bring a lawsuit to recover actual damages and seek equitable relief as necessary and proper. KRS 367.220(1).

A statutory bad faith cause of action also exists under the state's Unfair Claims Settlement Practices Act (UCSPA). *State Farm Mutual Automobile Insurance Company v. Reeder*, 763 S.W.2d 115 (Ky. 1989) The UCSPA sets out many examples of bad faith, including but not limited to failing to conduct a reasonable investigation based upon all information and refusing to attempt in good faith to settle claims in which liability has become reasonably clear. *See, e.g.*, KRS 304.12-230.

Damages

Consequential damages are available if due to an insurer's bad faith. *Curry*, 784 S.W.2d 176.

Emotional distress and mental anguish damages are considered consequential damages. *Wittmer v. Jones*, 864 S.W.2d 885, 889 (Ky. 1993).

Attorneys fees are available by statute if an insurer fails to settle a claim within a reasonable amount of time. "...if the delay was without reasonable foundation, the insured person or health care provider shall be entitled to be reimbursed for his reasonable attorneys fees incurred. No part of the fee for representing the claimant in connection with this claim shall be charged against benefits otherwise due the claimant." Ky. Rev. Stat. Ann. § 304.12-235 (West).

Punitive damages are available if the insurer's conduct was outrageous, that the insurer had evil motive, or that the insurer had a reckless indifference to the rights of others. *Federal Kemper Insurance Co. v. Hornback*, 711 S.W.2d 844, 848 (Ky. 1986).

LOUISIANA

Louisiana has adopted a version of the UCSPA. La. Rev. Stat. Ann. §§ 22:1964 (1958/2009).

Louisiana's "Good Faith law," creates a statutory right of recovery against an insurance company that acts in bad faith. The statute states the following:

An insurer...owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

La. Rev. Stat. Ann. § 22:1973(A).

Under Louisiana's "Good Faith law," the following acts constitute bad faith:

- (1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages;
- (2) Failing to pay a settlement within thirty days after an agreement is reduced to writing;
- (3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured;
- (4) Misleading a claimant as to the applicable prescriptive period;
- (5) Failing to pay a claim within sixty days after receipt of satisfactory proof of loss when such failure is arbitrary, capricious, or without probable cause; and
- (6) Failing to pay claims to "immovable property" (i.e., buildings) when such failure is arbitrary, capricious, or without probable cause.

La. Rev. Stat. Ann. § 22:1973(B).

The insured has the burden of proving the insurer not only acted (or failed to act), but did so arbitrarily, capriciously, and without probable cause. *Maloney Cinque, L.L.C. v. Pac. Ins. Co., Ltd.*, 89 So. 3d 12, 22 (La. Ct. App. 2012)). An insurer's failure to pay a claim is arbitrary, capricious or without probable cause if it is "unjustified, without reasonable probable cause or excuse." *Maloney Cinque, L.L.C.*, 89 So. 3d at 21 (quoting *Louisiana Bag Co., Inc. v. Audubon Indem. Co.*, 999 So. 2d 1104, 1114 (La. 2008)).

An insurer who has a reasonable basis to defend the claim and acts in good-faith reliance on that defense will not be liable under Louisiana's Good Faith law. *Id.*

An insured who brings a claim under Louisiana's Good Faith law may recover general damages; special damages; and statutory penalties in an amount of up to two times the actual damages or \$5,000, whichever is greater, when an insurer fails to pay a claim within 60 days of a satisfactory proof of loss when "such failure is arbitrary, capricious and without probable cause." La. Rev. Stat. Ann. § 22:1973(C).

If an insurer fails to pay a legitimate claim within 30 days receipt of a satisfactory proof of loss and this failure is determined to be "arbitrary, capricious, and without probable cause," the insurer will be subject to a penalty of 50% of the loss, or \$1,000, whichever is greater, as well as attorneys' fees and costs La. Rev. Stat. Ann. Section 22:1893(B)(1).

Damages

Consequential damages may be available in Louisiana. Statute allows for the recovery of general or "special damages" that stem from the insurer's breach. La. Rev. Stat. Ann. § 22:1973(C).

Emotional distress damages may be awarded in Louisiana if they are calculated within the general concept of damages. *Lewis v. State Farm Ins. Co.*, 946 So.2d 708, 729 (La. App. 2 Cir. 2006).

Attorneys fees "for insurer's arbitrary and capricious failure to pay claim within 30 days after receipt of satisfactory written proofs and demand are recoverable. "Penalties and attorney fees are mandatory, rather than discretionary. La. Rev. Stat. Ann. § 22:658, subd. B(1). A plaintiff may be awarded penalties under only one of the two statutes, whichever is greater. *Dickerson v. Lexington Ins. Co.*, 556 F.3d 290, 297 (5th Cir. 2009). Nonetheless, a plaintiff may recover attorneys' fees under section 22:1892 while seeking damages and penalties under section 22:1973. *Id.*

Punitive damages in the form of a statutory "penalty" recoverable in an amount not to exceed two times the damages sustained or \$5000, whichever is greater (see above). La. Rev. Stat. Ann. § 22:1892; *see also Sher v. Lafayette Ins. Co.*, 998 So. 2d. 201 (La. 2008).

MAINE

Maine has adopted a version of the UCSPA. Me. Rev. Stat. Ann. Tit. 24-A, § 2164-D (1964) (Portions of Model).

Maine does not recognize a common law cause of action for bad faith against a first-party insurer. Maine does recognize a common law cause of action for an insurer's breach of its contractual duty to act in good faith. *See Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 652 (Me. 1993); *see also Gardner v. Podiatry Ins. Co.*, 2007 WL 1170774 at *8 (D. Me. 2007).

However, Maine does permit an insured to bring a claim against its insurer under the state's unfair claims settlement practices law, Me. Rev. Stat. Tit. 24-A §2436-A. This statute permits an insured to bring a civil action for any of the following:

- (1) Knowingly misrepresenting to an insured pertinent facts or policy provisions relating to coverage at issue;
- (2) Failing to acknowledge and review claims, which may include payment or denial of a claim, within a reasonable time following receipt of written notice by the insurer of a claim by an insured arising under a policy;
- (3) Threatening to appeal from an arbitration award in favor of an insured for the sole purpose of compelling the insured to accept a settlement less than the arbitration award;
- (4) Failing to affirm or deny coverage, reserving any appropriate defenses, within a reasonable time after having completed its investigation related to a claim; or
- (5) Without just cause, failing to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear.

Me. Rev. Stat. Tit. 24-A §2436-A(1).

Under the statute, an insurer acts without just cause if it "refuses to settle claims without a reasonable basis to contest liability, the amount of any damages or the extent of any injuries claimed." Me. Rev. Stat. Tit. 24-A §2436-A(2).

Damages

Consequential damages are available as part of a breach of contract claim. *Marquis*, 628 A.2d at 650. (citing *Ginn v. Penobscot Co.*, 334 A.2d 874, 887 (Me. 1975)).

Emotional distress damages are not available. *See generally Anderson v. Va. Sur. Co.*, 985 F. Supp. 182 (D. Me. 1998)

Attorneys fees are available. An insured who successfully brings a claim under Maine's unfair claims settlement practices law may recover damages, costs and disbursements, reasonable attorneys fees, and interest on damages at the rate of 1½% per month. Me. Rev. Stat. Tit. 24-A §2436-A(1).

Punitive damages are not available in Maine in a breach of contract claim or in an action under the Maine Unfair Claims Settlement Practices Act. *Stull v. First Am. Title Ins. Co.*, 745 A.2d 975, 981 (Me. 2000).

MARYLAND

Maryland has adopted a version of the UCSPA. Md. Code Ann., Ins. §§ 27-301 to 27-306 (1986/2012).

Maryland has adopted claims practices regulations. Code Md. Reg. Ann., Ins. § 31.15.07.01 ff.

Maryland does not recognize an independent common law cause of action for bad faith against a first-party insurer. *See State Farm Mut. Ins. Co. v. White*, 236 A.2d 269 (Md. 1967).

However, Maryland has passed a first-party bad faith law that creates a statutory cause of action against insurers who fail to act in good faith in settling a claim under a property and casualty insurance policy. Under this law, an insured may recover damages from an insurer who fails to act in good faith. Md. Code Ann., Cts. & Jud. Proc. § 3-1701(e).

“Good faith” means an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim. Md. Code Ann., Ins. § 27-1001.

An insured must follow a specific statutorily-proscribed procedure in order to bring a claim under Maryland’s bad faith law. *See* Md. Code Ann., Ins. § 27-1001(c). Specifically, an insured must file a complaint with the Maryland Insurance Administration (MIA). Md. Code Ann., Ins. § 27-1001(d)(1). The complaint must include all documents the insured submitted to the insurer as proof of the loss, specify applicable coverage and the amount of the claim, and state the amount of actual damages and costs. Md. Code Ann., Ins. § 27-1001(d)(2). The MIA then forwards a copy of the complaint to the insurer. Md. Code Ann., Ins. § 27-1001(d)(3). The insurer then has 30 days to submit a written response to the Complaint. Md. Code Ann., Ins. § 27-1001(d)(4).

The MIA then issues a decision within 90 days after the date of filing, which determines:

- (1) whether the insurer is obligated to pay the insurance claim;
- (2) the amount the insured is entitled to from the insurer for the claim;
- (3) whether the insurer breached its obligation under the applicable policy to pay the claim;
- (4) whether the insurer failed to act in good faith; and
- (5) the amount of damages, expenses, litigation costs, and interest that the insured is entitled to recover from the insurer.

Md. Code Ann., Ins. § 27-1001(e)(1)(i).

Parties do have a right to appeal the decision of the MIA. First, either party may appeal the decision of the MIA to an administrative law judge, who will review the matter *de novo*. Md. Code Ann., Ins. § 27-1001(f). Second, either party may appeal the decision of an administrative law judge to the circuit court, who will also review the matter *de novo*. Md. Code Ann., Ins. § 27-1001(g); *see also Thompson v. State Farm Mut. Auto Ins. Co.*, 196 Md. App. 235, 238 (Md. Ct. Spec. App. 2010).

Damages

Consequential damages are not available in Maryland for first party bad faith claims. However, in “duty to settle” liability policy cases, an insurer can be liable for the full amount of a judgment in excess of the policy limits if the insurer refused to settle within the policy limits. *State Farm Mut. Ins. Co.*, 236 A.2d 269.

Emotional distress damages are not recoverable in Maryland. *Id.*

Attorneys fees are recoverable in first party bad-faith claims in the form of litigation costs, expenses, and reasonable attorneys’ fees, including actual damages (not to exceed 1/3 of the amount of actual damages recovered). Md. Code Ann., Cts. & Jud. Proc. § 3-1701(e).

Punitive damages are not available for first party bad faith claims. Md. Code Ann., Cts. & Jud. Proc. § 3-1701.

MASSACHUSETTS

Massachusetts has adopted a version of the UCSPA. Mass. Gen. Laws ch. 176D. § 3 (1972/1986).

Massachusetts recognize a common law cause of action for bad faith against a first-party insurer. *See, e.g. Green v. Blue Cross and Blue Shield*, 713 N.E.2d 992 (Mass. App. Ct). An insured may bring a collateral action against an insurer for unfair or deceptive business practices. Mass. Gen. Laws ch. 93A and ch. 176D.

Mass. Gen. Laws Ch. 93A § 9 establishes a statutory cause of action for any person “who has been injured by another person’s use or employment of any method, act or practice declared to be unlawful by ... [Mass. Gen. Laws Ch. 176D § 3(9)][.]”, a violation of which may give rise to civil liability under 93A § 9. *Hopkins v. Liberty Mutual Insurance Co.*, 750 N.E.2d 943, 949-50 (Mass. 2001).

Ch. 176D § 3(9) identifies the following specific unfair methods and deceptive acts:

- (1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
- (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- (4) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
- (5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
- (6) Failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
- (7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;
- (8) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
- (9) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

(10) Making claims payments to insured or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;

(11) Making known to insured or claimants a policy of appealing from arbitration awards in favor of insured or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(12) Delaying the investigation or payments of claims by requiring that an insured or claimant, or the physician of either, submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(13) Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

(14) Failing to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

In order to make out a claim against an insurer under Mass. Gen. Laws Ch. 93A §9 and Mass. Gen. Laws Ch. 176D, an insured must establish:

(1) that an unfair trade practice occurred; and

(2) that the unfair practice resulted in a loss to the insured.

Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 169 F.3d 43, 57 (1st Cir. 1999); Mass. Gen. Laws Ch. 93A §11; Mass. Gen. Laws Ch. 176D § 3(9)(f).

Damages

Consequential damages are available for a plaintiff where the consequences of the defendant's actions were foreseeable. *DiMarzo v. Am. Mut. Ins. Co.*, 449 N.E.2d 1189, 1200 (Mass. 1983). Foreseeable loss stemming from bad faith is recoverable. *Clegg v. Butler*, 676 N.E. 2d 113,114 (Mass. 1997).

Emotional distress damages are available in instances where the insurer acted deceptively and knowingly. *Hershenow v. Enter. Rent-A-Car Co.*, 840 N.E.2d 526, 533 (Mass. 2006) (citing *Haddad v. Gonzalez*, 576 N.E.2d 658 (Mass. 1991) (following 1979 amendment to G.L. c. 93A, § 9).

Attorneys fees are awardable so long as the insured acts reasonably with regard to settlement offers. *Bobick v. U.S. Fid. & Guar. Ins. Co.*, 790 N.E.2d 653, 660-61 (Mass. 2003). Mass. Gen. Laws Chapter 93A § 2(3A).

Punitive damages are available under Massachusetts Consumer Protection Act, General Laws, and may be awarded up to three times the actual damages if the insurer is found to be engaging in unlawful practices, but not more than 25% of the claim if such a showing is not made. G.L. c. 93A, § 9(3).

MICHIGAN

Michigan has adopted a version of the UCSPA. Mich. Comp. Laws § 500.2026 (1951/1977).

Michigan does not recognize an independent common law cause of action for bad faith against a first-party insurer. *Roberts v. Auto–Owners Ins. Co.*, 374 NW2d 905 (Mich. 1985). However, Michigan law recognizes a contractual obligation on the part of the insurer to act in good faith. *Murphy v. Cincinnati Ins. Co.*, 772 F.2d 273, 276 (6th Cir. 1985) (“The duty of exercising good faith [extends] to the investigation of claims).

Michigan has enacted a Uniform Trade Practices Act, Mich. Comp. Laws Ann. § 500.2001-2050, which identifies specifically-prohibited conduct. See Mich. Comp. Laws Ann. § 500.2026(1). However, an insured has no private cause of action for violations of the Michigan Uniform Trade Practices Act. *Young v. Michigan Mut. Ins. Co.*, 362 N.W.2d 844 (Mich. Ct. app. 1984) (citing *Shavers v. Attorney General*, 267 N.W.2d 72, fn. 27 (Mich. 1978)).

An insured may bring an action for damages suffered as a result of an insurer’s failure to act in good faith. *Auman v. Fed Ins. Co.*, 266 N.W.2d 457, 458 (Mich. Ct. pp. 1978).

Damages

Consequential damages are available. “Thus, when an insurer acts in bad faith in the settlement of a claim with its insured, the insured is entitled to recover damages for economic loss proximately caused by the insurer’s actionable conduct.” *Ruwe v. Farmers Mut. United Ins. Co., Inc.*, 238 Neb. 67, 75 (1991).

Emotional distress damages are generally unavailable, unless contemplated by the parties at the time of execution of the policy. *Kewin v. Massachusetts Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980).

Attorneys fees are not available for first party bad faith claims. See *Burnside v. State Farm Fire & Cas. Co.*, 528 N.W.2d 749 (Mich. 1995); but see *Murphy*, 772 F.2d at 277 (“...the district court did not err by interpreting Michigan law to permit an award of attorneys fees as a proper measure of damages arising out of an insured’s implied contractual duty to act fairly and reasonably in investigating and refusing to pay an insured’s claim”).

Punitive damages are not available in Michigan. *Kewin v.* 295 N.W.2d at 74.

MINNESOTA

Minnesota has adopted a version of the UCSPA. Minn. Stat. § 72A.20(12) (1967/2006).

Minnesota does not recognize an independent common law cause of action for bad faith against a first-party insurer. However, Minnesota has passed a first-party bad faith law that creates a statutory cause of action against insurers who fail to act in good faith in settling a claim under a property and casualty insurance policy. Minn. Stat. §604.18 *et seq*; *see also* 226 *Summit, LLC v. Lawyers Title Ins. Corp*, 2011 U.S. Dist. LEXIS 80547 *21 (D. Minn. 2011).

In order to recover under Minnesota's bad faith law, the insured must show:

- (1) The insurer lacked a reasonable basis for denying the benefits of the insurance policy; and
- (2) That the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy.

Minn. Stat. §604.18, subd. 2(a).

The statutory standard reflects the common law approach taken by several other states expressed in *Anderson v. Continental Ins. Co.*, 271 N.W.2d 368, 377 (Wis. 1978), *i.e.*, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim in order to show bad faith against an insurer.

An insured must obtain permission from the court before it can assert a claim under Minnesota's bad faith law. Minn. Stat. §604.18, subd. 4. This takes the form of a motion to amend the complaint, which must be supported by evidence demonstrating the insurer's bad faith. *Id.*

Under Minnesota's bad faith law, an insured may recover an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or \$250,000, whichever is less; and attorneys fees (*see below*).

Damages:

Consequential damages may be recoverable in Minnesota. *Olson v. Rugloski*, 177 N.W.2d 385, 388 (Minn. 1979). Such damages are determined by the court after the fact finder determines the amount the insured is entitled to under the policy. Minn. Stat. §604.18, subd. 4. (*see below*).

Emotional distress damages are not available unless it is accompanied by an independent tort. *Saltou v. Dependable Ins. Co.*, 394 N.W.2d 629 (Minn. Ct. App. 1986).

Attorneys fees may sometimes be recoverable in an amount no greater than \$100,000 under Minn. Stat. § 604.18(3)(2). However, attorneys' fees are generally not recoverable. *American Standard. Ins. Co. v. Le*, 551 N.W.2d 923 (Minn. 1996); *Garrick v. Northland Ins. Co.*, 469 N.W.2d 709 (Minn. 1991).

Punitive damages are not available. See *In re Silicone Implant Ins. Coverage Litig.*, 652 N.W.2d 46 (Minn. Ct. App. 2002), *aff'd in part, rev'd in part on other grounds*, 667 N.W.2d 405, 422 (Minn. 2003), *reh'g denied* (Sept. 29, 2003) ("Breach of the implied covenant of good faith is not an independent tort in Minnesota, and punitive damages may not be recovered from insurers who breach their contractual obligations in bad faith.").

MISSISSIPPI

Mississippi has not adopted the UCSPA.

Mississippi recognizes an independent common law cause of action for bad faith against a first-party insurer. *See, e.g. Vaughn v. Monticello Ins. Co.*, 838 So. 2d 983 (Miss. Ct. App. 2001); *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888, 895 (Miss. 2006).

For liability policies, an insured must show that the insurer:

- (1) Lacked an arguable or legitimate basis for denying the claim;
- (2) That the insurer committed a willful or malicious wrong; or
- (3) Acted with gross and reckless disregard for the insured's rights.

Liberty Mut. Ins. Co. v. McKneely, 862 So. 2d 530 (Miss. 2003), *reh'g denied* (Sep. 2 2004); *see also United Am. Ins. Co. v. Merrill*, 978 So. 2d 613, 634 (Miss. 2007).

Bad faith does not exist if an insurance company can give the insured a legitimate or arguable reason for denying a claim. *See Pioneer Life Ins. Co. of Illinois v. Moss*, 513 So.2d 927, 929 (Miss. 1987). An insurer need only show a reasonable justification in fact or law to deny payment. *Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618, 628 (5th Cir. 2008). A claim for bad faith cannot be based on a clerical error or honest mistake. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1187 (Miss.1990); *Weems v. American Sec. Ins. Co.*, 486 So.2d 1222, 1227 (Miss.1986); *Consolidated American Life Ins. Co. v. Toche*, 410 So.2d 1303, 1306 (Miss. 1982).

The mere fact that [an insurer's] denial of coverage proves to be incorrect is insufficient to prove bad faith. *McKneely*, 862 So.2d at 533. However, [the insurer] has a duty to re-evaluate [the insured's] claim, even after the lawsuit was filed. *Broussard*, 523 F.3d at 629; *see also Spansel v. State Farm Fire and Cas. Co.*, 683 F.Supp.2d 444 (2010).

Bad faith is an intentional tort, requiring a showing of more than mere negligence. *Universal Life Ins. C. v. Veasley*, 610 So. 2d 290, 295 (Miss. 1992).

Mississippi courts will consider a variety of factors in determining an insurer's liability for failure to settle. *See Hartford Accident and Indem. Co. v. Foster*, 528 So. 2d 255 (Miss. 1988)

Miss Code. Ann. §85-5-35 identifies certain acts and practices of insurers that are considered to be acts of unfair competition and thus prohibited, yet there is no statutorily authorized private cause of action. *Burley v. Homeowner's Warranty Corp.*, 773 F. Supp 844 (S.D. Miss. 1990), *aff'd* 936 F.2d 569 (5th Cir. 1991).

Damages

Consequential damages may be available in Mississippi. *Broussard v. State Farm Fire & Cas. Co.*, 523 F3d 618, 628 (5th Cir. 2008) (citing *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1186 n.13 (Miss. 1990)).

Extracontractual damages, such as awards for emotional distress and attorneys' fees, are not warranted where the insurer can demonstrate "an arguable, good-faith basis for denial of a claim." *United Services Auto. Ass'n (USSA) v. Lisanby*, 47 So.3d 1172, 1178 (2010) (citing *United Amer. Ins. Co. v. Merrill*, 978 So.2d 613, 627 (citing *State Farm Ins. Co. v. Grimes*, 722 So.2d 637 (Miss.1998); see also *Standard Life Ins. Co. v. Veal*, 354 So.2d 239 (Miss.1977)); *Spansel*, 683 F.Supp.2d at 448.

Emotional distress damages are recoverable if the insured proves that the insurer's conduct is culpable. *Jones v. Benefit Trust Life Ins. Co.*, 800 F.2d 1397, 1401 (5th Cir. 1986); *Allred v. Fairchild*, 916 So. 2d 529, 532-33 (Miss. 2005).

Attorneys fees as well as court costs are recoverable in Mississippi. *Windmon v. Marshall*, 926 So. 2d 867, 874-75 (Miss. 2006); *Allred*, 916 So. 2d at 532-33.

Punitive damages if the insured can demonstrate:

- (1) That the insurer had no legitimate or arguable reason to deny payment of the claim; and
- (2) That the insurer has showed malice, gross negligence, or wanton disregard of the rights of the insured.

Vaughn, 838 So. 2d at 988; see also *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 972 (Miss. 1999).

MISSOURI

Missouri has adopted a version of the UCSPA. Mo. Rev. Stat. §§ 375.1000 to 375.1018 (1991/1993).

Missouri has adopted a version of the UCSPA Model Regulation. Mo. Code Regs. Ann. Tit. 20, §§ 100-1/010 to 100-1.300 (1974/2011).

Missouri does not recognize an independent common law cause of action for bad faith against a first-party insurer. *Duncan v. Andrew County Mut. Ins. Co.*, 665 S.W.2d 13, 19-20 (Mo. Ct. App. 1983).

Missouri Annotated Statute §375.420 creates a statutory claim against insurers for statutory penalties and attorneys' fees for failing to pay a covered loss. The statute states as follows:

In any action against any insurance company to recover the amount of any loss under [an insurance policy] except [an] automobile liability insurance, if it appears from the evidence that such company has refused to pay such loss without reasonable cause or excuse, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed twenty percent of the first fifteen hundred dollars of the loss, and ten percent of the amount of the loss in excess of fifteen hundred dollars and a reasonable attorneys fee; and the court shall enter judgment for the aggregate sum found in the verdict.

In order to recover under this statute, the insured must show that:

- (1) The insured had an insurance policy with insurer;
- (2) The insurer refused to pay a claim; and
- (3) The insurer's refusal to pay the claim was without reasonable cause or excuse.

Schubert v. Auto Owners Ins. Co., 649 F.3d 817 (8th Cir. 2011).

An insurer will not be liable for vexatious refusal to pay under this statute if the insurer has reasonable cause to believe that there is no liability under its policy. *Grobe v. Vantage Credit Union*, 679 F.Supp.2d 1020 (E.D.Mo. 2010).

An insurer is not liable for bad faith if there is any reasonable doubt as to its liability, in absence of conduct clearly reflecting delaying tactics, bad faith, or willful and recalcitrant attitude toward claimant. *Wiener v. Mutual Life Ins. Co. of N. Y.*, 61 F.Supp. 430 (E.D. Mo. 1945).

Damages

Consequential damages may be recovered only on the underlying breach of contract claim. *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d62, 67(Mo. 2000).

Emotional distress damages are available for bad faith failure to settle claims. *Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W3d 583, 590 (Mo. Ct. App.2008).

Under Mo. Ann. Stat. § 375.420 (West), an insured may recover: 20% of the first \$1,500 of the loss, 10% of the amount of the loss in excess of \$1,500; and reasonable attorneys fees.

Punitive damages are available as provided by statute. Mo. Ann. Stat. § 375.420 (West).

MONTANA

Montana has adopted a version of the UCSPA. Mont. Code Ann. § 33-18-201 (1977).

Montana no longer recognizes an independent common law cause of action for bad faith against a first-party insurer. *Stephens v. Safeco Insurance Company of America*, 852 P.2d 565 (Mont. 1993);

Additionally, The Montana Unfair Trade Practices Act (MUTPA) establishes an independent statutory cause of action against an insurer for actual damages caused by the insurer's unfair claims settlement practices. Mont. Code Ann. §§ 33-18-242 (1), (3), and (6).

Unfair claims settlement practices under the Montana UTPA include:

- (1) Misrepresenting pertinent facts relating to insurance coverage;
- (2) Misrepresenting the insurance policy provisions relating to insurance coverage;
- (3) Refusing to pay an insurance claim without conducting a reasonable investigation based upon all available information;
- (4) Failing to admit or deny insurance coverage for a claim within a reasonable time after proof of loss statements have been completed;
- (5) Neglecting to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear; and
- (6) Failing to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

Mont. Code Ann. § 33-18-201.

Insurance companies will not be held liable for violating the MUTPA if there was a reasonable basis in law or in fact for contesting the claim or the amount of the claim. Mont. Code Ann. § 33-18-242 (5)

Damages

Consequential damages are recoverable. Mont. Code Ann. § 33-18-242 (4).

Emotional distress damages are recoverable. *Stephens*, 852 P.2d 565.

Attorneys fees are generally not recoverable in Montana. *Mountain West Farm Bureau v. Hall*, 2001 MT 314, 308 Mont. 29, 38 P.3d 825 (2001).

Punitive damages are available under the MUTPA if the insured can prove that the insurer violated one or more specified subsections of Mont. Code Ann. § 33-18-201. The insured must also prove that the insurer acted with actual malice or actual fraud, defined by Mont. Code Ann. § 27-1-221. Punitive damages are limited to \$10,000,000. Mont. Code Ann. §27-1-220(3)).

NEBRASKA

Nebraska has adopted a version of the UCSPA. Neb. Rev. Stat. §§ 44-1536 to 44-1544 (1991/2002).

Nebraska has adopted a version of the UCSPA Model Regulation. 210 Neb. Admin. Code §60 (1992/1994).

Nebraska recognizes an independent common law cause of action for bad faith against a first-party insurer. *Braesch v. Union Ins. Co.*, 464 N.W.2d 769 (Neb. 1991).

To establish a bad faith claim in Nebraska, an insured must prove:

- (1) The insurance company lacked a reasonable basis for denying benefits of the insurance policy; and
- (2) The insurance company knew or recklessly disregarded the lack of a reasonable basis for denying the claim.

Id.

“Bad faith” includes any number of bad faith settlement tactics, such as inadequate investigation, delays in settlement, and false accusations. *Ruwe v. Farmers Mut. United Ins. Co.*, 469 N.W.2d 129, 135 (Neb. 1991).

However, an insurer cannot be held liable for bad faith if the insurer had an arguable basis or a lawful basis on which to deny the claim. *Williams v. Allstate Indemnity Co.*, 669 N.W.2d 455 (Neb. 2003); *Radecki v. Mutual of Omaha Ins. Co.*, 583 N.W.2d 320, 325 (Neb. 1998).

Damages

Consequential damages are available. “Thus, when an insurer acts in bad faith in the settlement of a claim with its insured, the insured is entitled to recover damages for economic loss proximately caused by the insurer’s actionable conduct.” *Ruwe v. Farmers Mut. United Ins. Co., Inc.* (1991) 238 Neb. 67, 75.

Emotional distress damages are available. *Braesch*, 464 N.W. 2d at 769. “Recovery for emotional distress caused by insurer’s bad faith refusal to pay an insured’s claim should be allowed only when the distress is severe and substantial. Other damage is suffered apart from the loss of the contract benefits and the emotional distress.” *Bailey v. Farmers Union Coop. Ins. Co.*, 1 Neb.App. 408, 427 (2002).

Attorneys’ Fees are available. Neb. Rev. Stat. § 44-359.

Punitive Damages are not available. *Distinctive Printing and Packaging Co. v. Cox*, 443 N.W.2d 566 (Neb. 1989).

NEVADA

Nevada has not adopted the UCSPA.

Nevada has adopted a version of the UCSPA Model Regulation. Nev. Admin. Code §§ 686A.600 to 686A.680 (1980/2006).

Nevada recognizes both common-law against a first-party insurer. *U.S. Fidelity & Guaranty Co. v. Peterson*, 540 P.2d 1070 (Nev. 1975).

An insurer acts in bad faith when it refuses “without proper cause” to compensate the insured for a loss covered by the policy. *Id.* at 1071. Such conduct gives rise to a breach of the implied covenant of good faith and fair dealing in the insurance policy and is actionable as a tort. *See, e.g., Pemberton v. Farmers Ins. Exch.*, 858 P.2d 380, 382 (Nev. 1993); *Falline v. GNLV Corp.*, 823 P.2d 888, 891 (Nev. 1991). *But see, e.g., Guar. Nat. Ins. Co. v. Potter*, 912 P.2d 267, 272 (Nev. 1996) (upholding finding of bad faith against insurance company that failed to pay for insured’s independent medical examination).

To establish a first-party bad faith claim in Nevada, an insured must prove:

- (1) The insurance company had no reasonable basis for disputing coverage or denying benefits under the insurance policy; and
- (2) The insurance company knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage or denying benefits under the insurance policy.

Falline v. GNLV Corp., 823 P.2d 888 (Nev. 1991).

Nevada also recognizes an independent statutory cause of action against an insurer for violations of the state’s unfair claims practices statute, which designates certain activities which will be deemed unfair practices in settling insurance claims “if an insurer engages in them with such frequency as to indicate a general business practice,” including:

- (a) Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue;
- (b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- (c) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies;

(d) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured;

(e) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear;

(f) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered;

(g) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application;

(h) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, or the representative, agent or broker of the insured;

(i) Failing, upon payment of a claim, to inform insureds or beneficiaries of the coverage under which payment is made;

(j) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(k) Delaying the investigation or payment of claims by requiring an insured or a claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(l) Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

(m) Failing to comply with the provisions of NRS 687B.310 to 687B.390, inclusive, or 687B.410.

(n) Failing to provide promptly to an insured a reasonable explanation of the basis in the insurance policy, with respect to the facts of the insured's claim and the applicable law, for the denial of the claim or for an offer to settle or compromise the claim;

(o) Advising an insured or claimant not to seek legal counsel; and

(p) Misleading an insured or claimant concerning any applicable statute of limitations.

Nev. Rev. Stat. § 686A.310.

An insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth [in subsection 1] as an unfair practice. *Id.*

Damages

Consequential damages are available in common law claims. *U.S. Fidelity & Guaranty Co.*, 540 P.2d 234.

Emotional Distress damages are available. *Famers Home Mut. Ins. Co. v. Fiscus*, 725 P.2d 234 (Nev. 1986).

Nev. Rev. Stat. §18.010 provides a limited basis for the award of attorneys fees. *See e.g. Fiscus*, 725 P.2d 234; *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007 (9th Cir. 2007).

Punitive damages are available. “in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant.” Nev. Rev. Stat. §42.010; *see also Ainsworth v Combined Ins. Co. of Am.*, 763 P.2d 673 (Nev. 1988) *cert. denied*, 493 U.S. 958 (1989).

NEW HAMPSHIRE

New Hampshire has adopted a version of the UCSPA. N.H. Rev. Stat. Ann. § 417:4 (1947/1991).

New Hampshire does not recognize an independent common law cause of action for bad faith against a first-party insurer. *Lawton v. Great Sw. Fire Ins. Co.*, 392 A.2d 576 (N.H. 1978).

Rather, plaintiffs in New Hampshire are limited to claims for breach of contract predicated on the breach of the covenant of good faith and fair dealing implied in the contract of insurance based on an insurer's breach of a contractual obligation of good faith and fair dealing. *Lawton*, 392 A.2d at 580. The covenant of good faith and fair dealing can be breach when an insurance company fails to make prompt payment under the policy or underpays on a loss for an improper purpose such as to coerce the insured into accepting less than the full amount of the loss. *Id.*

Insureds do not have standing to bring §417 claims until the Insurance Commissioner has determined that the practice in question violates the statute. *Lacaillade v. Loignon Champ-Carr, Inc.*, 2010 WL 2902251 (D.N.H. 2010).

Damages for breach of contract in such cases are not limited to the policy limits.

Damages

Consequential damages are available to the insured if he can prove that such damages were reasonably foreseeable by the insurance company and that he could not have reasonably avoided or mitigated such damages. *Jarvis v. Prudential Ins. Co.*, 448 A.2d 407 (N.H. 1982). Whether the defendant's delay was in fact in bad faith, whether the damages alleged to have resulted from the delay were in fact foreseeable, and whether these damages could have been avoided with reasonable efforts by the insured are questions for the jury. We hold that the trial court erred in ruling as a matter of law that the damages available to the insured for a breach of the insurance contract are limited to the policy amounts." *Lawton*, 392 A.2d 576.

Emotional Distress damages are not available. *Id.*

Attorneys fees are available if the insurer acted in bad faith in promoting unnecessary litigation. *Johnson v. Phoenix Mut. Ins. Co.*, 445 A.2d 1097, 1099 (N.H. 1982) (quoting *Lawton*, 392 A.2d at 581). New Hampshire Statute section 417:20 states, "whenever a consumer shall prevail in an action brought under RSA 417:19, I, the consumer shall be allowed to recover, in addition to damages, the cost of the suit, including reasonable attorneys' fees." § 491:22 provides that an insured can recover attorneys fees if successful in obtaining declaratory relief in an coverage dispute.

Punitive damages are not available. N.H. Rev. Stat. Ann. § 507:16.

NEW JERSEY

New Jersey has adopted a version of the UCSPA. N.J. Rev. Stat. § 17:29B-4 (1947/2001).

New Jersey has adopted a version of the UCSPA Model Regulation. N.J. Admin. Code §§ 11:2-17.1 to 11:2-17.14 (1981/2003).

New Jersey recognizes an independent common law cause of action for bad faith against a first-party insurer. *Pickett v. Lloyds*, 621 A.2d 445, 457 (1993).

To establish a bad faith claim in New Jersey, an insured must prove:

- (1) That the insurance company had no valid reasons to deny or delay processing the claim; and
- (2) That the insurance company knew or recklessly disregarded the fact that no valid reason existed for denying or delaying the processing of the claim.

Pickett, 621 A.2d at 458.

Thus, under New Jersey law, if an insurance company has a valid reason for denying a claim or for delaying the processing of a claim, it will not likely be held liable for bad faith. *Id.*

Damages

Consequential damages are available for economic losses that are fairly within the contemplation of the insurance company in a bad faith action. *Id.* “Because we view the cause of action as sounding more in contract than in tort, we believe that the familiar principles of contract law will suffice to measure the damages. Under contract law, a party who breaches a contract is liable for all of the natural and probable consequences of the breach of that contract.” *Id.*

Emotional Distress damages are not generally available, except in egregious circumstances involving outrageous conduct on the part of the insurer. “We agree with those courts that have held that absent egregious circumstances, no right to recover for emotional distress or punitive damages exists for an insurer’s allegedly wrongful refusal to pay a first-party claim.” *Id.*

Attorneys fees are available for actions on liability insurance claims. New Jersey Civil Rule 4:42-9(6), provides “in an action upon a liability or indemnity policy of insurance in favor of a successful claimant.” “In determining whether to award counsel fees a trial court must consider:

- (1) the insurer's good faith in refusing to pay the demands;

- (2) [the] excessiveness of plaintiff's demands;
- (3) [the] bona fides of one or both of the parties;
- (4) the insurer's justification in litigating the issue;
- (5) the insured's conduct in contributing substantially to the necessity [of litigation];
- (6) the general conduct of the parties; and
- (7) the totality of the circumstances.”

Scullion v. State Farm Ins. Co. 345 N.J. Super 431, 438 (App. Div. 2001); *see also Bello v. Merrimack Mut. Fire Ins. Co.*, 2012 N.J. Super. Unpub. LEXIS 1654 (App. Div. 2012) (The question of bad faith “was squarely presented to the jury” and “sufficient evidence was offered and apparently accepted by the jury as credible, supporting its finding of bad faith.” The court also reasoned that its award of attorneys fees was proper. Such an award was “foreseeable because [the insured’s] damages resulted from defendant’s bad faith denial of plaintiff’s claim.)

Punitive damages are available. “Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions.” N.J.S.A. §2A:15-5.12, provides, punitive damages are limited to five times compensatory damages or \$350,000, whichever is greater.

NEW MEXICO

New Mexico has adopted a version of the UCSPA. N.M. Stat. Ann. § 59A-16-20 (1985/1993).

New Mexico recognizes an independent tort claim for first-party insurance bad faith. Under New Mexico law, an insurer who fails to pay a first-party claim acts in bad faith where its reasons for denying or delaying payment of the claim are frivolous or unfounded. *State Farm Gen. Ins. Co. v. Clifton*, 527 P.2d 798, 800 (N.M. 1974).

In order to recover damages for first-party insurance bad faith, the plaintiff must produce evidence of bad faith or a fraudulent scheme. *Clifton*, 527 P.2d at 800. “Bad faith” is defined as “any frivolous or unfounded refusal to pay.” *Id.* A refusal to pay is frivolous or unfounded when it is arbitrary or baseless, lacking any support in the wording of the insurance policy or the circumstances surrounding the claim. *Id.*

Before an insured may pursue a bad faith case, they must have a separate finding that the insurer had a contractual duty to pay under the policy (i.e. under common law bad faith is a “hybrid action.”). *Charter Svcs. V. Principal Mutual Life Ins. Co.*, 868 p.2d 1307, 1313 (N.M. Ct. App.), *cert. denied*, 882 P.2d 21 (N.M. 1994).

New Mexico permits recovery of both compensatory and punitive damages in a first-party bad faith insurance claim. *Sloan v. State Farm Mut. Auto. Ins. Co.*, 85 P.3d 230, 237 (N.M. 2004).

Damages

Consequential damages are available in limited circumstances. N.M. Stat. Ann. § 59A-16-30.

It is unclear whether emotional distress damages are available (*i.e. no reported cases*).

Attorneys fees are recoverable. In any action where an insured prevails against an insurer who has not paid a claim on any type of first party coverage, the insured person may be awarded reasonable attorneys fees and costs of the action upon a finding by the court that the insurer acted unreasonably in failing to pay the claim.” N.M.S.A. section 39-2-1.

Punitive damages are available in common law cases where an insurer’s conduct was in reckless disregard of the interests of the plaintiff, was based on a dishonest judgment, or was otherwise malicious. *Sloan*, 85 P.3d at 237. It is unclear whether punitive damages are available under statute. *See Hovet v. Allstate Ins. Co.*, 89 P.3d 69, 77 (N.M. 2004).

NEW YORK

New York has adopted a version of the UCSPA. N.Y. Ins. Law § 2601 (1984).

New York has adopted a version of the UCSPA Model Regulation. N.Y. Comp. Codes R. & Regs. Tit. 11, §§ 216.0 to 216.7 (Regulation 64) (1972/2003).

New York has adopted other claims practices regulations. *See, e.g.*, Insurance Department Circular Letters 2009-3 (2009); 2008-14 (2008); and 2011-13 (2011).

New York does not recognize an independent common law cause of action for bad faith against a first-party insurer. *Acquista v. New York Life Ins. Co.*, 730 N.Y.S.2d 272, 278 (N.Y. App. Div. 2001); *Bi-Economy Market, Inc. v. Harleysville Ins. Co.*, 886 N.E. 2d 127 (N.Y. 2008). New York has adopted the position that the duties and obligations of the parties to an insurance policy are contractual. Damages recoverable for an insurer's breach of duty investigate, bargain, and settle claims in good faith are not limited to the policy limits set forth in the policy. *Id.*

When an insurer's conduct is "egregious" a claim in tort for fraud or tortious breach of the duty of care. *New York Univ. v. Cont'l Ins. Co.*, 662 N.E. 2d 763 (N.Y. 1995); *Continental Information Systems Corp v. Federal Ins. Co.* 2003 WL 145561 (S.D. N.Y. 2003).

New York does not recognize a common law or statutory cause of action for violation of N.Y. Ins. Law §2601. *Rocanova v. Equitable Life Assur. Soc'y*, 634 N.E.2d 940 (N.Y. 1994).

However, insured's may bring a cause of action under statute if an insurer's conduct has broad impact on consumers at large (*i.e.* deceptive business practices). New York Gen Bus. §349; *see e.g. N.Y. Univ.*, 662 N.E. 2d 763.

Damages

Consequential damages are available. "To determine whether consequential damages were reasonably contemplated by the parties, courts must look to the nature, purpose and particular circumstances of the contract known by the parties ... as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made. Of course, proof of consequential damages cannot be speculative or conjectural." *Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York* 10 N.Y.3d at 187, 193 (2008); *Panasia Estates, Inc. v. Hudson Ins. Co.* 10. N.Y.3d 200 (2008).

Emotional distress damages have not been awarded in bad faith cases. *Id.*

Attorneys fees are not available. *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21 (1979)

Punitive damages are only if the insured can state a cause of action in tort and show:

(1) The insurer's conduct was so egregious that punitive damages are necessary to vindicate a public right and deter the insurer from engaging in conduct that is "gross" and "morally reprehensible" and of "such wanton dishonesty as to imply criminal indifference to civil obligations;

(2) This egregious conduct was directed at the plaintiff; and

(3) It was also part of a pattern of conduct directed at the public generally.

New York Univ, , 662 N.E. 2d 763.

NORTH CAROLINA

North Carolina has adopted a version of the UCSPA. N.C. GEN. STAT. § 58-63-15 (1949/1987).

North Carolina recognizes an independent common law cause of action for bad faith against a first-party insurer. *See Von Hagel v. Blue Cross and Blue Shield*, 370 S.E.2d 695 (N.C. Ct. App. 1988).

To establish a bad faith claim in North Carolina, an insured must prove:

- (1) That the insurance carrier refused to pay after recognition of a valid claim;
- (2) That the insurance carrier acted in bad faith; and
- (3) That there was aggravating or outrageous conduct by the insurance carrier.

Lovell v. Nationwide Mut. Ins. Co., 424 S.E.2d 181, 184 (N.C. Ct. App. 1993) *aff'd*, 435 S.E.2d 71 (N.C. 1993).

To satisfy the showing of “bad faith,” a plaintiff must demonstrate that the insurance carrier’s refusal to pay is not based on an honest disagreement or innocent mistake. *Dailey v. Integon Gen. Ins. Corp.*, 331 S.E.2d 148, 155 (N.C. Ct. App. 1985). In order to show “aggravating or outrageous conduct” by the insurance carrier, a plaintiff must show fraud, malice, gross negligence, insult, rudeness, oppression, or wanton and reckless disregard of plaintiff’s rights. *Id.* at 154; *see also Zurich, infra*.

North Carolina recognizes a statutory cause of action for “unfair and deceptive acts.” N.C. Gen. STAT. §75-1.1; *Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674, 693 (N.C. 2004). An insurer can violate §75-1.1 by not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims for which liability has become reasonably clear. *Topsail Reef Homeowner’s Ass’n v. Zurich Specialties London, Ltd.*, 11 Fed. App’x 225, 2001 WL 565317 (4th Cir. 2001) (unpublished).

Under §75-1.1, an insured must show:

- (1) An unfair or deceptive business practice;
- (2) In or affecting commerce;
- (3) Which proximately caused injury to the plaintiff.

Dalton v. Camp, 548 S.E.2d 704, 711 (N.C. 2001).

Damages

Consequential damages are available, but will be determined by the nature of the tort. *Newton v. Standard Fire Ins. Co.* (1976) 291 N.C. 105. Consequential damages are available under statute if proximately caused by an unfair or deceptive business practice.

Emotional distress damages are available. *Dailey v. Integon General Ins. Corp.* 75 N.C.App. 387 (1985).

Attorneys fees are available. In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or

(2) The party instituting the action knew, or should have known, the action was frivolous and "malicious." N.C Gen. Stat. § 75-16.1; *Country Club of Johnston County, Inc., v. USF&G Co.*, 563 S.E.2d 269 (N.C. App. 2002).

Punitive damages are available. *Johnson v. First Union Corp.*, 496 S.E.2d 1, 9 (N.C. Ct. App. 1998) (reversing court's dismissal of a bad faith claim for punitive damages). An insured must show:

(1) A refusal to pay after the recognition of a valid claim;

(2) Bad faith; and

(3) Aggravating or outrageous conduct.

Defeat the Beat, Inc. v. Lloyd's London, 194 N.C. App. 108 (N.C. Ct. App. 2008).

NORTH DAKOTA

North Dakota has adopted a version of the UCSPA. N.D. Cent. Code §§ 26.1-04-03 (1983/2003).

North Dakota recognizes an independent common law cause of action for bad faith against a first-party insurer. *Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co.*, 279 N.W.2d 638, 643 (N.D. 1979); *Bender v. Time Ins. Co.*, 286 N.W.2d 489, 493 (N.D. 1979).

To establish a bad faith claim, plaintiffs must prove that the insurer acted unreasonably in handling an insured's claim by failing to compensate the insured without proper cause, for a loss covered by the policy. *Seifert v. Farmers Union Mutual Ins. Co.*, 497 N.W.2d 694, 698 (N.D. 1993).

An insurer does not act in bad faith in denying a claim that is fairly debatable, or if there is a reasonable basis for denying the claim or delaying payment. *Fetch v. Quam*, 623 N.W.2d 357 (N.D. 2001).

Damages

Consequential damages are available. See *Corwin Chrysler-Plymouth, Inc.* 279 N.W.2d 638; see also *Smith v. American Family Mut. Ins. Co.*, 294 N.W.2d 751 (N.D. 1980).

Emotional distress damages are available. "Thus, in a case of this kind, damages for mental anguish may be 'general' damages—'damages for a harm so frequently resulting from the tort that is the basis of the action that the existence of the damages is normally to be anticipated and hence need not be alleged in order to be proved.'" *Ingalls v. Paul Revere Life Ins. Group* 561 N.W.2d 273 (N.D. 1997) "Because a primary consideration in purchasing insurance is the peace of mind and security it will provide, an insured may recover for any emotional distress resulting from an insurer's bad faith." *Id.* at 283.

Attorneys fees are available. In *Corwin Chrysler-Plymouth*, 279 N.W.2d at 643, this Court said an insurer who does not act in good faith in handling an insured's claim may be liable for all damages and detriment proximately caused by the breach, including attorney fees." *Hartman v. Estate of Miller*, 656 N.W.2d 676, 686 (2003).

Punitive damages are available. "The insurer's duty to act in good faith, however, emanates not from the terms of the insurance contract but from an obligation imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. Thus, in a proper case, an insurance company found to have acted in bad faith could be required to pay punitive damages to its insured." *Corwin Chrysler-Plymouth*, 279 N.W.2d 676. Punitive damages are capped at "two times the amount of compensatory damages or two hundred thousand dollars, whichever is greater". North Dakota Century Code section 32-03.2-11(4).

OHIO

Ohio has adopted a version of the UCSPA. Ohio Admin. Code § 3901-1-07 (1975).

Ohio has adopted a version of the UCSPA Model Regulation. Ohio Admin. Code 3901:1-54 (1993/2004).

Ohio recognizes an independent common law cause of action for bad faith against a first-party insurer. *See, e.g. Zoppo v. Homestead ins. Co.*, 644 N.E.2d 397 (Ohio 1994).

To establish a bad faith claim in Ohio, an insured must establish that an insurer's refusal to pay the claim "is not predicated upon circumstances that furnish reasonable justification therefore." *Zoppo*, 644 N.E.2d at 400. An insured does not need to establish that an insurer's failure to pay the claim was intentional, as intent is not an element of bad faith. *Id.* A lack of "reasonable justification" exists when an insurer refuses to pay a claim in an arbitrary or capricious manner. *Ohio Nat'l Life Assur. Corp v. Satterfield*, 2011 Ohio 2116 2011 Ohio App. LEXIS 1811 (Ohio Ct. App. May 4, 2011).

Damages

Consequential damages are available. We hold that an insurer who acts in bad faith is liable for those compensatory damages flowing from the bad faith conduct of the insurer and caused by the insurer's breach of contract." *Zoppo*, 644 N.E. 2d at 402.

Emotional distress damages are available. "A bad faith claim, if proven, allows for recovery of extracontractual damages. These are damages over and above those covered by the insurance contract sustained by the insured as a consequence of the insurer's bad faith." *LeForge v. Nationwide Mut. Fire Ins. Co.*, 82 Ohio App.3d 692, 700 (Ohio App. 1992).

Attorneys fees are available. "Attorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted." *Zoppo*, 644 N.E. at 402.

Punitive damages are available. "Inasmuch as the breach of the duty to act in good faith is tortious in nature, punitive damages may be recovered against an insurer who breaches his duty of good faith in refusing to pay a claim of its insured upon adequate proof." *See Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 277 (Ohio 1993). *See also: Dard-inger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, (Ohio 2002).

OKLAHOMA

Oklahoma has not adopted the UCSPA.

Oklahoma has adopted a claims practices statute. Okla. Stat. Tit. 36, §§ 1250.1 to 1250.16 (1986/2009).

Oklahoma has adopted a version of the UCSPA Model Regulation. Okla. Admin. Code §§ 365:15-3-1 to 365:15-3-9 (1989/1994).

Oklahoma recognizes an independent common law cause of action for bad faith against a first-party insurer. *Christian v. American Home Assur. Co.*, 577 P.2d 899, 904-05 (Okla. 1977).

To establish a bad faith claim in Oklahoma, an insured must prove:

- (1) He/she was covered under the insurance policy;
- (2) The actions of the insurer were unreasonable under the circumstances;
- (3) The insurer failed to deal fairly and act in good faith toward him/her in its handling of the claim; and
- (4) The breach or violation of the duty of good faith and fair dealing was the direct cause of the insured's damages.

Hale v. A.G. Ins. Co., 138 P.3d 567 (Okla. Civ. App. 2006) (citing *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080, 1093 (Okla. 2005)).

In other words, a bad faith claim turns on what the insurer knew or should have known at the time the insured requested payment under the applicable policy. *Hale*, 138 P.3d at 572-73.

There is no private right of action under §1250.5. *Walker v. Chouteau Lime Co.*, 849 P.2d 1085, 1086 (Okla. 1993).

Damages

An insured may recover both actual and consequential damages due to an insurer's bad faith. *Hale v. A.G. Ins. Co.*, 138 P.3d at 567 (Okla. Civ. App. 2006).

Emotional distress damages are available. Under the law of Oklahoma, recovery of damages for mental suffering does not require either 'severe' mental distress or 'outrageous' conduct to be actionable..." *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 816 (10th Cir. 1993).

Attorneys fees are available. Okla. Stat. Title 36 §3629.

Punitive damages are available. An insured may also recover punitive damages if it can establish that the insurer's conduct demonstrated a wanton or reckless disregard for the rights of the insured. *Willis v. Midland Risk Ins. Co.*, 42 F.3d 607, 615 (10th Cir. 1994). 23 Okla. Stat. Ann. §9.1 caps punitive damages awards. *See, e.g. Capstick*, 998 F.2d at 819.

OREGON

Oregon has adopted a version of the UCSPA. Or. Rev. Stat. § 746.230 (1967/1989).

Oregon has adopted a version of the UCSPA Model Regulation. Or. Admin. R. 836-080-0205 to 836-080-0250 (1980/1992).

Oregon does recognize an independent common law cause of action for bad faith against a first-party insurer, but the action only lies in tort for liability policies. *See McKenzie v. Pacific Health & Life Ins. Co.*, 847 P.2d 879, 881 (Or. 1993.) (holding that “a claim for breach of the duty of good faith may be pursued independently of a claim for breach of the express terms of the contract”); *see also Richardson v. Guardian Life Ins.*, 984 P.2d 917, 923 (Or. 1999) (“it is possible for an insurer to breach the duty of good faith dealing without also breaching the insurance contract...”).

Damages

Consequential damages are available but are limited to those damages that reasonably could have been contemplated by the parties at the time of the execution of the contract. “Thus, whether it is reasonable to include as consequential damages settlement costs in excess of the provisions of an insurance policy must be examined by reference to what was reasonably contemplated by the parties at the time of the execution of the policy.” *Northwest Pump & Equipment Co. v. America States Ins. Co.*, 144 Or. App. 222, 229 (1996).

Emotional distress damages are available, but only for emotional distress caused by the physical harm resulting from the insurer’s breach of the insurance contract. *McKenzie*, 847 P.2d at 882.

Attorneys fees are available if settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the costs of the action and any appeal thereon.” ORS § 742.061(1).

Punitive damages are not generally available but are recoverable if the insurer’s conduct amounts to outrageous conduct that could give rise to a separate tort action and the recovery of punitive damages. *Farris v. U.S. Fid & Guar. Co.* 284 Or. 453 (1978); *Employers’ Fire Ins. Co. v. Love It Ice Cream Co.* 64 Or. App 784 (1983).

PENNSYLVANIA

Pennsylvania has adopted a version of the UCSPA. 40 Pa. Stat. Ann. § 1171.5(a)(10) (1974/2006).

Pennsylvania has adopted a version of the UCSPA Model Regs. 31 Pa. Code §§ 146.1 to 146.10 (1978).

Pennsylvania does not recognize an independent common law cause of action for bad faith against a first-party insurer. *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Company*, 494 Pa. 501, 507, 431 A.2d 966, 970 (1981); *Romano v. Nationwide Mutual Fire Ins. Co.*, 435 Pa. Super. 545, 552, 646 A.2d 1228, 1232 (1994).

However, Pennsylvania has created a statutory remedy against an insurer for bad faith under 42 P.S. §8371. This statute provides that:

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made...in an amount equal to the prime rate of interest plus 3%.
- (2) Award punitive damages against the insurer.
- (3) Assess court costs and attorney fees against the insurer.

42 Pa. Cons. Stat. Ann. § 8371 (West)

Pennsylvania courts have interpreted “bad faith” on part of an insurer to be “any frivolous or unfounded refusal to pay proceeds of a policy.” *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. 1994). It implies a dishonest purpose and means a breach of a known duty (i.e. good faith) motivated by self-interest or ill will, but mere negligence or bad judgment is not bad faith. *Id.*

To establish a bad faith claim, an insured must establish that:

- (1) The insurer did not have a reasonable basis for denying policy benefits;
and
- (2) Knew or recklessly disregarded its lack of reasonable basis in denying the claim.

Id. (citing *American Franklin Life Insurance Company v. Galati*, 776 F.Supp. 1054, 1064 (E.D. Pa. 1991))

Damages

Consequential damages are available. “We hold...the insurer is liable for the known and/or foreseeable compensatory damages of its insured that reasonably flow from the insurer's bad faith conduct.” *Birth Center v. St. Paul Companies, Inc.*, 567 Pa. 386, 390 (2001).

Emotional distress damages are not generally available. *D’Ambrosio v. Pennsylvania Nat. Mut. Ins. Co.*, 494 Pa. 501 (1981); *Duffy v. Nationwide Mut. Ins. Co.*, 1993 WL 475501 at *4 (E.D. Pa. 1993); *but see Birth Center v. St. Paul Companies*, 727 A.2d 1446 (M.D. Pa. 2000) (The possibility cannot be ruled out that emotional distress damages may be recoverable on a contract where, for example, the breach is of such a kind that serious emotional disturbance was a particularly likely result...the present record falls far short of establishing such conduct) (quoting *D’Ambrosio*, 431 A.2d at 971 FN 11).

Attorneys fees are authorized by the Pennsylvania bad faith statute. 42 Pa. C.S.A. § 8371(3).

Punitive damages are authorized by the Pennsylvania bad faith statute. 42 Pa. C.S.A. § 8371(2)

RHODE ISLAND

Rhode Island has adopted a version of the UCSPA. R.I. Gen. Laws §§ 27-9.1-1 to 27-9.1-9 (1993/2010).

Rhode Island has adopted a version of the UCSPA Model Regulation. R.I. Code R. §§ 27-73-001 to 27-73-011 (1994); §§ 27-13-001 to 27-13-007 (2005/2006).

Rhode Island recognizes an independent common law cause of action against a first-party insurer. *Zarrella v. Minn. Mut. Life. Ins. Co.*, 824 A.2d 1249 (R.I. 2003).

Rhode Island has created a statutory remedy against an insurer for bad faith, which states:

... an insured under any insurance policy ... may bring an action against the insurer issuing the policy when it is alleged the insurer wrongfully and in bad faith refused to pay or settle a claim made pursuant to the provisions of the policy, or otherwise wrongfully and in bad faith refused to timely perform its obligations under the contract of insurance. In any action brought pursuant to this section, an insured may also make claim for compensatory damages, punitive damages, and reasonable attorney fees.

R.I. Gen. Laws Ann. § 9-1-33 (West)

To establish bad faith under this law, an insured must establish that the insurer denied coverage or refused payment without a reasonable basis in fact or law for the denial. *Skaling v. Aetna Ins. Co.*, 799 A.2d 997, 1010 (R.I. 2002). This turns on whether there is sufficient evidence from which reasonable minds could conclude that in the investigation, evaluation and processing of the claim, the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable. *Id.*

However, an insurer does not act in bad faith if its obligation to pay the claim is “fairly debatable.” *Id.*

Damages

Consequential damages are available. “The duty of an insurer to deal fairly and in good faith with an insured is implied by law. Since violation of this duty sounds in contract as well as in tort, the insured may obtain consequential damages for economic loss and emotional distress and, when appropriate, punitive damages.” *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 319.

Emotional distress damages are available. *Ibid.*

Attorneys fees are available under statute but are not generally available under common law. Gen. Laws of R. I. § 9-1-33; *Insurance Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403, 419 (R.I. 2001) (quoting *Bibeault*, 417 A.2d 319).

Punitive damages are available when an insurer acts with malice, wantonness, or willfulness. *Id.*

SOUTH CAROLINA

South Carolina has adopted a version of the UCSPA. S.C. Code Ann. §§ 38-59-10 to 38-59-50 (1987).

South Carolina recognizes an independent common law cause of action for bad faith against a first-party insurer. *Nichols v. State Farm Mut. Auto. Ins. Co.*, 306 S.E.2d 616 (1983).

To establish a bad faith claim in South Carolina, an insured must prove:

- (1) The existence of an insurance policy between the insured and the insurer;
- (2) The insurer's refusal to pay benefits due under the policy;
- (3) That the insurer's refusal to pay benefits due under the policy was in bad faith or an unreasonable action in breach of an implied covenant of good faith and fair dealing;
- (4) Damage to the insured.

Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 466 S.E.2d 727, 730 (S.C. 1996).

An insurer does not act in bad faith if there are reasonable grounds for contesting the claim. *Crossley v. State Farm Mut. Auto. Ins. Co.*, 415 S.E.2d 393, 397 (S.C. 1992).

Administrative review before the Chief Insurance Commissioner is available under S.C. Code Ann §§38-57-10. *See, e.g. Masterclean v. Star Ins. Co.*, 556 S.E.2d 371, 377 (S.C. 2001).

Damages

Consequential damages are available. "Where insurance contracts are concerned, Nichols holds that damages are not so limited if the refusal to pay is unreasonable or in bad faith. Instead, the insured may recover consequential damages caused by the insurer's refusal to pay without regard to the policy limits." *Brown v. South Carolina Ins. Co.* 284 S.C. 47, 58 (1984).

It is unclear whether emotional distress damages are available in South Carolina (i.e. no reported cases).

Attorneys fees are available. "In the event of a claim, loss, or damage which is covered by a policy of insurance ... and the refusal of the insurer ... to pay the claim within ninety days after a demand has been made by the holder of the policy ... and a finding on suit of the contract made by the trial judge that the refusal was without reasonable cause or in bad faith, the insurer ... is liable to pay the holder, in addition to any sum or any amount otherwise recoverable, all

reasonable attorneys' fees for the prosecution of the case against the insurer... The amount of reasonable attorneys' fees must be determined by the trial judge and the amount added to the judgment. The amount of the attorneys' fees may not exceed one-third of the amount of the judgment." S.C. Code Ann. § 38-59-40

Punitive damages are available. "If an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. Actual damages are not limited by the contract. Further, if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages." *See Nichols*, 306 S.E.2d at 619 (affirming award of punitive damages where insurer's actions were willful or in reckless disregard of insured's rights).

SOUTH DAKOTA

South Dakota has adopted a version of the UCSPA. S.D. CODIFIED LAWS § 58-33-67 (1986/1989).

South Dakota recognizes an independent common law cause of action for bad faith against a first-party insurer. *Champion v. United States Fidelity & Guaranty Co.*, 399 N.W.2d 320, 324 (S.D. 1987); *Stene v. State Farm Mut. Ins. Co.*, 583 N.W.2d 399, 403 (S.D. 1998).

To establish a bad faith claim in South Dakota, an insured must prove:

- (1) That the insurer did not have a reasonable basis for denying or withholding policy benefits or for failing to comply with the insurance contract;
- (2) The insurer knew it did not have a reasonable basis for denying or withholding policy benefits or acted with reckless disregard in determining whether it had a reasonable basis; and
- (3) The insured suffered damages by the insurer's actions.

Id.

Bad faith is an intentional tort and typically occurs when an insurance company consciously engages in wrongdoing during its processing or paying of policy benefits to its insured. *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 771 N.W.2d 623, 629 (S.D. 2009); *Hein v. Acuity*, 731 N.W.2d 231, 235 (S.D. 2007). Bad faith may include the failure to conduct a reasonable investigation concerning the claim. *Dakota, Minnesota & Eastern R.R. Corp.*, 771 N.W.2d at 629; *Walz v. Fireman's Fund Ins. Co.*, 556 N.W.2d 68, 70 (S.D. 1996); *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752, 758 (S.D. 1994).

However, if a claim is fairly debatable, then the insurer has a reasonable basis to deny the claim. *Dakota, Minnesota & Eastern R.R. Corp.*, 771 N.W.2d at 630. Whether a claim is fairly debatable depends on the facts and law available to the insurer at the time it made the decision to deny coverage. *Dakota, Minnesota & Eastern R.R. Corp.*, 771 N.W.2d at 630; *Walz*, 556 N.W.2d at 70.

Damages

Consequential damages are available. *Athey v. Farmers Ins. Exchange* 234 F.3d 357, 363 (8th Cir. 2000).

Emotional Distress damages are available, but the plaintiff must establish that they suffered pecuniary losses that had caused the emotional distress (i.e. pecuniary loss). *Id.*

Attorneys fees are available. "SDCL 58-12-13 provides in relevant part that: In all actions or proceedings hereafter commenced against any ... insurance company ... on any policy ... of insurance, if it appears from the evidence that such company ... has refused to pay the full amount of such loss, and that such refusal is vexatious or without reasonable cause, ... the trial court and the appellate court, shall, if judgment or an award is rendered for plaintiff, allow the plaintiff a reasonable sum as an attorneys fee to be recovered and collected as a part of the costs..." *Sawyer v. Farm Bureau Mut. Ins. Co.* 619 N.W.2d 644, 652 (S.D 2000).

Punitive damages are available when supported by evidence of an insurer's presumed malice. *See Athey v. Farmers Ins. Exch.*, 234 F.3d 357, 363 (8th Cir. 2000) (insurer's act of conditioning settlement of UIM policy on release of bad faith claim sufficient to support punitive damages award); *Kirchoff v. Am. Cas. Co.*, 997 F.2d 401, 406 (8th Cir. 1993).

TENNESSEE

Tennessee has adopted a version of the UCSPA. Tenn. Code Ann. §§ 58-8-2 to 58-8-13 (2008)

Tennessee does not recognize an independent common law cause of action for bad faith against a first-party insurer. *See, e.g. Fred Simmons Trucking, Inc. v. U.S. Fidelity and Guar. Co.*, No. E2003-02892-COA-R3-CV, 2004 WL 2709262 at *5 (Tenn. Ct. App. 2004) (unpublished).

However, Tennessee does recognize a statutory remedy against an insurer for bad faith under Tenn. Code Ann. § 56-7-105(a). Under this statute, an insured can recover for bad faith if it can establish:

- (1) The policy of insurance must by its terms have become due and payable;
- (2) A formal demand for payment must have been made;
- (3) The insured must wait 60 days after making his demand before filing suit unless there is a refusal to pay prior to the expiration of the 60 days; and
- (4) The refusal to pay must not have been in good faith.

The courts have further explained that to “discharge its duty to act in good faith, an insurer must exercise ordinary care and diligence in investigating the claim and the extent of damage for which the insured may be held liable.” *Johnson v. Tennessee Farmers Mut. Ins. Co.*, 205 S.W.3d 365 (Tenn. 2006).

An insurer’s mere negligence is insufficient to impose liability under Tennessee’s bad faith statute. *Id.* Similarly, an insurer’s honest mistake in judgment following an investigation performed with ordinary care and diligence is insufficient to impose liability under Tennessee’s bad faith statute. *Id.*

Finally, an insurer cannot be liable for bad faith if it appears that there is a reasonable basis for disagreement among reasonable minds as to its handling of the claim. *Id.*

The Tennessee Consumer Protection Act applies to the acts and practices of insurance companies, including bad faith. *See Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 925-25 (Tenn. Ct. App. 2004); *Sparks v. Allstate Ins. Co.*, 98 F.Supp. 2d 933, 938 (W.D. Tenn. 2000).

Damages

Consequential damages are available. Tennessee Code § 56-7-105.

Emotional Distress damages are available under Tennessee Code § 56-7-105, but the conduct complained of must be outrageous and as a result of that conduct serious mental injury. “From

the foregoing portion of the Restatement, we find the two factors which must concur in order to outweigh the policy against allowing an action for the infliction of mental disturbance: (a) the conduct complained of must have been outrageous, not tolerated in civilized society, and (b) as a result of the outrageous conduct, there must be serious mental injury.” *Holt v. American Progressive Life Ins. Co.* 731 S.W.2d 923, 927 (Tenn. Ct. App. 1987)

Attorneys fees are available per discretion of the jury. Tennessee Code § 56-7-105(a)

Punitive damages are not recoverable. § 56-7-105 provided a penalty, which is the exclusive extra-compensatory remedy. *See Fred Simmons Trucking, Inc, supra; Westfield Ins. Co. v. RLP Partners, LLC*, No. 3:13–00106, M.D. Tenn., 2013 WL 2383608 (May 30, 2013); *Chandler v. Prudential Ins. Co.*, 715 S.W.2d 615 (Tenn. App. 1986).

TEXAS

Texas has adopted a version of the UCSPA. Tex. Ins. Code Ann. §§ 542.001 to 542.014 (2005).

Texas recognizes a common-law cause of action against a first-party insurer. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995); *State Farm Fire and Cas/ Co. v. Simmons*, 963 S.W. 2d 42, 44 (Tex. 1998)

An insurer has a common law duty to fairly and in good faith process and pay claims. This duty is breached when:

- (1) there is an absence of a reasonable basis for denying or delaying payment of benefits under the policy; and
- (2) the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim.

Republic Ins. Co., 903 S.W. at 340.

Texas also allows an insured to bring a separate statutory claim under the state's deceptive trade practices statute, Tex. Ins. Code. § 541.151. Prohibited conduct giving rise to a statutory claim under this law includes:

- Misrepresenting a material fact or policy provision relating to coverage.
- Failure to attempt, in good faith, a prompt, fair and equitable settlement when coverage on a claim has become clear.
- Failure to provide an explanation of a denial.
- Failure to affirm or deny coverage, or submit a reservation of rights, within a reasonable time.
- Unreasonably delaying settlement on the basis that other coverage may be available, or third parties are reasonable except as specifically provided in the policy.
- Failure to pay a claim without conducting a reasonable investigation.

Tex. Ins. Code § 541.060.

An insurer found liable under Texas's deceptive trade practices statute may be liable for:

- (1) Actual damages;
- (2) Court costs and attorneys fees; and
- (3) Treble damages (if the insurer acted “knowingly”)

Tex. Ins. Code § 541.152.

Damages

Consequential damages are available. “When an insured establishes that the insurer breached the duty of good faith and fair dealing they are entitled to recover all damages proximately caused by the insurer’s actions.” *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex.1987); *Chitsey v. National Lloyds Ins. Co.* 738 S.W.2d 641 (Tex. 1987).

Emotional distress damages (*mental anguish*) are available if the insurer’s actions were from willful conduct and resulted in physical injury. *Arnold v. Nat’l County Mut. Fire. Ins. Co.*, 725 S.W.2d 165, 168 (Tex. 1987) Emotional distress damages may not be recovered absent proof of a willful or grossly negligent violation. See: Texas Insurance Code § 541.152(b); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430 (Tex. 1995). Emotional distress damages under common law are recoverable but are limited to actions when the denial or delay of claimant’s payment has seriously disrupted the insured’s life. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997).

Reasonable and necessary attorneys’ fees can be awarded on statutory bad faith claims under the Texas Insurance Code § 541.152(a)(1) and Tex. Bus. & Com. Code §17.50(d). Although under common law attorneys’ fees are not normally recoverable, they may be recovered when the action is joined with an action on the policy. *Grapevine Excavation, Inc. v. Maryland Lloyd’s*, 35 S.W.3d 1,5 (Tex. 2000).

Punitive damages are available when the breach of duty of good faith and fair dealing is accompanied by malicious, intentional, fraudulent or grossly negligent conduct. *State Farm Fire and Cas. Co.*, 963 S.W.2d 42, 47 (Tex. 1998). An insured may seek exemplary damages under Texas Insurance Code § 541 and Texas Business and Commerce Code § 17.50(b)(1) if the unfair or deceptive acts are committed knowingly or intentionally. The claimant may seek up to three times the amount of economic damages. For common law claims, exemplary damages may be awarded if the claimant proves by clear and convincing evidence that harm results from the defendant's fraud, malice, or gross negligence. Tex. Civ. Prac. & Remedies Code § 41.003(a).

UTAH

Utah has adopted a version of the UCSPA. Utah Code Ann. §§ 31A-26-303-31A-26-310 (1986).

Utah has adopted a version of the UCSPA Model Regulation. Utah Admin. Code R. 590-89 (1982/1989); r. 590-190 (1999/2009) 590-192-1 to 590-192-14 (1999/2012).

Utah does not recognize an independent common law cause of action for bad faith against a first-party insurer. *Beck v. Farmers Ins. Exch.*, 701 P.2d 795 (Utah 1985). However, Utah does recognize a cause of action for breach of the implied covenant of good faith and fair dealing. *Saleh v. Farmers Ins. Exch.*, 133 P.3d 428 (Utah 2006).

There is no private cause of action under §31A-26-303. *Saleh*, 133 P.2d at 436.

Damages

Consequential damages are available. *Beck*, 701 P.2d at 801. Damages can include general damages, which flow naturally from the breach. *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 468 (Utah 1996).

Emotional distress damages are available, but “the foreseeability of any such damages will always hinge upon the nature and language of the contract and the reasonable expectations of the parties.” *Beck*, 701 P.2d at 802.

Attorneys fees are available for breach of the covenant of good faith and fair dealing only. *Id*; *Saleh*, 133 P.3d at 435 n.4.

Punitive damages are not available since the action lies in contract, not in tort. *Gagon v. State Farm Mut. Auto Ins. Co.*, 771 P.2d 325 (Utah 1988).

VERMONT

Vermont has adopted a version of the UCSPA. Vt. Stat. Ann. Tit. 8, § 4724 (1955/1987).

Vermont has adopted a version of the UCSPA Model Regulation 79 Vt. Code R. § 2 (1979).

Vermont recognizes an independent common law cause of action for bad faith against a first-party insurer. *Peerless Ins. Co. v. Frederick*, 869 A.2d 112, 116 (Vt. 2004).

To establish a bad faith claim in Vermont, an insured must prove:

- (1) The insurer had no reasonable basis to deny the insured the benefits of the policy; and
- (2) The insurer knew or recklessly disregarded the fact that it had no reasonable basis for denying the insured's claim.

Id.

There is no private right of action under § 4724. *Laroque v. State Farm Ins. Co.*, 660 A.2d 286, 288 (Vt. 1995)

Damages

Consequential damages are available. "Under Vermont law consequential damages are routinely awarded, regardless of foreseeability, in tort actions." *Phillips v. Aetna Life Ins. Co.*, 473 F.Supp. 984, 989 (D. Vt. 1979).

Emotional Distress damages may be presented to the jury. *Buote v. Verizon New England*, 249 F. Supp. 2d 422 (D.Vt. 2003).

Attorneys fees are available for "dominating reasons of justice." See *Village of Morrisville Water & Light Dept. v. U.S. Fid. & Guar. Co.*, 775 F. Supp. 718 (D.Vt. 1991); *Burlington Drug Co. v. Royal Globe Ins. Co.*, 616 F. Supp. 481 (D.Vt. 1985); *Concord Gen. Mut. Ins. Co v. Woods*, 824 A.2d 572, 579 (Vt. 2003); *Monahan v. GMAC Mortg. Corp.*, 893 A.2d 298, 324 (Vt. 2005).

Punitive damages are available if the insurer has exhibited malice (gross misconduct or reckless disregard). *Davis v. Liberty Mut. Ins. Co.*, 19 F. Supp. 2d 193, 203 (D. Vt. 1998).

VIRGINIA

Virginia has adopted a version of the UCSPA. Va. Code Ann. §§ 38.2-510 (1986/2001).

Virginia has adopted other claims practices legislation. Va. Code Ann. § 38.2-517 (1992/1999).

Virginia has adopted a version of the UCSPA Model Regs. 14 Va. Admin. Code §§ 5-400-10-5-400-80 (1978).

Virginia does not recognize an independent common law cause of action against a first-party insurer. *See, e.g., A&E Supply Co. Inc. v. Nationwide Fire Ins. Co.*, 798 F.2d 669, 676 (4th Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987).

In determining whether an insurer acted in bad faith for purposes of awarding attorneys fees under Virginia law, courts apply a reasonableness standard and consider:

- (1) Whether reasonable minds could differ in the interpretation of policy provisions defining coverage and exclusions;
- (2) Whether the insurer had made a reasonable investigation of the facts and circumstances underlying the insured's claim;
- (3) Whether the evidence discovered reasonably supports a denial of liability;
- (4) Whether it appears that the insurer's refusal to pay was used merely as a tool in settlement negotiations; and
- (5) Whether the defense the insurer asserts at trial raises an issue of first impression or a reasonably debatable question of law or fact.

Carolina Cas. Ins. Co. v. Draper & Goldberg, PLLC, 369 F.Supp.2d 667 (E.D. Va. 2004).

Damages

Consequential damages are available. *Harris v. USAA Cas. Ins. Co.*, 37 Va. Cir. 553 (Va. Cir. Ct. 1994). "But if an indemnitor has violated the contractual duty of good faith, the indemnitee may recover full general and consequential damages." *A&E Supply Co*, 798 F2d at 677-78.

Emotional distress damages are not available unless "the conduct of the insurer rises to the level of an independent tort action." *Timms v. Rosenblum*, 713 F. Supp. 948, 954 (E.D.Va. 1989).

Attorneys fees are available. Virginia law allows recovery of attorneys fees if they prevail against their insurer in a suit for insurance benefits. Va. Code Ann. § 32.2-209(A). To recover,

insureds must establish that their insurers failed to act in good faith in denying coverage or in failing or refusing to make payment under the policy. Virginia Code § 8.01-66.6, 28.2-209 and 38.2-807.

Punitive damages are not available unless the insured can establish an independent tort action. *Douros v. State Farm & Cas. Co.*, 508 F.Supp.2d 479 (E.D. Va 2007). However, a policyholder bringing an action under Virginia Code § § 8.01-66.1(A) and (B) may recover, respectively, either double the amount that should have been paid or double the amount of interest from the date of the claim upon a finding of bad faith. Although this does not constitute “punitive damages” in the classic sense, it is a punitive remedy. *Id.*

WASHINGTON

Washington has adopted a version of the UCSPA. Wash. Admin. Code §284-30-300-284-30-390 (1978/2009). *See also* RCW 48.30.010, the enabling statute.

Washington recognizes an independent common law cause of action for bad faith against a first-party insurer. *Smith v. Safeco Ins. Co.*, 78 P.3d 1274, 1276 (Wash. 2003); *see also Coventry Assocs. v. American States Ins. Co.*, 136 Wash.2d 269 (1998). To succeed on a bad faith claim, a policyholder must show the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded. *Id.* at 1277; *see also St. Paul Fire and Marine Ins. Co. v. Onvia*, 165 Wn.2d 122, 196 P.3d 664 (2008).

An insurer acts in bad faith if it acts without reasonable justification in handling a claim. However, an insurer's denial of coverage based on a reasonable interpretation of the policy is not bad faith. *Overton v. Consolidated Ins. Co.*, 6 P.3d 1178 (Wash. Ct. App. 2000), *review granted in part*, 21 P.3d 291, *affirmed in part, reversed in part* 145 Wash.2d 417, 38 P.3d 322, *reconsideration denied*. Likewise, an insurer does not act in bad faith if it acts honestly in handling claims, and bases its decision on adequate information, and does not overemphasize its own interests. *Coventry Associates v. American States Ins. Co.*, 961 P.2d 933 (Wash. 1998).

An insurer may also be liable for bad faith where it fails to treat the policyholders interests equal with its own or acts unreasonably in the investigation of a claim whether or not the insurers coverage decision was ultimately the appropriate coverage result. *Coventry Assocs. v. American States Ins. Co.*, 136 Wash.2d 269 (1998) (insurer did not breach the contract because there was no coverage for the loss but the insurer can still be liable in bad faith for unreasonable investigation of a claim), *see also Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 16 P.3d 574 (2001) (holding that an insurer must "deal fairly with an insured, giving equal consideration in all matters to the insured's interests as well as its own.")

An insurer may also be liable for procedural bad faith where it has violated one of the Code provisions enumerated above. *American Manufactures Mut. Ins. Co. v. Osborn*, 104 Wash. App. 686 (2001)

Washington also recognizes that a violation of Wash. Admin. Code 284-30-300 to 284-30-390 may serve as the basis for a violation of the Consumer Protection Act, Wash. Rev. Code Sec. 19.86.090, *American Manufactures Mut. Ins. Co. v. Osborn*, 104 Wash. App. 686 (2001). A single violation of the Code is sufficient to find a violation of the Consumer Protection Act. *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 925, 792 P.2d 520 (1990).

Additionally, insurers have a statutory duty to handle claims in good faith. Wash. Rev. Code § 48.01.030. An insured may bring a tort claim for bad faith against an insurer who breaches this duty. *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 208 P.3d 557 (Wash. Ct. App. 2009).

In addition to common law causes of action or bad faith, under the Washington Insurance Fair Conduct Act (“IFCA”), a policyholder may bring claim where an insurer unreasonably denies a claim for coverage for payment of benefits. RCW 48.30.015.

Under the IFCA, a policyholder may also have a claim for attorneys fees and treble damages where an insurer violates one of several sections of the Washington Administrative Code enumerated in the statute. RCW 48.30.015(5).

Damages

Consequential damages are available under common law bad faith. *Coventry Assocs. v. American States Ins. Co.*, 136 Wash.2d 269 (1998).

Emotional distress damages are available under a common law claim for bad faith. *American Manufactures Mut. Ins. Co. v. Osborn*, 104 Wash. App. 686 (2001). *St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 196 P.3d 664 (Wash. 2008); *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007).

A policyholder is entitled to recover only losses to business or property under the Consumer Protection Act. Wash. Rev. Code. § 19.86.090. The policyholder is also entitled to recover reasonable attorneys fees and the statutory costs of suit, with the exception of expert costs. Wash. Rev. Code. § 19.86.090.

Actual damages are available to a policyholder who proves a violation of the Insurance Fair Conduct Act. RCW § 48.30.015(1)

Attorneys fees are available. The Insurance Fair Conduct Act provides that a court “shall” award attorneys fees and costs.” RCW § 48.30.015(3)

While not technically considered “punitive damages,” damage enhancements are available in Washington under the IFCA statute RCW 48.30.015. The Washington Insurance Fair Conduct Act provides for treble damages up to three times the amount of actual damages. RCW 48.30.015(2).

WEST VIRGINIA

West Virginia has adopted a version of the UCSPA. W. VA. CODE § 33-11-4 (1957/1985).

West Virginia recognizes an independent common law cause of action for bad faith against a first-party insurer. *Loudin v. National Liability & Fire Ins. Co.*, 716 S.E.2d 696 (W. Va. 2011).

West Virginia also recognizes an independent statutory cause of action for bad faith based on an insurer's violation of the West Virginia Unfair Trade Practices Act (UTPA). *Elmore v. State Farm Mut. Auto. Ins. Co.*, 504 S.E.2d 892 (W. Va. 1998).

In order to bring a bad faith claim under the West Virginia UTPA, an insured must establish that the insurer's conduct constitutes more than a single violation of the statute, that the violations arise from separate, discrete acts or omissions in the claim settlement, and that they arise from a habit, custom, usage, or business policy of the insurer. *Mills v. Watkins*, 582 S.E.2d 877 (W. Va. 2003). The evidence must show that the insurer's practice or practices are sufficiently pervasive or sufficiently sanctioned by the insurance company that the conduct can be considered a "general business practice" and can be distinguished by fair minds from an isolated event. *Id.*

A bad faith claim under the West Virginia UTPA cannot be brought until the underlying claim is settled or resolved via trial. *Klettner v. State Farm Mut. Auto. Ins. Co.*, 519 S.E.2d 870 (W. Va. 1999).

Damages

Consequential damages are available. *Hayseeds, Inc. v. State Farm Fire & Cas.*, S.E.2d 73 (W. Va. 1986)

Emotional distress damages are available. *Id.*

Attorneys fees are available. "Where an insurer has violated its contractual obligation to defend its insured, the insured should be fully compensated for all expenses incurred as a result of the insurer's breach of contract, including those expenses incurred in a declaratory judgment action. To hold otherwise would be unfair to the insured, who originally purchased the insurance policy to be protected from incurring attorneys fees and expenses arising from litigation." *Id.*

Punitive damages are available for an insurer's violation of the West Virginia UTPA. *See Nance v. Kentucky Nat. Ins. Co.*, 240 F. App'x 539, 548 (4th Cir. 2007). Punitive damages for failure to settle a property dispute shall not be awarded against an insurance company unless the policyholder can establish a high threshold of actual malice in the settlement process. By "actual malice" we mean that the company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim." *McCormick v. Allstate Ins. Co.*, 202 W.Va. 535, 540 (1998). An insured may also recover punitive damages from an insurer

for bad faith. See *Hayseeds, Inc.*, 352 S.E.2d at 80-81 (punitive damages appropriate when insurer actually knew that policyholder's claim was valid, but willfully, maliciously, and intentionally denied claim); *Berry v. Nationwide Mut. Fire Ins. Co.*, 381 S.E.2d 367, 375 (W. Va. 1989) (upholding jury's award of punitive damages).

WISCONSIN

Wisconsin has adopted a version of the UCSPA. Wis. Admin. Code Ins. § 6.11 (1971/2000).

Wisconsin recognizes a common-law cause of action for bad faith against a first-party insurer. *Anderson v. Cont'l Ins. Co.*, 271 N.W.2d 368, 374 (Wis. 1978).

To establish a claim for first-party bad faith, an insured must establish:

- (1) An absence of a reasonable basis for denial of policy benefits; and
- (2) The insurer's knowledge or reckless disregard of a reasonable basis for a denial.

Id. at 377.

An insurance company may challenge claims, which are fairly debatable and will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis. *Id.*

Damages

Consequential damages are available. *DeChant v. Monarch Life Ins. Co.*, 200 Wis.2d 559 (1996). The insured may recover any damages, which are the proximate result of the defendant's alleged bad faith, including damages that are otherwise recoverable in a breach of an insurance contract claim. *Jones v. Secura Ins. Co.*, 638 N.W.2d 575, 576-577 (Wis. 2002).

Emotional Distress damages are available. "A recovery for emotional distress caused by an insurer's bad faith refusal to pay an insured's claim should be allowed only when the distress is severe and substantial other damage is suffered apart from the loss of the contract benefits and the emotional distress." *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 696 (1978); see also *Jones*, 638 N.W.2d at 580.

Attorneys fees are available. "When an insurer acts in bad faith, a plaintiff is allowed to recover for all detriment proximately resulting from the insurer's bad faith, which includes . . . those attorneys fees that were incurred to obtain the policy benefits that would not have been incurred but for the insurer's tortious conduct." *DeChant*, 200 Wis.2d at 573.

Punitive damages are available. For punitive damages to be awarded, a defendant must not only intentionally have breached his duty of good faith, but in addition must have been guilty of oppression, fraud, or malice in the special sense defined by *Mid-Continent v. Straka*." *Anderson*, 85 Wis.2d at 697.

WYOMING

Wyoming has adopted a version of the UCSPA. Wyo. Stat. Ann. § 26-13-124 (1986).

Wyoming recognizes an independent common law cause of action for bad faith against a first-party insurer. *Ahrenholtz v. Time Ins. Co.*, 968 P.2d 946, 950 (Wyo. 1998)

To establish a claim for first-party bad faith, an insured must establish:

- (1) The absence of any reasonable basis for denying the claim; and
- (2) The insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.

Id. at 950–51.

An objective standard is also used to determine whether an insurer has committed first-party bad faith. *Kirkwood v. CUNA Mut. Ins. Soc.*, 937 P.2d 206, 211 (Wyo.1997). The question is whether the validity of the denied claim is fairly debatable. *First Wyoming Bank, N.A., Jackson Hole v. Continental Ins. Co.*, 860 P.2d 1094, 1101 (Wyo.1993). The validity of a claim is fairly debatable if a reasonable insurer would have denied or delayed payment of benefits under the facts and circumstances. *Ahrenholtz*, 968 P.2d at 950.

Damages

Consequential damages are available. *State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d 813 (Wyo. 1994)

Emotional distress damages are available. “We hold the scope of available compensatory damages for a breach of the duty of good faith and fair dealing includes damages for harm to pecuniary interests and emotional distress. There is a limitation, however, upon the recovery of damages for emotional distress for a breach of this duty. We agree with the court in Gruenberg, that to recover damages for emotional distress, the insured must allege that as a result of the breach of the duty of good faith and fair dealing, the insured has suffered substantial other damages, such as economic loss, in addition to the emotional distress.” *Farmers Ins. Exchange v. Shirley*, 958 P.2d 1040, 1047 (Wyo. 1998); *Hatch v. State Farm Fire & Cas. Co.*, 930 P.2d 382 (Wyo. 1997).

Attorneys fees are available. Wyoming Statute § 26-15-124(c) (as a form of compensatory damages when an insurer unreasonably or without cause refuses to pay first party policy benefits, *Shrader, supra.*)

Punitive damages are available when there is a showing of “evil intent deserving of punishment or wanton disregard of duty or gross and outrageous conduct.” *McCullough v. Golden Rule Ins.*

Co., 789 P.2d 855, 860 (Wyo. 1990); *see also* *Cathcart v. State Farm Mut. Auto Ins. Co.*, 123 P.3d 579 (Wyo. 1990).

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

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Prefatory Note: By adopting this model act in June 1990, the NAIC separated issues regarding unfair claims settlement practices into a free-standing act apart from the NAIC Model Unfair Trade Practices Act. This change focuses more attention on unfair claims as a function of market conduct surveillance separate and apart from general unfair trade practices. By doing so, the NAIC is not recommending that states repeal their existing acts, but states may modify them for the purpose of capturing the substantive changes. However, for those states wishing to completely rewrite their comprehensive approach to unfair claims practices, this separation of unfair claims from unfair trade practices is recommended.

Section 1. Purpose

The purpose of this Act is to set forth standards for the investigation and disposition of claims arising under policies or certificates of insurance issued to residents of [insert state]. It is not intended to cover claims involving workers' compensation, fidelity, suretyship or boiler and machinery insurance. Nothing herein shall be construed to create or imply a private cause of action for violation of this Act.

Drafting Note: A jurisdiction choosing to provide for a private cause of action should consider a different statutory scheme. This Act is inherently inconsistent with a private cause of action. This is merely a clarification of original intent and not indicative of any change of position. The NAIC has promulgated the Unfair Property/Casualty Claims Settlement Practices and the Unfair Life, Accident and Health Claims Settlement Practices Model Regulations pursuant to this Act.

Section 2. Definitions

When used in this Act:

- A. "Commissioner" means the Commissioner of Insurance of this state;

Drafting Note: Insert the title of the chief insurance regulatory official wherever the term "commissioner" appears.

- B. "Insured" means the party named on a policy or certificate as the individual with legal rights to the benefits provided by the policy;
- C. "Insurer" means a person, reciprocal exchange, interinsurer, Lloyd's insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers, adjusters and third party administrators. Insurer shall also mean medical service plans, hospital service plans, health maintenance organizations, prepaid limited health care service plans, dental, optometric and other similar health service plans as defined in Section [insert applicable section]. For purposes of this Act, these foregoing entities shall be deemed to be engaged in the business of insurance;

Unfair Claims Settlement Practices Act

- D. “Person” means a natural or artificial entity, including, but not limited to, individuals, partnerships, associations, trusts or corporations;
- E. “Policy” or “certificate” means a contract of insurance, indemnity, medical, health or hospital service, or annuity issued. “Policy” or “certificate” for purposes of this Act, shall not mean contracts of workers’ compensation, fidelity, suretyship or boiler and machinery insurance.

Drafting Note: The term “policy” is intended to cover the product issued by medical, health or hospital service plans and should be changed to conform to the laws of each state.

The Federal Employee Retirement Income Security Act (ERISA) preempts certain entities and some activities of those entities from the application of state laws. The purpose of these definitions is to include within this Act and regulations issued pursuant to it, all entities and activities to the extent not preempted by ERISA.

Section 3. Unfair Claims Settlement Practices Prohibited

It is an improper claims practice for a domestic, foreign or alien insurer transacting business in this state to commit an act defined in Section 4 of this Act if:

- A. It is committed flagrantly and in conscious disregard of this Act or any rules promulgated hereunder; or
- B. It has been committed with such frequency to indicate a general business practice to engage in that type of conduct.

Section 4. Unfair Claims Practices Defined

Any of the following acts by an insurer, if committed in violation of Section 3, constitutes an unfair claims practice:

- A. Knowingly misrepresenting to claimants and insureds relevant 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 and settlement of claims arising under its policies;
- D. Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;
- E. Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;
- F. Refusing to pay claims without conducting a reasonable investigation;
- G. Failing to affirm or deny coverage of claims within a reasonable time after having completed its investigation related to such claim or claims;

- H. Attempting to settle or settling claims for less than the amount that a reasonable person would believe the insured or beneficiary was entitled by reference to written or printed advertising material accompanying or made part of an application;
- I. Attempting to settle or settling claims on the basis of an application that was materially altered without notice to, or knowledge or consent of, the insured;
- J. Making claims payments to an insured or beneficiary without indicating the coverage under which each payment is being made;
- K. Unreasonably delaying the investigation or payment of claims by requiring both a formal proof of loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof of loss form;
- L. Failing in the case of claims denials or offers of compromise settlement to promptly provide a reasonable and accurate explanation of the basis for such actions;
- M. Failing to provide forms necessary to present claims within fifteen (15) calendar days of a request with reasonable explanations regarding their use;
- N. Failing to adopt and implement reasonable standards to assure that the repairs of a repairer owned by or required to be used by the insurer are performed in a workmanlike manner.

Section 5. Statement of Charges

Whenever the commissioner has reasonable cause to believe that an insurer doing business in this state is engaging in any unfair claims practice and that a proceeding in respect thereto would be in the public interest, the commissioner shall issue and serve upon the insurer a statement of the charges in that respect and a notice of hearing, which shall set a hearing date not less than thirty (30) days from the date of the notice.

Drafting Note: If a formal hearing procedure exists, states may wish to incorporate the timeframes from that existing procedure.

Section 6. Cease and Desist and Penalty Orders

If, after hearing, the commissioner finds an insurer has engaged in an unfair claims practice, the commissioner shall reduce the findings to writing and shall issue and cause to be served upon the insurer charged with the violation a copy of the findings and an order requiring the insurer to cease and desist from engaging in the act or practice and the commissioner may, at the commissioner's discretion, order:

- A. Payment of a monetary penalty of not more than \$1,000 for each violation but not to exceed an aggregate penalty of \$100,000, unless the violation was committed flagrantly and in conscious disregard of this Act, in which case the penalty shall not be more than \$25,000 for each violation, but not to exceed an aggregate penalty of \$250,000 pursuant to hearing; and/or
- B. Suspension or revocation of the insurer's license if the insurer knew or reasonably should have known it was in violation of this Act.

Section 7. Penalty for Violation of Cease and Desist Orders

An insurer that violates a cease and desist order of the commissioner and, while the order is in effect, may, after notice and hearing and upon order of the commissioner, be subject, at the discretion of the commissioner, to:

- A. A monetary penalty of not more than \$25,000 for each and every act or violation not to exceed an aggregate of \$250,000 pursuant to hearing; and/or
- B. Suspension or revocation of the insurer's license.

Section 8. Regulations

The commissioner may, after notice and hearing, promulgate reasonable rules, regulations and orders as are necessary or proper to carry out and effectuate the provisions of this Act. The regulations shall be subject to review in accordance with Section [insert applicable section].

Drafting Note: Insert section number providing for review of administrative orders.

Section 9. Severability

If any provision of this Act, or the application of the provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of the provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Chronological Summary of Actions (all references are to the Proceedings of the NAIC).

*1972 Proc. I 15, 16, 443-444, 491, 495-496 (claims settlement practices made part of Unfair Trade Practices Act).
1990 Proc. II 7, 13-14, 160, 177-179 (adopted free-standing claims settlement practices act).
1991 Proc. I 9, 16, 192-193, 203-206 (amended and reprinted).*

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These charts are intended to provide the readers with additional information to more easily access state statutes, regulations, bulletins or administrative rulings which are related to the NAIC model. Such guidance provides the reader with a starting point from which they may review how each state has addressed the model and the topic being covered. The NAIC Legal Division has reviewed each state's activity in this area and has made an interpretation of adoption or related state activity based on the definitions listed below. The NAIC's interpretation may or may not be shared by the individual states or by interested readers.

This state page does not constitute a formal legal opinion by the NAIC staff on the provisions of state law and should not be relied upon as such. Every effort has been made to provide correct and accurate summaries to assist the reader in targeting useful information. For further details, the laws cited should be consulted. The NAIC attempts to provide current information; however, due to the timing of our publication production, the information provided may not reflect the most up to date status. Therefore, readers should consult state law for additional adoptions and subsequent bill status.

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

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UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

KEY:

MODEL ADOPTION: States that have citations identified in this column adopted the most recent version of the NAIC model in a **substantially similar manner**. This requires states to adopt the model in its entirety but does allow for variations in style and format. States that have adopted portions of the current NAIC model will be included in this column with an explanatory note.

RELATED STATE ACTIVITY: States that have citations identified in this column have **not** adopted the most recent version of the NAIC model in a substantially similar manner. Examples of Related State Activity include but are not limited to: An older version of the NAIC model, legislation or regulation derived from other sources such as Bulletins and Administrative Rulings.

NO CURRENT ACTIVITY: No state activity on the topic as of the date of the most recent update. This includes states that have repealed legislation as well as states that have never adopted legislation.

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Alabama		ALA. ADMIN. CODE r. 482-1-124 to 482-1-125 (2003/2009); 482-12-24 (1971).
Alaska	ALASKA STAT. §§ 21.36.125 (1976).	
American Samoa	NO CURRENT ACTIVITY	
Arizona	ARIZ. REV. STAT. ANN. § 20-461 (1981/2004).	
Arkansas	ARK. CODE ANN. § 23-66-206 (1959/2009).	BULLETIN 8-2014 (2014).
California	CAL. INS. CODE § 790.03 (1959/1989).	CAL. CODE REGS. tit. 10, § 2695.85 (2003/2009).
Colorado	COLO. REV. STAT. § 10-3-1104 (1963/2014).	BULLETIN B-6.3 (2012/2013); BULLETIN B-4.55 (2013); BULLETIN B-4.72 (2014).
Connecticut	CONN. GEN. STAT. § 38a-816 (1955/2013).	
Delaware	18 DEL. ADMIN. CODE § 902 (1977/2003).	
District of Columbia	NO CURRENT ACTIVITY	

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Florida	FLA. STAT. § 626.9541 (1976/2014).	FLA. STAT. § 626.9743 to 626.9744 (2004) (Motor vehicle settlements).
Georgia	GA. CODE ANN. §§ 33-6-30 to 33-6-37 (1992).	
Guam	NO CURRENT ACTIVITY	
Hawaii	HAW. REV. STAT. § 431:13-103 (1988/1989).	
Idaho	IDAHO CODE ANN. §§ 41-1329 (1977/1987).	
Illinois	215 ILL. COMP. STAT. 5/154.6 (1997).	
Indiana	IND. CODE § 27-4-1-4.5 (1983/1987).	
Iowa	NO CURRENT ACTIVITY	
Kansas	KAN. STAT. ANN. §§ 40-2404 (1955/1992).	
Kentucky	KY. REV. STAT. ANN. §§ 304.12-230 (1984/1988).	
Louisiana	LA. REV. STAT. ANN. § 22:1964 (1958/2009).	LA. REV. STAT. ANN. § 22:1973 (2009) (Duty of P/C insurers); § 22:1892 (2009).
Maine	ME. REV. STAT. ANN. tit. 24-A, § 2164-D (1987) (Portions of model).	
Maryland	MD. CODE ANN., INS. §§ 27-301 to 27-306 (1986/2012).	MD. CODE ANN., INS. § 31.15.08.03 (1989/2009); BULLETIN 2012-13 (2012).
Massachusetts	MASS. GEN. LAWS ch. 176D, § 3 (1972/1986).	
Michigan	MICH. COMP. LAWS § 500.2026 (1951/1977).	

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Minnesota	MINN. STAT. § 72A.20 Subd. 12 (1967/2006).	
Mississippi	NO CURRENT ACTIVITY	
Missouri	MO. REV. STAT. §§ 375.1000 to 375.1018 (1991/1993).	
Montana	MONT. CODE ANN. § 33-18-201 (1977).	Memorandum 1-29-2014 (2014).
Nebraska	NEB. REV. STAT. §§ 44-1536 to 44-1544 (1991/2002).	
Nevada	NO CURRENT ACTIVITY	
New Hampshire	N.H. REV. STAT. ANN. § 417:4 (1947/1991).	
New Jersey	N.J. REV. STAT. § 17:29B-4 (1947/2001).	
New Mexico	N.M. STAT. ANN. § 59A-16-20 (1985/1993).	
New York	N.Y. INS. LAW § 2601 (1984).	Circular Letter 2009-3 (2009); Circular Letter 2008-14 (2008); Circular Letter 2011-13 (2011).
North Carolina	N.C. GEN. STAT. § 58-63-15 (1949/1987).	
North Dakota	N.D. CENT. CODE §§ 26.1-04-03 (1983/2003).	
Northern Marianas	4 N. MAR. ISLAND CODE § 7302(g) (1984).	
Ohio	OHIO ADMIN. CODE § 3901-1-07 (1975).	
Oklahoma		OKLA. STAT. tit. 36, §§ 1250.1 to 1250.16 (1986/2009).
Oregon	OR. REV. STAT. § 746.230 (1967/1989).	OR. ADMIN. R. 836-080-0235 (1980/2006).

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Pennsylvania	40 PA. STAT. ANN. § 1171.5(a)(10) (1974/2006).	
Puerto Rico	P.R. LAWS ANN. tit. 26, § 2716a (1974).	
Rhode Island	R.I. GEN. LAWS §§ 27-9.1-1 to 27-9.1-9 (1993/2013).	BULLETIN 2007-7 (2007); BULLETIN 2010-6 (2010).
South Carolina	S.C. CODE ANN. §§ 38-59-10 to 38-59-50 (1987).	
South Dakota	S.D. CODIFIED LAWS § 58-33-67 (1986/1989).	
Tennessee	TENN. CODE ANN. §§ 58-8-2 to 58-8-13 (2008) (Portions of model).	
Texas	TEX. ADMIN. CODE § 21.203 (1976/1985).	TEX. INS. CODE ANN. §§ 542.001 to 542.014 (2005).
Utah	UTAH CODE ANN. §§ 31A-26-303 to 31A-26-310 (1986).	
Vermont	VT. STAT. ANN. tit. 8, § 4724 (1955/1987).	
Virgin Islands	NO CURRENT ACTIVITY	
Virginia	VA. CODE ANN. §§ 38.2-510 (1986/2001).	VA. CODE ANN. § 38.2-517 (1992/1999).
Washington	WASH. ADMIN. CODE 284-30-300 to 284-30-390 (1978/2013).	
West Virginia	W. VA. CODE § 33-11-4 (1957/1985).	
Wisconsin	WIS. ADMIN. CODE INS. § 6.11 (1971/2000).	
Wyoming	WYO. STAT. ANN. § 26-13-124 (1986).	

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

Legislative History

Cited to the Proceedings of the NAIC

In 1971 the Unfair Trade Practices Subcommittee identified several areas where they thought changes needed to be made to the Unfair Trade Practices Act. One of those areas was related to claims practices, particularly unreasonable delay or refusal. **1971 Proc. II 341.**

A draft of revisions being considered in Michigan was presented and it served as a pattern for the amendment adopted by the NAIC. **1971 Proc. II 373-374.**

The amended Unfair Trade Practices Act adopted in December 1971 included a section on unfair claims settlement practices which identified 14 activities which, when committed or performed with such frequency as to indicate a general business practice, were violations. In the past it had been difficult for regulators and insurers to solve problems because there were no ground rules. The provisions adopted set out standards the subcommittee thought were desirable. **1972 Proc. I 491-492, 495-496.**

In 1989 a subgroup was appointed to consider revisions to the unfair claims settlement practices provisions. The group decided it would be appropriate to create a separate free-standing unfair claims settlement practices act by removing the section from the Unfair Trade Practices Act and setting it apart. In addition the group decided that further amendments needed to be discussed. **1989 Proc. II 204.**

Section 1. Purpose

The first issue of discussion was the NAIC's position regarding whether a private cause of action was intended to be created. The group decided no private cause of action was intended and language was added to the draft to that effect. **1989 Proc. II 204.**

It was the consensus of the drafters and the advisory committee that these new drafts would provide a new emphasis on claims issues. **1990 Proc. II 160.**

Section 2. Definitions

The subcommittee considered numerous linguistic and stylistic changes recommended by industry and staff. Of notable substance was the issue regarding the definitions of "insurer" and "person" and their relative scope. The purpose of the definitions was to provide the broadest possible authority while at the same time not being overly broad. It was noted the authority of the insurance department was to regulate insurers, not all persons. However, there was several sections of the drafts where the word person was utilized to include all entities, whether engaged in the business of insurance or not. **1991 Proc. IA 218.**

B. The definition of insured was added when the model was amended in December 1990. **1991 Proc. IA 204.**

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

Legislative History

Cited to the Proceedings of the NAIC

Section 3. Unfair Claims Settlement Practices Prohibited

The unfair claims settlement practices section which had been part of the Unfair Trade Practices Act defined an unfair claims settlement practice as one which was committed or performed with such frequency as to indicate a general business practice. **1972 Proc. I 495.**

When amendments were being developed in 1989 there were extensive discussions on whether it was appropriate to broaden the scope beyond the long-standing “general business practice” standard. **1989 Proc. II 204.**

The standards adopted broadened the scope to include either a flagrant violation or one committed with such frequency that it indicated a general business practice. **1990 Proc. II 178.**

Section 4. Unfair Claims Practices Defined

This section was patterned after the basic list of claims settlement violations adopted in 1971. **1990 Proc. II 172-173, 178.**

A. The significant difference from the original model was the addition of the word “knowingly.” In addition the wording “pertinent facts” was changed to “relevant facts.” **1990 Proc. II 178.**

D. This provision was not part of the original section from the Unfair Trade Practices Act. The section most nearly comparable made it an unfair claims practice to fail to settle a clearly liable claim in order to influence a settlement on other portions on the coverage. **1990 Proc. II 172-173.**

K. The original model language was altered by the addition of the qualifier “unreasonably” delaying investigation. **1990 Proc. II 173, 178.**

M. This subsection was not included in the original list deleted from the Unfair Trade Practices Act. **1990 Proc. II 172-173.**

N. This provision was not included in the original list deleted from the Unfair Trade Practices Act. **1990 Proc. II 172-173.**

Section 5. Statement of Charges

Section 6. Cease and Desist and Penalty Orders

One industry attendee at the task force meeting commented that he found the amendment of the draft which changed the potential penalty for an unfair claims practices violation from an aggregate of \$50,000 to an aggregate of \$250,000 somewhat alarming. He offered concern that this change could legitimize some current practices of states utilizing fines for revenue raising and retaliation purposes rather than for bona fide regulatory purposes. He stated he hoped the committee did not defend or intend this change to encourage that practice. The chair of the drafting committee responded that, without question, increasing the size of the penalties was not intended to increase the size of the state coffers. **1990 Proc. II 160.**

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

Legislative History

Cited to the Proceedings of the NAIC

Section 6 (cont.)

Extensive discussions on the appropriateness of the aggregate penalty were again held when the model was amended in late 1990. While the industry was divided on the issue, regulators indicated a commitment to the heightened penalties while still endorsing their position taken previously that such penalties be utilized for regulatory purposes and not revenue enhancement devices. **1991 Proc. IA 218.**

A. The amendments adopted in December 1990 did reduce the aggregate penalty for violations to \$100,000, but maintained the \$250,000 penalty for flagrant violations. **1991 Proc. IA 205.**

The model adopted in June 1990 contained language specifying the penalty for “each and every” violation. The “and every” was removed by the December amendments. **1991 Proc. IA 205.**

Section 7. Penalty for Violation of Cease and Desist Orders

This section was added at the time amendments were adopted in late 1990. It was the desire of the drafting committee to include heightened penalties for violation of cease and desist orders. **1991 Proc. IA 218.**

Section 8. Regulations

Section 9. Severability

Chronological Summary of Actions

December 1971: Adopted claims settlement section as part of Unfair Trade Practices Act.

June 1990: Deleted section from Unfair Trade Practices Act and made it part of new model on claims settlement practices.

December 1990: Technical amendments made to correlate language of Unfair Trade Practices Act, this model, and two claims settlement regulations.

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

Legislative History

Cited to the Proceedings of the NAIC

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UNFAIR PROPERTY/CASUALTY CLAIMS SETTLEMENT PRACTICES MODEL REGULATION

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Section 1. Authority

This regulation is adopted under the authority of the Unfair Claims Settlement Practices Act.

Section 2. Purpose

The purpose of this regulation is to set forth minimum standards for the investigation and disposition of property and casualty claims arising under contracts or certificates issued to residents of the State. It is not intended to cover claims involving workers' compensation, fidelity, suretyship or boiler and machinery insurance. The various provisions of this regulation are intended to define procedures and practices which constitute unfair claims practices. Nothing herein shall be construed to create nor imply a private cause of action for violation of this regulation. This is merely a clarification of original intent and does not indicate any change of position.

Drafting Note: Any jurisdiction which may choose to provide for a private cause of action should consider a different statutory scheme. This regulation is inherently inconsistent with a private cause of action. This is merely a clarification of original intent and not indicative of any change of position. The NAIC has separately promulgated an Unfair Life, Accident and Health Claims Settlement Practices Model Regulation.

Section 3. Definitions

All definitions contained in the Unfair Claims Settlement Practices Act (or Unfair Trade Practices Model Act) are hereby incorporated by reference. As otherwise used in this regulation:

- A. "Agent" means any individual, corporation, association, partnership or other legal entity authorized to represent an insurer with respect to a claim;
- B. "Claim file" means any retrievable electronic file, paper file or combination of both;
- C. "Claimant" means either a first party claimant, a third party claimant, or both and includes the claimant's designated legal representative and includes a member of the claimant's immediate family designated by the claimant;
- D. "Days" means calendar days;

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- E. “Documentation” includes, but is not limited to, all pertinent communications, transactions, notes, work papers, claim forms, bills and explanation of benefits forms relative to the claim;
- F. “First party claimant” means an individual, corporation, association, partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by the policy or contract;
- G. “Investigation” means all activities of an insurer directly or indirectly related to the determination of liabilities under coverages afforded by an insurance policy or insurance contract;
- H. “Limited insurance representative” means an individual, partnership or corporation who is authorized by the Commissioner to solicit or negotiate policies for a particular line of insurance which the Commissioner may by regulation deem essential for the transaction of business in this State and which does not require the professional competency demanded for an insurance agent’s or insurance broker’s license.
- I. “Notification of claim” means any notification, whether in writing or other means acceptable under the terms of an insurance policy to an insurer or its agent, by a claimant, which reasonably apprises the insurer of the facts pertinent to a claim;
- J. “Third party claimant” means any person asserting a claim against any person under a policy or certificate of an insurer; and
- K. “Written communications” includes all correspondence, regardless of source or type, that is materially related to the handling of the claim.

Section 4. File and Record Documentation

Each insurer’s claim files for policies or certificates are subject to examination by the Commissioner of Insurance or by the Commissioner’s duly appointed designees. To aid in such examination:

- A. The insurer shall maintain claim data that is accessible and retrievable for examination. An insurer shall be able to provide the claim number, line of coverage, date of loss and date of payment of the claim, date of denial or date closed without payment. This data must be available for all open and closed files for the current year and the two preceding years.
- B. Detailed documentation shall be contained in each claim file in order to permit reconstruction of the insurer’s activities relative to each claim.
- C. Each relevant document within the claim file shall be noted as to date received, date processed or date mailed.
- D. For those insurers that do not maintain hard copy files, claim files must be accessible from Cathode Ray Tube (CRT) or micrographics and be capable of duplication to hard copy.

Drafting Note: States are encouraged to recognize the efficiencies of electronic or other type “paperless” file systems and are encouraged to accommodate all reasonable application of such systems.

Section 5. Misrepresentation of Policy Provisions

- A. No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of a policy or contract under which a claim is presented.
- B. No agent shall conceal from first party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.
- C. A claim shall not be denied on the basis of failure to exhibit property unless there is documentation of breach of the policy provisions in the claim file.
- D. No insurer shall deny a claim based upon the failure of a first party claimant to give written notice of loss within a specified time limit unless the written notice is a written policy condition, or claimant's failure to give written notice after being requested to do so is so unreasonable as to constitute a breach of the claimant's duty to cooperate with the insurer.
- E. No insurer shall indicate to a first party claimant on a payment draft, check or in any accompanying letter that said payment is "final" or "a release" of any claim unless the policy limit has been paid or there has been a compromise settlement agreed to by the first party claimant and the insurer as to coverage and amount payable under the contract.
- F. No insurer shall issue checks or drafts in partial settlement of a loss or claim under a specific coverage that contains language purporting to release the insurer or its insured from total liability.

Section 6. Failure to Acknowledge Pertinent Communications

- A. Every insurer, upon receiving notification of a claim shall, within fifteen (15) days, acknowledge the receipt of such notice unless payment is made within that period of time. If an acknowledgement is made by means other than writing, an appropriate notation of the acknowledgement shall be made in the claim file of the insurer and dated. Notification given to an agent of an insurer shall be notification to the insurer.
- B. Every insurer, upon receipt of any inquiry from the insurance department respecting a claim shall, within twenty-one (21) days of receipt of such inquiry, furnish the department with an adequate response to the inquiry in duplicate.
- C. An appropriate reply shall be made within fifteen (15) days on all other pertinent communications from a claimant which reasonably suggest that a response is expected.
- D. Every insurer, upon receiving notification of claim, shall promptly provide necessary claim forms, instructions and reasonable assistance so that first party claimants can comply with the policy conditions and the insurer's reasonable requirements. Compliance with this paragraph within fifteen (15) days of notification of a claim shall constitute compliance with Subsection A of this section.

Section 7. Standards for Prompt, Fair and Equitable Settlements Applicable to All Insurers

- A. Within twenty-one (21) days after receipt by the insurer of properly executed proofs of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer. No insurer shall deny a claim on the grounds of a specific policy provision, condition or exclusion unless reference to such provision, condition, or exclusion is included in the denial. The denial must be given to the claimant in writing and the claim file of the insurer shall contain documentation of the denial as required by Section 4.

Where there is a reasonable basis supported by specific information available for review by the insurance regulatory authority that the first party claimant has fraudulently caused or contributed to the loss, the insurer is relieved from the requirements of this subsection; provided, however, that the claimant shall be advised of the acceptance or denial of the claim within a reasonable time for full investigation after receipt by the insurer of a properly executed proof of loss.

- B. If the insurer needs more time to determine whether a first party claim should be accepted or denied, it shall so notify the first party claimant within twenty-one (21) days after receipt of the proofs of loss, giving the reasons more time is needed. If the investigation remains incomplete, the insurer shall, forty-five (45) days from the initial notification and every forty-five (45) days thereafter, send to the claimant a letter setting forth the reasons additional time is needed for investigation.

Where there is a reasonable basis supported by specific information available for review by the insurance regulatory authority for suspecting that the first party claimant has fraudulently caused or contributed to the loss, the insurer is relieved from the requirements of this subsection; provided, however, that the claimant shall be advised of the acceptance or denial of the claim by the insurer within a reasonable time for full investigation after receipt by the insurer of a properly executed proof of loss.

- C. Insurers shall not fail to settle first party claims on the basis that responsibility for payment should be assumed by others except as may otherwise be provided by policy provisions.
- D. No insurer shall continue negotiations for settlement of a claim directly with a claimant who is not legally represented, if the claimant's rights may be affected by a statute of limitations, unless the insurer has given the claimant written notice of such limitation. Notice shall be given to first party claimants at least thirty (30) days and to third party claimants at least sixty (60) days before the date on which such time limit may expire.
- E. No insurer shall make statements indicating that the rights of a third party claimant may be impaired if a form or release is not completed within a given period of time unless the statement is given for the purpose of notifying the third party claimant of the provision of a statute of limitations.

- F. The insurer shall affirm or deny liability on claims within a reasonable time and shall tender payment within thirty (30) days of affirmation of liability, if the amount of the claim is determined and not in dispute. In claims where multiple coverages are involved, payments which are not in dispute and where the payee is known should be tendered within thirty (30) days if such payment would terminate the insurer's known liability under that individual coverage.
- G. No insurer shall request or require any insured to submit to a polygraph examination unless authorized under the applicable insurance contracts and state law.
- H. If, after an insurer rejects a claim, the claimant objects to such rejection, the insurer shall notify the claimant in writing that he or she may have the matter reviewed by the [insert state] Department of Insurance, [insert department address and telephone number].

Section 8. Standards for Prompt, Fair and Equitable Settlements Applicable to Automobile Insurance

- A. When the insurance policy provides for the adjustment and settlement of first party automobile total losses on the basis of actual cash value or replacement with another of like kind and quality, one of the following methods shall apply:
 - (1) The insurer may elect to offer a replacement automobile that is at least comparable in that it will be by the same manufacturer, same or newer year, similar body style, similar options and mileage as the insured vehicle and in as good or better overall condition and available for inspection at a licensed dealer within a reasonable distance of the insured's residence. The insurer shall pay all applicable taxes, license fees and other fees incident to transfer of evidence of ownership of the automobile paid, at no cost other than any deductible provided in the policy. The offer and any rejection thereof must be documented in the claim file.
 - (2) The insurer may elect a cash settlement based upon the actual cost, less any deductible provided in the policy, to purchase a comparable automobile including all applicable taxes, license fees and other fees incident to transfer of evidence of ownership of a comparable automobile. Such cost may be derived from:
 - (a) The cost of two or more comparable automobiles in the local market area when comparable automobiles are available or were available within the last ninety (90) days to consumers in the local market area; or
 - (b) The cost of two (2) or more comparable automobiles in areas proximate to the local market area, including the closest major metropolitan areas within or without the state, that are available or were available within the last ninety (90) days to consumers when comparable automobiles are not available in the local market area pursuant to Subparagraph (a); or

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- (c) One of two or more quotations obtained by the insurer from two or more licensed dealers located within the local market area when the cost of comparable automobiles are not available pursuant to (a) and (b) above; or
- (d) Any source for determining statistically valid fair market values that meet all of the following criteria:
 - (i) The source shall give primary consideration to the values of vehicles in the local market area and may consider data on vehicles outside the area;
 - (ii) The source's database shall produce values for at least eighty-five percent (85%) of all makes and models for the last fifteen (15) model years taking into account the values of all major options for such vehicles; and
 - (iii) The source shall produce fair market values based on current data available from the area surrounding the location where the insured vehicle was principally garaged or a necessary expansion of parameters (such as time and area) to assure statistical validity.
- (e) Right of Recourse—If the insurer is notified within thirty-five (35) days of the receipt of the claim draft that the insured cannot purchase a comparable vehicle for the market value, the company shall reopen its claim file and the following procedures shall apply:
 - (i) The company may locate a comparable vehicle by the same manufacturer, same year, similar body style and similar options and price range for the insured for the market value determined by the company at the time of settlement. Any such vehicle must be available through licensed dealers;
 - (ii) The company shall either pay the insured the difference between the market value before applicable deductions and the cost of the comparable vehicle of like kind and quality which the insured has located, or negotiate and effect the purchase of this vehicle for the insured;
 - (iii) The company may elect to offer a replacement in accordance with the provisions set forth in Section 8A(1); or
 - (iv) The company may conclude the loss settlement as provided for under the appraisal section of the insurance contract in force at the time of loss. This appraisal shall be considered as binding against both parties, but shall not preclude or waive any other rights either party has under the insurance contract or a common law.

The company is not required to take action under this subsection if its documentation to the insured at the time of settlement included written notification of the availability and location of a specified and comparable vehicle of the same manufacturer, same year, similar body style and similar options in as good or better condition as the total loss vehicle which could have been purchased for the market value determined by the company before applicable deductions. The documentation shall include the vehicle identification number.

- (3) When a first party automobile total loss is settled on a basis which deviates from the methods described in Subsection A(1) and A(2) of this section, the deviation must be supported by documentation giving particulars of the automobile condition. Any deductions from the cost, including deduction for salvage, must be measurable, discernible, itemized and specified as to dollar amount and shall be appropriate in amount. The basis for the settlement shall be fully explained to the first party claimant.
- B. Where liability and damages are reasonably clear, insurers shall not recommend that third party claimants make claim under their own policies solely to avoid paying claims under such insurer's policy.
- C. Insurers shall not require a claimant to travel an unreasonable distance either to inspect a replacement automobile, to obtain a repair estimate or to have the automobile repaired at a specific repair shop.
- D. Insurers shall, upon the claimant's request, include the first party claimant's deductible, if any, in subrogation demands. Subrogation recoveries shall be shared on a proportionate basis with the first party claimant, unless the deductible amount has been otherwise recovered. No deduction for expenses can be made from the deductible recovery unless an outside attorney is retained to collect such recovery. The deduction may then be for only a pro rata share of the allocated loss adjustment expense.
- E. Vehicle Repairs. If partial losses are settled on the basis of a written estimate prepared by or for the insurer, the insurer shall supply the insured a copy of the estimate upon which the settlement is based. The estimate prepared by or for the insurer shall be reasonable, in accordance with applicable policy provisions, and of an amount which will allow for repairs to be made in a workmanlike manner. If the insured subsequently claims, based upon a written estimate which he obtains, that necessary repairs will exceed the written estimate prepared by or for the insurer, the insurer shall (1) pay the difference between the written estimate and a higher estimate obtained by the insured, or (2) promptly provide the insured with the name of at least one repair shop that will make the repairs for the amount of the written estimate. If the insurer designates only one or two such repairers, the insurer shall assure that the repairs are performed in a workmanlike manner. The insurer shall maintain documentation of all such communications.
- F. When the amount claimed is reduced because of betterment or depreciation all information for such reduction shall be contained in the claim file. The deductions shall be itemized and specified as to dollar amount and shall be appropriate for the amount of deductions.

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- G. When the insurer elects to repair and designates a specific repair shop for automobile repairs, the insurer shall cause the damaged automobile to be restored to its condition prior to the loss at no additional cost to the claimant other than as stated in the policy and within a reasonable period of time.
- H. Storage and Towing. The insurer shall provide reasonable notice to an insured prior to termination of payment for automobile storage charges and documentation of the denial as required by Section 4. Such insurer shall provide reasonable time for the insured to remove the vehicle from storage prior to the termination of payment. Unless the insurer has provided an insured with the name of a specific towing company prior to the insured's use of another towing company, the insurer shall pay any and all reasonable towing charges irrespective of the towing company used by the insured.
- I. Betterment deductions are allowable only if the deductions:
- (1) (a) Reflect a measurable decrease in market value attributable to the poorer condition of, or prior damage to, the vehicle;
 - (b) Reflect the general overall condition of the vehicle, considering its age, for either or both:
 - (i) The wear and tear or rust, limited to no more than a deduction of \$1,000;
 - (ii) Missing parts, limited to no more of a deduction than the replacement costs of the part or parts.
 - (2) Any deductions set forth in (1)(a) or (b) above must be measurable, itemized, specified as to dollar amount and documented in the claim file.
 - (3) No insurer shall require the insured or claimant to supply parts for replacement.
- J. Replacement Crash Parts
- (1) Purpose

The purpose of this subsection is to set forth standards for the prompt, fair and equitable settlements applicable to automobile insurance with regard to the use of replacement crash parts. It is intended to regulate the use of replacement crash parts in automobile damage repairs which insurers pay for on their insured's vehicle. It also requires that all replacement crash parts, as defined in this section, be identified and be of the same quality as the original part.
 - (2) "Replacement crash part," for purposes of this regulation, means sheet metal or plastic parts which generally constitute the exterior of a motor vehicle, including inner and outer panels.

(3) Identification

All replacement crash parts, which are subject to this section and manufactured after the effective date of this section, shall carry sufficient permanent non-removable identification so as to identify its manufacturer. Such identification shall be accessible to the extent possible after installation.

(4) Like Kind and Quality

No insurer shall require the use of replacement crash parts in the repair of an automobile unless the replacement crash part is at least equal in kind and quality to the original part in terms of fit, quality and performance. Insurers specifying the use of replacement crash parts shall consider the cost of any modifications which may become necessary when making the repair.

Drafting Note: Subsection J incorporates the fundamental provisions of the NAIC 1987 “After Market Parts Model Regulation” and makes requirements applicable to all replacement crash parts. Adoption of this subsection is the recommended approach.

Section 9. Standards for Prompt, Fair and Equitable Settlements Applicable to Fire and Extended Coverage Type Policies with Replacement Cost Coverage

A. When the policy provides for the adjustment and settlement of first party losses based on replacement cost, the following shall apply:

- (1) When a loss requires repair or replacement of an item or part, any consequential physical damage incurred in making such repair or replacement not otherwise excluded by the policy, shall be included in the loss. The insured shall not have to pay for betterment nor any other cost except for the applicable deductible.
- (2) When a loss requires replacement of items and the replaced items do not match in quality, color or size, the insurer shall replace all items in the area so as to conform to a reasonably uniform appearance. This applies to interior and exterior losses. The insured shall not bear any cost over the applicable deductible, if any.

B. Actual Cash Value:

- (1) When the insurance policy provides for the adjustment and settlement of losses on an actual cash value basis on residential fire and extended coverage, the insurer shall determine actual cash value as follows: replacement cost of property at time of loss less depreciation, if any. Upon the insured’s request, the insurer shall provide a copy of the claim file worksheets detailing any and all deductions for depreciation.
- (2) In cases in which the insured’s interest is limited because the property has nominal or no economic value, or a value disproportionate to replacement cost less depreciation, the determination of actual cash value as set forth above is not required. In such cases, the insurer shall provide, upon the insured’s request, a written explanation of the basis for limiting the amount of recovery along with the amount payable under the policy.

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Chronological Summary of Actions (all references are to the Proceedings of the NAIC)

1990 Proc. II 7, 13-14, 160, 179-184 (adopted).

1991 Proc. I 9, 16, 192-193, 206-211 (amended and reprinted).

This document replaces a model named "Unfair Claims Settlement Practices Model Regulation."

1976 Proc. II 15, 17 342, 365, 367-370 (adopted).

1980 Proc. II 22, 26, 906, 930, 936 (amended).

1981 Proc. I 47, 51, 255, 258, 263 (amended).

**UNFAIR PROPERTY/CASUALTY CLAIMS SETTLEMENT PRACTICES
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These charts are intended to provide the readers with additional information to more easily access state statutes, regulations, bulletins or administrative rulings which are related to the NAIC model. Such guidance provides the reader with a starting point from which they may review how each state has addressed the model and the topic being covered. The NAIC Legal Division has reviewed each state's activity in this area and has made an interpretation of adoption or related state activity based on the definitions listed below. The NAIC's interpretation may or may not be shared by the individual states or by interested readers.

This state page does not constitute a formal legal opinion by the NAIC staff on the provisions of state law and should not be relied upon as such. Every effort has been made to provide correct and accurate summaries to assist the reader in targeting useful information. For further details, the laws cited should be consulted. The NAIC attempts to provide current information; however, due to the timing of our publication production, the information provided may not reflect the most up to date status. Therefore, readers should consult state law for additional adoptions and subsequent bill status.

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KEY:

MODEL ADOPTION: States that have citations identified in this column adopted the most recent version of the NAIC model in a **substantially similar manner**. This requires states to adopt the model in its entirety but does allow for variations in style and format. States that have adopted portions of the current NAIC model will be included in this column with an explanatory note.

RELATED STATE ACTIVITY: States that have citations identified in this column have **not** adopted the most recent version of the NAIC model in a substantially similar manner. Examples of Related State Activity include but are not limited to: An older version of the NAIC model, legislation or regulation derived from other sources such as Bulletins and Administrative Rulings.

NO CURRENT ACTIVITY: No state activity on the topic as of the date of the most recent update. This includes states that have repealed legislation as well as states that have never adopted legislation.

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Alabama	ALA. ADMIN. CODE r. 482-1-124 (2003); r. 482-1-125 (2003/2009).	
Alaska	ALASKA ADMIN. CODE tit. 3, §§ 26.010 to 26.300 (1989/2011).	
American Samoa	NO CURRENT ACTIVITY	
Arizona	ARIZ. ADMIN. CODE § 20-6-801 (1981).	
Arkansas	ARK. CODE R. § 43 (1989/2001).	
California		CAL. CODE REGS. tit. 10, §§ 2695.1 to 2695.13 (1993/2013).
Colorado		5 COLO. CODE REGS. § 1-14 (2001); § 2-15 (2004).
Connecticut	NO CURRENT ACTIVITY	
Delaware		18 DEL. CODE REGS. § 903 (2001/2003); § 1310 (1998/2005); DOM./FOR. INSUR. BULLETIN 61 (2013).
District of Columbia	NO CURRENT ACTIVITY	

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Florida	FLA. ADMIN. CODE ANN. r. 690-166.021 to 690-166.031 (1992/2004).	FLA. STAT. §§ 626.9743 to 626.9744 (2004); FLA. ADMIN. CODE ANN. r. 690-220.001 to 690-220.201 (1993) (Code of Ethics-Insurance Adjusters).
Georgia		GA. COMP. R. & REGS. 120-2-52 (1993).
Guam	NO CURRENT ACTIVITY	
Hawaii	NO CURRENT ACTIVITY	
Idaho	NO CURRENT ACTIVITY	
Illinois		ILL. ADMIN. CODE tit. 50, §§ 919.10 to 919.100 (1974/2004).
Indiana	NO CURRENT ACTIVITY	
Iowa	NO CURRENT ACTIVITY	
Kansas	KAN. ADMIN. REGS. §§ 40-1-34 (1981/2003).	
Kentucky	806 KY. ADMIN. REGS. 12:095 (1992/2001); 12:092 (1990).	
Louisiana		LA. REV. STAT. ANN. § 22:1892 (2009).
Maine	NO CURRENT ACTIVITY	
Maryland		MD. CODE ANN., INS. § 27-304.1 (2003) (Authorizes commissioner to adopt rules about claims involving a total loss of auto); MD. CODE REGS. §§ 31.15.07.03 to 31.15.07.10 (1990/2010).
Massachusetts	NO CURRENT ACTIVITY	
Michigan	NO CURRENT ACTIVITY	

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Minnesota		MINN. STAT. § 72A.201 (1967/2006); BULLETIN 2006-2 (2006).
Mississippi	NO CURRENT ACTIVITY	
Missouri	MO. CODE REGS. ANN. tit. 20, §§ 100-1.010 to 100-1.300 (1974/2011).	MO. CODE REGS. ANN. tit. 20, § 300-1.100 (2008).
Montana	NO CURRENT ACTIVITY	
Nebraska	210 NEB. ADMIN. CODE § 60 (1992/1994).	
Nevada	NEV. ADMIN. CODE §§ 686A.600 to 686A.680 (1980/2006).	
New Hampshire		N.H. CODE ADMIN. R. ANN. INS. 1001.01 to 1001.16 (1982/1999).
New Jersey	N.J. ADMIN. CODE §§ 11:2-17.1 to 11:2-17.14 (1981/2013).	
New Mexico	NO CURRENT ACTIVITY	
New York	N.Y. COMP. CODES R. & REGS. tit. 11, §§ 216.0 to 216.13 (Regulation 64) (1972/2013).	Circular Letter 2011-13 (2011).
North Carolina		11 N.C. ADMIN. CODE § 4.03919 (1979/1989); §§ 4.0418 to 4.0428 (1979).
North Dakota	NO CURRENT ACTIVITY	
Northern Marianas	NO CURRENT ACTIVITY	
Ohio	OHIO ADMIN. CODE 3901:1-54 (1993/2004).	OHIO ADMIN. CODE 3901:1-60 (1994/2010) (Health claims).

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Oklahoma	OKLA. ADMIN. CODE §§ 365:15-3-1 to 365:15-3-9 (1989/1994).	
Oregon	OR. ADMIN. R. 836-080-0205 to 836-080-0250 (1980/1992).	
Pennsylvania	31 PA. CODE §§ 146.1 to 146.10 (1978).	
Puerto Rico		P.R. RULE XLVII (1975).
Rhode Island	11-5-73 R.I. CODE R. §§ 1 to 11 (2014).	BULLETIN 2004-3 (2004).
South Carolina	NO CURRENT ACTIVITY	
South Dakota	NO CURRENT ACTIVITY	
Tennessee	NO CURRENT ACTIVITY	
Texas		TEX. ADMIN. CODE §§ 21.201 to 21.205 (1976/1998); §§ 21.2801 to 21.2816 (2000).
Utah	UTAH ADMIN. CODE r. 590-89 (1982/1989); r. 590-190 (1999/2014); 590-192-1 to 590-192-14 (1999/2012).	UTAH ADMIN. CODE r. 590-191 (1999/2014),
Vermont	79 VT. CODE R. § 2 (1979).	
Virgin Islands	NO CURRENT ACTIVITY	
Virginia	14 VA. ADMIN. CODE §§ 5-400-10 to 5-400-80 (1978).	
Washington	WASH. ADMIN. CODE 284-30-300 to 284-30-800 (1978/2013).	

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
West Virginia	W. VA. CODE R. §§ 114-14-1 to 114-14-10 (1981/2005).	Informational Letter 189 (2014).
Wisconsin	NO CURRENT ACTIVITY	
Wyoming	NO CURRENT ACTIVITY	

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UNFAIR PROPERTY/CASUALTY CLAIMS SETTLEMENT PRACTICES MODEL REGULATION

Legislative History

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After a section was added to the Unfair Trade Practices Act defining unfair claims settlement practices, the subcommittee began work on a regulation. **1975 Proc. II 319.**

It was the consensus of the drafters working on the new regulation that the new drafts would provide a new emphasis on claims issues. **1990 Proc. II 160.**

Section 1. Authority

Section 2. Purpose

In 1988 a new subgroup was appointed to revisit the Unfair Claims Settlement Practices Regulation. Several regulators discussed the need to address the regulation in light of the emerging growth of private causes of action under the comparable state provisions and whether the actions were appropriate and beneficial to consumers in general. **1989 Proc. I 159.**

Two drafts were offered based on the existing model. The drafts were separated into one covering life and health claims and one covering property and casualty claims. The first issue of discussion was the NAIC's position regarding whether a private cause of action was intended to be created by the Unfair Trade Practices Act and the corresponding regulation. The subgroup decided no private cause of action was intended and language was added to the proposed drafts to that effect. **1989 Proc. II 204.**

The last sentence stating this was a clarification of original intent rather than a change of position was added with the technical amendments six months after adoption of the new model. **1991 Proc. IA 206.**

Section 3. Definitions

Most of the definitions adopted in the original model were incorporated in the new replacement model also. **1975 Proc. II 319.**

The provision incorporating the statutory definition by reference was added with the technical amendments in December of 1990. **1991 Proc. IA 206.**

B. A definition of claim file was added with the technical amendments. **1991 Proc. IA 206.**

C. The advisory committee expressed concern about the definition of claimant which also included his legal representative. The advisory committee interpreted this to mean the claimant's attorney or someone else authorized by law to represent the claimant. They did not interpret it, for example, to include the garage owner to whom the claimant had taken his car. The garage owner has an inherent conflict of interest with the claimant. Permitting the garage owner to negotiate claims on behalf of the claimant would increase the cost of settling claims. **1976 Proc. II 371.**

F. The model recognized the distinction between first and third party claimants by definition and application. This was supported by the advisory committee. **1976 Proc. II 372.**

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Section 4. File and Record Documentation

Section 5. Misrepresentation of Policy Provisions

Section 6. Failure to Acknowledge Pertinent Communications

The chair of the advisory committee presented their objections to the time frame for responding to claimants. The model originally adopted allowed ten days for response, but the advisory committee did not feel this was long enough. Since the proposed regulation was to fit all lines of insurance and all kinds of companies with varying methods of operations, they thought 15 days was a more realistic starting point. **1976 Proc. II 370.** The provision adopted continued to include the ten-day limit. **1976 Proc. II 368.**

One comment received on the draft suggested that including requirements for unnecessary correspondence, unrealistic deadlines, and inflexible guidelines would ultimately result in an increase in settlement costs. **1976 Proc. II 372.**

Section 7. Standards for Prompt, Fair and Equitable Settlements Applicable to All Insurers

It was suggested by one commentator that claim settlement guidelines that would be appropriate for one line might not be appropriate for another. The time needed for settling an auto claim may have little bearing on that needed for an ocean marine claim. **1976 Proc. II 372.**

When drafters were preparing the new model regulation, the advisory committee reported continuing concerns where it felt the property and casualty regulation had gone too far in the particulars of claim assessment and the payment process. **1990 Proc. II 160.**

B. The NAIC Arson Task Force spoke in favor of adoption of the model regulation by the states and particularly endorsed the provision permitting extra time for investigations. There was general agreement that the model provision permitted insurers additional periods of time to conduct investigations as long as the insured is notified at a specific interval and given reasons for the need for additional time. The model usually works well in balancing the rights of insureds with the needs of insurance companies to adequately investigate claims. **1980 Proc. I 683.**

An amendment to both Subsections B and C was adopted upon the recommendation of the Arson Task Force. Adjusters had frequently complained that the model regulation did not allow enough time for investigation. The new second paragraph allowed a longer time to investigate in cases of suspected arson, supported by specific information, such as evidence of an accelerant used in the fire. The specific information must be available for insurance department review. **1980 Proc. II 933, 936.**

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Section 8. Standards for Prompt, Fair and Equitable Settlements Applicable to Automobile Insurance

The first model adopted had specific provisions addressed to claims practices that had produced problems in the past, principally in the auto insurance field. **1976 Proc. II 370-371.**

E. A provision in the original model prohibited basing cash settlement on an amount less than what repairs would cost except in total loss situations. This was deleted in 1980 as incompatible with cost containment concerns. The language permitted the practice of a growing number of insurers to make a claim settlement offer based on the difference in value of the car from the time before the loss to a time directly after the loss in situations where they have good reason to believe the claimant would not have the car repaired. In almost all cases this difference in value would be less than the cost of repairing the damage and would frequently involve a situation where there already existed unrepaired damage. The subcommittee listed several advantages of this loss settlement technique: (1) Promotes cost containment on auto physical damage insurance; (2) The law of damages in most states supports a decrease in value concept; (3) Insured still has the option to have car repaired; (4) Procedure has indirectly encouraged repairing of vehicles. They also listed several disadvantages: (1) Determination of the amount of decrease is often difficult; (2) Offer often causes insureds to think they are being offered less than actual loss; (3) Procedure becomes unfair if arbitrary formulas used; (4) Hard to explain to claimants. **1981 Proc. I 262-263.**

A consumer representative expressed concern about the deletion. He described problems he felt exist in the “decrease in value” claims program. The subcommittee agreed to give consideration to his concerns. **1981 Proc. II 431.**

The subcommittee voted to reaffirm the deletion of the provision. Several insurers spoke and presented statements in support of the NAIC action. One said that the NAIC action did not imply endorsement of “decrease in value” loss settlement practices, but rather recognized currently approved policy provisions permitting alternate types of claims settlement. **1982 Proc. I 158-159.**

An association of insurers encouraged the subcommittee to retain the deletion. The representatives stated that courts in many jurisdictions used decrease in value as the measure of damage. To require settlement based on the cost of repair, regardless of whether repairs are made, will oftentimes result in the insured receiving a windfall. **1982 Proc. I 160.**

One regulator noted that certain consumer safeguards should be observed in connection with “decrease in value” claims settlement programs. The seven characteristics, necessary to make such programs effective were outlined:

- (1) An estimate of the decrease in value must be made by a qualified appraiser who has personally inspected the vehicle and this estimate must be given to the claimant.
- (2) The estimate of the decrease in value must be based on the value of the car prior to the loss and the value of the car after the loss.

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Section 8E (cont.)

- (3) Formulas, such as percentage of repair cost, may not be used to determine the decrease in value.
- (4) Settlements based on the decrease in value must contain an offer to pay the difference between the decrease in value settlement and the repair cost if the car is subsequently repaired within a reasonable period.
- (5) There must be complete documentation of each decrease in value claim settlement including an explanation of how both the decrease in value and repair cost were determined and a copy of this should be given to the claimant.
- (6) The decrease in value procedure should not be used in instances where vehicle damage involves safety-related equipment.
- (7) The decrease in value procedure should be used uniformly and should not discriminate against first-party or third-party claimants. **1982 Proc. I 158.**

J. A drafting note was added stating that this subsection incorporates the fundamental provisions of the NAIC's After Market Parts Regulation. **1991 Proc. IA 211.**

Section 9. Standards for Prompt, Fair and Equitable Settlements Applicable to Fire and Extended Coverage Type Policies with Replacement Cost Coverage

Chronological Summary of Actions

June 1976: Adopted Unfair Claims Settlement Practices Model Regulation.

June 1980: Adopted provision allowing additional time to investigate claims when arson is suspected.

December 1980: Deleted sentence that proscribed setting lower limit on settlement offers.

June 1990: Adopted new separate regulation for property and casualty claims.

December 1990: Adopted technical amendments.