50 State Survey of Bad Faith Laws and Remedies

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Acknowledgments

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Introduction

Insurance is woven into the economic fabric of our society: Insurance policies provide financial security that makes it possible for people to buy homes, run businesses, borrow money, operate motor vehicles and recover from everyday losses and catastrophic events. Insurance is a modern day necessity - not a luxury.

Insurance is so essential in our modern world that Americans who want to drive cars, operate businesses, maintain their health, and take out loans are *legally required* to buy insurance. Insurance protection and coverage after an adverse event makes the difference between recovery and ruin.

With a few exceptions, the insurance industry is regulated by the states, not the federal government. Each state takes its own approach to reviewing insurance policy forms, rates, solvency, claim handling and consumer complaints and the size of their workforce and resources vary.

Many states have adopted versions of model regulations and laws that have been developed by the National Association of Insurance Companies, (NAIC) or the National Conference of State Insurance Legislators (NCOIL), so there is some uniformity across the country. In addition to the regulations and statutes in place in states across the country, there are case law principles rendered by their courts that define the standards that companies must adhere to when dealing with their insureds. Most state insurance oversight agencies have the authority to conduct "Market Conduct Exams" that are essentially audits of insurer claim handling, and have the ability to levy fines and penalties against insurers found to have violated their regulations or laws.

Virtually every state insurance oversight agency offers some level of assistance to consumers who have questions about insurance or need help resolving a problem, coverage or claim dispute, but they do not as a rule provide individual legal representation. In general, it is often up to private litigants and their attorneys prosecute insurers for breaching their policy contracts, failing to defend their insureds and/or pay amounts owed in full or on time, failing to adhere to applicable laws or regulations, otherwise treating claimants unfairly and/or defeating the reasonable expectations of coverage they created through representations to their customers at the point of sale or in writing.

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 laws across the United States that apply to insurers and available remedies for policyholders who are harmed by their conduct.

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

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

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.

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 privately-managed insurance system. This ability is also important to insurers that want to be law-abiding, because the threat of damages for violation of claim handling standards, regulations and laws helps protect them from being unfairly disadvantaged in the marketplace by competitors that engage in unfair practices in order to increase profitability.

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 by insurers have impacted decisional law in their favor over the past two decades. Attorneys that specialize in representing insureds, trial lawyer organizations and consumer advocates are constantly working to maintain and strengthen legal protections and rights for policyholders.

In recent years, insurer lobbying has successfully made very substantial reductions in available litigation remedies and rights in Florida, Louisiana and several other states, but insurance consumers have won significant victories in other states, including the Insurance Fair Conduct Act in the State of Washington[2] and post-disaster policyholder rights enacted in California, Oregon and Colorado.

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:

- In 1997 the National Association of Insurance Commissioners drafted and published a proposed model Unfair Claims Settlement Practices Act (referred to as "UCSPA"). Since that time almost every state has adopted all or portions of the model Act. The UCSPA specifies conduct that constitutes fair and unfair claim practices. "Refusing to pay claims without conducting a reasonable investigation" and "not attempting in good faith to effectuate prompt, fair and equitable settlement of claims where liability has become reasonably clear" are prohibited claim practices that come from the model act. The survey details a few states where an insured has standing to sue an insurer directly for violating a

[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/

claim practices statute. In all states that adopted portions of the UCSPA, there are standards that can provide the basis for a claim against an insurer.[3]

- Some states have adopted statutes other than the UCSPA that define claims handling standards and give insureds remedies for violations. For example, some state statutes impose deadlines and penalties related to claim decisions and payments.

- The National Association of Insurance Commissioners also promulgated Model Regulations designed to implement the UCSPA. These regulations specify insurers' obligations in more detail. Some state insurance departments have adopted their own regulations and administrative rules separate from or in addition to the NAIC's proposed models.

- Every state recognizes that an insured can file a breach of contract suit against an insurance company for failing to pay what was owed on a claim. However, not all states allow for recovery of ***consequential*** damages in these suits, such as attorneys fees, 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. This obligation is often called the "covenant of good faith and fair dealing." It requires the insurer to act fairly and reasonably in processing, investigating, evaluating, and paying a claim. Among the key principles that underlie the covenant is that an insurer must protect and consider the interests of its policyholders and balance those with its own financial interests. Breach of the covenant is often referred to as "bad faith" conduct.[4]

- Some states define bad faith as conduct that is "unreasonable or without proper cause." Other states define bad faith more narrowly. Some states will not allow a bad faith claim to proceed where it determines that coverage was "fairly debatable" or that a "genuine dispute" existed between the insurer and insured. 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 deemed 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. A few states provide statutory penalties that either supplement these remedies or are an exclusive extra-contractual remedy.

About UP

[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*").

[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 is a non-profit 501(c) (3) organization founded 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, support the organization's work. UP is based in San Francisco, California but has staff in Colorado, Florida and Hawaii and over 250 volunteers nationwide. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (disaster preparedness through insurance literacy), and *Advocacy and Action* (advancing pro-consumer laws and public policy through Amicus Briefs and legislative advocacy). UP hosts a library of publications, consumer tips and tools, legal briefs 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 300 amicus briefs on insurance issues throughout the United States in federal and state courts of appeal, and the U.S. Supreme Court.

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ALABAMA

Alabama has not adopted the Unfair Claims Settlement Practices Act ("UCSPA").

Alabama has adopted claims practices regulations. AL ADC 482-1-124-.01 to AL ADC 482-1-124-.11.

Bad Faith

Alabama recognizes a common law tort cause of action for bad faith against a first-party insurer for intentional misconduct in wrongfully reusing to settle a claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal. *State Farm Fire and Cas. Co. v. Brechbill*, 144 So.3d 248, 257-58 (Ala. 2013) (*citing Chavers v. Nat'l Sec. Fire & Cas. Co.*, 405 So. 2d 1, 7 (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.

Brechbill, 144 So.3d at 258 (citing *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. *Brechbill*, 144 So.3d at 258. If the insured relies on the insurer's intentional failure to determine the existence of a lawful bases to pay insurance benefits, it "must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim." *Id*.; *see also Bowen*, 417 So. 2d at 183 ("If the plaintiff relies on the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.").

Alabama courts also recognize a claim for third-party "bad faith failure to settle and for bad faith refusal to defend under circumstances where the obligation to afford a defense has been established." *Aetna Cas. & Sur. Co. v. Mitchell Bros., Inc*., 814 So. 2d 191, 201 (Ala. 2001). "[A] cause of action arising out of a failure to settle a third-party claim made against the insured does not accrue unless and until the claimant obtains a final judgment [against the insured] in excess of the policy limits." *Fed. Ins. Co. v. Travelers Cas. And Sur. Co.*, 843 So.2d 140, 145 (Ala. 2002).

Where an insurer's refusal to settle a third party claim within policy limits leads to an excess judgment against an insured, the insurer is liable for the excess judgement where the insurer's wrongful refusal to settle was either negligent or intentional. *Chavers*, 405 So. 2d at 5.

Damages

Consequential damages are recognized in bad faith claims, including damages for "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, 22 (Ala. 2001). "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); *rev'd on other grounds, Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

Punitive damages are recoverable. *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). Compensatory or nominal damages must be awarded in order to support a punitive damages award. *Life Ins. Co. of Ga. v. Smith*, 719 So. 2d 797, 806 (Ala. 1998). No award of punitive damages may exceed three times the compensatory damages of the party claiming punitive damages or $500,000, whichever is greater. Ala. Code § 6-11-21.

Attorneys' fees that insureds incur litigating coverage issues against their insurers may not be recoverable. *Green v. Standard Fire Ins. Co. of Ala.*, 477 So. 2d 333, 335 (Ala. 1985).

Statute of Limitations

In Alabama, the statute of limitations for an insurance bad faith claim is two years. Ala. Code § 6-2-38(l); *ALFA Mut. Ins. v. Smith,* So.2d 691, 692-93 (Ala. 1988).

ALASKA

Alaska has adopted a version of the UCSPA. Alaska Stat. § 21.36.125. This statute enumerates inappropriate actions by insurers but does not contain an express or implied private cause of action against an insurer. Alaska Stat. §21.36.125; *O.K. Lumber Co. v. Providence Wash. Ins. Co.* 759 P.2d 523 (Alaska 1998).

Alaska has adopted a version of the UCSPA Model Regulation. 3 AAC §§ 26.010 to 26.300.

Bad Faith

Alaska recognizes a tort 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.*

When an injured third party brings a claim against an insured, the insurer "must investigate claims and inform the insured of all settlement offers and the possibility of excess recovery by the injured claimant." *Whitney v. State Farm Mut. Auto. Ins. Co.*, 258 P.3d 113, 117 (Alaska 2011). When an injured third party "makes a policy limits demand, the insurer must tender maximum policy limits to settle [the] demand when there is a substantial likelihood of an excess verdict against the insured." *Id*. The insurer is liable for damages resulting from its breach of the covenant of good faith and fair dealing, including any excess judgment against its insured. *Jackson v. Am. Equity Ins. Co.*, 90 P.3d 136, 142 (Alaska 2004).

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 also recoverable. *Alaska Pac. Assur. Co. v. Collins*, 794 P.2d 936, 949 (Alaska 1990). Alaska courts have not explicitly limited recovery of emotional distress damages in bad faith cases to those instances where the plaintiff has shown "severe emotional distress." *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1249 (9th Cir. 1998).

Attorneys' fees are recoverable by statute to the prevailing party based on a formula established in Alaska Rule of Civil Procedure 82. Alaska R. Civ. P. 82; *see also Hillman v. Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1327 (Alaska 1993). The prevailing party is the party "who has successfully prosecuted or defended against the action, the one who is successful on the 'main issue' of the action and 'in whose favor the decision or verdict is rendered and the judgment entered.'" *Day v. Moore*, 771 P.2d 436, 437 (Alaska 1989). Unrepresented litigants have no right to recover attorneys' fees under Rule 82 unless they are attorneys themselves. *Maloney v.*

Progressive Specialty Ins., 99 P.3d 565, 569 (Alaska 2004). Insurers are not obligated to include attorneys' fees as a part of policy limits offer when the insured is not represented by an attorney.

Punitive damages are also available in bad faith tort actions. *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1157 (Alaska 1989); Alaska Stat. §09.17.020; Punitive damages "may be awarded only on proof by clear and convincing evidence that a defendant's conduct was either outrageous, including acts done with malice or bad motives, or evidenced reckless indifference to the interests of another." *Great Divide Ins. Co. v. Carpenter*, 79 P.3d 599, 608 (Alaska 2004).

Statute of Limitations

Alaska's statute of limitations for bringing first-party bad faith claim is two years. Alaska Stat. Ann. § 09.10.070 (a).

AMERICAN SAMOA

American Samoa has not adopted the UCSPA.

Bad Faith

American Samoa recognizes a common law tort cause of action for bad faith against an insurer for delaying payment on legitimate insurance claims. *Paisano's Corp. v. Nat'l Pacific Ins.*, 30 A.S.R. 2d. 139, *1 (Am. Samoa 1996). An insurer's duty to pay is triggered only after an insured has made a demand to the insurer. *Id*.

American Samoa has adopted the common law bad faith standard of care articulated by the Wisconsin Supreme Court in *Anderson*. *S. Star Int'l, Inc., v. Progressive Ins. Co. (Pago Pago) Ltd*, 4 A.S.R. 3d., *25 (Am. Samoa 2002); *see also Anderson v. Cont'l Ins. Co.*, 271 N.W.2d 368 (Wis. 1978). Under the *Anderson* standard, to prevail on a bad faith claim, the insured must demonstrate (1) that the insurer lacked a reasonable basis for denying benefits under the policy, and that the insured, and (2) the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *See S. Star, supra*., at *24.

American Samoa also has a statute that imposes strict liability on any insurer that fails to pay on a loss within the time specified in the insurance policy. A.S.C.A. § 29.1577; *see also S. Star, supra*. at *16-18. The tort of bad faith delay in paying legitimate insurance claims is not preempted by A.S.C.A. § 29.1577 because the statute penalizing delay in paying insurance claims does not rest upon a showing of bad faith. *Paisano's Corp. supra*., at *2.

Damages

American Samoa imposes a statutory penalty of 12% damages, similar to punitive damages, for any claim in which the insurer fails to pay on a loss within the time specified in the insurance policy. A.S.C.A. § 29.1577; *see also Paisano's Corp. supra*. at *1.

Attorneys' fees are recoverable for the costs of collecting insurance proceeds in situations where the insurer failed to pay a loss within the time specified in the insurance policy. A.S.C.A. § 29.1577; *see also Paisano's Corp. supra*., at *1.

Statute of Limitations

There is no specific statute of limitations for bad faith actions in the American Samoa, but the statute of limitations for claims based on written contracts is ten years. Am. Samoa Code Ann. § 43.0120.

ARIZONA

Arizona has adopted a version of the UCSPA. Ariz. Rev. Stat. Ann. § 20-461 (1981/2004). There is no private cause of action under the statute. §20-461(D) ("Nothing contained in this section is intended to provide any private right or cause of action to or on behalf of any insured or uninsured resident or nonresident of this state. It is, however, the specific intent of this section to provide solely an administrative remedy to the director for any violation of this section or rule related to this section.").

Arizona has also adopted a version of the UCSPA Model Regulation that applies to all insurance policies except those for worker's compensation and title insurance. Ariz. Admin. Code § 20-6-801 (1981) ("This rule applies to all persons and to all insurance policies, insurance contracts and subscription contracts except policies of Worker's Compensation and title insurance.").

Bad Faith

Arizona recognizes a cause of action for bad faith against a first-party insurer. *Noble v. Nat'l Am. Life Ins. Co.*, 624 P.2d 866, 868 (Ariz. 1981). In first-party cases, an insurer breaches its duty to act in good faith "if it (1) acts unreasonably towards its insured, and (2) acts knowingly or with reckless disregard as to the reasonableness of its actions." *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 792 P.2d 719, 723 (Ariz. 1990). In *Clearwater*, the Supreme Court of Arizona stated that the "insurer breaches its duty when it fails to process or denies a claim without a reasonable basis for doing so." *Id*. The absence of a reasonable basis is measured from an objective standard. *Id*. The inquiry is whether "a reasonable insurer under the circumstances have denied or delayed payment of the claim." *Noble,* 624 P.2d at 868. "The insurer must intend the act or omission and must form that intent without reasonable or fairly debatable grounds." *Demetrullas v. Wal-Mart Stores Inc.*, 917 F. Supp. 2d 993, 1005 (D. Ariz. 2013) (*quoting Rawlings v. Apodaca*, 726 P.2d 565, 576 (Ariz. 1986) (en banc)).

Arizona also recognizes a bad faith cause of action against a third-party insurer. In this context, "the trier of fact must decide whether the insurer considered the insured's interests equally with its own interests." *Clearwater*, 792 P.2d at 723. The standard "requires that the insurer consider various factors," including "the relative strength of the claim by the third party against the insured," the "debatability" of the claim, and "the financial risk to the insured in the event of a judgment in excess of the policy limits[.]" *Id*.; *see also Essex Ins. Co. v. W.G.S., LLC*, No. CV08-1402-PHX-JAT, 2010 WL 729323, at *4 (D. Ariz. Mar. 2, 2010) ("In determining whether an insurer has breached its duty by failing to give equal consideration to an insured's interest in settling a third-party case, the Court considers the following factors, if applicable: (1) the strength of the injured claimant's case on the issues of liability and damages; (2) attempts by the insurer to induce the insured to contribute to a settlement; (3) failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; (4) the insurer's rejection of advice of its own attorney or agent; (5) failure of the insurer to inform the insured of a compromise offer; (6) the amount of financial risk to which each party is exposed in the event of a refusal to settle; the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and any other factors tending to establish or negate bad faith on the part of the insurer.").

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

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 (Ariz. 2000).

Damages

Consequential damages are recoverable in bad faith cases. *Farr v. Transamerica Occidental Life Ins. Co. of California*, 699 P.2d 376, 383 (Ariz. App. 1st Div. 1984) ("An insured's recovery in a bad faith case is *not* limited to the policy limits plus interest. Instead, the insured would be entitled to the amount due under the contract, to consequential damages, and to attorneys' fees."). "While consequential damages might be modest or nonexistent in many bad faith cases, in others they are substantial and represent a considerable deterrent to a refusal to pay." *Id*.

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 also recoverable. *Farr*, 699 P.2d at 382 (concluding "that damages for emotional distress may be awarded even though the defendant did not intentionally cause the distress and even though the distress was not severe.").

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) (holding that attorneys' fees can be awarded in connection with the tort of bad faith).

Punitive damages are also available if the insurer sought to intentionally harm the insured, proven by clear and convincing evidence of the insurer's "evil mind." *Rawlings v. Apodaca*, 726 P.2d 565, 578 (Ariz. 1986) ("[P]laintiff must also show that the evil hand that unjustifiably damaged the objectives sought to be reached by the insurance contract was guided by an evil mind which either consciously sought to damage the insured or acted intentionally, knowing that its conduct was likely to cause unjustified, significant damage to the insured."). Alternatively, a prima facie case for punitive damages may be established by showing that the insurer acted with a desire to harm or conscious disregard for known risks of harm from bad faith conduct. *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1081 (Ariz. 1987) ("[T]o establish a prima facie case for the recovery of punitive damages, Hawkins had to prove that an evil mind—either a desire to harm or conscious disregard of the Hawkins' right to a fair valuation of their property loss—motivated Allstate's bad faith conduct.").

Statute of Limitations

The Arizona statute of limitations is two years for a bad faith insurance claim for both first-party and third-party claims. *Ness v. W. Sec. Life Ins. Co.*, 851 P.2d 122, 125 (Ariz. Ct. App. 1992) ("Ness concedes that the bad faith claim is subject to the two-year limitations period in A.R.S.

§ 12-542"); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 913 P.2d 1092, 1097 (Ariz. 1996) ("We approve that portion of the court of appeals' opinion finding that an action for bad faith failure to settle is governed by the two-year statute of limitations period in A.R.S. § 12-542.").

ARKANSAS

Arkansas adopted the UCSPA. This statutory scheme governs unfair claims settlement practices, and the insurance provisions may be found at Ark. Code Ann. § 23-66-206.

Bad Faith

Arkansas recognizes a cause of action for common law bad faith against a first-party insurer. *Parker v. S. Farm Bureau Cas. Ins. Co.*, 935 S.W.2d 556, 561 (Ark. 1996) ("This court has stated that an insurance company may incur liability for the first-party tort of bad faith when it affirmatively engages in dishonest, malicious, or oppressive conduct in order to avoid a just obligation to its insured.").

In order to maintain a common law 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 562. 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." *Columbia Nat'l Ins. Co. v. Freeman*, 64 S.W.3d 720, 723 (Ark. 2002); *State Auto Prop. And Cas. Ins. Co. v. Swaim*, 991 S.W.2d 555, 559 (Ark. 1999) (same).

Arkansas has also recognized common law third-party bad faith claims for failure to settle. *McCall v. Southern Farm Bureau Cas. Ins. Co.*, 501 S.W.2d 223 (Ark. 1973) ("It is true that an insurer is liable to its insured for any excess judgment of the insured's policy limits if the failure to settle the claim by the insurer is due to fraud, bad faith or negligence."); *S. Farm Bureau Cas. Ins. Co. v. Parker*, 341 S.W.2d 36, 40-41 (Ark. 1960) (explaining that, in considering whether to settle, the insurer must give at least equal consideration to the interests of the insured as to its own interests).

Arkansas recognizes a limited, private cause of action for statutory first party bad faith when an insurer fails to pay losses within the time specified in the policy after demand is made. Ark. Code Ann. § 23-79-208(a)(1).

Damages

Parties may recover compensatory and punitive damages from a common law bad faith claim. *Employers Equitable Life Ins. Co. v. Williams*, 665 S.W.2d 873 (Ark. 1984) (explaining that punitive damages serve a deterrent effect that is useful in this type of case). Punitive damages are available in bad faith claims where the insurer's behavior is intentionally dishonest or deceitful. *Viking Ins. Co. v. Jester*, 836 S.W.2d 371, 379 (Ark. 1992) (affirming the lower court's judgment awarding $1,000 in compensatory damages and $250,000 in punitive damages).

Further, under Ark. Code Ann. § 23-79-208(a)(1), policyholders can recover damages in the amount of the loss plus 12% damages upon the amount of the loss and reasonable attorneys' fees for the prosecution and collection of the loss. Ark. Code Ann. § 23-79-208(a)(1).

Consequential damages may also be available under the common law. On appeal from the District Court for the Eastern District of Arkansas, the Eighth Circuit stated that consequential damages may flow from the insurer's bad faith. *Carpenter v. Auto. Club Interinsurance Exch.*, 58 F.3d 1296, 1302 (8th Cir. 1995) ("[T]he policy excluded coverage for punitive damages, yet we hold that Carpenter is entitled to be made whole, which necessarily requires her to recover the amount of the punitive damages awarded to the Whites and Giles in the underlying state court action. Those damages are part of the consequential damages flowing from AAA's alleged bad faith and negligence in handling Carpenter's insurance claims."). Similarly, the Eighth Circuit acknowledged the fact that while consequential damages are not available in the case at hand because they are not available for breach of contract under Arkansas law, they may be recoverable if the insured could have proven the insurer had acted in bad faith. *H & H Brokerage, Inc. v. Vanliner Ins. Co.*, 168 F.3d 1124, 1126 (8th Cir. 1999) (recognizing that consequential damages may be recoverable in bad faith action).

Statute of Limitations

In Arkansas, the statute of limitations for an insurance bad faith claim is three years. *Carpenter v. Auto. Club Interins. Exch.*, 58 F.3d 1296, 1300 (8th Cir. 1995) (applying Arkansas law).

CALIFORNIA

California has adopted a version of the UCSPA. Cal. Ins. Code § 790.03 (1959/2012).

California has adopted Fair Claims Settlement Practices Regulations, but does not recognize a private right of action. 10 Cal. Code Regs. tit. 10 § 2695.1 (2003/2023); *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 758 P.2d 58 (Cal. 1988). However, if the insurer's conduct also violates California's unfair competition law ("UCL"), the insured can bring a cause under that statute. *See* Cal. Bus. & Prof. Code § 17200 *et seq*., *Zhang v. Super. Ct.*, 304 P.3d 163, 166 (Cal. 2013).

Bad Faith

California recognizes a common law cause of action for bad faith against a first-party insurer. *Gruenberg v. Aetna Ins. Co*., 510 P.2d 1032 (Cal. 1973).

An insured must show two things to maintain a first-party 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.

Id.; *Major v. W. Home Ins. Co.*, 169 Cal. App. 4th 1197, 1209 (Cal. Ct. App. 2009).

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. *Gruenberg*, 510 P.2d at 1032*; see also Egan v. Mut. of Omaha Ins. Co.*, 620 P.2d 141(Cal. 1979) (an insurer also commits bad faith by failing to properly investigate a claim); *Gelfand v. N. Am. Capacity Ins. Co.*, No. C-12-4819, 2013 WL 6662501, at *5 (N.D. Cal. Dec. 17, 2013).

Whether an insurer acted reasonably is evaluated objectively based on the circumstances, as they existed at the time of the action or decision in question. *R&B Auto Ctr., Inc. v. Farmers Grp., Inc.*, 140 Cal. App. 4th 327, 354 (Cal. Ct. App. 2006).

California also recognizes a third-party bad faith claim for failure to defend or settle in good faith. *Johansen v. Cal. State Auto. Ass'n Inter-Ins.* Bureau, 538 P.2d 744, 746 (Cal. 1975); *Archdale v. Am. Int'l Specialty Lines Ins. Co.*, 64 Cal. Rptr. 3d 632 (Cal. App. 4th 2007). While 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*, 758 P.2d at 58, they are evidence that can be used to prove that the carrier acted in bad faith. *Safeco Ins. v. Parks*, 88 Cal. Rptr. 3d 730 (Cal. Ct. App. 2009); *Jordan v. Allstate Ins. Co*., 56 Cal. Rptr. 3d 312 (Cal. Ct. App. 2007). The Judicial Council has adopted a list of factors that can be considered in deciding whether an insurer acted unreasonably. Cal. Civ. Jury Instruction No. 2337.

The insurer has a duty to accept "reasonable" settlement offers. *Johansen*, 538 P.2d at 748. An offer is reasonable if, given the plaintiff's injuries and insured's likely liability, the judgment is likely to exceed the offer. *Id.*

The statute of limitations for a common law, third-party bad faith claim depends on the type of damages sought. *See Planet Bingo LLC v. Burlington Ins. Co.*, 62 Cal. App. 5th 44, 58 (2021). The statute of limitations is four years if the insured is seeking contract damages. Cal. Code Civ. P. § 337; *Archdale*, 154 Cal. App. 4th at 471. The statute of limitations is two years if the insured is seeking tort damages (such as attorneys' fees under *Brandt v. Superior Court*, 693 P.2d 796 (Cal. 1985)). Cal. Code Civ. P. § 339; *Lee v. Metro. Life Ins. Co.*, 87 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015); *see Richardson v. Allstate Ins. Co.*, 172 Cal. Rptr. 423 8, 12-13 (Cal. Ct. App. 1981) (cited in *Gourley v. State Farm Mut. Auto. Ins. Co.*, 822 P.2d 374, 378-79 (Cal. 1991)).

Damages

Consequential damages are available in California, provided they are reasonably foreseeable. *Behnke v. State Farm Gen. Ins. Co.*, 196 Cal. App. 4th 1443, 1468 (Cal. Ct. App. 2011); Cal. Civ. § 3300 (measure of damages is "amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or … would be likely to result therefrom").

Emotional distress damages are recoverable in California. *Cates Const., Inc. v. Talbot Partners*, 980 P.2d 407 (Cal. 1999); Cal. Code Civ. P. § 3333.

Attorneys' fees are rewarded for properly apportioned awards to insureds. *See Cassim v. Allstate Ins. Co.*, 94 P.3d 513, 531-32 (Cal. 2004) (can recover "*Brandt*" attorneys' fees: those reasonably incurred to compel payment of insurance benefits); *Essex Ins. Co. v. Five Star Dye House, Inc.*, 137 P.3d 192, 194-95 (Cal. 2006); *McGregor v. Paul Revere Life Ins. Co.*, 369 F.3d 1099, 1102 (9th Cir. 2004) (attorneys' fees can be recovered in appeal of bad faith case).

Punitive damages may be awarded in California upon proof by clear and convincing evidence that the insurer acted with oppression, fraud, or malice. Cal. Civ. § 3294(a); *see Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1161 (9th Cir. 2002); *Nickerson v. Stonebridge Life Ins. Co.*, 371 P.3d 242, 244 (Cal. 2016). Punitive damages are unavailable for actions based purely on negligence and the failure of the insurer to act. *See, e.g.*, *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.*, 185 Cal. App. 3d 1149, 1154 (Cal. Ct. App. 1986).

Statute of Limitations

The statute of limitations for claims under the UCL statute is four years. Cal. Bus. & Prof. Code § 17208; *Aryeh v. Canon Bus. Sols., Inc.*, 292 P.3d 871, 876 (Cal. 2013).

COLORADO

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

Bad Faith

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)); *Herod v. Colorado Farm Bureau Mut. Ins. Co.,* 928 P.3d 834, 836 (Colo. App. 1996) (explaining that to establish bad faith in a first-party action, the policyholder must demonstrate the absence of a reasonable basis for denial of policy benefits and the insurer's knowledge or reckless disregard for the denial of benefits).

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); *Fincher ex rel. Fincher v. Prudential Prop. & Cas. Ins. Co.*, 2010 U.S. App. Lexis 8134 (10th Cir. 2010) (applying Colorado law) ("[A]n insurer may challenge claims which are fairly debatable and will be found to have acted in bad faith only if it has intentionally denied (or failed to process or pay) a claim without a reasonable basis."). 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).

Additionally, the Supreme Court of Colorado recognized the tort of bad faith in the third-party liability insurance context in *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138 (Colo. 1984). "The question of whether an insurer has breached its duties of good faith and fair dealing with its insured is one of reasonableness under the circumstances." *Id*. "The relevant inquiry is whether the facts pleaded show the absence of any reasonable basis for denying the claim, 'i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.'" *Id.* at 1142 (internal citations omitted).

"To establish that the insurer breached its duties of good faith and fair dealing, the insured must show that a reasonable insurer under the circumstances would have paid or otherwise settled the third-party claim." *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 415 (Colo. 2004).

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

Further, Colorado has a "prompt payment statute" that allows insureds to maintain an action when an insurer unreasonably delays or denies payment. The statute defines "unreasonable" as: "[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." Colo. Rev. Stat. § 10-3-1115, 10-3-1116. The statute also allows for recovery of double damages and attorneys' fees. *See*, *e.g.*, *Rockhill Ins. Co. v. CFI-Glob. Fisheries Mgt.*, 782 F. App'x 667, 673 (10th Cir. 2019) (remanding statutory bad faith claim under a liability policy and explaining that, under Colorado law, an insured whose claim for covered benefits has been unreasonably denied may seek to recover reasonable attorneys' fees and court costs and two times the covered benefit)*; Fisher v. State Farm Mut. Automobile Ins. Co.*, 419 P.3d 985, 990 (Colo. App. 2015), *aff'd*, 418 P.3d 501 (Colo. 2018) (explaining that "the only element at issue in [a] statutory claim [under section 10–3–1115] is whether an insurer denied benefits without a reasonable basis").

Insurers can also be held liable for violations of § 6-1-105 of the Colorado Consumer Protection Act. *Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 57 (Colo. 2001), *as modified on denial of reh'g* (Jan. 11, 2002) ("[W]e conclude that section 6–1–106 does not exempt the insurance industry from the provisions of the CCPA."). An insurer who engages in unfair trade practices, as set forth in the statute, can be liable for three times the amount of actual damages sustained, if it is established by clear and convincing evidence that such insurer engaged in bad faith conduct. Colo. Rev. Stat. Ann. § 6-1-113.

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 in statutory bad faith claims in Colorado, Colo. Rev. Stat. § 10-3-1116. Attorneys' fees are also 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 common law bad faith claim or in the underlying breach of contract claim. *Allstate Ins. Co. v. Huizar*, 52 P.3d 816 (Colo. 2002).

Punitive damages may be recovered on a claim of bad faith breach of insurance contract if the breach is accompanied by circumstances of fraud, malice or willful and wanton conduct. *Ballow v. PHICO Ins. Co.*, 878 P.2d 672, 682 (Colo. 1994); *S. Park Aggregates, Inc. v. Nw. Nat'l. Ins. Co.*, 847 P.2d 218, 224 (Colo. App. 1992); *Tait v. Harford Underwriters Ins. Co.*, 49 P.3d 337 (Colo. App. 2001); C.R.S. § 13-21-102(3)(a).

As discussed, it is possible to recover three times actual damages if the insurer is found liable for bad faith under the Colorado Consumer Protection Act. *Showpiece Homes Corp. v. Assurance Co. of America*, 38 P.3d 47 (Colo. 2001); Colo. Rev. Stat. Ann. § 6-1-113.

Statute of Limitations

In Colorado, a "bad faith breach of insurance contract claim is a tort claim governed by the two-year statute of limitations in section 13–80–102." *Cork v. Sentry Ins.*, 194 P.3d 422, 427 (Colo.

App. 2008) (internal citations omitted); *see also Harmon v. Fred S. James & Co. of Colorado, Inc.*, 899 P.2d 258, 260 (Colo. App. 1994) (explaining that since a claim for bad faith "sounds in tort, it is barred . . . unless it is brought within two years").

CONNECTICUT

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

Bad Faith

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). Bad faith "in general implies . . . actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *Dorfman v. Smith*, 271 A.3d 53, 71 (Conn. 2022).

"Improper motive" or "dishonest purpose" may include:

(1) failing to conduct an adequate investigation of claim;

(2) failing to promptly notify insured that it was not paying the claim;

(3) reneging on a prior agreement to pay insured's claim;

(4) requiring insured to provide numerous statements to generate inconsistent statements supporting a denial;

(5) 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;

(6) wrongfully withholding payment to compel the insured to retain an attorney; and

(7) refusing to enter into reasonable adjustment or settlement negotiations.

See, e.g., Bruce v. Progressive Halcyon Ins. Co., No. 065001057, 2007 WL 447230, at *2 (Conn. Super. Jan. 26, 2007).

Insureds may bring a statutory cause of action for, *among other things,* the following actions:

(1) misrepresenting pertinent facts or insurance policy provisions relating to coverages;

(2) failing to acknowledge and 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.

See Conn. Gen. Stat. §38a-816.

In the third-party context, an insurer can be sued for failing to settle a claim against the insured in bad faith. *See*, *e.g.*, *Carford v. Empire Fire & Marine Ins. Co.*, No. CV065001946, 2012 WL 4040337, at *4 (Conn. Super. Aug. 21, 2012) ("Connecticut has long recognized a cause of action for negligent failure to settle a claim."). The standard for whether an insurer has wrongfully failed to settle a case against its insured "may be generally summarized as a requirement of good faith and honest judgment on the part of the insurer or one that the insurer should use that care and diligence which a person of ordinary prudence would exercise in the management of his own business.").

Damages

Consequential damages are available. *See*, *e.g.*, *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 67 A.3d 961, 990 (Conn. 2013) ("Insurers disclaiming their duty to defend or indemnify under the policy, subsequent to a failure to investigate, risk extracontractual liability for consequential economic and noneconomic losses."); *see also Uberti v. Lincoln Nat. Life Ins. Co.*, 144 F.Supp.2d 90 (D. Conn. 2001); *Masik v. Costa*, No. CV970348616S, 2000 WL 1513789, at *1 (Conn. Super. Sept. 7, 2000); *Hennessey v. Travelers Prop. Cas. Ins. Co.*, No. CV 980332786S, 1999 WL 240231, at *1 (Conn. Super. Apr. 14, 1999).

Emotional distress damages are available. *Buckman v. People Exp., Inc.*, 530 A.2d 596, 597 (Conn. 1987); *Uberti*, 144 F.Supp. 2d at 90.

Attorneys' fees may be available to the prevailing party for showing of bad faith as a component of compensatory damages, but they may not be available for actions solely for declaratory relief. *ACMAT Corp. v. Greater New York Mut. Ins. Co.*, 923 A.2d 697, 708 (Conn. 2007) (concluding "that, even without an authorizing contractual or statutory provision, a trial court may award attorney's fees to a policyholder that has prevailed in a declaratory judgment action against its insurance company only if the policyholder can prove that the insurer has engaged in bad faith conduct prior to or in the course of the litigation.").

Punitive damages are available only under the Unfair Trade Practices Act. Conn. Gen. Stat. Ann. §42-110g (a) and (d).

Statute of Limitations

Under Connecticut law, the statute of limitations for common law and statutory bad faith claims is three years. *See, e.g., City of W. Haven v. Com. Union Ins. Co.*, 894 F.2d 540, 546 (2d Cir. 1990) ("We agree with the district court that a claim involving a duty of good faith and fair dealing sounds in tort . . . and is properly governed by Connecticut's three-year general tort statute of limitations."); *Guillory v. Allstate Ins. Co.*, 476 F. Supp. 2d 171, 176 (D. Conn. 2007) (noting that the defendant "correctly states that the statute of limitations under CUTPA is three years").

DELAWARE

Delaware has adopted a version of the UCSPA. 18 Del. Admin. Code § 902.

Bad Faith

Delaware recognizes a cause of action for bad faith against a first-party insurer. *See Enrique v. State Farm Mut. Automobile Ins. Co.*, 142 A. 3d 506 (Del. 2016). In *Enrique*, the Supreme Court of Delaware explained that:

> [A]n insured has a cause of action for breach of the implied covenant of good faith when the insurer [1] refuses to honor its obligations under the policy and [2] clearly lacks reasonable justification for doing so.

Id. at 511. As the court noted, a "mere delay in paying benefits is insufficient to constitute bad faith, but '[d]elays attributed to a 'get tough' policy, *i.e.,* a general business practice of claims denial without a reasonable basis, may subject the insurer to a bad faith claim.'" *Id*. at 511–12. 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. *Tackett v. State Farm Fire and Cas. Ins. Co.*, 653 A.2d 254, 264-266 (Del. 1995). A cause of action for the bad faith delay, or nonpayment, of an insured's claim in a first-party context is cognizable under Delaware law as a breach of contract. *See*, *e.g.*, *Maccari v. Bituminous Cas. Corp.,* 447 Fed. Appx. 340 (3d Cir. 2011) (unpublished).

Delaware also recognizes a cause of action for bad faith in the third-party context. *Corrado Bros., Inc. v. Twin City Fire Ins. Co.*, 562 A.2d 1188, 1192 (Del. 1989). In the third-party context, "liability of an insurance carrier to its policyholder in excess of policy limits is based on the tortious conduct of the insurance carrier, which under the policy has sole control of the defense." *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958); s*ee also McNally v. Nationwide Ins. Co.*, 815 F.2d 254, 259 (3d Cir. 1987) (applying Delaware law) (finding that when "a judgment in excess of the policy limits might be obtained by the claimant, the good faith standard is satisfied only if the insurer acts in the same way as would a reasonable and prudent man with the obligation to pay all of the recoverable damages") (citation and internal quotation omitted); *Gruwell v. Allstate Ins. Co.*, 988 A.2d 945, 949 (Del. Super. Ct. 2009) ("I am satisfied that *McNally* states good law in Delaware and I adopt its legal analysis.").

The Third Circuit, in *McNally*, citing the Delaware Supreme Court case *Stilwell* "recognized that, in a lawsuit between the insured and the party allegedly injured by the insured's conduct, liability of an insurer to its policyholder in excess of policy limits is based on the tortious conduct of the insurer, which under the policy has sole control of the defense." *Gruwell*, 988 A.2d at 948. Quoting *Stilwell,* the court in *McNally* "noted that the insurer is liable if it 'fail[ed] to use good faith or due care in settlement negotiations with plaintiff prior to trial.'" *Id*. An insurer's "good faith standard is satisfied only if the insurer acts the same as would a reasonable and prudent person where a judgment in excess of the policy limits might be obtained." *Id*.

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). *Tackett*, 653 A.2d at 265 (An insured is entitled to consequential damages that were "reasonably foreseeable at the time the [insurance] contract was made.").

Emotional distress damages may be recoverable when accompanied by physical injury. *See, e.g., Tackett,* 653 A.2d at 265 ("Historically, Delaware has not permitted the recovery of damages for emotional distress unaccompanied by physical injury."); *Pierce v. Intl. Ins. Co. of Illinois*, 671 A.2d 1361, 1367 (Del. 1996) ("This rule has traditionally excluded recovery for emotional distress for breach of contract which was unaccompanied by physical injury.").

Attorneys' fees are available under certain circumstance. *See Clausen v. Natl. Grange Mut. Ins. Co.*, 730 A.2d 133, 140 (Del. Super. Ct. 1997) ("An insurer who acts in bad faith in dealing with a claim may incur liability not only for damages under the policy but for uncovered economic losses of the insured, the insured's emotional distress damages, attorney's fees, and punitive damages."); s*ee also* 18 Del. Code § 4102 ("The court upon rendering judgment against any insurer upon any policy of property insurance, as 'property' insurance is defined in § 904 of this title, shall allow the plaintiff a reasonable sum as attorneys' fees to be taxed as part of the costs.").

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). *Enrique*, 142 A.3d at 512 ("Although direct and consequential damages would ordinarily be the limit of damages for a breach of the implied contractual obligation of good faith, earlier cases of this Court carved out an exception for insurance contracts. As the law now stands, given the special nature of the insurance relationship, punitive damages are available as a remedy for bad faith breach of the implied covenant of good faith where the plaintiff can show malice or reckless indifference by the insurer."); *See also E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 446 (Del. 1996) ("punitive damages may be available in the context of a contract action if the denial of coverage is willful or malicious ... [and] when the bad faith actions of an insurer are taken with a reckless indifference or malice toward the plight of the injured employee [insured]").

Statute of Limitations

In Delaware, the statute of limitations for an insurance bad faith claim is three years. 10 Del. C. § 8106(a); *Connelly v. State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1275-79 (Del. 2016) (discussing the insurer's duty of good faith and explaining that because "the insurance company's duty is grounded in its contractual relationship with the insured, a claim that the insurer breached that duty is subject to the three-year statute of limitations under 10 Del. C. § 8106."); *Crowhorn v. Nationwide Mut. Ins. Co.*, No. CIV.A. 00C-06-010WLW, 2002 WL 1767529, at *5 (Del. Super. July 10, 2002) ("bad faith claims are subject to a three-year statute of limitations").

DISTRICT OF COLUMBIA

The District of Columbia has not adopted the UCSPA.

Bad Faith

The District of Columbia does not recognize a tort of bad faith claims handling in the first-party context. *See, e.g.*, *Choharis v. State Farm Fire and Cas. Co.*, 961 A.2d 1080, 1087 (D.C. 2008) ("[D]isputes relating to the respective obligations of the parties to an insurance contract should generally be addressed within the principles of law relating to contracts, and bad faith conduct can be compensated within those principles."); *Gebretsadike v. Travelers Home & Marine Ins. Co.*, 694 F. App'x 2, 3 (D.C. Cir. 2017) (similar); *Tolson v. The Hartford Fin. Servs. Grp., Inc.*, 278 F. Supp. 3d 27, 40 (D.D.C. 2017) (similar).

There is no instructive authority on third-party bad faith in the District of Columbia, although *Choharis* casts at least some doubt on whether the District of Columbia would recognize a cause of action in that context. *See Choharis*, 961 A.2d at 1087 ("If there is something special in the insurance relationship that calls for protection of policy holders beyond that provided by contract principles, such a determination is one most appropriately to be made by the legislative body."). That said, District of Columbia courts give special weight to Maryland law in the absence of on-point District of Columbia law. *See id.* at 1088 & n.10. And as described in the Maryland section of this survey, Maryland recognizes a private right of action for bad faith in the third-party context.

The District of Columbia does have prohibitions against unfair claims practices, D.C. Code §31-2231.17, although these prohibitions do not "create or imply a private cause of action." D.C. Code
§31-2231.02(a).

Damages

Because the District of Columbia does not recognize tort action for bad faith, "an insured is limited to recovery of his or her contractual damages where the basis of the complaint is a breach of contract." *Nkpado v. Standard Ins. Co.*, 697 F. Supp. 2d 94, 98 (D.D.C. 2010). "[T]he damages which are normally recoverable in actions for breach of contract are those which arise directly from the breach itself, or could reasonably have been in contemplation of both parties when they made the contract." *Id.* at 98-99 (quoting *Mercer Mgmt. Consulting v. Wilde*, 920 F. Supp. 219, 238 (D.D.C. 1996)).

An insured may recover punitive damages for a breach of contract action where "the alleged breach of contract 'merges with, and assumes the character of, a willful tort.'" *Nkpado*, 697 F. Supp. 2d at 98 (quoting *Choaris*, 961 A.2d at 1090).

Statute of Limitations

"The statute of limitations for a breach of contract claims in the District of Columbia is three years." *Nkpado*, 697 F. Supp. 2d at 99 n.6.

FLORIDA

Florida has adopted a version of the UCSPA and the UCSPA Model Regulation. Fla. Stat. §626.9541; Fla. Admin. Code Ann. Rev. 690-166.021 to 69O-166.031.

Bad Faith

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) ("In contrast to third-party bad faith claims, Florida common law did not permit first-party claims in which an insured contends that his insurance company is acting in bad faith for refusing to pay for benefits under the policy."). "Florida has long permitted so-called third-party bad faith claims." *Id.* (Third-party bad faith claims occur when an "insured sues his liability insurance company for bad faith in failing to settle a claim which ultimately results in a third-party judgment against him in excess of the policy limits.").

Florida enacted a Civil Remedy Statute in 1982, 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 . . .
>
> (b) 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. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
>
> 3. 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).

Section 624.155 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 that 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), this is referred to as a Civil Remedy Notice or CRN. 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).

Recently, provisions were added to § 624.155. Subsection 4, which changed the precedent from prior case law and shield the insurer from bad-faith liability if the insurer makes a timely tender. Subsection 4 sets a fixed period of 90 days for the insurer to offer the policy limits to the insured. This subsection states:

> (a) An action for bad faith involving a liability insurance claim, including any such action brought under the common law, shall not lie if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant within 90 days after receiving actual notice of a claim which is accompanied by sufficient evidence to support the amount of the claim.
>
> (b) If an insurer does not tender the lesser of the policy limits or the amount demanded by the claimant within the 90-day period provided in paragraph (a), the existence of the 90-day period and that no bad faith action could lie had the insurer tendered the lesser of policy limits or the amount demanded by the claimant pursuant to paragraph (a) is inadmissible in any action seeking to establish bad faith on the part of the insurer.
>
> (c) If the insurer fails to tender pursuant to paragraph (a) within the 90-day period, any applicable statute of limitations is extended for an additional 90 days.

Fla. Stat. § 626.155(4).

Subsection 5 was also added. This subsection clarifies that the standard for bad faith requires more than "mere negligence." Fla. Stat. § 626.155(5)(a). It also imposes a duty of good faith on the "insured, claimant, and representative of the insured or claimant in making demands of the insurer, in setting deadlines, and in attempting to settle the claim." Fla. Stat. § 626.155(5)(b)(1). "In any action for bad faith against an insurer, the trier of fact may consider whether the insured, claimant, or representative of the insured or claimant did not act in good faith pursuant to this paragraph, in which case the trier of fact may reasonably reduce the amount of damages awarded against the insurer." Fla. Stat. § 626.155(5)(b)(2).

Subsection 6 was also added and establishes safe harbors for insurers that are sued by multiple third-party claimants filing competing claims arising out of the same occurrence that would exceed policy limits of one of the insured, potentially liable parties, if taken together. Fla. Stat. § 626.155(6). If this situation occurs, "an insurer is not liable beyond the available policy limits for failure to pay all or any portion of the available policy limits to one or more of the third-party claimants if, within 90 days after receiving notice of the competing claims in excess of the available policy limits, the insurer complies with either" (a) or (b). *Id.* The first option is for the insurer to file an "interpleader action under the Florida Rules of Civil Procedure". Fla. Stat. § 626.155(6)(a). If the competing claims exceed policy limits, the claimants are "entitled to a

prorated share of the policy limits as determined by the trier of fact". *Id.* The interpleader does not change the "insurer's obligation to defend its insured." *Id.* The second option for the insurer is to make the "the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator agreed to by the insurer and such third-party claimants at the expense of the insurer." Fla. Stat. § 626.155(6)(b). The claimants are entitled to a prorated share of the policy determined by an arbitrator who considers the comparative fault of each claimant and the likely outcome at trial based on all economic and noneconomic damages. *Id.* "A third-party claimant whose claim is resolved by the arbitrator must execute and deliver a general release to the insured party whose claim is resolved by the proceeding." *Id.*

Additionally, an amendment was made to Fla. Stat. § 624.1551 which created an additional requirement to claims made under Fla. Stat. § 626.155(1)(b). "Notwithstanding any provision of s. 624.155 to the contrary, in any claim for extracontractual damages under s. 624.155(1)(b)," there may not be an action until a "named or omnibus insured" or "named beneficiary" has established, in court, that the insurer breached the insurance contract and a judgment or decree has been entered into against the insurer. Fla. Stat. § 626.1551. "Acceptance of an offer of judgment under s. 768.79 or the payment of an appraisal award does not constitute an adverse adjudication under this section." *Id.* Adverse adjudication is also not satisfied by the difference between an insurer's appraiser's final estimate and the appraisal award. While that may be evidence of bad faith under s. 624.155(1)(b), it does not give rise to a cause of action. *Id.*

Damages:

An insured may recover consequential damages 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) ("Such damages may include, but are not limited to, interest, court costs, and reasonable attorney's fees incurred by the plaintiffs. The attorney's fees recoverable shall also include any fees incurred in the original underlying action as a result of the insurer's bad faith actions."); *Heritage Corp. of South Florida v. National Union Fire Ins. Co. of Pittsburgh, PA*., 361 Fed. Appx. 986, 987 (11th Cir. 2010) ("The only damages recoverable in a bad faith action are "those damages which are a reasonably foreseeable result of a specified violation of Section 624.155 by the authorized insurer," . . . and "the natural, proximate, probable, or direct consequence of the insurer's bad faith."). "The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits." Fla. Stat. § 626.155(11).

Emotional distress damages are available for the insured where an insurer fails to pay in a timely fashion. *Time Ins. Co., Inc. v. Burger*, 712 So. 2d 389 (Fla. 1998) ("[I]f there is proof of bad-faith conduct in denying or untimely paying a claim and that conduct results in an insured not receiving either necessary or timely health care, we believe that the insured ought to have an opportunity to claim damages for emotional distress."). Corporations, however, may not recover emotional distress damages. *Lampliter Dinner Theater, Inc. v. Liberty Mut. Ins. Co.*, 792 F.2d 1036, 1039 n.2 (11th Cir. 1986) ("We agree with the district court that corporations cannot experience emotional distress and cannot therefore maintain a suit for outrageous conduct.").

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 and third-party claimants who bring statutory bad faith claims. Upon adverse adjudication at trial or upon appeal, the authorized insurer shall be liable for damages, together with court costs and reasonable attorney fees incurred by the plaintiff. Fla. Stat. § 624.155(7).

A insured may recover punitive damages only 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(8).

Statute of Limitations

The statute of limitations for any action on a written contract in Florida, including bad faith actions, is five years. Fla. Stat. § 95.11(2)(b); *Baranowski v. Geico Gen. Ins. Co.*, 719 F. App'x. 933, 935 (11th Cir. 2018).

G EORGIA

Georgia has adopted a version of the UCSPA. O.C.G.A. §§ 33-6-30 to 33-6-37.

Bad Faith

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. O.C.G.A. § 33-4-6.

To prevail on a statutory 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. v. National Fire Ins. Co. of Hartford, 666 S.E.2d 387, 391 (Ga. App. 2008).

For a statutory claim, "bad faith" means 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, 788 (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, 637 (Ga. App. 2010). "An insurer's refusal to pay is not frivolous or unfounded if is predicated upon a reasonable question of law or a reasonable issue of fact, even if the insurer's position ultimately is rejected by a court or jury." *Flynt v. Life of South Ins. Co.*, 718 S.E.2d 343, 349 (Ga. App. 2011).

In addition to statutory bad faith, Georgia recognizes a common law claim for bad faith, but only in the third-party context. *Southern Gen. Ins. Co. v. Holt*, 416 S.E.2d 274, 276 (Ga. 1992).

If a third-party obtains an excess judgment against an insured, the "insurance company may be liable for the excess judgment entered against its insured based on the insurer's bad faith or negligent refusal to settle a personal claim within the policy limits." *Cotton States Mut. Ins. Co. v. Brightman*, 580 S.E.2d 519, 521 (Ga. 2003). An "insurer is negligent in failing to settle if the ordinarily prudent insurer would consider choosing to try the case created an unreasonable risk. *Id*. In deciding whether to settle a claim within policy limits, the insurer must give the insured's interests "equal consideration" to its own interest. *Holt*, 416 S.E.2d at 276. "An insurance company's bad faith in refusing to settle depends on whether the insurance company acted reasonably in responding to a settlement offer, bearing in mind that, in deciding whether to settle, the insurer must give the insured's interests the same consideration that it gives its own." *First Acceptance Ins. Co. of Ga. v. Hughes*, 826 S.E.2d 71, 74 (Ga. 2019) (applying the "equal consideration" rule).

The Georgia Supreme Court has cited three factors and insurer should consider in deciding whether or not to accept a policy limits demand: (1) the strength of the liability case against the insured;
(2) the risk of an excess judgment, and (3) the damages the claimant may ultimately recover. *Holt*, 416 S.E.2d at 276.

Damages

An insured who prevails on a first-party bad faith claim under O.C.G.A. § 33-4-6 may recover the following from the insurer:

(4) The amount of the loss;

(5) The greater of either: (a) 50% of the amount of the loss; or (b) $5,000; and

(6) Attorney's fees.

Id. Consequential damages are not allowed for first-party bad faith claims in Georgia; the exclusive remedy is provided by O.C.G.A. §33-4-6(a). *See also Wallace v. State Farm Fire & Cas. Co.*, 539 S.E.2d 509, 512 (Ga. App. 2000).

Emotional distress damages are not recoverable in a bad faith action in Georgia. *Holt*, 416 S.E.2d at 277.

Punitive damages are available in Georgia and may be awarded in bad faith actions. *Howell v. Southern Heritage Ins. Co.*, 448 S.E.2d 275, 276 (Ga. App.1994). To be entitled to punitive damages, the insured (1) must also be entitled to compensatory damages and (2) must not have assigned her rights to recover to another party. *Holt*, 416 S.E.2d at 276-77.

Statute of Limitations

Georgia does not have a specific statute of limitations for insurance bad faith claims. Georgia courts apply the six-year statute of limitations for a written contract to bad faith claims when the claims arise from the terms in an insurance contract. *Sentry Ins. v. Echols,* 330 S.E.2d 725, 728 (Ga. App. 1985); O.C.G.A. § 9-3-24.

HAWAII

Hawaii has adopted a version of the UCSPA. Haw. Rev. Stat. § 431:13-103.

Bad Faith

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). Policyholders may use evidence of statutory violations to support a common law cause of action for bad faith. *Aloha Petroleum, Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, PA, 2014 WL 3359933, at *7 (D. Haw. July 8, 2014) (citing *Wailua Assocs. v. Aetna Cas. & Sur. Co.*, 27 F.Supp.2d 1211, 1220-1221 (D. Haw. 1998)).

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.

Best Place, Inc., 920 P.2d 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 (internal citations omitted).

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.

Statute of Limitations

There is a two-year statute of limitations for a bad faith claim. Haw. Rev. Stat. § 657-7; *Silva v. Allstate Ins. Co.*, 2007 WL 1795561, at *3 (D. Haw. June 19, 2007), aff'd, 304 F. App'x 609 (9th Cir. 2008) (recognizing that a bad faith claim is a tort claim and the two-year state statute of limitations for torts under HRS § 657–7 applies).

IIDAHO

Idaho has adopted a version of the UCSPA. Idaho Code Ann. §§ 41-1329. However, this statute does not give rise to a private right of action. *White v. Unigard*, 730 P.2d 1014, 1015 (Idaho 1986) (holding that because Idaho recognizes a tort for bad faith, "a statutory remedy is neither prescribed nor necessary to assure the effectiveness of Idaho's Unfair Claims Settlement Practices Act, Idaho Code § 41-1329"). Rather, in Idaho, an insured can bring a tort cause of action for bad faith against both first party and third party insurers. *Id.* at 1021 (holding that insured may bring independent tort of bad faith against insurer); *McKinley v. Guar. Nat'l Ins. Co.*, 159 P.3d 884, 888 (Idaho 2007) (recognizing that bad faith action can be brought against third party insurers for unreasonably denying or unreasonably delaying settlement of a claim).

Bad Faith

For an insured to succeed in a bad faith claim against a first party insurer, 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). This is referred to as the "fairly debatable" standard and is intended to "adequately protect[] both parties' interests in first party claims." *Truck Ins. Exch. v. Bishara*, 916 P.2d 1275, 1279 (Idaho 1996).

The Idaho Supreme Court held that the "fairly debatable" standard "inadequately protects the insured's interests in third party actions which, unlike first party claims, may result in 'financial ruin' of the insured if settlement efforts are not successful." *Id.* Accordingly, for an insured to succeed in a third party bad faith action, it must show that the insurer failed to give "'equal consideration' to the interests of its insured in deciding whether to accept an offer of settlement." *Id*. Under this standard, the trier of fact must consider seven factors, with emphasis on two: "1) whether the insurer has failed to communicate with the insured, including particularly informing the insured of any compromise offers, and 2) the amount of financial risk to which each of the parties will be exposed in the event an offer is refused." *McKinley*, 159 P.3d at 888 (quoting *Bishara*, 916 P.2d at 1279). The remaining five factors to be considered are:

> the strength of the injured claimant's case on the issues of liability and damages; whether the insurer has thoroughly investigated the claim; the failure of the insurer to follow the legal advice of its own attorney; any misrepresentations by the insured which have misled the insurer in its settlement negotiations; and any other factors which may weigh toward establishing or negating the bad faith of the insurer.

McKinley, 159 P.3d at 888 (quoting *Bishara*, 916 P.2d at 1279).

Damages

An insured "who has proven bad faith by an insurer can recover damages normally recoverable in a tort case." *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 464 (Idaho 1996). "The measurement of recoverable damages in tort is not limited to those foreseeable at the time of the tortious act; rather they include a reasonable amount which will compensate plaintiff for all actual detriment proximately caused by the defendant's wrongful conduct." *White*, 730 P.2d 1017-18 (internal quotes omitted). Accordingly, an insured can recover unforeseeable extra-contractual damages if it succeeds on its bad faith claim. *Id.* This includes damages for emotional distress. *Walston*, 923 P.2d at 465 (upholding award of damages for emotional distress in bad faith claim).

Further, an insured may recover its attorneys' fees under Idaho Code § 41-1839 for any action or arbitration commenced against the insurer for recovery under the terms of the policy. Idaho Code § 41-1839. To recover under this statute, (1) the insured must provide a proof of loss as required by the insurance policy, and (2) the insurer must fail to pay the amount justly due under the policy within thirty days after the receipt of proof of loss. *Weinstein*, 233 P.3d at 1259. Idaho Code § 41-1839 and Idaho Code § 12-1523 (allowing attorneys' fees as sanction for frivolous conduct in civil case) are "the exclusive remedy for the award of statutory attorneys' fees in all actions or arbitrations between insureds and insurers involving disputes arising under policies of insurance." IDAHO CODE § 41-1839.

An insured may also recover attorneys' fees as part of an award of punitive damages for the insurer's bad faith conduct. *See Garnett v. Transamerica Ins. Servs.*, 800 P.2d 656, 671 (Idaho 1990) (holding that juries can be instructed to include attorneys' fees in an award of punitive damages). In Idaho, an insured may recover punitive damages for an insurer's bad faith conduct, but the claimant must "prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted." *Weinstein*, 233 P.3d at 1254-55 (citing Idaho Code §6-1604(1)) (awarding $1.89 million in punitive damages to insured); *Hall v. Farmers Alliance Mut. Ins. Co.*, 179 P.3d 276, 288 (Idaho 2008) (awarding punitive damages award of $74,600 to insured).

Statute of Limitations

In Idaho, the statute of limitations is four years for an insurance bad faith claim. Idaho Code § 5-224; *Christionson v. U.S.,* 415 F.Supp.2d 1186 (D. Idaho 2006).

ILLINOIS

Illinois has adopted a version of the UCSPA. 215 Ill. Comp. Stat. 5/154.6 (2022).

Bad Faith

Illinois does not recognize a common law cause of action for bad faith against a first-party insurer. Section 155 of the Illinois Insurance Code (ILCS 5/155) has preempted common law first-party bad faith, which is where a policyholder brings a claim again its insurer for a delay in settling the policyholder's claim. Section 155 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*, 675 N.E. 2d 897, 900 (Ill. 1996).

However, Illinois recognizes 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 for the insurer's bad-faith failure to settle within policy limits. *Griffith v. Valor Ins*., 763 N.E.2d 299, 304 (Ill. 2001); *Founders Ins. Co. v. Shaikh,* 937 N.E.2d 1186, 1192 (Ill. Ct. App. 2010); Punitive damages are available for a bad faith refusal to settle. *O'Neill v. Gallant Ins. Co.*, 769 N.E.2d 100, 109. (Ill. 2002). The duty of an insurance provider to settle "arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured." *Griffith*, 763 N.E.2d at 304.

Damages

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 or 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 one 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;
> >
> > (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. The remedies under the Illinois Insurance Code are exclusive: an insured's maximum recovery is limited to reasonable attorneys' fees and costs plus a maximum penalty of $60,000. *Nelles v.State Farm Fire & Cas. Co.*, 742 N.E. 2d 420 (2000).

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) (applying Illinois law).

Consequential and emotional distress damages are not available for statutory claims brought by an insured. Although it preempts a common law first-party bad faith claim, Section 155 does not preempt a separate and independent tort action, such as common law fraud, for insurer misconduct. *Cramer*, 174 675 N.E. 2d at 906.

Statute of Limitations

The statute of limitation for a bad faith claim in Illinois is five years. *Chandler v. Am. Fire & Cas. Co.*, 879 N.E.2d 396, 398 (2007)

IINDIANA

Indiana has adopted a version of the UCSPA. Ind. Code § 27-4-1-4.5.

Bad Faith

Indiana recognizes that an insured may maintain a cause of action for bad faith against a first-party insurer. *Friedline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002). The Indiana Supreme Court has not opined as to whether an injured third-party may maintain a negligent failure to settle cause of action against an insurer. *Cincinnati Ins. Co. v. Selective Ins. Co. of Am.*, 2021 WL 766651 (S.D. Ind. Feb. 25, 2021).

Poor judgment or negligence alone will not amount to bad faith; the additional element of conscience wrongdoing must also be present. *Lumberman's Mut. Cas. Co. v. Combs*, 873 N.E. 2d 692 (Ind. Ct. App. 2007). To establish that an insurer has engaged in bad faith when attempting to settle an insurance claim, 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). The insured can meet this standard by proving, among other ways, that the insurer denied liability knowing that there was no rational, principled basis for doing so. *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 520 (Ind. 1993).

Damages

Consequential damages are available but generally are limited to "reasonably foreseeable economic losses." *Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E.2d 60, 67 (Ind. Ct. App. 2009). An insured is entitled to compensatory damages for all damages that the insured sustained as a result of the insurer's denial of the insurance claim. *Erie*, 622 N.E.2d at 523.

Emotional distress damages are recoverable under the intentional tort exception to Indiana's impact rule if the emotional damages are proximately caused by the insurer's conduct. *Patel v. United Fire and Cas. Co.,* 80 F. Supp. 2d 948, 959 (N.D. Ind. 2000) (applying Indiana law).

Attorneys' fees may be recoverable if the insurer is found to have litigated in bad faith. "[I]n the context of a bad faith insurance dispute, an insurer's denial of coverage in bad faith may lead to a conclusion that the insurer litigated the action in bad faith, as that term is contemplated under § 34– 52–1–1(b)(3)…. While § 34–52–1–1(b)(3) provides a vehicle by which an award of attorneys' fees may be assessed, the decision of whether to award them, and the amount, lie within the discretion of the trial court, post-trial." *Patel*, 80 F.Supp.2d at 963.

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, 203 (Ind. Ct. App. 2005). Further, Indiana uses the "American Rule," whereby attorneys' fees are not recoverable in the absence of a statute or an agreement permitting recovery of attorneys' fees. *Id.* at 205.

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, 622 N.E.2d at 520.* "[A] jury's determination that a claim was, in retrospect, incorrectly denied is not sufficient to establish a breach of the duty to exercise good faith, proof that a tort was committed is not sufficient to establish the right to punitive damages." *Id*. An insurer's negligence alone cannot support awarding punitive damages, but intentionally failing to conduct an investigation presents a genuine issue of material fact regarding insurer's bad faith. *Gooch v. State Farm Mut. Auto. Ins. Co*., 712 N.E.2d 38, 41 (Ind. Ct. App. 1999).

Statute of Limitations

The statute of limitations for a bad faith claim, which are treated the same as claims for breach of a fiduciary duty. Ind. Code § 34-11-2-4(a).

IOWA

Iowa has not adopted the UCSPA.

Bad Faith

Iowa recognizes a common law cause of action for bad faith against a first-party insurer. *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 657 (Iowa 2002). "A first-party bad-faith claim involves an insured's attempt to recover for his or her own losses allegedly covered under the insurance policy." *Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 455, 461 (Iowa 2017).

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.

Thornton, 897 N.W.2d at 461-62.

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. *Thornton*, 897 N.W.2d at 465.

In the third-party context, if an injured party makes a settlement demand that is rejected by the tortfeasors' insurer and subsequently obtains an excess verdict against a tortfeasor, the insurer cannot be found liable third-party for bad faith "[i]f the insurer has exercised good faith in its dealings with the insured and if the settlement proposal has been fully and fairly considered and decided against, based upon an honest belief that the action could be defeated or the judgment held within the policy limits, and in which respect counsel have honestly expressed their conclusion." *Johnson v. Am. Family Mut. Ins. Co.*, 674 N.W.2d 88, 90 (Iowa 2004). "If the insurer in good faith believed that it could successfully defend, it was not bound to relieve the insured of all possible harm that might come from his failure to purchase insurance in an amount that would have protected him from heavy liability." *Id*. at 91. "[T]he reasonableness of an insurer's rejection of a settlement offer within policy limits must be judged from the point of view of one who is exposed to the entire risk." *Id*.

Damages

Consequential damages are available. *Nassen v. National States Ins. Co*., 494 N.W.2d 231, 237 (Iowa 1992).

Emotional distress damages can be awarded with a showing of mental suffering. *Id*.

Attorneys' fees are recoverable. *Clark-Petersen Co., Inc., v. Indep. Ins. Assocs., 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 v. Aid Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1998); *Bradley v. W. Bend Mut. Ins. Co.*, 796 N.W.2d 455 (Iowa Ct. App. 2003). Punitive damages awards should be evaluated in the context of the wrongful conduct of the offending party. *Johnston v. Norfolk Southern Corp.*, 448 N.W.2d 486, 489 (Iowa 1989).

Statute of Limitations

In Iowa, the statute of limitations for an insurance company's bad faith claim is five years. Iowa Code Ann. § 614.1(4); *see Brown v. Liberty Mut. Ins. Co.*, 513 N.W.2d 762, 764-65 (Iowa 1994).

K ANSAS

Kansas has adopted a version of the UCSPA. Kan. Stat. Ann. § 40-2404. Kansas has also adopted a version of the UCSPA Model Regulation. Kan. Admin. Regs. § 40-1-34.

Bad Faith

Kansas does not recognize a common law cause of action by an insured for bad faith against a first-party insurer. *Stroud v. Ozark Nat. Life Ins. Co.*, 510 P.3d 728, *8 (Kan. App. 2022); *see also 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. Ann. § 40-256.

An injured party may seek damages from an insurer in a third-party bad faith action by bringing a breach of contract claim against an insurer after obtaining an excess judgment against an insured. *Aves v. Shah*, 906 P.2d 642, 648 (Kan. 1995); *see also Gruber v. Marshall*, 482 P.3d 612, 625 (Kan. App. 2021) (an insurer may be liable for an excess judgment against its insured if there is "a causal link between the insurer's conduct and the excess judgment against the insured.").

"Before attorney fees can be awarded under K.S.A. 40-256, it must first appear that the insurance company 'refused' to pay appellant's claim. Prior to such 'refusal,' the insurance company has a duty to make a good faith investigation of the facts." *Brown v. Combined Ins. Co. of Am.,* 597 P.2d 1080, 1081-82 (Kan. 1979); *see also Wiles v. Am. Family Life Assurance Co.*, 350 P.3d 1071, 1073-74 (Kan. 2015). 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 v. Prudential Ins. Co. of Am.*, 470 P.2d 756, 760 (Kan. 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, 1344 (Kan. App. 1989).

Damages

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, including a resulting judgment in excess of policy limits. *Gruber v. Marshall*, 482 P.3d at 616. 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).

Emotional distress damages are available when the insurer commits the tort of outrage 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, 967 P.2d 727, 733 (Kan. 1998).

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." Kan. Stat. Ann. § 40-256; *see Hofer v. UNUM Life Ins. Co. of Am.,* 338 F. Supp. 2d 1252, 1253 (D. Kan. 2004) (awarding statutory attorneys' fees under Kan. Stat. Ann. § 40-256 where the insurer denied the insured's claim for reasons that "did not comport with policy language and were not valid reasons to deny benefits" and subsequently extended insurance benefits to the insured after the insured filed a lawsuit against the insurer).

Punitive damages are available under Kan. Stat. Ann. § 60–3702(c). *Reeves v. Carlson*, 969 P.2d 252, 255 (Kan. 1998). To recover punitive damages, the insured must prove that the insurer committed an independent tort accompanied by willful or wanton conduct, malice, or fraud. *Guarantee Abstract & Title Co., Inc. v. Interstate Fire & Cas. Co., Inc*., 652 P.2d 665, 667 (Kan. 1982).

Statute of Limitations

In Kansas, the statute of limitations for a bad faith claim based on breach of contract is five years. K.S.A. 60-511(1).

K ENTUCKY

Kentucky has adopted a version of the UCSPA. Ky. Rev. Stat. Ann. §304.12-230. Kentucky has also adopted a version of the UCSPA Model Regulation. 806 Ky. Admin. Regs. §§ 12:092, 12:095.

Bad Faith

Kentucky recognizes a common-law cause of action for bad faith against a first-party insurer. *Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 26 (Ky. 2017); *see also Curry v. Fireman's Fund Ins. Co.*, 784 S.W.2d 176, 178 (Ky. 1989); *Deaton v. Allstate Ins. Co.,* 548 S.W.2d. 162, 164 (Ky. Ct. App. 1977). A first-party claim involves an insured pursuing a claim against their own insurer. *Federal Kemper Ins. Co. v. Hornback*, 711 S.W.2d 844, 846 (Ky. 1986).

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.

Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993); *Scott v. Deerbrook Ins. Co.*, 714 F.Supp.2d 670, 676 (E.D. Ky. 2010).

Insureds may bring a claim against their insurers under Kentucky's Consumer Protection Act (KCPA). *Stevens v. Motorist Mut. Ins.*, 759 S.W.2d 819, 821-22 (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 Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116, 117 (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.

Injured individuals who are harmed by an insurer's violation of KRS §304.12-230 may maintain a third-party cause of action for bad faith. *Reeder*, 763 S.W.2d at 118. Third parties may not maintain a cause of action under the KCPA. *Anderson v. National Sec. Fire and Cas. Co.*, 870 S.W.2d 432, 435-36 (Ky. App. 1993).

Damages

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

Emotional distress and mental anguish damages are recoverable under the state's UCSPA. *Wittmer*, 864 S.W.2d at 889.

Attorneys' fees are available by statute if an insurer fails to settle a claim within a reasonable amount of time. "[I]f 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.

Punitive damages are available if the insurer's conduct was outrageous, if the insurer had evil motive, or if the insurer had a reckless indifference to the rights of others. *Wittmer*, 864 S.W.2d at 890.

Statute of Limitations

In Kentucky, the statute of limitations for a bad faith claim is two years for first-party claims under the Kentucky Consumer Protection Act. KRS 367.220(5). The statute of limitation is five years for first and third-party claims under the Kentucky Unfair Claims Settlement Practices Act. KRS 304.12-230; *see also United States Liab. Ins. Co. v. Watson*, 626 S.W.3d 569, 575 (Ky. 2021).

L OUISIANA

Louisiana has adopted a version of the UCSPA. La. Rev. Stat. Act No. 3. This statute has repealed the previous bad faith law in Louisiana. La. Rev. Stat. Ann. §§ 22:1973. and has amended and restructured La. Rev. Stat. Ann. 1892; another bad faith statute in Louisiana.

Bad Faith

Before a bad faith action can be brought by an insured in Louisiana, the insured first has to provide the insurer with satisfactory proof of loss that puts the insurer on notice of your claim and damages. *Id.* Second, the insured has to show that the insurer failed to pay within the time period set for the statute after receipt of notice, which is 30 days. *Id.* Third, the insured has to show the insurer's failure to pay within the thirty day period was arbitrary, capricious, or without probable cause. *Id.* An insurer's compliance with the thirty day period alone does not preclude a court finding that the insurance company acted arbitrarily, capriciously, or without probable cause. *LeBlanc v. Allied Tr. Ins. Co*., 2:21-CV-01928, 2022 WL 4597863, at *4 (W.D. La. 2022).

Insurers have the affirmative duty to adjust claims fairly and promptly and to make reasonable efforts to settle claims with the insured or claimant or both. *Id.* Insurers also owe insureds a duty of good faith and fair dealing. *Id.* Any one of the following acts if knowingly committed by an insurer is a breach of the insurers duties imposed by the act:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.

(2) Failing to pay a settlement--including a third-party 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 the amount of any claim due to any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.

(6) Failing to pay claims pursuant to La. Rev. Stat. 22:1893 when such failure is arbitrary, capricious, or without probable cause.

La. Rev. Stat. Ann. §§ 22:1892(A)(1)-(6)(amended by ACT NO. 3, 2024).

La. Rev. Stat. Ann. §§ 22:1892, as amended by ACT NO. 3, impresses a duty of good faith and fair dealing on an insured and their representatives when submitting a claim for insurance coverage. Three acts of an insured or their representative constitute a breach of the insured's duty of good faith and fair dealing: (1) failure to comply with affirmative contractual duties under the policy;

(2) misrepresentation of the pertinent facts or policy provisions; and (3) submission of an estimate or claim for damages that lacks a basis for coverage under the terms of the policy or that lacks evidentiary support. La. Rev. Stat. Ann. §§ 22:1892 (amended by ACT NO. 3, 2024).

An insured's breach of its duty of good faith does not create a cause of action for the insurer, but the breach of these duties has to be considered when determining whether an insured should be awarded penalties under Act No. 3.

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

Under Act No. 3, proven economic damages that are sustained as a result of an insurer's breach of its duty of good faith are available to an insured.

Consequential damages are available to insureds but unlike Louisiana's previous bad faith statute, (La. Rev. Stat. Ann. §§ 22:1973), insureds are not entitled to twice their consequential damages.

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). It is unclear how emotional distress damages will be interpreted in the context of this new statute.

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).

Statute of Limitations

The period for claims to be brought under the statute is two years. La. Rev. Stat. Ann. §§ 22:1892.

M AINE

Maine has adopted a version of the UCSPA. Me. Re. Stat. Ann. Tit. 24-A §24-36-A.

Bad Faith

Maine recognizes 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) (explaining that in "view of the broad range of compensatory damages available in a contract action and in view of the statutorily provided remedies of interest on the judgment and attorneys' fees, we believe sufficient motivation presently exists to stifle an insurer's bad faith tendencies without the further imposition of the specter of punitive damages under an independent tort cause of action."); *see also Gardner v. Podiatry Ins. Co.,* No. 06–147–B–W, 2007 WL 1170774 at *8 (D. Me. 2007).

There is no third-party bad faith in Maine. *Linscott v. State Farm Mutual Auto. Ins. Co*., 368 A.2d 1161 (Me. 1977).

Further, Maine permits 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 for bad faith. *Marquis*, 628 A.2d at 650. (citing *Ginn v. Penobscot Co.*, 334 A.2d 874, 887 (Me. 1975)).

"The general rule is that damages for emotional distress as a result of a breach of contract are not recoverable. *McAfee v. Wright*, 651 A.2d 371, 372–73 (Me. 1994). But some "courts and the Restatement (Second) of Contracts, § 353 (1981), have recognized a few limited exceptions to this rule involving breaches of contracts between carriers and innkeepers and their passengers and guests; contracts for the carriage and proper disposition of dead bodies and; contracts for the delivery of messages concerning death." *Id*. The common thread between these exceptions is that mental distress is a particularly likely result of a breach." *Id*.

Attorneys' fees are also 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 1.5% per month. Me. Rev. Stat. Tit. 24-A §2436-A(1). Attorneys' fees are also available if a common law claim of bad faith is brought, if the contract includes a provision for the award of attorneys' fees. *Foremost Ins. Co. v. Levesque et al.,* 926 A.2d 1185 (Me. 2007).

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).

Statute of Limitations

The statute of limitations for a bad faith claim in Maine has not been defined, but an insured can sue for breach of contract, late payment, or unfair claims settlement practices. *Marquis v. Farm Family Mut. Ins. Co.,* 628 A.2d 644, 652 (Me. 1993). The statute of limitations for a breach of contract action and for unfair claims settlement practices act actions is six years. *Marquis*, 628 A.2d at 652.

M ARYLAND

Maryland has adopted a version of the UCSPA. Md. Code Ann., Ins. §§ 27-301 to 27-306. The Maryland statute, however, does not provide a private right of action. Md. Code Ann., Ins. § 27-301; *see also Banerjee v. Allstate Prop. & Cas. Ins. Co.*, No. CV GLR-22-685, 2024 WL 1994940, at *3 (D. Md. May 6, 2024) (collecting cases).

Maryland has also adopted claims practices regulations. Code Md. Reg. Ann., Ins. § 31.15.07.01 et seq.

Bad Faith

"Maryland does not recognize a specific tort action against an insurer for bad[-]faith failure to pay an insurance claim." *Sefcik v. State Farm Fire & Cas. Co.*, 2024 WL 411899, at *1 (Md. Ct. Spec. App. Feb. 5, 2024), *cert. denied*, 487 Md. 49 (2024) (citing *Johnson v. Fed. Kemper Ins. Co.*, 536 A.2d 1211, 1213 (Md. Ct. Spec. App. 1988); *see also Sharestates Investments, LLC v. WFG National Title Insurance*, 2023 WL 8436159, at *7 (D. Md. Dec. 5, 2023) (similar and collecting cases).

However, Maryland has passed a first-party bad faith statute that creates a 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 decided on a claim. Md. Code Ann., Ins. § 27-1001; *see also Cecilia Schwaber Tr. Two v. Hartford Acc. & Indem. Co.*, 636 F. Supp. 2d 481, 485 (D. Md. 2009) (applying the "good faith" standard). In evaluating whether an insurer has acted in good faith, Maryland courts consider, among other things:

(1) the "efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds";

(2) "the substance of the coverage dispute or the weight of legal authority on the coverage issue"; and

(3) "the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage."

Charter Oak Fire Co. v. Am. Cap. Ltd., 2017 WL 3315306, at *20 (D. Md. Aug. 3, 2017), *aff'd*, 760 F.App'x. 224 (4th Cir. 2019).

An insured must follow a specific statutorily proscribed procedure to bring a claim under Maryland's bad faith law. *See* Md. Code Ann., Ins. § 27-1001(c). 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 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 Thompson v. State Farm Mut. Auto Ins. Co.,* 9 A.3d 112, at **114 (Md. Ct. Spec. App. 2010).

"Maryland recognizes a common law tort claim based on an insurer, upon having agreed to defend against a claim, acting in bad faith in failing to settle the claim within the policy limits." *Trattner v. Nat'l W. Life Ins. Co.*, 2024 WL 3237075, at *6 (D. Md. June 28, 2024) (collecting cases).

Damages

"If an insurer refuses, in bad faith, to settle a claim within the policy limits, then it may become liable for the amount of judgment obtained in excess of the policy limits." *Hartford Fire Ins. Co. v. Annapolis Bay Charters, Inc.*, 69 F.Supp. 2d 756, 762 (D. Md. 1999).

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 unavailable for first-party bad faith claims. Md. Code Ann., Cts. & Jud. Proc.
§ 3-1701; *Allstate Indem. Co. v. Parsons*, 2010 WL 2163869, at *2 (D. Md. May 26, 2010) (applying Maryland law).

Statute of Limitations

The statute of limitations is likely three years, although there is little case law on this topic, generating some uncertainty. *See Nationwide Mut. Ins. Co. v. Shilling*, 227 A.3d 171, **182 (Md. App. Ct. 2020); Md. Code Ann., Cts. & Jud. Proc. § 5-101.

M ASSACHUSETTS

Massachusetts has adopted a version of the UCSPA. Mass. Gen. Laws ch. 176D. § 3. That statute prohibits "unfair claim settlement practices" in the business of insurance. *See Great Lakes Ins. SE v. Andersson*, 66 F.4th 20, 24 (1st Cir. 2023).

Bad Faith

Massachusetts recognizes 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 Ins. 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.

Chapter 176D violations are actionable via G.L. c. 93A. *See Great Lakes Ins. SE*, 66 F.4th at 24.

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).

The second element requires that a plaintiff "prove that the defendant's unfair or deceptive act caused an adverse consequence or loss." *Estrada v. Progressive Direct Ins. Co.*, 53 F. Supp. 3d 484, 501 (D. Mass. 2014); *see also Hopkins v. Liberty Mut. Ins. Co.*, 750 N.E.2d 943, **951 (Mass. S.J.C. 2001) (similar). That is, Massachusetts courts consistently hold that causation is a required element of a bad-faith claim. G.L. c. 176D, § 3(9); *Rawan v. Cont'l Cas. Co.*, 136 N.E.3d 327 at **343 (Mass. S.J.C. 2019).

A putative Section 9 plaintiff must also show that they delivered an adequate demand letter to the insurer at least thirty days before the plaintiff started the lawsuit. G.L. c. 93A, § 9(3); *Spring v. Geriatric Auth. of Holyoke*, 394 Mass. 274, 287 (1985).

"The existence of unfair acts and practices must be determined from the circumstances of each case." *Com. v. DeCotis*, 316 N.E.2d 748 at **754 (Mass. S.J.C. 1974). Relevant evidence "may

include insurance industry practices in similar circumstances, expert testimony that the insurer violated sound claims practices, the defendant's own evaluation of the plaintiff's claim, and advice given to the insurance company on the probability of success at trial." *O'Leary-Alison v. Metro. Prop. & Cas. Ins. Co.*, 752 N.E.2d 795 at **797 (Mass. Ct. App. 2001).

Damages

"Actual damages under G.L. c. 93A, § 9(3) include 'all losses which were the foreseeable consequences of the defendant's unfair or deceptive act or practice."' *Rivera v. Com. Ins. Co.*, 993 N.E.2d 1208 at **1210 (Mass. Ct. App. 2013).

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 when 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).

Statute of Limitations

In Massachusetts, the statute of limitations for insurance actions involving unfair or deceptive business practices brought under Chapter 93A or Chapter 176D of the Massachusetts General Laws is four years. M.G.L. c. 260, § 5A; *Schwartz v. Travelers Indem. Co.*, 740 N.E.2d 1039, 1041 (Mass. App. Ct. 2001); *Budrow v. Nat'l City Mortg. Co.*, 2022 WL 14829551, at *3 (D. Mass. Oct. 26, 2022).

M ICHIGAN

Michigan has adopted a version of the Unfair Claims Settlement Practices Act, which was designed to protect policyholders from deceptive practices used by insurance carriers in handling claims. Uniform Trade Practices Act, Mich. Comp. Laws § 500.2001, *et seq.*. Michigan's Uniform Trade Practices Act prohibits insurers from certain conduct, *see*, *e.g.*, Mich. Comp. Laws §§ 500.2005, 500.2026(1), and instructs the insurance commissioner to investigate and penalize insurers who engage in this conduct. Mich. Comp. Laws §§ 500.2028-500.2039.

Bad Faith

An insured has no private cause of action for violating the Uniform Trade Practices Act. *Kassab v. Mich. Basic Prop. Ins. Ass'n*, 491 N.W.2d 545 at **547 (Mich. 1992), *overruled on other grounds*, *Haynes v. Neshewat*, 729 N.W.2d 488 (Mich. 2007) ("We recognize that the remedies provided by the [Uniform Trade Practices Act] probably do not include a private cause of action for damages") (citing *Safie Enters., Inc. v. Nationwide Mut. Fire Ins. Co.*, 381 N.W.2d 747 at **752 (Mich. App.1985); *see also*, *Pantos Inv. Co. v. Peerless Indem. Ins. Co.*, No. 334108, 2017 WL 4678451, at *3 (Mich. Ct. App. Oct. 17, 2017) (same). Similarly, policyholders likely have no claim against insurers under the Michigan Consumer Protection Act, Mich. Comp. Laws § 445.901, *et seq.*, for claim practices within the scope of the Uniform Trade Practices Act. Mich. Comp. Laws § 445.904(3) ("This act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code of 1956" if the act occurred after March 28, 2001); *see also Dell v. Citizens Ins. Co. of Am.*, 880 N.W.2d 280,287 (Mich. App. 2015) (limited exception for claims filed before June 5, 2014 where conduct occurred before March 28, 2001). However, violations of these statutes can serve as evidence of bad faith. *See generally* Adam Kutinsky, *Michigan Recognizes Claims for Bad Faith Insurance Practices*, 98 MICH. B J. 28, Mar. 2019 (discussing use of evidence of bad faith, such as wrongfully denying coverage and fraud, to prove up contract claims, other claims, and extra-contractual damages).

Policyholders may have claims under the Michigan Consumer Protection Act for claims practices that fall outside the Uniform Trade Practices Act. *Dell*, 880 N.W.2d at 287-88.

However, insureds may recover penalty interest on late-paid claims "unless the claim is reasonably in dispute." Mich. Comp. Laws § 500.2006(4); *see also Young v. Mich. Mut. Ins. Co*., 362 N.W.2d 844, 846 (Mich. App. 1984) (similar); *Palmer Park Square, LLC v. Scottsdale Ins. Co.*, 878 F.3d 530, 539 (6th Cir. 2017) (citing *Young*, 362 N.W.2d at 846). If claims by an insured are paid later than "60 days after satisfactory proof of loss," the policyholder is entitled to 12% per annum interest on the claim. Mich. Comp. Laws § 500.2006(4); *see also Griswold Props., L.L.C. v. Lexington Ins. Co*., 741 N.W.2d 549, 556 (Mich. App. 2007) (same); *Griswold*, 741 N.W.2d at 557 (clarifying that "not reasonably in dispute" language in § 500.2006(4) applies only to third-party claimants, *i.e.*, non-insureds); *accord*, *Stryker Corp. v. XL Ins. Am.*, 735 F.3d 349, 360-61 (6th Cir. 2012).

Michigan does not recognize an independent tort of bad faith by a first-party insurer. *Roberts v. Auto-Owners Ins. Co.*, 374 N.W.2d 905, 910-15 (Mich. 1985); *see also Hanczaryk v. Chapin*, No. 313278, 2014 WL 5462600, at *10 (Mich. Ct. App. Oct. 28, 2014) (same). In some circumstances,

bad faith conduct by the insurer may justify awarding consequential damages flowing from that conduct. *See Wendt v. Auto Owners Ins. Co.*, 401 N.W.2d 375, 379-78 (Mich. App.1986) (holding that consequential damages flowing from bad faith claims handling may be recoverable in breach of contract claims); *see also Murphy v. Cincinnati Ins. Co.*, 772 F.2d 273, 276-77 (6th Cir. 1985) (same); *but see Ishagholian v. Transamerica Ins. Corp.*, 527 N.W.2d 13, 17 (Mich. App. 1994) (rejecting *Murphy*, and thus, consequently *Wendt*, to the extent they held that attorneys' fees were recoverable if insurer acted in bad faith).

Caselaw is unclear whether Michigan recognizes a separate bad faith tort claim against a third-party insurer. In *Kewin v. Massachusetts Mutual Life Insurance Company*, which is still good law, the Michigan Supreme Court rejected an independent bad faith tort cause of action. 295 N.W.2d 50, 56-57 (Mich.1980). However, the Michigan Supreme Court has allowed claims for bad faith failure to settle as "hybrid cause[s] of action sounding in contract, but actually allowing recovery of losses akin to punitive damages." *Frankenmuth Mut. Ins. Co. v. Keeley*, 447 N.W.2d 691, 707 (Mich. 1989) (Levin, J., dissenting), *dissent adopted*, 461 N.W.2d 666, 666 (Mich. 1990); *see also generally Com. Union Ins. Co. v. Liberty Mut. Ins. Co.*, 393 N.W.2d 161 (Mich. 1986) (bad faith failure to settle claim cognizable). Other courts have upheld bad faith claims rooted in other conduct linked to a claim for breach of the duty of good faith and fair dealing, *see*, *e.g.*, *Com. Union Ins. Co. v. Med. Protective Co.*, 356 N.W.2d 648, 650 (Mich. App.1984) (bad faith settlement conduct), as well as for independent torts. *See*, *e.g.*, *Schimmer v. Wolverine Ins. Co.,* 220 N.W.2d 772, 774-76 (Mich. App. 3 1974) (insurer's agent gave bad advice at renewal).

While Michigan clearly compensates insureds for bad faith conduct, and allows recovery of amounts beyond policy limits in some cases, it appears those claims are technically breach of contract claims. *See Stryker Corp. v. XL Ins. Am., Inc.*, No. 1:17-cv-66, 2021 WL 3829704, at *3-4 (W.D. Mich. July 26, 2021) (citing Michigan cases); *see also Stryker Corp. v. XL Ins. Am., Inc.*, No. 1:17-cv-66, 2018 WL 3950899, at *9 (W.D. Mich. Aug. 17, 2018) (similar).

Bad faith means that the insurer acted with "arbitrary, reckless, indifferent, or intentional disregard" of the policyholder's interests. *Liberty Mutual*, 393 N.W.2d at 164. Factors that the court will consider in determining whether the insurer acted in bad faith include:

(1) "[F]ailure to keep the insured fully informed of all developments in the claim or suit";

(2) "[F]ailure to inform the insured of all settlement offers [not falling] within the policy limits";

(3) "[F]ailure to solicit a settlement offer or initiate settlement negotiations when warranted";

(4) Failure to accept or reject a reasonable settlement offer within limits;

(5) Acting with undue delay in accepting a reasonable offer to settle a "potentially dangerous case" within limits with a high likelihood of a verdict;

(6) Attempting "to coerce or obtain an involuntary contribution from [the policyholder] to settle within the policy limits";

(7) Failure to properly investigate the claim before refusing a settlement offer within limits;

(8) Disregarding the advice of an adjuster or attorney;

(9) Acting with "serious and recurrent negligence";

(10) "[R]efussal to settle a case within the policy limits following an excess[] verdict when the chances of reversal on appeal are slight or doubtful"; and

(11) Failure to appeal "a verdict in excess of the policy limits where there are reasonable grounds" to do so, especially where trial counsel recommends doing so.

Id. at 137-39.

Damages

For failing to settle a case in bad faith in the third-party liability context, insurers can be liable for the entire amount of the judgment or settlement, including the amount that exceeds policy limits. *Frankenmuth*, 447 N.W.2d at 698.

For breach of contract claims, consequential damages such as lost profits and costs of defending a third-party claim are available only if they were contemplated by the parties at the time the contract was made. *Lawrence v. Will Darrah & Assocs., Inc.*, 516 N.W.2d 43, 47-49 (Mich. 1994) (contract, lost profits); *Stryker Corp. v. XL Ins. Am.*, 735 F.3d 349, 358 (6th Cir. 2012) (contract, costs of defending third-party claim). Consequential damages are not available for tort claims. *Burnside v. State Farm Fire & Cas. Co.*, 528 N.W.2d 749, 754 (Mich. App. 1995) (Talbot, J., concurring) (citing *Kewin*, 295 N.W.2d at 56).

Emotional distress (sometimes called mental anguish) damages are generally unavailable for contract claims, unless the policyholder proves an independent tort. *Roberts*, 374 N.W.2d 905, 907-08; *Benefield v. Cincinnati Ins. Co.*, 837 N.W.2d 283 (Mich. 2013).

Attorneys' fees incurred in pursuing the insurer are unavailable for first- or third-party claims. *See Burnside*, 528 N.W.2d at 752-53 (first-party); *Johnson v. USA Underwriters*, 936 N.W.2d 834, 847-48 (Mich. App. 2019) (third-party). But policyholders can recover attorneys' fees incurred in defending the underlying action. *Schiebout v. Citizens Ins. Co. of Am.*, 366 N.W.2d 45, 49 (Mich. App. 1985).

Punitive damages are unavailable for first- or third-party claims. *Casey v. Auto Owners Ins. Co.*, 729 N.W.2d 277, 285 (Mich. App. 2006). However, exemplary damages—highly similar to punitive damages and which are meant to compensate plaintiffs for '"humiliation, sense of outrage, and indignity' resulting from injuries 'maliciously, willfully and wantonly' inflicted by" defendants—are recoverable for tort, but not contract, claims. *Kewin*, 295 N.W.2d at 55. There is

a narrow exception for contracts of a personal nature, *Id*. at 413-14 (disability insurance), but in practice, most insurance contracts will likely be deemed "commercial" and outside *Kewin* exception. *Hanczaryk*, 2014 WL 5462600, at *13.

Statute of Limitations

In Michigan, first- and third-party breach of contract claims are subject to a six-year statute of limitations. Mich. Comp. Laws § 600.5807(9); *Strachura v. Metro. Life Ins. Co.*, 333 N.W.2d 219, 220 (Mich. App. 1983), *rev'd on other grounds*, 417 Mich. 1100.20 (1983) (first-party claims); *Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 761 N.W.2d 846, 864-65 (Mich. App. 2008) (third-party claims; citing prior version of statute); *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, P.C. v. Bakshi*, 771 N.W.2d 411, 416-17 (Mich. 2009) ("Under the rules governing claims alleging breach of contract, the statute of limitations for bringing a cause of action is six years.").

Generally, the statute of limitations begins running when the claim accrues, which is when the breach occurred. Mich. Comp. Laws § 600.5827; *Blazer Foods, Inc. v. Rest. Props., Inc.*, 673 N.W.2d 805, 809-10 (Mich. App. 2003); *Seyburn*, 771 N.W.2d at 419. For the failure to pay out first-party benefits, the claim accrues when the insurer denies payment of those benefits. *Strachura*, 333 N.W.2d at 220; *accord*, *Sweet v. Liberty Mut. Grp., Inc.*, No. 14-11155, 2015 WL 3440859, at *2 (E.D. Mich. May 28, 2015). For third-party claims, determining when the breach occurred requires looking to the facts. *Tenneco*, 761 N.W.2d 846, 864; *see also Scherer v. Hellstrom*, 716 N.W.2d 307, 310 (Mich. App. 2006) ("To determine what constituted the 'wrong upon which the claim is based,' we look first to the parties' agreement."). A cause of action for breach of the duty to defend accrues when the insurer refuses to defend a lawsuit brought against the policyholder, which may not require a formal denial. *Jacobs v. Detroit Auto. Inter-Insurance Exch.*, 309 N.W.2d 627, 629-30 (Mich. App. 1981); *see Tenneco*, 761 N.W.2d 846, 865-66 (rejecting argument that "period of limitations did not begin to run until defendant formally denied coverage"). A cause of action for breach of the duty to indemnify accrues when the policyholder "sustained the loss" or when the insurer "fails to perform under the contract." *Tenneco,* 761 N.W.2d 846, 864 (quoting *Ins. Co. of N. Am. v. Se. Elec. Co.*, 275 N.W.2d 255, 256 (Mich. 1979); *Cordova Chem. Co. v. Dep't of Nat. Res.*, 536 N.W.2d 860, 865 (Mich. App. 1995)).

Though again, Michigan technically does not recognize an independent tort cause of action, some Courts of Appeal have applied the tort statute of limitations, which is three years. Mich. Comp. Laws § 600.5805(2); *see*, *e.g.*, *Smith v. Gilles*, 184 N.W.2d 271, 272 (Mich. App. 1970) (bad faith failure to settle); *see also Vutci v. Indianapolis Life Ins. Co.*, 403 N.W.2d 157, 164-65 (applying tort statute of limitation to bad faith failure to advise and breach of implied contract claims). The statute of limitations for third-party tort claims begins running "when all the elements of [the cause of action] have occurred and can be alleged in a proper complaint." *Stephens v. Worden Ins. Agency, LLC*, 859 N.W.2d 723, 732 (Mich. App. 2014) (quoting *Schaendorf v. Consumers Energy Co.*, 739 N.W.2d 402, 406 (Mich. App. 2007)). Determining when the elements have occurred requires looking to the facts. *See id.* Generally, an insured must prove tortious conduct beyond the mere failure to pay benefits. *See Roberts*, 374 N.W.2d at 909 ("In a contractual setting, a tort action must rest on a breach of duty distinct from contract.").

M INNESOTA

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

Bad Faith

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 Peterson v. W. Nat'l Mut. Ins. Co.*, 946 N.W.2d 903, 909 (Minn. 2020).

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*).

In the context of third-party bad faith claims, there is no statutory cause of action, but under common law, the fiduciary obligations owed to the insured in a third-party claim are greater than a first party claim. *Fette v. Columbia Cas. Co.*, No. C0-93-242, 1993 WL 377091, at *2 (Minn. Ct. App. 1993). The insurer's duty of good faith includes an obligation to view the situation as if there were no policy limits applicable to the claim, and to give equal consideration to the financial exposure of the insured. *Peterson v. W. Nat'l Mut. Ins. Co.*, 946 N.W.2d 903, 917 (Minn. 2020).

Damages

Consequential damages may be recoverable in Minnesota. *See Pillsbury Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 425 N.W.2d 244, 248 (Minn. Ct. App. 1988) (citing *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. *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 561 (Minn. 1996). 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 for first-party claims. *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."). Recovery of punitive damages against an insurer for bad faith failure to settle has been restricted to third party claims. *Wilbur v. State Farm Mut. Auto. Ins. Co.*, 880 N.W.2d 874, 881 (Minn. Ct. App. 2016), *aff'd,* 892 N.W.2d 521 (Minn. 2017); *Pillsbury Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 425 N.W.2d 244, 250 (Minn. Ct. App. 1988) ("In Minnesota, recovery of punitive damages against an insurer for bad faith failure to settle has been restricted to third party claims").

Statute of Limitations

Actions based on insurance contracts are subject to a six-year statute of limitations. Minn.Stat. § 541.05, subd. 1(1) (1990). The limitations period begins to run when an insured has an identifiable claim against the insurer. *Amdahl v. Stonewall Ins. Co.*, 484 N.W.2d 811, 813 (Minn. Ct. App. 1992).

MSSISSIPPI

Mississippi has not adopted the UCSPA. **Bad**

Faith

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). Mississippi law does not recognize a cause of action for third-party bad faith.

To prove bad faith in a first-party cause of action, an insured must show that the insurer:

(1) Lacked an arguable or legitimate basis for denying the claim;

(2) 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 (S.D. Miss. 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).

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 (Miss. 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); *Hoover v. United Servs. Auto. Ass'n*, 125 So. 3d 636, 642 (Miss. 2013).

Emotional distress damages are recoverable if the insured proves that the insurer's conduct is culpable. *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290, 295 (Miss. 1992); *Allred v. Fairchild*, 916 So. 2d 529, 532-33 (Miss. 2005).

Attorneys' fees as well as court costs are recoverable in Mississippi if they were reasonable foreseeable because of the insurer's conduct. *Windmon v. Marshall*, 926 So. 2d 867, 874-75 (Miss. 2006); *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290, 295 (Miss. 1992); *Allred,* 916 So. 2d at 532-33.

Punitive damages are available 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; *Hoover*, 125 So.3d at 643; *see also Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 972 (Miss. 1999).

Statute of Limitations

There is a three-year statute of limitations to bring a first-party bad faith claim under Mississippi law. *Blanchard v. GEICO Gen. Ins. Co.*, 375 So. 3d 723, 730 (Miss. Ct. App. 2023); Miss. Code Ann. § 15-1-49. The limitations period begins to run when an insured has discovered, or by reasonable diligence should have discovered, its claim against the insurer. Miss. Code Ann. § 15-1-49.

M ISSOURI

Missouri has adopted a version of the UCSPA Model Regulation. Mo. Code Regs. Ann. tit. 20 §§ 100-1.010 to 100-1.300.

Missouri has adopted a version of the UCSPA. Mo. Rev. Stat. §§ 375.1000 to 375.1018.

Bad Faith

Missouri Annotated Statute §375.420 creates a statutory right of action against insurers for statutory penalties and attorneys' fees for an insurer's vexatious refusal to pay a covered loss. The statute applies to first-party and third-party bad faith claims. *See Drury Co. v. Missouri United Sch. Ins. Couns.*, 455 S.W.3d 30, 35 (Mo. Ct. App. 2014) (extending the right of action for vexatious refusal to pay a claim to third-party beneficiaries).

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.

Dhyne v. State Farm Fire and Cas. Co., 188 S.W.3d 454, 457 (Mo. 2006).

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. *Doe Run Res. Corp. v. Certain Underwriters at Lloyd's London*, 400 S.W.3d 463, 471 (Mo. Ct. App. 2013).

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); *see also Shobe v. Kelly*, 279 S.W.3d 203, 209 (Mo. Ct. App. 2009).

In the third-party context, an insurer "has a fiduciary duty to its insured to evaluate and negotiate third-party claims in good faith" and may be liable for any losses suffered by its insured where it breaches its duty and refuses to settle a claim within policy limits. *Shobe*, 279 S.W.3d at 209. "The

insurance company incurs liability exposure when the company refuses to settle a claim within the policy limits and the insured is subjected to a judgment in excess of the policy limits as a result of the company's bad faith in disregarding the interests of its insured in hopes of escaping its responsibility under the liability policy." *Id*. at 210. Where the insurer's bad faith refusal to settle results in an excess judgment against its insured, the insurer is liable for a tort, not negligence or breach of contract, "for the entire resulting judgment against the insured, including that part in excess of the policy limits." *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 S.W.3d 64, 94 (Mo. Ct. App. 2005).

Damages

If the insurer's refusal to defend or settle a claim is made in bad faith, the insured may recover the damages proximately caused by the insurer's bad faith. Those damages may include punitive damages. *Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 597 (Mo. App. W.D. 2008).

Punitive damages are available where the injured party shows by clear and convincing evidence that the insurer's bad faith actions are such that the insurer "had a culpable mental state, either by a wanton, willful or outrageous act, or reckless disregard for an act's consequences (from which evil motive is inferred)." *John v. Allstate Ins. Co.*, 262 S.W.3d 655, 666 (Mo. Ct. App. 2008).

Emotional distress damages are also available for bad faith failure to settle claims. *Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 590 (Mo. Ct. App. 2008).

Under Mo. Ann. Stat. § 375.420, an insured may recover bad faith damages of up to 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. A third-party right of action is also available under Mo. Stat. § 375.420, meaning a third-party claimant may recover bad faith damages available for the insurer's vexatious refusal to pay a claim under the statute.

Statute of Limitations

In Missouri, the statute of limitations for a third-party bad faith claim is five years, as those claims are based in tort. *See* Mo. Stat. § 516.120(4); *State ex rel. Lumbermens Mut. Cas. Co. v. Stubbs*, 471 S.W.2d 268, 269 (Mo. 1971). Missouri does not recognize a common law cause of action for first-party bad faith.

M ONTANA

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

Bad Faith

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.

Unfair claims settlement practices, in the first and third-party liability context, 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 (6).

In both the first and third-party context, in addition to allowing private rights of action for violations of certain duties expressed in the UTPA, an insured has a "common-law right to bring a breach of contract claim" against its insurer. *Draggin' Y Cattle Co., Inc. v. Junkermier, Clark, Campanella, Stevens, P.C.*, 439 P.3d 935, 942-43 (Mont. 2019). Moreover, in the third-party liability context, insurance contracts include "a covenant of good faith and fair dealing, which we have long recognized gives rise to a duty to accept a reasonable offer within policy coverage limits." *Id*. Further, in "determining whether to settle, the insurer must give the insured's interest as much consideration as it gives its own interest." *Id*.

Damages

An insured may recover compensatory and consequential damages from its insurer for a breach of the insurer's duty to settle. *Draggin' Y Cattle Co., Inc. v. Junkermier, Clark, Campanella, Stevens, P.C.*, 439 P.3d 935, 943 (Mont. 2019) ("An insured may recover compensatory and consequential damages for breach of this duty in a breach of contract action.").

Emotional distress damages are recoverable for a common law bad faith claim. *Stephens v. Safeco Ins. Co. of Am.*, 852 P.2d 565, 567 (Mont. 1993).

Further, an insured may recover consequential and punitive damages under the MUTPA. Mont. Code Ann. § 33-18-242 (5). To recover punitive damages, the insured must 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).

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

Statute of Limitations

In Montana, bad faith claims are subject to a three-year statute of limitations. *O'Connor v. Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 87 P.3d 454, 456 (Mont. 2004) (explaining that the "statute of limitations for a common law bad faith claim is three years"). Moreover, the Montana Unfair Trade Practices Act provides that the "period prescribed for commencement of an action under this section is . . . (a) for an insured, within 2 years from the date of the violation of 33-18-201; and (b) for a third-party claimant, within 1 year from the date of the settlement of or the entry of judgment on the underlying claim." Mont. Code Ann. § 33-18-242.

N EBRASKA

Nebraska has adopted a version of the UCSPA. Neb. Rev. Stat. §§ 44-1536 to 44-1544.

Nebraska has adopted a version of the UCSPA Model Regulation. 210 Neb. Admin. Code §60.

Bad Faith

Nebraska recognizes an independent common law cause of action for bad faith against a first-party insurer. *LeRette v. American Med. Sec., Inc.*, 705 N.W.2d 41, 47 (Neb. 2005).

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. at 47-48.

An insurer can also be held liable for third-party bad faith. *Millard Gutter Co. v. Shelter Mut. Ins. Co.*, 980 N.W.2d 420, 431 (Neb. 2022). "The liability of an insurer to pay in excess of the face of the policy accrues when the insurer, having exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within the policy limit." *Hadenfeldt v. State Farm Mut. Auto. Ins. Co.*, 239 N.W.2d 499, 502 (Neb. 1976). Third-party bad faith requires more than negligence; instead, "there must be some level of intentional wrongdoing" by the insurer. *Braesch v. Union Ins. Co.*, 464 N.W.2d 769, 777 (Neb. 1991).

"Bad faith" includes a 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. *LeRette*, 705 N.W.2d at 49-50.

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*, 469 N.W.2d at 135.

Emotional distress damages are available. *Millard Gutter Co.*, 980 N.W.2d 420, 432 (Neb. 2022). "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. of Neb.*, 498 N.W.2d 591, 603 (Neb. App. 1992).

Attorneys' fees are available. Neb. Rev. Stat. § 44-359.

Punitive Damages are generally not available. *Distinctive Printing and Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989).

Statute of Limitations

In Nebraska, the statute of limitations for a bad faith claim or any other claim arising out of an insurance policy is five years. *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 980 N.W.2d 437, 445 (2022) (citing Neb. Rev. Stat. § 25-205).

N EVADA

Nevada has adopted a version of the UCSPA, codified at Nev. Rev. Stat. §§ 686A.600 to 686A.680 (2011).

Bad Faith

Nevada recognizes common law bad faith. *U.S. Fid. & Guar. Co. v. Peterson*, 540 P.2d 1070, 1071 (Nev. 1975). In a first-party action, an insurer breaches the duty of good faith when it refuses without proper cause to compensate its insured for a loss covered by the policy. "An insurer is without proper cause to deny a claim when it has an actual or implied awareness that no reasonable basis exist to deny the claim. Thus, the insurer is not liable for bad faith for being incorrect about policy coverage as long as the insurer had a reasonable basis to take the position that it did." *Pioneer Chlor Alkali Co., Inc. v. Nat'l Union Fire Ins. Co.,* 863 F. Supp. 1237, 1242 (D. Nev. 1994). 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, 891 (Nev. 1991); *Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 604 (Nev. 1998), *opinion modified on denial of reh'g*, 979 P.2d 1286 (Nev. 1999).

In the context of third-party bad faith, "the litmus test is whether the insurer, in determining whether to settle a claim, [gave] as much consideration to the welfare of its insured as it [gave] to its own interests." *Landow v. Med. Ins. Exch. of Cal.,* 892 F. Supp. 239, 240–41 (D. Nev. 1995).

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.

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.

Nev. Rev. Stat. § 686A.310.

Damages

Consequential damages are available in common law claims. *U.S. Fid. & Guar. Co.*, 540 P.2d at 1071.

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

Nevada permits recovery of attorneys' fees when the prevailing party does not recover more than $20,000 or when the claim of the opposing party was brough to harass the prevailing party. Nev. Rev. Stat. Ann. § 18.010. Punitive damages are available. Nevada is one of few states that do not put a cap on punitive damages. Punitive damages may be awarded when the plaintiff proves by clear and convincing evidence that the defendant is "guilty of oppression, fraud or malice, express or implied." Nev. Rev. Stat. Ann. § 42.005(1).

Statute of Limitations

The statute of limitations for a common law bad faith claim in Nevada is four years. The general statute of limitations for tort actions in Nevada, which is four years as per NRS 11.190(2)(c).

The statute of limitations for violations of the Unfair Claims Practices Act in Nevada is two years. This is based on the application of NRS 11.190(4)(b), which requires actions upon a statute for a penalty or forfeiture to be commenced within two years from when the cause of action accrued.

N EW HAMPSHIRE

New Hampshire has adopted a version of the UCSPA. *See* N.H. St. § 417:3, § 417:4, § 417:19(I). While the New Hampshire Supreme Court has not weighed in on this matter, the First Circuit has held that insureds cannot bring § 417 claims (for damages or declaratory relief) until the Insurance Commissioner determines that the relevant practice violations the statute. *Hunt v. Golden Rule Ins. Co.*, 638 F.3d 83, 88 (1st Cir. 2011) (citing *Lacaillade v. Loignon Champ-Carr, Inc.,* No. 10-cv-68-JD, 2010 WL 2902251, at *3-4 (D.N.H. July 22, 2010)); *c.f. Bell v. Liberty Mut. Ins. Co.*, 776 A.2d 1260, 1262 (N.H. 2001) (observing that trial court ruled plaintiff had no cause of action under § 417 because there had not been a finding of a violation by the Insurance Commissioner, without ruling whether proper). New Hampshire's Consumer Protection Act does not apply to the insurance industry. *Bell*, 776 A.2d at 1262.

Bad Faith

New Hampshire does not recognize an independent tort claim for bad faith against a first-party insurer. *Lawton v. Great Sw. Fire Ins. Co.*, 392 A.2d 576, 581, 614 (N.H. 1978); *accord, Bell*, 776 A.2d at 1264. There is a narrow exception if the insurer had exclusive control over the investigation—for example, by threatening to cancel the policy if the insured investigated—in which case, the insurer owes a duty of good faith to exercise reasonable care in its investigation, and breach of that duty is an independent tort. *Bennett v. ITT Hartford Grp., Inc.*, 846 A.2d 560, 564-65 (N.H. 2004); *but see Skrekas v. State Farm Fire & Cas. Co.*, No. 2015-0368, 2017 WL 2797415, at *3 (N.H. May 12, 2017) (distinguishing on facts).

Generally, though, plaintiffs may bring only breach of contract claims against first-party insurers. *Lawton*, 392 A.2d at 580. A breach of contract claim arises "when there is a failure without [any] legal excuse to perform any promise which forms the whole or part of a contract." *Keene Auto Body, Inc. v. State Farm Mut. Auto. Ins. Co.*, 293 A.3d 1146, 1153 (N.H. 2022). The covenant of good faith and fair dealing, implied in every insurance contract, *Lawton*, 392 A.2d at 580, is breached when an insurance company does not 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.*

New Hampshire does recognize an independent common law cause of action for third-party bad faith. *Dumas v. State Farm Mut. Auto. Ins. Co.*, 274 A.2d 781, 782-83 (N.H. 1971); *accord*, *In re O'Meara's Case*, 54 A.3d 762, 767 (N.H. 2012). The policyholder may state a claim if (1) there is an outstanding judgment against the policyholder that exceeds policy limits, and (2) the case *could* have been settled within policy limits. *O'Meara*, 54 A.3d at 767. Prong (2) is a negligence standard, meaning that a reasonable person would have settled the case, *Gelinas v. Metro. Prop. & Liab. Ins. Co.*, 551 A.2d 962, 966 (N.H. 1988), and is a question of fact. *Certain Underwriters at Lloyd's London v. Home Ins. Co.*, 783 A.2d 238, 241 (N.H. 2001). The court will make "a slow motion rerun of [the insurer's] actions *leading up* to the verdict." *Gelinas*, 551 A.2d at 966 (emphasis original).

Damages

If the Insurance Commissioner determined that the insurer's conduct violates § 417, the Commissioner may impose on the insurer a penalty of $2,500 per violation, payable to the insured. N.H. St. § 417:10. If the insured prevails on a cause of action based on § 417, the insured may recover, in addition to damages, costs of suit and attorneys' fees. N.H. St. § 417:20(III). Punitive damages are unavailable. N.H. St. § 507:16.

In addition to compensatory damages, consequential damages are available if the insured can prove that such damages were reasonably foreseeable by the insurance company and that the insured could not have reasonably avoided or mitigated such damages. *Bell*, 776 A.2d at 1263 (first-party claim); *A.B.C. Builders, Inc. v. Am. Mut. Ins. Co.*, 661 A.2d 1187, 1192 (N.H. 1995) (third-party claim). That is usually a jury question. *Jarvis v. Prudential Ins. Co. of Am.*, 448 A.2d 407, 411 (N.H. 1982).

Emotional distress damages are unavailable unless there is a separate finding of extreme and outrageous conduct by the insurer. *Id.* at 410 (no emotional distress damages for breach of contract); *Lister v. Bankers Life & Cas. Co.*, 218 F. Supp. 2d 49, 52-53 (D. N.H. 2002) (damages available when insurer's conduct was extreme and outrageous).

For claims arising out of the insurer's breach of the duty to defend, defense costs are recoverable. *Broom v. Cont'l Cas. Co.*, 887 A.2d 1128, 1133 (N.H. 2005).

Attorneys' fees are available if the insurer acted in bad faith in promoting unnecessary litigation. *Drop Anchor Realty Tr. v. Hartford Fire Ins. Co.*, 496 A.2d 339, 343 (N.H. 1985). Also, in declaratory actions to resolve coverage disputes, attorneys' fees are recoverable if the insured successfully obtains declaratory relief. N.H. St. § 491:22-b; *see* N.H. St. § 491:22, *held unconstitutional*, *Duncan v. State*, 102 A.3d 913, 919-21 (N.H. 2014); *but see Carrigan v. N.H. Dep't of Health & Human Servs.*, 262 A.3d 388, 394-95 (N.H. 2021) (holding that *Duncan* was superseded by constitutional amendment).

Punitive damages are unavailable. N.H. St. § 507:16.

Statute of Limitations

The statute of limitations for a breach of contract claim is three years. N.H. St. § 508:4; *Metro. Prop. & Liab. Ins. Co. v.* Walker, 620 A.2d 1020, 1021 (N.H. 1993); *Pierce v. Metro. Life Ins. Co.*, 307 F. Supp. 2d 325, 328 (D.N.H. 2004). Certain types of policies have different statute of limitations. *See Skrekas*, 2017 WL 2797415, at *2 (fire policies) (citing N.H. St. § 407:15, N.H. St. § 407:22).

The statute of limitations for a third-party bad faith claim is three years. N.H. St. § 508:4; *Walker*, 620 A.2d at 1021-22; *Provencal v. Vt. Mut. Ins. Co.*, 571 A.2d 276, 277 (N.H. 1990).

N EW JERSEY

New Jersey has adopted a version of the UCSPA and the UCSPA Model Regulation. N.J. Rev. Stat. § 17:29B-4; N.J. Admin. Code §§ 11:2-17.1 to 11:2-17.14.

Bad Faith

In 2022, New Jersey enacted the "New Jersey Insurance Fair Conduct Act" which created a statutory cause of action for bad faith in first-party insurance claims relating to uninsured or underinsured motorists if the insurer committed (1) "any unreasonable delay or unreasonable denial of a claim for payment of benefits under an insurance policy" or (2) "any violation of the provisions of section 4 of N.J.S.A. 17:29B." N.J. Stat. § 17:29BB-3.

For all other first-party insurance claims, New Jersey recognizes an independent common law cause of action for bad faith against a first-party insurer. *Pickett v. Lloyd's*, 621 A.2d 445, 468 (N.J. 1993) ("Although the regulatory framework does not create a private cause of action, it does declare state policy and we do not think that finding a cause of action for the breach of the duty of good faith and fair dealing would conflict with that policy"). To establish a claim for "bad faith," the plaintiff must demonstrate: (1) the absence of a reasonable basis for denying benefits of the policy and (2) that the defendant knew or recklessly disregarded the lack of a reasonable basis for denying the claim. *Liberty Mut. Fire Ins, Co. v. Reade Mfg. Co.*, No. 3:22-cv-00003, 2023 WL 3597675, at *6 (D.N.J. 2023) (dismissing the bad faith claim because the plaintiff did not allege sufficient facts to support the claim that the insurer had "ill motive or lacked a reasonable basis to deny coverage."). New Jersey law also recognizes a "fairly debatable" standard with respect to tort-based liability in the insurance contract context—"if a claim is fairly debatable, no liability in tort will arise." *Id*. (citation omitted).

Additionally, New Jersey recognizes a common law private right of action against third-party insurers. *Id.* at 449. An "insured may recover more than the policy limit if their liability insurer, in bad faith, refused to settle a third-party claim against its insured within that limit, and as a result, the third-party's judgment against the insured exceeds the policy limit." *Id.* A third-party insurer acts in bad faith when its decision not to settle within policy limits is not "an honest one" and does not "result from a weighing of probabilities in a fair manner." *Id.* at 450.

Damages

If an insurer is found to have acted in bad faith, the insured can recover various damages, discussed below.

First, an insured can recover consequential damages for economic losses, such as loss of income, that are fairly within the contemplation of the insurance company in a bad faith action. *Pickett*, 621 A.2d at 480. "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.* at 454. "Casualty insurers undertake an implied contractual duty, as fiduciaries to parties with whom they have a contractual relationship, to act in good faith and to deal fairly in the settlement of claims, and that such an implied contractual duty supports a claim for consequential damages." *Id.* at 472.

Emotional Distress damages are not generally available, except in egregious circumstances involving outrageous conduct on the part of the insurer. *Id.* at 454 ("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.").

An insured may only recover punitive damages in specific situations. "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. Punitive damages are limited to five times compensatory damages or $350,000, whichever is greater. *Id.* "A plaintiff would have to show something other than a breach of the good-faith obligation as we have defined it" including wantonly reckless or malicious conduct or wrongfulness of an intentional act. *Pickett*, 621 A.2d at 455. "Wrongful failure to pay benefits, wrongful withholding of benefits or other violation of the statute does not thereby give rise to a claim for punitive damages." *Pickett* at 477.

An insured can also recover attorneys' fees for actions on liability insurance claims. Pursuant to New Jersey Civil Rule 4:42- 9(a)(6), an insured may collect fees for legal services "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 (N.J. App. Div. 2001); *see also Bello v. Merrimack Mut. Fire Ins. Co*., No. A-4750-10T4, 2012 WL 2848642, at *10 (N.J. Super. Ct. App. Div. July 12, 2012) (The jury, when presented with the question of bad faith and offered sufficient evidence, found bad faith on the part of the insurer and reasoned that its award of attorneys' fees was proper and foreseeable because the "damages resulted from defendant's bad faith denial of plaintiff's claim.").

An insured may receive prejudgment interest. However, the situation in which prejudgment interest is granted is limited. "[F]ollowing *Pickett*, his measure of damages, if he could prove bad faith, would be any foreseeable consequential damages. This might typically include, for example, costs of litigation, including expenses for experts and counsel fees, and prejudgment interest."

Taddei v. State Farm Indem. Co., 951 A.2d 1041, 1048 (App. Div. 2008) (allowing prejudgment interest to be awarded to the plaintiff in a bad faith claim).

Statute of Limitations

In New Jersey, the statute of limitations for claims based on an insurance policy is six years unless a provision in the policy or a statute says otherwise. N.J. STAT. ANN. § 2A:14-1; *Gahnney v. State Farm Ins. Co.*, 56 F.Supp.2d 491 (D.N.J. 1999) (enforcing a policy's limitation period of one year).

N EW MEXICO

New Mexico has adopted a version of the Unfair Claims Settlement Practices Act. N.M. Stat. Ann. § 59A-16-20. New Mexico's unfair claims practices statute creates a private right of action. *See* N.M. Stat. Ann. § 59A–16–30 ("Any person covered by [Article 16] who has suffered damages as a result of a violation of that article by an insurer or agent is granted a right to bring an action in district court to recover actual damages.").

Bad Faith

"Under New Mexico law, an insurer who fails to pay a first-party claim has acted in bad faith where its reasons for denying or delaying payment of the claim are frivolous or unfounded." *See Sloan v. State Farm Mut. Auto. Ins. Co.*, 85 P.3d 230, 236 (N.M. 2004); *see also Hovey-Jaramillo v. Liberty Mut. Ins.*, 535 P.3d 747, 751, *cert. denied* (Sept. 12, 2023) ("It is now clear that insurance bad faith claims are treated as torts in New Mexico."). The terms "frivolous or unfounded" in this context "does not mean erroneous or incorrect," rather, they mean "an arbitrary or baseless refusal to pay, lacking any support in the wording of the insurance policy or the circumstances surrounding the claim." *Id.* at 237 (quoting *Jackson Nat'l Life Ins. Co. v. Receconi*, 827 P.2d 118, 134 (N.M. 1992)). Therefore, an insurer may deny coverage "without exposure to a claim of bad faith failure to pay as long as it has reasonable grounds for the denial." *Haygood v. United Servs. Auto. Ass'n*, 453 P.3d 1235, 1241 (N.M. Ct. App. 2019). Generally, reasonable grounds will follow from a "reasonable investigation," but where an insurer fails to make an "adequate investigation," it may be liable for a bad faith denial of a claim. *Id.*; *see also, e.g.*, *Dechane v. Liberty Mutual Ins. Co.*, No. 1:23-CV-1134 KRS/LF, 2024 WL 1376528, at *6 (D.N.M. Apr. 1, 2024); *Fuel Depot, LLC v. Travelers Cas. Ins. Co. of Am.*, 668 F. Supp. 3d 1212, 1220 (D.N.M. 2023).

As for third-party bad faith, "New Mexico clearly recognizes a claim for insurance bad faith in the contexts of failing to defend, settle third-party claims, and timely pay insureds' claims." *Am. Nat'l Prop. & Cas. Co. v. Rosenschein*, 2020 WL 3448276, at *2 (D.N.M. Jan. 16, 2020) (citing *Sloan*, 85 P.3d at 232). "An insurer who refuses to accept a reasonable settlement offer within policy limits, in violation of its duty of good faith and fair dealing, is liable for the entire judgment against the insured even if it exceeds policy limits." *Dairyland Ins. Co. v. Herman*, 134 F.3d 382 (10th Cir. 1998) (applying New Mexico law).

Damages

New Mexico permits recovery of punitive damages where the insurer had a "culpable mental state." *Supreme Contracting, Inc. v. Preferred Contractors Ins. Co.*, No. 1:20-CV-00482-KWR-LF, 2023 WL 3956628, at *4 (D.N.M. June 12, 2023); *see also Peck v. Progressive N. Ins. Co.*, 665 F. Supp. 3d 1248, 1262 (D.N.M. 2023); *Ingwaldson v. Moore*, No. 19-CV-00801 MIS/JFR, 2022 WL 704132, at *6 (D.N.M. Mar. 9, 2022).

Consequential damages may also be available in some cases. N.M. Stat. Ann. § 59A-16-30; *see also Servants of Paraclete, Inc. v. Great Am. Ins. Co.*, 866 F. Supp. 1560, 1578 (D.N.M. 1994) (applying New Mexico law).

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. Stat. Ann. § 39-2.

Although there is a lack of New Mexico authority on whether emotional distress damages are available, a federal court applying New Mexico law has rejected the availability of emotional distress damages in the bad faith insurance context. *See Fava v. Liberty Mut. Ins. Corp.*, 338 F. Supp. 3d 1217, 1227 (D.N.M. 2018).

Statute of Limitations

In New Mexico, the statute of limitations is four years for statutory bad faith insurance claims. *Martinez v. Cornejo*, 208 P.3d 443, 452 (N.M. Ct. App. 2008).

N EW YORK

New York has adopted a version of the UCSPA and UCSPA Model Regulation. N.Y. Ins. Law § 2601; N.Y. Comp. Codes R. & Regs. Tit. 11, §§ 216.0 to 216.7 (Regulation 64). However, New York does not recognize a common law or statutory cause of action for violation of these laws or bad faith. *Rocanova v. Equitable Life Assur. Soc'y,* 634 N.E.2d 940 (N.Y. 1994).

Bad Faith

New York also 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.*, 285 A.D.2d 73, 81 (N.Y. App. 1st Dep't. 2001) ("We are unwilling to adopt the widely-accepted tort cause of action for 'bad faith' in the context of a first-party claim . . . we accept the more conservative approach adopted by the minority of jurisdictions that 'the duties and obligations of the parties to an insurance policy are contractual rather than fiduciary."). New York has adopted the position that the duties and obligations of the parties to an insurance policy are contractual. *Id.* 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.*

New York does however, recognize that a third-party insurer has a duty to settle underlying claims in good faith. *Pavia v. State Farm Mut. Auto. Ins. Co.*, 626 N.E.2d 24, 27 (N.Y. 1993). The duty of good faith stems from the fact that, when a plaintiff makes a settlement offer within the policy limits, "an inherent conflict arises between the insurer's desire to settle the claim for as little as possible, and the insured's desire to avoid personal liability in excess of the policy limits." *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 398–99 (2d Cir. 2000). Thus, by refusing to settle within policy limits, an insurer risks being charged with bad faith on the premise that it has "advanced its own interests by compromising" those of the policyholder. *Pavia*, 626 N.E.2d at 27.

A policyholder can establish that an insurer breached its duty of good faith in settling an underlying claim by showing the insurer's conduct involved a "deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer." *Id.* at 24. Such a failure can be shown by "a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted." *Id*. A "sinister motive" is not required. *Id*.

Courts applying New York law routinely find an insurer has acted in bad faith when it refuses to reasonably settle within its policy limits. *See*, *e.g.*, *Quincy Mut. Fire Ins. Co. v. New York Cent. Mut. Fire Ins. Co.*, 89 F. Supp. 3d 291, 315 (N.D.N.Y. 2014) ("Through its litigation strategy, by which it did not tender the full extent of its policy . . . [the insurer] acted in bad faith, in gross disregard of the interests of its insured[.]"); *Schwartz v. Twin City Fire Ins. Co.*, 492 F. Supp. 2d 308, 318 (S.D.N.Y. 2007) ("[T]here was more than ample evidence to support the jury's verdict that [the policyholder] had fully complied with [its] contractual obligations and that [the insurer] had unreasonably withheld its consent . . . not acted in good faith in withholding its consent to the $20 million settlement.").

Damages

When a first-party insurer breaches its contractual duty of good faith, it can be liable for consequential damages. *Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 193 (N.Y. 2008); *Panasia Estates, Inc. v. Hudson Ins. Co.*, 10. N.Y.3d 200 (N.Y. 2008).

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 Mkt., Inc.*, 10 N.Y.3d at 193. The law in New York is "well established that compensatory damages in excess of the policy limits" may be recovered where an insurer, in violation of its implied obligation to act in good faith, has failed to make a reasonable settlement of a claim within policy limits. *AFIA v. Cont'l. Ins. Co.*, 140 A.D.2d 167, 168 (1st Dep't 1988); *see also*, *e.g.*, *Panasia Ests., Inc.* 39 A.D.3d at 343 (A policyholder "may recover foreseeable damages, beyond the limits of its policy, for breach of a duty to . . . settle claims in good faith.").

In third-party insurance bad faith "[a]n excess judgment is a class of harm that naturally and foreseeably flows from an insurer's failure to accept a pretrial settlement offer within the policy limits." *Soto v. State Farm Ins. Co.*, 635 N.E.2d 1222, 1224 (N.Y. 1994). "Accordingly, when the harm has been caused by the insurer's breach of its obligation to perform in good faith, the insurer should be required to remedy that harm by paying the excess judgment." *Id.* In this regard, the damages recoverable in an action based on an insurer's bad-faith refusal to settle are generally measured by "the amount for which the insured becomes charged in excess of his policy coverage." *Id.*

Emotional distress damages have not been awarded in bad faith cases. *Bi-Economy Mkt., Inc.*, 10 N.Y.3d at 193; *Panasia Ests., Inc.* 39 A.D.3d at 343.

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

Courts applying New York law will consider "multifaceted factors" in determining whether excess liability should be imposed. *Hartford Ins. Co. v. Methodist Hosp.*, 785 F. Supp. 38, 40 (E.D.N.Y. 1992). Among such factors is the likelihood that the policyholder "will be subject to personal liability." *Id.*

Statute of Limitations

In New York, the statute of limitations for an insurer's bad faith refusal to settle is governed by the six-year statute of limitations applicable to actions founded upon breach of contract. *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 31 (N.Y. App. Div. 1989)

N ORTH CAROLINA

North Carolina has adopted a version of the UCSPA. N.C. Gen. Stat. § 58-63-15.

Bad Faith

North Carolina recognizes an independent common law cause of action for bad faith against insurers. *See Von Hagel v. Blue Cross and Blue Shield,* 370 S.E.2d 695 (N.C. Ct. App. 1988); *see also Lifebrite Hosp. Grp. of Stokes, LLC v. Travelers Prop. Cas. Co. of Am.*, No. 1:22-CV-849, 2023 WL 6201460, at *4 (M.D.N.C. Sept. 22, 2023) (similar, applying North Carolina law, and citing *Von Hagel* approvingly). 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); *see also Guessford v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 983 F. Supp. 2d 652, 672 (M.D.N.C. 2013) (similar, citing *Lovell* approvingly).

To satisfy the showing of "bad faith," a plaintiff must show 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). 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.

North Carolina also 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 bring about 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 (4th Cir. 2001) (unpublished).

Under §75-1.1, an insured must show:

(4) An unfair or deceptive business practice;

(5) In or affecting commerce; and

(6) Which proximately caused injury to the plaintiff.

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

To support a violation under § 75-1.1, a court may look to N.C. Gen. Stat. § 58-63-15, a version of the UCSPA which North Carolina has adopted, for examples of conduct that reflect unfair or deceptive business practices to support a finding of liability under the broader standards of N.C.

Gen. Stat. § 75-1.1. *See Gray v. N.C. Ins. Underwriting Ass'n*, 529 S.E.2d 676, 683 (N.C. 2000) (holding that an insurer that engages in practices violating N.C. Gen. Stat. § 58-63-15(11)(f), also constitutes a violation of N.C. Gen. Stat. § 75-1.1). However, § 58-63-15 does not, itself, create a private cause of action.

Damages

"The North Carolina Court of Appeals has not ruled on the specific issue of whether or under what circumstances a policyholder can obtain consequential damages stemming from an insurer's breach of an insurance policy." *Blis Day Spa, LLC v. Hartford Ins. Grp.*, 427 F. Supp. 2d 621, 637 (W.D.N.C. 2006). That said, at least one federal court applying North Carolina law has allowed a consequential damages claim to proceed. *See Bald Head Island Ltd., LLC v. Ironshore Specialty Ins. Co.*, 609 F. Supp. 3d 393, 401 (E.D.N.C. 2022), *reconsideration denied*, No. 7:21-CV-177-BO, 2022 WL 17637455 (E.D.N.C. Dec. 13, 2022).

Emotional distress damages can be available in a limited set of cases. *Dailey v. Integon Gen. Ins. Corp*. 331 S.E.2d 148, 157-58 (N.C. Ct. App. 1985); *Christmas v. Nationwide Mut. Ins. Co.*, 30 F. Supp. 3d 435, 447 (E.D.N.C. 2014) (noting that emotional distress damages are available in a "limited class" of cases).

Attorneys' fees are available. In any suit instituted by a person who alleges that the defendant violated N.C. Gen. Stat. § 75-1.1, the presiding judge may 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); *see also Williams v. Ests. LLC*, No. 1:19-CV-1076, 2022 WL 4120780, at *1 (M.D.N.C. Sept. 9, 2022) (similar, applying North Carolina law, and discussing the award of attorneys' fees under N.C Gen. Stat. § 75-16.1).

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, 669 S.E2d 48, 55 (N.C. Ct. App. 2008); *see also Lifebrite Hosp. Grp. of Stokes, LLC*, No. 1:22-cv-849, 2023 WL 6201460, at *3 & n.6. Under N.C. Gen. Stat. § 1D-15, entitlement to punitive damages is only available where the aggravating or outrageous conduct involves fraud, malice, or willful or wanton conduct.

Statute of Limitations

There is a four-year statute of limitations for unfair and deceptive trade practices. N.C. Gen. Stat. § 75-16.2; *Page v. Lexington Ins. Co.*, 628 S.E.2d 427, 430 (N.C. Ct. App. 2006) (allowing a claim for unfair and deceptive trade practices claim to proceed because it is governed by a four-year statute of limitations even though the breach of contract claim had run under the applicable three-year limitations period).

There is a three-year statute of limitations for bad faith claims for loss covered by an insurance policy. N.C. Gen. Stat. § 1-52(12); *Page*, 628 S.E.2d at 430.

N ORTH DAKOTA

North Dakota has adopted a version of the UCSPA. N.D. Cent. Code Ann. § 26.1-04-03(9). However, North Dakota has not addressed whether this statute explicitly creates a private right of action. *Volk v. Wisconsin Mortgage Assurance Co.*, 474 N.W.2d 40 (N.D.1991) (holding that it "need not determine whether Chapter 26.1–04, N.D.C.C., creates a private civil right of action" because the statute does require proscribed acts to be performed with a frequency to indicate a general business practice and that did not occur).

Bad Faith

North Dakota does recognize a claim for bad faith against insurers under the common law. *Fetch v. Quam*, 623 N.W. 357, 361 (N.D. 2001) (an "insurer has a duty to act fairly and in good faith in its contractual relationship with its policyholders."); *Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co.*, 279 N.W.2d 638, 643 (N.D. 1979) (explaining that when an insurer fails to deal "fairly and in good faith," the insured may have a cause of action in tort for breach of "an implied covenant of good faith and fair dealing.").

The "gravamen of the test for bad is whether the insurer acts unreasonably in handling an insured's claim." *Fetch*, 623 N.W. at 361. "An insurer acts unreasonably by failing to compensate an insured for a loss covered by a policy, unless the insurer has a proper cause for refusing payment." *Hartman v. Estate of Miller*, 656 N.W.2d 676, 681 (N.D. 2003) (holding issue of whether insurer acted in bad faith was a question of fact for the jury).

Damages

If an insurer is found to have acted in bad faith, then an insured can recover various forms of damages, which are discussed in turn below.

First, an insured can recover consequential damages. *See Corwin Chrysler-Plymouth, Inc.*, 279 N.W.2d at 645 (explaining that violating the implied duty of good faith gives rise to a tort action for which consequential damages may be sought). Consequential damages include attorneys' fees. *Hartman v. Est. of Miller*, 656 N.W.2d 676, 686 (N.D. 2003) ("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 attorneys' fees") (citing *Corwin Chrysler-Plymouth*, 279 N.W.2d at 643).

Second, an insured may also recover compensatory damages. *Corwin Chrysler-Plymouth*, 279 N.W. 2d at 645 (recognizing that an insured can recover compensatory damages if it prevails on bad faith claim). As part of compensatory damages, an insured may recover emotional damages. *Ingalls v. Paul Revere Life Ins. Group*, 561 N.W.2d 273, 283 (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.").

Finally, a prevailing insured may also recover punitive damages. In *Corwin Chrysler-Plymouth*, the North Dakota Supreme Court held that because an insurer's duty to act in good faith "emanates not from the terms of the insurance contract but from an obligation imposed by the law . . . 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 at 645. However, "a finding of bad faith alone does not entitle the insured to punitive damages; oppression, fraud, or malice, actual or implied, must also be found." *Id*.

Statute of Limitations

The statute of limitations for a bad faith claim has not been decided in North Dakota. The statute of limitations for a breach of contract more generally is six years. N.D. Cent. Code § 28-01-15(1)).

N ORTHERN MARIANA ISLANDS

The Northern Mariana Islands, often referred to as the Commonwealth, has adopted the Model Unfair Claims Settlement Practices Act at 4 CMC §§ 7302 and 7505. However, these statutes do not provide for a private cause action for unfair settlement practices. *Dong v. Royal Crown Ins. Corp.*, No. CIV 09-0035, 2010 WL 4072285, at *13 (D. N. Mar. I. Oct. 18, 2010) ("the Commonwealth Supreme Court concluded that §§ 7302(g) and 7505(h) do not provide for a private cause of action for unfair settlement practices").

Bad Faith

The Commonwealth has recognized a common law bad faith claim against insurers. "To prove bad faith in the insurance context, 'a plaintiff must show: (1) benefits due under the policy were withheld; and (2) the reason for withholding benefits was unreasonable or without proper cause.' . . . . Otherwise stated, bad faith occurs when 'the refusal to pay policy benefits ... was unreasonable,' and not as a result of mere negligence or bad judgment.'" *Ishimatu v. Royal Crown Ins. Corp.*, No. 02-0065, 2010 WL 2219348, at *5 (N. Mar. I. June 1, 2010) (holding that there was sufficient evidence for the jury to conclude that insurer acted in bad faith by unreasonably denying claim). Given the dearth of caselaw on this topic, the courts have not differentiated between first party and third party bad faith claims.

When an insurer is found liable for bad faith, the insured can recover punitive damages. *Ishimatu*, 2010 WL 2219348, at *12 (holding that award of punitive damages for common law bad faith claim was not abuse of discretion). In the Northern Mariana Islands, punitive damages may be awarded for outrageous conduct due to the "defendant's evil motive or his reckless indifference to the rights of others." *Id*. The purpose of such an award is to "deter similar conduct in the future." *Id.*

When an insurer is liable for bad faith, it is not necessarily responsible for the insured's attorneys' fees. *Id.* at *29 ("While we upheld a non-statutory fee award in contravention of the American Rule for a party's bad faith conduct during litigation, bad faith during litigation is distinct from the common law bad faith cause of action. An equitable award of attorneys' fees is inappropriate for a breach of the covenant of good faith and fair dealing claim.").

Damages

An insured in the Northern Mariana Islands may also bring a claim under Consumer Protection Act ("CPA"), 4 CMC § 5105. Under this statute, a violation "consists of (1) an unlawful act or practice, (2) in the conduct of trade or commerce." *Ishimatu*, 2010 WL 2219348, at *8 (holding that insurer violated the CPA). When an insured prevails under the CPA, it may recover actual damages, liquidated damages (including prejudgment interest), compensatory damages, and attorneys' fees and costs. *Id.* at *11. ("In addition to an award of actual damages under the CPA, 'the court shall award liquidated damages in an amount equal to the actual damages in cases of willful violations.') (quoting 4 CMC § 5112); *id*. ("The liquidated damages awarded under 4 CMC § 5112 properly included prejudgment interest because prejudgment interest is part of actual damages for the purpose of the statute."); *id.* at *28 ("The CPA authorizes an award of reasonable fees to a prevailing plaintiff.").

Statute of Limitations

The statute of limitations for a common law bad faith claim is likely six years. The general catch-all statute of limitations provided by 7 CMC § 2505 states that all actions not specifically covered by other sections must be commenced within six years after the cause of action accrues.

O HIO

Ohio has adopted a version of the UCSPA and UCSPA Model Regulation. Ohio Rev. Code Ann. § 3901.21; Ohio Admin. Code § 3901-1-07. However, in Ohio, these do not create a private cause of action. *Strack v. Westfield Companies*, 515 N.E.2d 1005, 1007-08 (Ohio Ct. of App. 1986) (declining to extrapolate a private cause of action from Ohio Rev. Code Ann. § 3901.21 and Ohio Admin. Code § 3901-1-07).

Bad Faith

Ohio recognizes an independent common law cause of action against both first-party and third-party insurers. *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401 (Ohio 1994) (recognizing first-party bad faith claim against insurer under Ohio law); *Am. States Ins. Co. v. Sovereign Chemical Co.*, No. 20794, 2002 WL 1376057, at *4 (Ohio Ct. App. June 26, 2002) (finding that evidence established that third-party insurer acted in bad faith). In Ohio, an "insurer owes a duty to its insured to act in good faith in the processing, payment, satisfaction, and settlement of the insured's claims." *Ballard v. Nationwide Ins. Co.*, 46 N.E.3d 170, 173 (Ohio Ct. App. 2015) (citing *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 605 N.E.2d 936 (Ohio 1992)).

Further, Ohio recognizes two types of bad faith claims: "(1) when an insurer breaches its duty of good faith by intentionally refusing to pay an insured's claim where there is no lawful basis for the refusal coupled with actual knowledge of that fact; and (2) when an insurer breaches its duty of good faith by intentionally refusing to pay an insured's claim where the insurer intentionally failed to determine whether there was any lawful basis for such refusal." *Ballard*, 46 N.E.3d at 173 (citing *Essad v. Cincinnati Cas. Co.*, No. 00 CA 199, 2002 WL 924439, at 7 (Ohio Ct. App. Apr. 16, 2002). "The language in the two types of bad faith that require actual knowledge and intentional failure, now requires reasonable justification." *Ballard*, 46 N.E.3d at 173 (citing *Zoppo*, 644 N.E.2d at 399-400). The difference between the two types of bad faith claims lies in whether they can succeed when the corresponding breach of contract claim fails. *Ballard*, 46 N.E.3d at 173. Under the first type of bad faith, the policyholder must prove that the insurer had no lawful basis for coverage, and therefore, the breach of contract claim must succeed. *Id.* But, for the second type of bad faith success on the breach of contract claim is not required. *Id.* Instead, "the insured need only establish that the insurer had no reasonable justification to fail to determine whether its refusal had a lawful basis." *Id.* at 174.

Damages

In *Zoppo*, the Ohio Supreme Court held 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." 644 N.E.2d at 402. While the Court did not expand on which types

of compensatory damages are recoverable, courts have traditionally allowed a policyholder to recover damages for emotional distress[1], economic harm[2], and at times, attorneys' fees and costs[3].

Additionally, "[p]unitive damages may be recovered against an insurer that breaches its duty of good faith in refusing to pay a claim of its insured upon proof of actual malice, fraud or insult on the part of the insurer." *Zoppo*, 644 N.E.2d at 402 (holding that award of punitive damages against insurer was justified where the insurer acted with actual malice).

Statute of Limitations

The statute of limitations for a bad faith claim in Ohio is six years. Ohio Rev. Code Ann. § 2305.06.

[1] *Eastham v. Nationwide Mut. Ins. Co.*, 586 N.E.2d 1131, 1134 (Ohio Ct. App. 1990) (holding that trial court did not err in allowing jury to consider "any physical or mental suffering, including embarrassment, humiliation or damages to reputation" that the insured experienced because of the insurer's bad faith); *LeForge v. Nationwide Mut. Fire Ins. Co.,* 612 N.E.2d 1318, 1324 (Ohio Ct. App. 1992) (affirming award of damages for "mental anguish" as a result of the insurer's bad faith conduct); *Bell v. Zurich Am. Ins. Co.*, 156 F. supp.3d 884, 890 (N.D. Ohio 2015) (holding that Zurich breached duty to act in good faith and was liable to Bell for compensatory damages in the amount of $100,000 for emotional distress).

[2] *Asmaro v. Jefferson Ins. Co. of New York*, 574 N.E.2d 1118, 1125 (Ohio Ct. App. 1989) (holding that value of loss of a business and loss of a building over and above the fire damage covered under the insurance policy were recoverable extra-contractual damages, if the amount of these damages is established); *Bell*, 156 F. supp.3d at 890 (N.D. Ohio 2015) (holding that Zurich breached duty to act in good faith and was liable to Bell for compensatory damages in the amount of $10,000 for loan against retirement account).

[3] *Zoppo*, 644 N.E.2d at 402 ("Attorneys' fees may be awarded as an element of compensatory damages [in a bad faith case] where the jury finds that punitive damages are warranted").

O 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).

Bad Faith

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 Oklahoma law, 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.

Statute of Limitations

The statute of limitations for an insurer bad faith claim in Oklahoma is two years. This is established under 12 O.S. § 95(A)(3), which specifies a two-year limitations period for actions for injury to the rights of another, not arising on contract. This two-year period applies to bad faith claims as they are considered tort actions rather than contract actions. *See*, *e.g.*, *Tyson v. Casualty Corp. of America, Inc.*, 560 P.2d 238, 240 (Okla. Civ. App. 1976).

O REGON

Oregon has adopted a version of the Unfair Claims Settlement Practices Act and its corresponding model regulations. Or. Rev. Stat. § 746.230; Or. Admin. R. 836-080-0205 to 836-080-0250. Oregon has historically not recognized a private right of action for first-party bad faith claims. *See Farris v. United States Fid. & Guar. Co.*, 587 P.2d 1015 (Or. 1978); *see also, e.g.*, *Employers' Fire Ins. Co. v. Love It Ice Cream Co.*, 670 P.2d 160, 165 (Or. 1983) ("[A]n insurer's bad faith refusal to pay policy benefits to its insured sounds in contract and is not an actionable tort in Oregon."); *Fallow v. Bankers Life & Cas. Co.*, No. 1:11-CV-03088-CL, 2013 WL 5160734, at *3 (D. Or. Sept. 12, 2013) (similar, applying Oregon law); *Russell v. Liberty Mut. Ins. Co.*, No. 3:13-CV-00163-SU, 2013 WL 3994678, at *3 (D. Or. Aug. 2, 2013) (similar, applying Oregon law).

Bad Faith

But the landscape changed in December 2023 when the Oregon Supreme Court decided *Moody v. Oregon Community Credit Union*, 371 Or. 772 (Or. 2023). In *Moody*, the Oregon Supreme Court held that emotional distress damages may be sought under a negligence per se theory, where a plaintiff shows that an insurer breached its statutory duties under ORS 746.230 and establishes the remaining elements of a common law negligence claim. *See generally id.*

The "implications of the Oregon Supreme Court's decision in *Moody*" are still being determined as Oregon state and federal courts discern the breadth of its holding and the implications for bad faith law in Oregon generally. *Butters v. Travelers Indem. Co.*, No. 3:22-CV-726-SB, 2024 WL 1328412, at *1 (D. Or. Mar. 28, 2024). Since *Moody*, at least one court has allowed a plaintiff to subsequently add a negligence claim based on the insurer's violation of the standard of care expressed by the Oregon Unfair Claims Settlement Practices Act. *See Liquid Agents Healthcare, LLC v. Evanston Ins. Co.*, No. 1:20-CV-02225-CL, 2024 WL 1286700, at *1 (D. Or. Mar. 26, 2024).

Otherwise, under Oregon Law, "an insured's bad faith claim against its insured will not lie in tort but rather sounds in contract . . ." *Barnard v. State Farm Fire & Cas. Co.*, No. 3:17-CV-1340-PK, 2017 WL 6819887, at *3 (D. Or. Dec. 6, 2017), *report and recommendation adopted*, No. 3:17-CV-1340-PK, 2018 WL 325199 (D. Or. Jan. 8, 2018). Consistent with this rule, some Oregon federal courts have allowed contract claims based on a breach of the implied covenant of good faith and fair dealing to proceed against insurers. *See, e.g.*, *Abitare Condo. Ass'n v. State Farm Fire & Cas.*, No. 3:18-CV-01074-YY, 2021 WL 7081392, at *14 (D. Or. Dec. 22, 2021); *Degon v. USAA Cas. Ins. Co.*, 511 F. Supp. 3d 1144, 1156 (D. Or. 2021).

Separately, the Supreme Court of Oregon has recognized that third-party bad faith claims are viable. *See Georgetown Realty, Inc. v. Home Ins. Co.*, 831 P.2d 7, 14 (Or. 1992) (en banc); *Parvin v. CNA Fin. Corp.*, No. 6:10-CV-6332-TC, 2013 WL 5530618, at *4 (D. Or. Oct. 4, 2013), *aff'd*, 646 F. App'x 562 (9th Cir. 2016) ("[A]n insurer can be liable on a bad faith claim (sounding in tort) for failing to settle a claim within the policy limits when an insured is exposed to a judgment in excess of those limits."). To prevail on a third-party bad faith claim, an insured "must prove: (1) that the insurer breached its duty of care to the insured, (2) causation, and (3) damages. "*Hosp. Mgmt., Inc. v. Preferred Contractors Ins. Co.*, No. 3:18-CV-00452-YY, 2021 WL 3700264, at *15

(D. Or. Mar. 17, 2021), *report and recommendation adopted*, No. 3:18-CV-452-YY, 2021 WL 2813610 (D. Or. July 6, 2021).

Damages

Consequential damages are available under a breach of contract theory but are limited to 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." *Nw. Pump & Equip. Co. v. America States Ins. Co*., 925 P.2d 1241, 1244 (Or. 1996).

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); *see also Schnitzer Steel Indus., Inc. v. Cont'l Cas. Corp.*, No. 3:10-CV-01174-MO, 2014 WL 6063976, at *1 (D. Or. Nov. 12, 2014), *aff'd*, 2016 WL 3059067 (9th Cir. May 31, 2016) (applying ORS § 742.061(1)).

Punitive damages are generally unavailable. *Farris*, 587 P.2d at 1023.

Statute of Limitations

"In Oregon, the statute of limitations for contract claims—which includes claims regarding the implied covenant of good faith and fair dealing—is six years." *Meunier v. Nw. Mut. Life Ins. Co.*, 51 F. Supp. 3d 1023, 1036 (D. Or. 2014).

P ENNSYLVANIA

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

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

Bad Faith

There are two separate "bad faith" claims that a policyholder can bring against an insurer under Pennsylvania law: (i) a "contract claim for breach of the implied contractual duty to act in good faith"; and (ii) a "statutory bad faith tort claim under 42 Pa. Cons. Stat. Ann. Section 8371." *Tubman v. USAA Cas. Ins. Co.*, 943 F. Supp. 2d 525, 529 (E.D. Pa. 2013).

Regarding a claim for breach of the implied contractual duty to act in good faith, such a claim is "subsumed within a breach of contract claim." *Ash v. Continental Ins. Co.*, 932 A.2d 877, 883 (Pa. 2007) ("Courts generally treat a breach [of implied covenant of good faith and fair dealing] as a breach of contract action."). To establish a claim for breach of the implied contractual duty to act in good faith, which under Pennsylvania law is nothing more than a breach of contract claim, the plaintiff must establish (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, (3) resultant damages, and (4) a causal connection between the breach and the loss. *LSI Title Agency, Inc. v. Evaluation Servs., Inc.*, 951 A.2d 384, 391 (Pa. Super. Ct. 2008) ("the claim for breach of the implied covenant of good faith and fair dealing is subsumed in a breach of contract claim"); *Gorski v. Smith*, 812 A.2d 683, 691 (Pa. Super. Ct. 2002) (stating elements of breach of contract claim); *Logan v. Mirror Printing Co. of Altoona, Pa.*, 600 A.2d 225, 226 (Pa. Super. Ct. 1991) ("In order to recover for damages pursuant to a breach of contract, the plaintiff must show a causal connection between the breach and the loss.").

A claim for bad faith brought pursuant to § 8371 sounding in tort is "a separate and distinct cause of action and is not contingent on the resolution of the underlying contract claim." *Doylestown Elec. Supply Co. v. Maryland Cas. Ins. Co.*, 942 F. Supp. 1018, 1020 (E.D. Pa. 1996) (citing *March v. Paradise Mut. Ins. Co.*, 646 A.2s 1254, 1256 (Pa. Super. Ct. 1994)); *Ash*, 932 A.2d at 884(stating there is a difference between common law contractual duty to good faith and the duty of good faith imposed by § 8371 and concluding that §8371 provides additional damages beyond the available in the common law); *Nordi v. Keystone Health Plan West, Inc.*, 989 A.2d 376, 381–83 (Pa. Super. Ct. 2010) (addressing the bad faith claim on the merits despite the concession that the insured's coverage claim failed). It is thus "settled law that an insured may pursue a bad faith claim . . . without regard to the status of a parallel contractual claim." *Nealy v. State Farm Mut. Auto. Ins. Co.*, 695 A.2d 790, 792–93 (Pa. Super. Ct. 1997).

Pennsylvania's claim for statutory bad faith, under 42 P.S. §8371, 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; *Ash*, 932 A.2d at 880.

Thus, § 8371 provides an "additional remedy" and authorizes the award of additional damages when a court finds that an insurer has acted in breach of the implied contractual duty to act in good faith. *Birth Center v. St. Paul Companies, Inc.*, 787 A.2d 376, 386–87 (Pa. 2001) (the "statute does not prohibit the award of compensatory damages. It merely provides an additional remedy and authorizes the award of additional damages.")

The standard of proof required to establish a statutory bad faith claim against an insurer under Pennsylvania law is "clear and convincing" evidence. *Watchword Worldwide v. Erie Ins. Exch.*, 308 A.3d 294, 303 (Pa. Super. Ct. 2024); *Berg v. Nationwide Mut. Ins. Co.*, 189 A.3d 1030, 1037 (Pa. Super. Ct. 2018). Further, 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.

Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994).

Damages

As discussed above, an insured that prevails in its breach of the implied contractual duty to act in good faith claim may recover compensatory damages. *Birth Center v. St. Paul Companies, Inc*., 567 Pa. 386, 390 (Pa. 2001)("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."). This may include emotional distress damages. *Id.* at 401 ("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").

Additionally, as quoted above, Pennsylvania's bad faith statute authorizes 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%, attorneys' fees, and punitive damages. 42 Pa. C.S.A. § 8371.

Statute of Limitations

In Pennsylvania, the common law violation of good faith and fair dealing has been construed as a contractual claim with its four-year statute of limitations. *See*, *e.g.*, *Healthfleet Ambulance Inc. v. Markel Ins. Co.*, No. 20-2250, 2020 WL 4201618 at *3-4 (E.D. Pa. July 22, 2020) ("[b]ecause Pennsylvania courts have held that the common law duty of good faith and fair dealing is implied in every contract, such contractual bad faith claims are a species of a breach of contract claim and cannot exist separate and apart from a breach of contract claim.").

Under Pennsylvania law, a bad-faith action under 42 Pa. C.S. § 8371 is subject to a two-year statute of limitations. Pennsylvania courts have held that a bad-faith claim under 42 Pa. C.S. § 8371 is considered to have accrued at the point the claim for insurance benefits is first denied. *See*, *e.g.*, *Jones v. Harleysville Mut. Ins. Co.,* 900 A.2d 855, 858–59 (Pa. Super. Ct. 2006) (statute of limitations began running when insurer first issued letter denying claim for property damage under fire policy; rejecting argument that statute of limitations did not begin running until after insurer conducted additional investigation and sent another letter reaffirming previous decision to deny coverage); *Ash v. Continental Ins. Co.,* 861 A.2d 979, 984 (Pa. Super. Ct. 2004) (two-year limitation period began running at initial denial of coverage for damage to insured's property under first-party fire policy), *aff'd,* 932 A.2d 877 (2007); *Adamski v. Allstate Ins. Co.,* 738 A.2d 1033, 1042–43 (Pa. Super. Ct. 1999) (limitation period under § 8371 began to run upon first occurrence of refusal to pay); and *see also*, *e.g.*, *Cozzone v. AXA Equitable Life Ins. Soc.,* 858 F. Supp. 2d 452, 459 (M.D. Pa. 2012) ("an insurance company's willingness to reconsider its denial does not toll the statute of limitations, as the limitations period runs from the time when Plaintiff's claim was first denied").

P UERTO RICO

The Puerto Rico insurance code has its own version of an unfair insurance practices law that covers unfair settlement practices of insurers. P.R. Law Art. 27.164.

Bad Faith

In Puerto Rico, bad faith is referred to as "dolo." *Oriental Fin. Grp, Inc. v. Fed. Ins. Co., Inc.*, 598 F. Supp. 2d 199, 218-19 (D. P.R. 2008) (holding that policyholder did not make showing of dolo). "Dolo entails a malicious intent to do harm, and is thus differentiated from mere negligence." *Id.* at 219. "To succeed on a bad faith claim, an insured must show that (1) the insurer acted unreasonably, (2) in denying or delaying a claim, and (3) did so intentionally or knowingly." *Fazio v. James River Ins. Co.*, No. CV 20-1074 (MEL), 2024 WL 758359, at *12 (D.P.R. Feb. 23, 2024) (denying summary judgment on bad faith issue because genuine issue of material fact existed); *Oriental Fin. Grp.*, 598 F. Supp. 2d at 221 ("[A] party acts with bad faith ('dolo') if it (1) 'knowingly and intentionally, through deceitful means,' (2) avoids complying with its contractual obligation."). "The First Circuit and the Puerto Rico Supreme Court have repeatedly stated that 'a party alleging dolo could meet its burden only with evidence that is solid, clear and convincing, and unquestionable.'" *MCLP Asset Co.*, 2024 WL 1765527, at *19 (citing *Portugues-Santana v. Rekomdiv Int'l*, 657 F.3d 56, 60–61 (1st Cir. 2011) and *Texas Co. (P.R.) Inc. v. Estrada*, 50 P.R.R. 709, 713–14, 50 D.P.R. 743 (P.R. 1936)).

Damages

Puerto Rico law allows consequential damages to be awarded if a finding of bad faith or dolo is made. In other words, when an insured acts in bad faith, "the aggrieved party may recover all damages that originate from the nonfulfillment of the obligation." *Oriental Fin. Grp., Inc. v. Fed. Ins. Co.*, 483 F. Supp. 2d 161, 165 (D.P.R. 2007).

Under Puerto Rico law, an insurer generally cannot be held liable for punitive damages. *NPR, Inc., Am. Intern. Ins. Co. of Puerto Rico*, 242 F. Supp. 2d 121, 127 ("The law of Puerto Rico does not, as a general rule, recognize or permit the recovery of punitive damages . . . an insurer cannot be held liable for punitive damages under the law of Puerto Rico); *Clarendon Am. Ins. Co. v. Rodriguez*, 1999 WL 33218159, at *2 ("because Puerto Rico law governs the instant counterclaim and punitive damages do not exist in Puerto Rico, the Court hereby STRIKES Defendants' request for punitive damages").

However, if a statutory bad faith claim is made, punitive damages are allowed only if the insured proves that the unfair practices of the insurer are willful, insensitive, malicious and in reckless disregard of the insured's rights. P.R. LAW ART. 27.164. Insureds who assert a statutory cause of action can also recover attorneys' fees. *Id.*

Statute of Limitations

There is no specified bad faith statute of limitations in Puerto Rico.

R HODE ISLAND

Rhode Island has adopted a version of the UCSPA Model Regulation. R.I. Gen. Laws §§ 27-9.1-1 to 27-9.1-9.

Bad Faith

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

> [A]n 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.

For an insurance company to have bad faith liability under the statute, 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, 1007 (R.I. 2002). The inquiry into whether the insurance company has a reasonable basis for denying coverage focuses 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*. at 1009. "An insurer has the right to debate a claim that is fairly debatable." *Id*. at 1010. However, an insurer commits bad faith where it intentionally fails "to determine whether there is a lawful basis to deny the claim." *Id*. at 1011.

Rhode Island also recognizes an independent common law cause of action against a first-party insurer. *Zarrella v. Minn. Mut. Life. Ins. Co.,* 824 A.2d 1249, 1261 (R.I. 2003). "To succeed on a common law bad faith claim in Rhode Island, a plaintiff must demonstrate the absence of a reasonable basis for denying the policy benefits and that defendant had knowledge or recklessly disregarded the lack of a reasonable basis for denying the claim." *Id*.

Further, Rhode Island recognizes a common-law tort for third-party bad faith. In the third-party context, "an insurance company has a fiduciary obligation to act in the best interests of its insured in order to protect the insured from excess liability and to refrain from acts that demonstrate greater concern for the insurer's monetary interest than the financial risk attendant to the insured's situation." *Asermely v. Allstate Ins. Co.*, 728 A.2d 461, 464 (R.I. 1999). The insurer may be liable for a judgment against its insured in excess of policy limits if it rejects a settlement offer within policy limits. *Id*. When an insurer rejects a settlement demand in policy limits and the insured is subsequently found liable for an amount in excess of policy limits, an insurer may be liable for a judgement in excess of policy limits even where it did not act in bad faith "unless the insurer can show that the insured was unwilling to accept the plaintiff's settlement offer." *DeMarco v. Travelers Ins. Co.*, 26 A.3d 585, 607 (R.I. 2011).

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 (R.I. 1980).

Emotional distress damages are also available. *Id.*, *see also Marshall Contractors, Inc. v. Peerless Ins. Co.*, 827 F. Supp. 91, 95 n.2 (D. R.I. 1993).

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

Punitive damages are available as a matter of right in bad faith cases. *Skaling v. Aetna Ins. Co.*, 799 A.2d at 1016.

Statute of Limitations

The statute of limitations for a bad faith claim in Rhode Island depends on the type of policy upon which the claim is brought. *Collins v. Fairways Condominiums Ass'n*, 592 A.2d 147, 148 (R.I. 1991). Rhode Island specifies a statute of limitations of three years for claims against insurers on accident and sickness insurance policies. R.I. Gen. Laws § 27-18-3(a)(2)). Claims under fire insurance policies are governed by a two-year statute of limitations. R.I. Gen. Laws § 27-5-3(161). Claims under all other types of insurance policies are governed by a ten-year statute of limitations. *Am. States Ins. Co. v. LaFlam*, 69 A.3d 831, 838 (R.I. 2013) (citing *Pickering v. Am. Emps. Ins. Co.*, 282 A.2d 584, 589 (R.I. 1971).

As an additional consideration, Rhode Island courts have "routinely upheld provisions in insurance contracts that require the insured to commence legal actions within a time period that is less than the legislatively enacted statute of limitations." *Chase v. Nationwide Mut. Fire Ins. Co.*, 160 A.3d 970, 974 (R.I. 2017). *See also Hay v. Pawtucket Mutual Insurance Co.*, 824 A.2d 458, 460, 461 (R.I. 2003) (enforcing two-year statute of limitation provision in home insurance policy).

S OUTH CAROLINA

South Carolina has adopted a version of the UCSPA. S.C. Code Ann. §§ 38-59-10 to 38-59-50 (1987). The South Carolina Supreme Court has held that such statutes do not create a private cause of action for bad faith. *Masterclean, Inc. v. Star Ins. Co.*, 556 S.E.2d 371, 377 (S.C. 2001); *see also Coffey & McKenzie, LLC v. Twin City Fire Ins. Co.,* No. 2:20-CV-01671-BHH, 2021 WL 1310872, at *3 (D.S.C. Apr. 8, 2021) ("Courts have repeatedly held that the Claims Practices Act does not create a private right of action.").

Bad Faith

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 (S.C. 1983).

To establish a bad-faith claim against a first-party insurer 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; and

(4) Damage to the insured.

Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 466 S.E.2d 727, 730 (S.C. 1996); *see also BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc.*, 731 S.E.2d 902, 907 (S.C. Ct. App. 2012) (similar).

With respect to a third-party bad faith claim, in the seminal case of *Tyger River Pine*, the South Carolina Supreme Court recognized that a liability insurer owes its insured a duty to settle a personal injury claim if settlement "is the reasonable thing to do." *Tyger River Pine Co. v. Maryland Cas. Co*., 170 S.E. 346, 349 (S.C. 1933); *see also Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 557 S.E.2d 670, 674 (S.C. 2001) (same). "In the defense of an action against its insured, an insurer is bound not only to act in good faith but also to exercise reasonable care." *Miles v. State Farm Mut. Auto. Ins. Co.*, 120 S.E.2d 217, 220 (S.C. 1961); *see also Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 862 S.E.2d 248, 256 (S.C. 2021) (citing *Miles* for the same). An insurer who unreasonably refuses or fails to settle within policy limits is liable to the insured for the excess judgment regardless of policy limits. *Tyger River*, 170 S.E. at 348–49; *see also Doe,* 557 S.E.2d at 674 ("An insurer who unreasonably refuses or fails to settle a covered claim within the policy limits is liable to the insured for the entire amount of the judgment obtained against the insured regardless of the limits contained in the policy.")

To elaborate further on the standard a court will apply to a bad faith claim, the South Carolina Supreme Court has said "an insurer acts in bad faith when there is no reasonable basis to support the insurer's decision to deny benefits." *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 594 S.E.2d 455, 462 (S.C. 2004); *see also Cock-N-Bull*, 466 S.E.2d at 730 ("An insured may recover

damages for a bad faith denial of coverage if he or she proves there was no reasonable basis to support the insurer's decision to deny benefits under a mutually binding insurance contract."); *Nichols*, 306 S.E.2d at 620 (concluding that a jury could consider negligence on the issue of unreasonable refusal to pay benefits under a bad faith claim). Further, "[a]n insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a coverage issue raised under the particular facts of the case." *Mixson, Inc. v. Am. Loyalty Ins. Co.*, 562 S.E.2d 659, 662 (S.C. Ct. App. 2002). "Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim or if the insurance company did not specifically deny the claim by the evidence it had before it at the time the suit was filed." *Howard v. State Farm Mut. Auto. Ins. Co.*, 450 S.E.2d 582, 584 (S.C. 1994).

Conversely, an insurer can defend itself against a bad faith claim when there were reasonable grounds for contesting the claim. *Crossley v. State Farm Mut. Auto. Ins. Co*., 415 S.E.2d 393, 397 (S.C. 1992); *see also Snyder v. Auto-Owners Ins. Co.*, 634 F. Supp. 3d 252, 261 (D.S.C. 2022) (citing *Crossley* approvingly, observing that "the crux of a bad faith case" is whether "there is a reasonable ground for contesting [or delaying] a claim.").

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*., 324 S.E.2d 641, 645 (S.C. Ct. App. 1984); *see also Collins v. Auto-Owners Ins. Co.*, 438 F. App'x 247, 249 (4th Cir. 2011) (applying South Carolina law) (quoting *Nichols* in acknowledging that an insured may recover consequential damages that result from the insurer's bad faith actions); *Wright v. UNUM Life Ins. Co.*, No. 2:99-2394-23, 2001 WL 34907077, at *11 (D.S.C. Aug. 31, 2001) ("South Carolina has not limited the rule in *Nichols*").

While there does not appear to be South Carolina state law about the availability of emotional distress damages, there is some federal authority applying South Carolina law holding that emotional distress damages may be available. *See Wright*, 2001 WL 34907077, at *11 ("[A]ll consequential damages" includes damages for emotional distress . . ."); *see also Univ. Med. Assocs. of Med. Univ. of S.C. v. UnumProvident Corp.*, 335 F. Supp. 2d 702, 709 (D.S.C. 2004) (stating that "the Fourth Circuit implicitly recognized that emotional distress damages related to a bad faith cause of action in South Carolina were recoverable when the distress was related to the refusal to pay."); *State Farm Fire & Cas. Co. v. Barton*, 897 F.2d 729, 733 (4th Cir. 1990) (applying South Carolina law) (implying that emotional distress damages could be recovered for bad faith if established by the evidence).

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; *see also Est. of Taylor v. John Alden Life Ins. Co.*, 574 F. Supp. 3d 347, 357 (D.S.C. 2021) ("South Carolina law provides that policyholders can recover attorney's fees when they show that a denial of a claim was unreasonable or in bad faith.").

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); *see also James*, 371 S.C. at 187-193 (upholding a punitive damages award of $1,000,000 in insureds' bad-faith action, reasoning that it was not excessive and satisfied due process); *Crossley*, 415 S.E.2d at 397 ("If the insured proves the insurer's conduct was willful or in reckless disregard of his rights under the contract, the insured also may recover punitive damages.").

Statute of Limitations

The statute of limitations is three years, which is applicable to actions on any policy of insurance. S.C. Code Ann. § 15-3-530(8).

S OUTH DAKOTA

South Dakota has adopted a version of the UCSPA. SD Codified L. § 58-33-67. However, this statute does not create a private right of action. SD Codified L. § 58-33-69 ("Nothing in §§ 58-33-66 to 58-33-69, inclusive, grants a private right of action").

Bad Faith

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

Stene, 583 N.W.2d at 403. Bad faith may include the failure to conduct a reasonable investigation concerning the claim. *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 771 N.W.2d 623, 629 (S.D. 2009). However, if a claim is fairly debatable, then the insurer has a reasonable basis to deny the claim and a claim for bad faith cannot succeed. *Id*. 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. *Id*.

In the third-party context, after an insured is found liable for a judgment in excess of policy limits, the insured may bring a "cause of action against the insurer for a wrongful or unreasonable refusal to settle within the policy limits." *Crabb v. Nat'l Indem. Co*., 205 N.W.2d 633, 638 (S.D. 1973). An insured may assign their cause of action "for a wrongful or unreasonable refusal to settle within the policy limits" to the injured third party. *Id*. In a third-party coverage lawsuit, "the relationship of an insurer to its insured is like that of a fiduciary because the insurer must give as much consideration to its insured's interests as it does its own." *Trouten v. Heritage Mut. Ins. Co.,* 632 N.W.2d 856, 863-64 (S.D. 2001).

Damages

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

Emotional Distress damages are also available, but the plaintiff must establish that they suffered pecuniary losses that had caused the emotional distress. *Id*.

Attorneys' fees are available under SD ST § 58-12-3. "Before attorneys' fees may be awarded under this section, the trial court must find that the insurance company refused to pay the full

amount of the insured's loss and that said refusal was either vexatious or without reasonable cause." S*awyer v. Farm Bureau Mut. Ins. Co*., 619 N.W.2d 644, 651-52 (S.D. 2000).

Punitive damages are available and may be awarded against an insurer under SDCL § 21–3–2 when supported by evidence that the insurer is guilty of oppression, fraud, or malice. *Harter v. Plains Ins. Co., Inc.*, 579 N.W.2d 625, 633-34 (S.D. 1998); *see also Sawyer*, 619 N.W.2d at 650.

Statute of Limitations

South Dakota applies a six-year statute of limitations to insurance bad faith claims. *Corner Const. Co. v. United States Fid. & Guar. Co.*, 638 N.W.2d 887, 896 (S.D. 2009) (citing SD Codified L. § 15-2-13(1) (establishing a six-year statute of limitations for an action "upon a contract, obligation, or liability")).

T ENNESSEE

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

Bad Faith

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) ("in Tennessee there is no tort action for bad faith, but Tenn. Code Ann. § 56-7-105 provides that the insurance company 'shall be liable' to pay 'a sum not exceeding twenty-five percent (25%) on the liability for the loss' if a bad faith failure to pay is proven."). But, Tennessee does recognize a statutory remedy against an insurer for bad faith under Tenn. Code Ann. § 56-7-105(a); *see also Wilson v. State Farm Fire & Cas. Co.*, 799 F. Supp. 2d 829 (E.D. Tenn. 2011) ("This statute is penal in nature and must be strictly construed. The plaintiff has the burden of proving bad faith on the part of the insurer.").

Under the statute, an insured can recover for bad faith if it can establish that:

(1) the policy of insurance, by its terms, became due and payable;

(2) A formal demand for payment was made;

(3) The insured waited 60 days after making its 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 was not in good faith.

See, *e.g.*, *Cox Paradise, LLC v. Erie Ins. Exch.*, No. 120CV01068JDBJAY, 2020 WL 6878357, at *2 (W.D. Tenn. Nov. 23, 2020).

Tennessee does recognize a common law cause of action for failing to settle within policy limits against third-party insurers. *Johnson v. Tennessee Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006) ("It is well established that an insurer having exclusive control over the investigation and settlement of a claim may be held liable to its insured for an amount in excess of its policy limits if as a result of bad faith it fails to effect a settlement within the policy limits."). In the bad faith failure to settle context, 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." *Id.* at 370. "Bad faith on the part of the insurer can be proved by facts that tend to show "a willingness on the part of the insurer to gamble with the insured's money in an attempt to save its own money or any intentional disregard of the financial interests of the plaintiff in the hope of escaping full liability imposed upon it by its policy." *Id*. An insurer's mere "negligence is not sufficient to impose liability for failure to settle" but "negligence may be considered along with other circumstantial evidence to suggest an indifference toward an insured's interest." *Id.* at 371. "Ordinary care and diligence in investigation require the insurer to investigate the claim to such an extent that it can exercise an honest judgment regarding whether the claim should be settled." *Id*.

The Tennessee Consumer Protection Act of 1977 also 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) ("[W]hile this Court has never explicitly held the Tennessee Consumer Protection Act applicable to insurance companies, we implicitly did so in *Morris v. Mack's Used Cars*, 824 S.W.2d 538, 539–40 (Tenn.1992).").

Damages

Regarding statutory bad faith claims for first-party insurers, Tennessee law provides for a "bad faith penalty" that allows up to an additional 25% damage award. Tenn. Code Ann. § 56-7-105. There has been some conflict as to whether the penalty under § 56-7-105 is the exclusive exemplary remedy for such a claim. *See Fred Simmons Trucking, Inc.*, 2004 WL 2709262, at *5 ("Punitive damages are inappropriate in a case such as this because the statutory [bad faith] penalty is applicable, and also because such damages are not generally awarded in cases of breach of contract."); *Westfield Ins. Co. v. RLP Partners, LLC*, No. 3:13-00106, 2013 WL 2383608, at *4 (M.D. Tenn. May 30, 2013) ("where the bad faith penalty statute applies punitive damages are not available."); *but see Riad v. Erie Ins. Exch.*, 436 S.W.3d 256, 276 (Tenn. App. 2013) ("we reaffirm our conclusion that Plaintiff was entitled to recover any damages applicable in breach of contract actions and was not statutorily limited to the recovery of the insured loss and the bad faith penalty. Punitive damages, while generally 'not available in a breach of contract case,' may be awarded in a breach of contract action under 'certain circumstances.' To recover punitive damages, the trier of fact must find that a defendant acted either intentionally, fraudulently, maliciously, or recklessly."); *Lindenberg v. Jackson Natl. Life Ins. Co.*, 912 F.3d 348, 358 (6th Cir. 2018) ("Our review of Tennessee caselaw reveals that the Tennessee Court of Appeals has abrogated *Heil*'s pronouncement that the statutory remedy for bad faith is the 'exclusive extracontractual remedy for an insurer's bad faith refusal to pay on a policy' . . . We find no indication that the Tennessee Supreme Court disagrees with *Riad* . . . The law in Tennessee now provides that the statutory remedy for bad faith is the exclusive *statutory* remedy for an insurer's bad faith refusal to pay on a policy, but a plaintiff may freely pursue common law claims and remedies alongside a statutory bad faith claim.") (emphasis in original).

A prevailing insured may also recover consequential damages as well as emotional distress damages. Tennessee Code § 56-7-105; *Holt v. American Progressive Life Ins. Co.*, 731 S.W.2d 923, 927 (Tenn. Ct. App. 1987) ("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."). Further, attorneys' fees are available per the discretion of the court or jury. Tennessee Code § 56-7-105.

Regarding a claim for failure to settle against a third-party insurer, a prevailing insured may recover compensatory damages. *Johnson*, 205 S.W.3d at 370 ("The jury determined that Tennessee Farmers acted in bad faith and awarded a judgment against Tennessee Farmers in the amount of $ 279,430.92 in compensatory damages.").

Statute of Limitations

In Tennessee, the statute of limitations for bad faith insurance claims is one year. *McCoy v. Stonebridge Life Ins. Co.*, 2012 WL 4442527, at *4 (E.D. Tenn. Sept. 25, 2012) (applying Tennessee law); *Wynne v. Stonebridge Life Ins. Co.*, 694 F. Supp. 2d 871, 879 (W.D. Tenn. 2010) (applying Tennessee law).

T EXAS

Texas has adopted a version of the UCSPA, which was designed to protect policyholders from deceptive practices used by insurance carriers in handling claims. Tex. Ins. Code §§ 542.001 to 542.014 ("Unfair Claim Settlement Practices Act"). Texas's Unfair Claim Settlement Practices Act prohibits insurers from certain conduct, including misrepresenting policy provisions and bad faith in settling claims, *see* Tex. Ins. Code § 542.003, and instructs the insurance department to investigate and penalize insurers who engage in this conduct. Tex. Ins. Code §§ 542.008-.009.

Bad Faith

There is no private right of action under the Unfair Claim Settlement Practices Act; it can be enforced only by the insurance department. *KLZ Diamond Tools, Inc. v. TKG Gen. Agency, Inc.*, No. 05-14-00458-CV, 2016 WL 3947412, at *6 (Tex. App.—Dallas July 18, 2016, not pet.); *accord*, *Am. Phys. Ins. Exch. v. Garcia*, 876 S.W.2d 842, 847 at n. 11 (Tex. 1994) (holding same under prior version of statute).

However, a policyholder may bring a statutory claim under the insurance code's deceptive trade practices section, Tex. Ins. Code § 541.151. *See*, *e.g.*, *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 496 (Tex. 2018). Section 541.151 states that the policyholder can recover for practices that violate either Texas Insurance Code § 541.051 *et seq.* or Texas Business & Commerce Code § 17.46(b); the latter requires the policyholder to prove that they relied on the deceptive act or practice to their detriment. Tex. Ins. Code § 541.151.

To state a claim, the policyholder must establish either (1) a right to receive benefits under the policy, or (2) injury independent of a right to benefits. *In re State Farm Mut. Auto. Ins. Co.*, 629 S.W.3d 866, 872-73 (Tex. 2021). Prohibited conduct giving rise to a statutory claim under this law includes misrepresenting policy terms and benefits and inducing the insured to let lapse or forfeit the policy, Tex. Ins. Code § 541.051, and failing to act in good faith in setting forth coverage positions, settling, and paying claims, *id*. § 541.060.

Policyholders may also bring statutory claims under Texas's general deceptive trade practices act. Tex. Bus. & Com. Code § 17.50. To recover under section 17.50, policyholders must prove that the insurer's conduct "constitute[s] a producing cause of [actual] damages," Tex. Bus. & Com. Code § 17.50(a)(1): the insurer's conduct must be a substantial factor in causing damages, and damages must not have occurred without the insurer's conduct. *Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 835 (Tex. 2009).

Finally, policyholders have claims against insurers who violate Texas's prompt payment of claims act, Tex. Ins. Code § 542.051 *et seq.* To state a claim under this act, policyholders must show that (1) the insurer is liable under the insurance policy and (2) the insurer failed to comply with one or more sections of the act in processing or paying the claim. *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806, 813 (Tex. 2019), *superseded by statute on other grounds by Rodriguez v. Safeco Ins. Co. of Ind.*, 684 S.W.3d 789, 791 (Tex. 2024). The prompt payment of claims act applies to defense costs owed under a liability policy. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 19 (Tex. 2007).

Texas also recognizes an independent tort claim against a first-party insurer for breach of the implied duty of good faith and fair dealing. *Arnold v. Nat'l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987), *abrogated on other grounds*, *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828-30 (Tex. 1990). To state a claim, the policyholder must prove that (1) the insurer had no reasonable basis for denying or delaying payment, and (2) the insurer knew or should have known that fact. *Universe Life Ins. Co. v.* Giles, 950 S.W.2d 48, 63 (Tex. 1997) (Hecht, J., concurring in the judgment); *State Farm Mut. Auto. Ass'n v. Cook*, 591 S.W.3d 677, 680 (Tex. App.—San Antonio 2019, no pet.). A bona fide coverage dispute is insufficient. *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W. 2d 42, 44 (Tex. 1998). There is no claim for failing to adequately investigate. *Provident Am. Ins. Co. v. Castañeda*, 988 S.W.2d 189, 198 (Tex. 1998).

Policyholders may also bring contractual causes of action against first-party insurers. *USAA Tex. Lloyds Co.*, 545 S.W.3d at 489. Policyholders must establish the existence of a valid insurance policy covering the denied claim, and entitlement to money damages on that claim. *Davis v. Nat'l Lloyds Ins. Co.*, 484 S.W.3d 459, 468 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

Texas recognizes a limited independent tort claim against a third-party insurer, for negligence in failing to settle a claim. *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 267 (Tex. 2021). Under landmark case *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. 1929), insurers must settle third-party claims against their policyholders when it is reasonably prudent to do so: (1) the third party's claim is covered by the policy, (2) the third party's demand is within policy limits, and (3) an "ordinarily prudent insurer" would accept the demand, "considering the likelihood and degree of the insured's potential exposure to an excess judgment." *Farmers Tex.*, 621 S.W.3d at 267. If all those conditions are met, and the insurer's negligent failure to settle causes the third party to obtain a judgment or settlement against the policyholder that exceeds policy limits, the insurer is liable for the entire judgment or settlement—*i.e.*, even amounts exceeding policy limits. *Id.*

Policyholders may also bring contractual causes of action against third-party insurers, such as breaches of the duties to defend and indemnify. *Farmers Tex.*, 621 S.W.3d at 269-70.

Damages

For statutory claims under Texas Insurance Code § 541.060, if the policyholder establishes a right to receive benefits under the policy, the policyholder can recover the benefits as actual damages. *State Farm*, 629 S.W.3d at 873. In addition, if the policyholder establishes an injury independent of a right to benefits, the policyholder can recover damages for that injury. *Id.* Additionally, the insurer may be liable for court costs, attorneys' fees, and treble damages (if the insurer acted "knowingly"). Tex. Ins. Code § 541.152.

For statutory claims under Texas Business & Commerce Code § 17.50, policyholders may recover actual damages, attorneys' fees, and court costs. Tex. Bus. & Com. Code § 17.50(b)(1); *see Loya Ins. Co. v. Avalos*, 610 S.W.3d 878, 884 (Tex. 2020). If the insurer acted knowingly or intentionally, policyholders can recover treble damages and damages for mental anguish (emotional distress). Tex. Bus. & Com. Code § 17.50(b)(1).

Finally, for statutory claims under Texas Insurance Code Section 542.051 *et seq.*, policyholders can recover, in addition to other remedies (including the amount of the claim), *id*. § 524.061, yearly interest of 18% and attorneys' fees. *Id*. § 524.060(a).

For common law breach of contract claims, consequential damages are available if foreseeable and proved with reasonable certainty. *Signature Indus. Servs., LLC v. Int'l Paper Co.*, 638 S.W.3d 179, 186 (Tex. 2022) (contract); *J & D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649, 655 (Tex. 2016) (tort). In the first-party context, that could include loss of use of property, *J & D* Towing, 478 S.W.3d at 677-78, and lost profits, *Signature Indus. Servs.*, 638 S.W.3d at 189. In the third-party context, that could include a judgment or settlement in excess of policy limits. *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 604 S.W.3d 421, 428 (Tex. App.—San Antonio 2019, no pet.). Mental anguish damages are recoverable for tort (but not contract) claims if the insurer acted willfully or grossly negligently and its conduct resulted in physical injury. *Arnold*, 725 S.W.2d at 168; *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006).

Punitive damages (sometimes called "exemplary damages") are not available for breach of contract claims unless the policyholder can prove the insurer committed an independent tort. *Trans. Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994), *superseded by statute on other grounds by U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118 (Tex. 2012); *accord*, *KLZ Diamond*, 2016 WL 3947412, at *10 (*citing Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986)). If the policyholder has stated a tort claim, punitive damages are available if the policyholder can prove by clear and convincing evidence that harm results from the defendant's fraud, malice, or gross negligence. Tex. Civ. Prac. & Rem. Code § 41.003(a); *Simmons*, 963 S.W.2d at 47; *see U-Haul Int'l*, 380 S.W.3d at 140 (agreeing with standard).

Under Texas Civil Practice & Remedies Code § 38.001(b)(8), attorneys' fees are available to policyholders who successfully prove breach of contract claims unless the insurer is already liable under a different statutory scheme. Tex. Civ. Prac. & Rem. Code § 38.006; *see Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 817 (Tex. 2006); *see also* Tex. Civ. Prac. & Rem. Code § 38.002 (describing requirements to state claim for attorneys' fees). Attorneys' fees are not generally recoverable for tort claims. *Chapa*, 212 S.W.3d at 304.

Statute of Limitations

The statute of limitations for statutory claim under the insurance code's deceptive trade practices section, Tex. Ins. Code § 541.151 is two years and begins running when (1) the unfair method or practice occurred or (2) the insured should have discovered that method or practice occurred. Tex. Ins. Code § 541.162(a); *see* § 541.162(b) (extending period for 180 days if the insured's failure to file a claim was caused to the insurer inducing the insured not to file). That usually means when the insurer denies coverage. *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 100 (Tex. 1994), *judgment reformed* (Dec. 22, 1994) (cited in *Jayne v. Health Care Serv. Corp.*, No. 6:22-cv-00564, 2023 WL 2541977, at *2 (W.D. Tex. Mar. 1, 2023), *report and recommendation adopted in* 2023 WL 2544344 (W.D. Tex. Mar. 16, 2023)).

The statute of limitations for a claim under Texas's general deceptive trade practices act is two years and begins running when (1) the unfair method or practice occurred or (2) the insured should have discovered that method or practice occurred. Tex. Bus. & Com. Code § 17.565.

The statue of limitations for claims brought under Texas' prompt payment of claims act is likely four years. *Silo Rest. Inc. v. Allied Prop. & Cas. Ins. Co.*, 420 F. Supp. 3d 562, 573 n. 4 (W.D. Tex. 2019) (explaining that courts disagree whether the statute of limitations is two or four years, and finding four yeas to be more persuasive); *see Woodcrest Cap., LLC v. Zurich Am. Ins. Co.*, No. 20-cv-00130, 2021 WL 5234970, at *4 (W.D. Tex. Aug. 11, 2021) (explaining district court split and majority rule). Interest begins accruing from the date payment was required to be made. Tex. Ins. Code § 542.060.

The statute of limitations for a claim alleging that a first-party insurer breached the implied duty of good faith and fair dealing is two years and typically accrues when the insurer denies the insured's claim. Tex. Civ. Prac. & Rem. Code § 16.003(a); *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003); *accord*, *Hudspeth v. Enter. Life Ins. Co.*, 358 S.W.3d 373, 387 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

The statute of limitations for contractual causes of actions against first party and third party insurers is four years. Tex. Civ. Prac. & Rem. Code § 16.004(a); *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 203 (Tex. 2011).

The statute of limitations for an independent tort claim against a third-party insurer for negligence in failing to settle a claim is two years and begins running when the judgment is final. *Street v. Hon. Second Ct. of Appeals*, 756 S.W.2d 299, 301 (Tex. 1988); *Knott*, 128 S.W.3d at 221.

U .S. VIRGIN ISLANDS

The U.S. Virgin Islands have adopted a version of the UCSPA. 22 V.I.C. § 1201, et seq.; *see also* 22 V.I.C. § 228 for prompt payment requirements.

Bad Faith

The U.S. Virgin Islands recognize a cause of action for bad faith against a first-party insurer. *Justin v. Guardian Ins. Co*., 670 F. Supp. 614, 23 V.I. 278 (D.V.I. 1987). There is no authority suggesting that the U.S. Virgin Islands recognizes a cause of action for third-party bad faith.

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

(1) The existence of an insurance contract between the parties and a breach by the insurer;

(2) Intentional refusal to pay the claim;

(3) The nonexistence of any reasonably legitimate or arguable reason for the refusal (debatable reason) either in law or fact;

(4) The insurer's knowledge of the absence of such a debatable reason; or

(5) When the plaintiff argues that the intentional failure results from the failure of the insurer to determine the existence of an arguable basis, the plaintiff must prove the insurer's intentional failure to determine the existence of such a debatable reason.

See Charleswell v. Chase Manhattan Bank, N.A., 308 F. Supp. 2d 545, 45 V.I. 495 (D.V.I. 2004); *Justin v. Guardian Ins. Co*., 670 F. Supp. 614, 23 V.I. 278 (D.V.I. 1987).

"Bad faith" requires "not only that the plaintiff establish that an insurer lacked even an arguable or debatable reason to deny the claim, but also that the insurer had knowledge or exhibited reckless disregard as to whether it was fairly debatable to deny the claim." *Charleswell v. Chase Manhattan Bank, N.A*., 308 F. Supp. 2d 545, 45 V.I. 495 (D.V.I. 2004); *Justin v. Guardian Ins. Co*., 670 F. Supp. 614, 23 V.I. 278 (D.V.I. 1987) (same).

If an insurer has a "fairly debatable" reason for denying a claim, it has not acted in bad faith, even if its reason is wrong. The "fairly debatable" standard is based on the idea that when an insurer denies coverage with a reasonable basis to do so, it is not guilty of bad faith even if the insurer is later held to have been wrong. An insurer has the right to litigate a claim when it feels there is a question of law or fact that needs to be decided before it must pay the claimant. To impose "bad faith" liability, the policyholder must demonstrate that no debatable reasons existed for the denial. *Worthington v. Euwema Ins. Agency, Inc*., No. CIV. 1996-100, 2000 WL 1751838 (D.V.I. May 2, 2000). In most normal cases, this requires that the policyholder obtain a directed verdict on the contract in order to even get to the jury and make out a successful bad faith claim. *Justin v. Guardian Ins. Co*., 670 F. Supp. 614, 23 V.I. 278 (D.V.I. 1987).

The availability of a bad faith remedy "arises out of the insurer's special duty owed to the insured as well as the fact that, when an insured suffers a loss, the insured becomes 'particularly vulnerable' to the insurer." *Mendez v. Coastal Sys. Dev., Inc.,* No. CIV. 2005-0165, 2008 WL 2149373, at *6 (D.V.I. May 20, 2008). In other words, an insured has a "heightened reliance" on its insurer. *Id.*

Damages

A policyholder who prevails on a claim may recover the following from the insurer:

(1) The amount of the loss;

(2) Punitive damages upon a showing, by clear and convincing evidence, that the insurer's acts were outrageous, done with evil motive or reckless indifference to the policyholder's rights; and

(3) Attorneys' fees.

Justin v. Guardian Ins. Co., 670 F. Supp. 614, 23 V.I. 278 (D.V.I. 1987); for recoverability of attorneys' fees, *see also* 22 V.I.C. § 541(a)(6), (b) (including attorneys' fees as costs which may be allowed in a civil action); *Buntin v. Cont'l Ins. Co*., 18 V.I. 604, 614, 525 F. Supp. 1077, 1083 (D.V.I. 1981) (explaining that it is within the court's discretion to award costs to the prevailing party).

Statute of Limitations

A two year statute of limitations applies to "any action for injury to the person or rights of another not arising on contract and not herein especially enumerated." 5 V.I.C. § 31(5)(A). The district court has applied the two-year statute of limitations to bad faith actions. *See Charleswell v. Chase Manhattan Bank, N.A*., 308 F. Supp. 2d 545, 45 V.I. 495 (D.V.I. 2004).

U TAH

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

Utah has also adopted a version of the UCSPA Model Regulation. Utah Admin. Code R. 590-89, 590-190, 590-192-1 to 590-192-14.

Bad Faith

Utah does not recognize an independent common law tort cause of action for bad faith against a first-party insurer. *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 799 (Utah 1985).

Additionally, there is no private cause of action under § 31A-26-301, the law that requires insurers to timely pay claims. *Saleh v. Farmers Ins. Exch*., 133 P.3d 428, 436 (Utah 2006) ("Utah Code section 31A–26–301 does not allow a private cause of action by an insured against an insurer.").

However, Utah does "recognize a tort cause of action for breach of an insurer's obligation to bargain in a third-party context." *Beck*, 701 P.2d at 799. "[B]ecause a third-party insurance contract obligates the insurer to defend the insured, the insurer incurs a fiduciary duty to its insured to protect the insured's interests as zealously as it would its own…" *Id*.

Damages

Damages can include general damages, which flow naturally from the breach. *Billings v. Union Bankers Ins. Co*., 918 P.2d 461, 468 (Utah 1996). Consequential damages are also available, including those "reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." *Beck*, 701 P.2d at 801. Utah's Supreme Court has cautioned insurers that breaching the duty of good faith can expose them to consequential damages "in excess of policy limits." *Black v. Allstate Ins. Co.*, 100 P.3d 1163, 1169 (Utah 2004) (citing *Beck*, 701 P.2d at 800).

Emotional distress and mental anguish 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 only available when there has been a breach of the implied covenant of good faith and fair dealing. *Saleh*, 133 P.3d at 435 n.4.

Punitive damages are only available if the insured commits a separate tort, not in breach of contract actions. *Gagon v. State Farm Mut. Auto Ins. Co.*, 771 P.2d 325, 325 (Utah 1988) ("While consequential damages for breach of the covenant would be available, tort damages, including punitive damages, would not. To recover punitive damages, a plaintiff would have to show all of the elements of a separate tort.").

Statute of Limitations

There appear to be no published Utah cases applying a statute of limitations to a third-party bad faith claim. And while Utah Code Ann. § 31A-21-313 specifies a three-year statute of limitations

for claims arising out of first-party insurance contracts, there is no analogous provision for third-party insurance. However, given Utah courts' prior application of a four-year statute of limitations to actions alleging breach of fiduciary duty, it is likely the same four-year limit would apply in the context of a third-party insurance bad faith claim. *See Val Peterson Inc. v. Tennant Metals Pty. Ltd.*, 537 P.3d 660 (Utah App., 2023) (explaining that four-year statute of limitations applied to claims for breach of fiduciary duties existing outside contract); *Tucker v. State Farm Mut. Auto. Ins. Co.*, 53 P.3d 947, 951 (Utah 2002) (rejecting application of four-year statute of limitations to insured's claims against insurer because claims sounded in contract, not tort, and arose out of first-party relationship).

V ERMONT

Vermont has adopted a version of the Unfair Claims Settlement Practices Act. Vt. Stat. Ann. tit. 8, § 4724. Vermont has also adopted a version of the Unfair Claims Settlement Practices Act Model Regulation. Vt. Admin. Code 4-3-7:1, *et seq.*. There is no statutory private right of action under
§ 4724. *Hamill v. Pawtucket Mut. Ins. Co.*, 892 A.2d 226, 231(Vt. 2005). It is an open question whether there is an independent cause of action under the Vermont Consumer Fraud Act, Vt. Stat. Ann. it. 9, § 2451, *et seq.*, because the Vermont Supreme Court has not said whether it applies to the insurance industry. *Greene v. Stevens Gas Serv.*, 858 A.2d 238, 248 (Vt. 2004) (noting that Vermont Attorney General submitted an *amicus curiae* brief arguing that the Consumer Fraud Act may apply to the insurance industry, but declining to answer the question); *Johnson v. Smith Brothers Ins. LLC*, No. 2020-101, 2020 WL 5269927, at *3 n.1 (Vt. Sept. 4, 2020) (noting that the Vermont Supreme Court has still not answered the question and declined to answer the question).

Bad Faith

Vermont recognizes an independent tort cause of action for bad faith against a first-party insurer for unreasonably denying benefits.[4] *Bushey v. Allstate Ins. Co.*, 670 A.2d 807, 809 (Vt. 1995); *Peerless Ins. Co. v. Frederick*, 869 A.2d 112, 116 (Vt. 2004). Third-party beneficiaries cannot bring bad faith claims. *Laroque v. State Farm Ins. Co.*, 660 A.2d 286, 288 (Vt. 1995); *R.L. Vallee, Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 431 F. Supp. 2d 428, 441 (D. Vt. 2006).

To establish a first-party 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."

Town of Ira v. Vt. League of Cities & Towns—Prop. & Cas. Intermunicipal Fund, Inc., 109 A.3d 893, 901 (Vt. 2014) (quoting *Bushey v. Allstate Ins. Co.*, 670 A.2d 807, 809 (Vt. 1995)). If the claim is "fairly debatable" as a matter of law, the insurer will not be liable. *Murphy v. Patriot Ins. Co.*, 106 A.3d 911, 917 (Vt. 2014) (citing *Bushey*, 670 A.3d at 809).

There is no independent tort duty to handle claims in a reasonable manner, and thus can be no extracontractual tort negligence claim against the insurer. *Id*.

Vermont recognizes an independent third-party bad faith claim for failure to settle a claim against the policyholder. *See Myers v. Ambassador Ins. Co., Inc.*, 508 A.2d 689, 692 (Vt. 1986). An insurer acts in bad faith if it "intentionally disregarded 'the financial interests of [the policyholder] in the hope of escaping the full responsibility imposed upon it by its policy.'" *Id*. at 691 (citation omitted). In settling a claim, the insurers must: (1) "diligently investigate the facts and the risks involved in the claim" and in doing so "rely only upon persons reasonably qualified to make such an assessment;" (2) "fully inform the insured of the results of its assessment of the risks, including

[4] *See Monahan v. GMAC Mortg. Corp.*, 893 A.2d 298, 310 (Vt. 2005) (explaining standards for contract

claim based on breach of duty of good faith and fair dealing vs. independent tort claim).

any potential excess liability;" (3) "convey any demands for settlement which have been made;" and (4) "inform the insured of significant developments as they arise." *Id*.

If the insurer acted in bad faith, the insurer is "liable for a judgment in excess of the policy limits . . . ." *Id.*

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, 988 (D. Vt. 1979); *but see City of Burlington v. Hartford Steam Boiler Inspection & Ins. Co.*, 190 F. Supp. 2d 663, 690 n.23, 692 n.25 (no consequential damages where policy covered "risks of direct physical loss or damage to the property insured by the perils insured," nor when business interruption exclusion).

Emotional Distress damages may be recoverable. *Buote v. Verizon New England*, 249 F. Supp. 2d 422, 433 n.11 (D. Vt. 2003).

Attorneys' fees are available for "dominating reasons of justice," including bad faith and other outrageous conduct. *Concord Gen. Mut. Ins. Co v. Woods*, 824 A.2d 572, 579 (Vt. 2003); *Monahan*, 893 A.2d at 324 ("[W]e intimated, in dicta, that bad-faith insurance denial might satisfy the 'demanding' standard for departure from the American Rule, but ultimately declined to award fees because no bad faith or other outrageous conduct on the part of the insurer had been shown. . . .We will not rule on the issue here.").

Punitive damages are available if the insurer has exhibited malice, gross misconduct, and/or reckless disregard. *Davis v. Liberty Mut. Ins. Co.*, 19 F. Supp. 2d 193, 203 (D. Vt. 1998); *Monahan*, 893 A.2d at 324; *Kibbie v. Killington/Pico Ski Resort Partners, LLC*, No. 5:16-cv-247, 2020 WL 13261209, at *18 (D. Vt. Dec. 4, 2020) ("Punitive damages require a showing of essentially two elements. . . . The first is wrongful conduct that is outrageously reprehensible The second is malice, defined variously as bad motive, ill will, personal spite or hatred, reckless disregard, and the like." (quoting *Fly Fish Vt., Inc. v. Chapin Hill Ests., Inc.*, 996 A.2d 1167, 1173 (Vt. 2010)).

Statute of Limitations

Civil claims, including first-party bad faith (and breach of contract) claims, are subject to a six-year statute of limitations. Vt. Stat. Ann. tit. 12, § 511; *see Benson v. MVP Health Plan, Inc.*, 978 A.2d 33, 35 (Vt. 2009) (applying § 511 to first-party bad faith claim); *see also Kaufman v. State Farm Mut. Auto. Ins. Co.*, 857 F. Supp. 23, 25 (D. Vt. 1994) (applying § 511 to first-party breach of contract claim arising out of insurance contract). A first party bad faith claim accrues when the insurer "errs, unreasonably, in denying coverage." *Benson*, 978 A.2d at 35; *accord Littlefield v. Concord Gen. Mut. Ins. Co.*, No. 2:10-cv-07, 2010 WL 5300814, at *2 (D. Vt. Dec. 22, 2010) (same). A cause of action for a first-party breach of contract claim accrues when the insurer breaches the contract. *Benson*, 978 A.2d at 35.

There appears to be no published caselaw applying the statute of limitations to a third-party bad faith claim, but such claims would likely be subject to the general civil statute providing for a six-year statute of limitations. Vt. Stat. Ann. tit. 12, § 511; see *Benson v. MVP Health Plan, Inc.*, 978

A.2d at 35 (noting that trial court recognized that § 511 may govern bad faith claim without holding on issue); *Benson v. MVP Health Plan, Inc.*, No. 578-8-07, 2007 WL 7632580 (Vt. Super. Ct. Dec. 6, 2007) ("Under the Administrator's theory, the applicable limitations period is six years after the action accrues, under 12 V.S.A. § 511).

Insurers can shorten this statute of limitations if the limitation is unambiguous and reasonable and is not "less than 12 months from the occurrence of the loss, death, accident, or default." Vt. Stat. Ann. tit. 8, § 3663.

V IRGINIA

Virginia has adopted a version of the Unfair Claims Settlement Practices Act and its model regulations. Va. Code Ann. § 38.2-510; 14 Va. Admin. Code 5-400-10 to 5-400-110. The Virginia UCSPA statute does not include a private right of action. *Sustainable Sea Prod. Int'l, LLC v. Am. Empire Surplus Lines Ins. Co.*, No. 3:21CV697, 2022 WL 3573247, at *4 (E.D. Va. Aug. 19, 2022).

Bad Faith

In the first-party bad faith context, "Virginia law does not recognize a separate cause of action for bad faith." *Botkin v. Donegal Mut. Ins. Co.,* No. 5:10CV00077, 2011 WL 1225999, at *4 (W.D. Va. Mar. 29, 2011); *see also Liberty Ins. Corp. v. Talley*, No. 3:22CV715 (RCY), 2023 WL 6345823, at *3 (E.D. Va. Sept. 28, 2023) ("Virginia law disfavors free-standing tort claims for bad faith in carrying out obligations under insurance contracts."). Instead, first-party bad faith claims can be asserted breaches of the contractual duty of "good faith and fair dealing." *Great Am. Ins. Co. v. GRM Mgmt., LLC*, No. 3:14CV295, 2014 WL 6673902, at *9 (E.D. Va. Nov. 24, 2014). Put differently, bad faith "claims against an insurer are contract claims, not tort claims." *A-View Est. Tr. v. Allstate*, 109 Va. Cir. 26 (Va. Cir. 2021).

A plaintiff cannot prevail on a contractual bad faith claim without first establishing that the insurance policy affords coverage. *See ACAC Downtown, LLC v. Cincinnati Ins. Co. Inc.*, 660 F. Supp. 3d 529, 537 (W.D. Va. 2023) ("[T]here cannot be a plausible claim for breach of the implied covenant of good faith and fair dealing where the policy does not afford coverage.").

In the third-party bad faith context, Virginia recognizes a cause of action against an insurer that refuses in bad faith to settle claims asserted by a third party against its insured. *Aetna Cas. & Sur. Co. v. Price*, 146 S.E.2d 220, 228 (Va. 1966). An insurer that fails to settle within its policy limits as a result of its bad faith will be liable to its insured for the excess judgment. *State Farm Mut. Auto. Ins. Co. v. Floyd*, 366 S.E.2d 93, 96 (Va. 1988). For an insured to recover the excess judgment from its insurer, it must establish, by clear and convincing evidence, that the insurer failed to take advantage of an opportunity to settle within policy limits, and the insurer acted to advance its own interest, with intentional disregard of the financial interest of the insured. *Id.* at 97–98.

In evaluating the insurer's conduct, courts will apply a reasonableness standard. *CUNA Mut. Ins. Soc'y v. Norman*, 375 S.E.2d 724 (Va. 1989). The court's analysis of the bad-faith claim will consider whether reasonable minds could differ in interpreting policy provisions defining coverage and exclusions; whether the insurer made a reasonable investigation of the facts underlying the insured's claim; whether the evidence the insurer discovered supported a denial of liability; whether the insurer's refusal to pay was merely a tool used in settlement negotiations; and whether the defense the insurer asserts at trial raises an issue of first impression or a reasonably debatable question of law or fact. *Id.* at 727.

Damages

A separate Virginia statute allows an insured to recover costs and reasonable attorneys' fees in a declaratory judgment action brought by the insured against the insurer, if the trial court

determines

that the insurer was not acting in good faith when it denied coverage or refused payment under the policy. Va. Code Ann. § 38.2-209. "This code provision has been interpreted only as a remedy should a plaintiff be able to prevail on an underlying insurance contract claim." *A-View Est. Tr.*, 109 Va. Cir. at 26; *Leighton v. Homesite Ins. Co. of the Midwest*, No. 2:21CV490, 2022 WL 2904169, at *3 (E.D. Va. Jan. 12, 2022) ("[A] plaintiff may only recover the costs of litigating an insurer's bad faith refusal to pay under § 38.2-209 (A), if he first proves that the insurer breached the insurance contract."). In determining whether an insurer acted in bad faith in awarding attorneys' fees, Virginia courts apply a reasonableness standard. *See Carolina Cas. Ins. Co. v. Draper & Goldberg, PLLC*, 369 F. Supp. 2d 667 (E.D. Va. 2004).

Virginia allows an insured to recover full general and consequential damages from its insurer where the insurer acted in bad faith. *See Meccia v. Pioneer Life Ins. Co. et al.*, 13 Va. Cir. 17 (Va. Cir. 1987) ("[T]he relief provided in third party cases, for the most part, is full judgment for foreseeable losses, i.e., consequential damages."); *TIG Ins. Co. v. Alfa Laval, Inc.*, No. 3:07CV683, 2008 WL 639894 (E.D. Va. 2008) ("[W]hile there is no separate tort of bad faith, Virginia law does permit general and consequential damages in contract when an insurer breaches its duty of good faith."). These consequential damages most routinely take the form of the judgment entered against the insured in excess of the policy limits, after the insurer refused in bad faith to settle the underlying litigation. *See Atl. Permanent Fed. Savings & Loan Ass'n v. Am. Cas. Co. of Reading, Pa.*, 670 F. Supp. 168 (E.D. Va. 1986).

Punitive damages are unavailable. *A-View Est. Tr.*, 109 Va. Cir. at 26; *Harris v. USAA Cas. Ins. Co.*, 37 Va. Cir. 553 (Va. Cir. 1994).

Statute of Limitations

The statute of limitations for a breach of the contractual duty of "good faith and fair dealing" is likely three years. *See Corinthian Mortg. Corp. v. ChoicePoint Precision Mktg., LLC*, No. 1:07cv832, 2008 WL 2776991, at *3 (E.D. Va. July 14, 2008).

W ASHINGTON

Washington has adopted a version of the UCSPA. Wash. Rev. Code. §48.30.010. Washington has also adopted a version of the UCSPA Model Regulation. Wash. Admin. Code §§ 284-30-300 to 284-30-390.

Bad Faith

Washington recognizes a statutory private right of action for bad faith under the "Insurance Fair Conduct Act," Wash. Rev. Code Ann. § 48.30.015; *see Smith v. Safeco Ins. Co.*, 78 P.3d 1274 (Wash. 2003); *see also Perez-Crisantos v. State Farm Fire & Cas. Co.*, 389 P.3d 476, 481 (Wash. 2017), ("IFCA explicitly creates a cause of action for first party insureds who were unreasonably denied a claim for coverage or payment of benefits."). To prevail on a claim under the IFCA, the "insured must show the insurer unreasonably denied a claim for coverage or that the insurer unreasonably denied payment of benefits. If either or both acts are established, a claim exists under the IFCA." *Langley v. GEICO Gen. Ins. Co.*, 89 F. Supp. 3d 1083 (E.D. Wash. 2015) (citing *Ainsworth v. Progressive Cas. Ins. Co.*, 322 P.3d 6 (Wash. Ct. App. 2014)).

An insured may also maintain an action against its insurer for bad faith under Washington's Consumer Protection Act (CPA). Wash. Rev. Code Ann. § 19.86.020. To prevail on a claim under the CPA, an insured must prove that the insurer's "act or practice (1) is unfair or deceptive; (2) occurs in the conduct of trade or commerce; (3) affects the public interest; (4) causes injury to the plaintiff's business or property; and (5) causes the injury suffered." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 535 (Wash. 1986). "A violation of the insurance code or a regulation promulgated thereunder constitutes an unfair practice under the CPA." *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 196 P.3d 664, 667 (Wash. 2008). An insured may prevail under the CPA "regardless of whether the insurer was ultimately correct in determining coverage did not exist." *P.E.L. v. Premera Blue Cross*, 540 P.3d 105, 126 (Wash. 2023).

Washington additionally recognizes a common law cause of action for bad faith that sounds in tort. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 196 P.3d at 668. "Claims of insurer bad faith are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty. In order to establish bad faith, an insured is required to show the breach was unreasonable, frivolous, or unfounded." *Id*. (internal quote and citation omitted). If an insurer denial of coverage is based on a reasonable interpretation of the insurance policy, there is no action for common law bad faith. *Overton v. Consolidated Ins. Co.*, 38 P.3d 322, 330 (Wash. 2002).

Damages

In Washington state, there are several types of damages available for bad faith insurance claims. These can include the awarding of actual or compensatory damages, attorneys' fees, and in some cases, treble penalties.

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

Compensatory damages are typically awarded to cover the economic loss suffered by the insured due to the insurer's bad faith conduct. This could include any consequential damages resulting from the insurer's conduct Bad Faith Elements State Law Survey. In some cases, emotional distress damages may also be recoverable. *Schmidt v. Coogan*, 335 P.3d 424, 432 (Wash. 2004).

Attorneys' fees can be awarded under the Insurance Fair Conduct Act (IFCA). *Perez-Crisantos,* 389 P.3d at 477. The Insurance Fair Conduct Act provides that a court shall "award reasonable attorneys' fees and statutory litigation costs." Wash. Rev. Code Ann. § 48.30.015(3).

Treble damages up to three times the amount of actual damages can be awarded under the IFCA. RCW 48.30.015(2). *Perez-Crisantos,* 389 P.3d at 477. Punitive damages are generally not recoverable in Washington state, except when expressly authorized by statute. *McGinnis v. Ky. Fried Chicken*, 51 F.3d 805 (9th Cir. 1994) *see also McKee*, 191 P.3d at 860 (explaining that treble damages in the Consumer Protection Act are to be construed as exemplary damages).

In addition to these damages, the concept of "coverage by estoppel" may apply in cases where the insurer has breached the duty to defend in bad faith. This remedy creates liability for the insurer to pay at least policy limits for any claim that should have been defended but was not. *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124, 1128 (Wash. 1998).

Consequential and emotional distress damages are available under a common law tort claim for bad faith. *Coventry v. Am. States Ins. Co.,* 961 P.2d 933, 939 (Wash. 1998).

A policyholder is entitled to recover only losses to business or property under the Consumer Protection Act. Wash. Rev. Code Ann § 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 Ann. § 19.86.090.

A policyholder that has been "injured in his or her business or property by a violation" to recover actual damages, trial costs, and attorney's fees." *Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299, 1310 (W.D. Wash. 2013) (citing Wash. Rev. Code Ann. § 19.86.090).

Statute of Limitations

In Washington, the statute of limitations for a bad faith claim is three years. WASH. REV. CODE. ANN. § 4.16.080; *Moratti ex rel. Tarutis v. Farmers Ins. Co. of Wash.,* 254 P.3d 939, 942 (Wash. Ct. App. 2011).

W EST VIRGINIA

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

Bad Faith

West Virginia recognizes an independent common law cause of action for bad faith against a first-party insurer. *Loudin v. Nat'l Liab. & Fire Ins. Co.*, 716 S.E.2d 696 (W. Va. 2011). A third-party claimant cannot bring a cause of action against any person for an unfair claims settlement practice. W. VA. CODE § 33-11-4a. Bad faith actions are not allowed by third parties. *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman,* 658 S.E.2d 728, 735 (W. Va. 2008). West Virginia does not recognize a cause of action against an insurer for the common law breach of the implied covenant of good faith and fair dealing. *Elmore v. State Farm Mut. Auto. Ins. Co.*, 504 S.E.2d 893, 901 (W. Va. 1998)

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 (WVUTPA). *Elmore v. State Farm Mut. Auto. Ins. Co.*, 504 S.E.2d 893 (W. Va. 1998). A third party who has a claim against an insured can sue an insurer under the WVUTPA. *Weese v. Nationwide Ins. Co.,* 879 F.2d 115 (4th Cir. 1989) (applying West Virginia law).

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

Attorneys' fees are also 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'l 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.*, 505 S.E.2d 454, 459 (W. Va.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).

Statute of Limitations

The statute of limitations for bringing a cause of action for bad faith in West Virginia is ten years for bad faith based on a contract theory. W. VA. CODE § 55-2-6. Bad faith actions under the common law or the West Virginia Unfair Trade Practices Act have a statute of limitations of one year. W.VA. CODE § 55-2-12(c); *West Va. ex rel. Erie Ins. Prop. & Cas. Co.,* 2016 WL 3392560 (W. Va. 2016).

W ISCONSIN

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

Bad Faith

Wisconsin recognizes a common-law cause of action for bad faith against a first-party insurer. *Jones v. Secura Ins. Co.,* 638 N.W.2d 575, 579 (Wis. 2002) (citing *Anderson v. Cont'l Ins. Co.,* 271 N.W.2d 368 (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.

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. *Anderson*, 271 N.W.2d at 377.

Wisconsin also permits third-party bad faith. The Supreme Court of Wisconsin held that "[t]he insurer has the right to exercise its own judgment in determining whether a claim should be settled or contested. But exercise of this right should be accompanied by considerations of good faith. In order to be made in good faith, a decision not to settle a claim must be based on a thorough evaluation of the underlying circumstances of the claim and on informed interaction with the insured." *Mowry v. Badger State Mut. Cas. Co.,* 385 N.W.2d 171, 178 (Wis. 1986); *Roehl Transp., Inc. v. Liberty Mut. Ins. Co.,* 784 N.W.2d 542, 555 (Wis. 2010) ("For the very reasons our cases have concluded that an insurance company becomes liable for the tort of bad faith when it fails to act in good faith and exposes its insured to liability over policy limits, we likewise conclude that an insurance company may be liable for the tort of bad faith when the insurance company fails to act in good faith and exposes the insured to liability for sums within the deductible amount.")

Damages

Consequential damages are available. *DeChant v. Monarch Life Ins. Co*., 547 N.W.2d 592, 596 (Wis. 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*, 638 N.W.2d at 576-577.

Emotional Distress damages are also 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,* 271 N.W2d at 696; *see also Jones,* 638 N.W.2d at 580.

Additionally, 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,* 200 547 N.W.2d at 597.

Finally, 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,* 271 N.W.2d at 379.

Statute of Limitations

The statute of limitations for an insurance bad faith claim is three years because the claim falls under the intentional tort statute of limitations. Wis. Stat. § 893.57.

W YOMING

Wyoming has adopted a version of the UCSPA. Wyo. Stat. Ann. § 26-13-124 (1986/2010).

Bad Faith

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; *Cathcart v. State Farm Mut. Auto. Ins. Co.*, 123 P.3d 579, 589 (Wyo. 2005).

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); *Harper v. Fid. & Guar. Life Ins. Co.*, , 234 P.3d 1211, 1221 (Wyo. 2010). 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. To recover damages for emotional distress, an insured must allege that as a result of the breach of the duty of good faith and fair dealing, they have suffered 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 when it is determined that the insurer, unreasonably or without cause, refused to pay the full amount of a covered loss. Wyoming Statute § 26-15-124(c).

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).

Statute of Limitations

The statute of limitations for insurer bad faith claims in Wyoming is two years. This is based on the general statute of limitations for tort claims, which applies to bad faith claims against insurers. The statute of limitations begins to run when the act, error, or omission occurs, rather than when the cause of action accrues. *See*, *e.g.*, *Falkenburg v. Laramie Investment Company, Inc.*, 533 P.3d 511, 516 (Wyo. 2023).