Bad Faith 2021 and Beyond: A Survey of Extra Contractual Law and Where Things Stand

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FLORIDA

I. FIRST-PARTY STATUTORY BAD FAITH:

Under Fla. Stat. § 624.155, the duty of an insurer to act in good faith in handling claims and creates an express cause of action for bad faith on behalf of the aggrieved insured against the insured's own carrier. Fla. Stat. Ann. § 624.155 (West 2020).

In *State Farm Mut. Auto. Ins. Co. v. Laforet*, the court considered the amount of damages that an insurer would be exposed to in a bad faith action. 658 So. 2d 55, 56–61 (Fla. 1995). The court held that whether an insurer acted fairly and honestly towards its insured requires a totality of the circumstances determination. *Id.* at 62. The court reasoned that an insurer's efforts taken to resolve a coverage dispute to limit potential prejudice to the insured, the substance of the coverage dispute, and the insurer's diligence through its coverage investigation. *Id.* at 62–63; *see also* Fla. Stat. Ann. § 624.155(b)(1)–(3) (West 2020).

There is no common law first-party bad faith cause of action against insurer. *United Property and Cas. Ins. Co. v. Chernick*, 94 So. 3d 646 (Fla. 4th DCA 2012).

Fla. Stat. § 624.155 (3)(a) provides that, before filing a civil action under § 624.155, the insurer "the [Florida Department of Financial Services] and the authorized insurer must have been given 60 days' written notice of the violation." Fla. Stat. Ann. § 624.155(3)(a) (West 2020); *see also* Fla. Stat. Ann. § 624.05(1) (West 2020). This notice is the "Civil Remedy Notice" (hereinafter "CRN") and contains statutorily and administratively prescribed information. Fla. Stat. Ann. § 624.155 (3)(b) (West 2020).

Further, under Fla. Stat. § 624.155 (3)(d), "[n]o action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected." Fla. Stat. Ann. § 624.155(3)(d) (West 2020). The insurer can cure its violation by paying damages or comply with its claim-handling obligations in good faith to avoid the statutory cause of action. *Id.*

In *Talat Enter., Inc. v. Aetna Cas. & Sur. Co*., the insured pursued a claim against its commercial fire insurer for bad faith in failing to pay the insurance claim promptly, but the insurer paid the claim within sixty days of the notice of intent to file a bad faith claim. 753 So. 2d 1278, 1279 (Fla. 2000). The court held that the payment of contractual damages, without payment of extracontractual damages, within sixty-day statutory cure period precludes a first-party bad faith action for extracontractual damages. *Id.* at 1282; *see also Fridman v. Safeco Insurance Company of Illinois*, 185 So.3d 1214, 1220 (Fla. 2016) (noting that the CRN provides an insurer a sixty-day cure period which allows the insurer a final opportunity to comply with its claim handling obligations, and gives the insurer a final opportunity "to comply with their claim-handling obligations when a good-faith decision by the insurer would indicate that contractual benefits are owed.").

The Florida Supreme Court held that there is a presumption of bad faith sufficient to shift the burden to the insurer to show why it did not respond" to the CRN if the insurer fails to respond within the sixty-day window. *Imhof v. Nationwide Mutual Insurance Co.*, 643 So.2d 617, 619 (Fla. 1994).

The recovery of damages for emotional distress in a first-party bad faith claim against an insurer are also authorized under Fla. Stat. § 624.155(1). Fla. Stat. Ann. § 624.155(1) (West 2020). Consequential damages are also recoverable under Fla. Stat. § 624.155(4),(8) that are reasonably foreseeable as result of the violation of the statute. Fla. Stat. Ann. § 624.155(4),(8) (West 2020). The damages may also be in excess of the policy limits. *Id.*

In *Time Insurance Co. v. Burger*, the court held that an insured can claim damages for emotional distress by showing: (1) the bad-faith conduct resulted in the insured's failure to receive necessary or timely health care; (2) based on a reasonable medical probability, this failure caused or aggravated the insured's medical or psychiatric condition; and (3) the insured suffered mental distress related to the condition or the aggravation of the condition. 712 So.2d 389, 393 (Fla. 1998). However, for an insured to recover, these allegations must be substantiated by testimony of a qualified health care provider. *Id.*

The court in *Otero v. Midland Life Ins. Co*., however, notes that the *Burger* ruling only applies to health insurers. 753 So. 2d 579, 580 (Fla. 3d DCA 1999).

In *Julien v. United Property & Casualty Insurance Company*, 2021 WL 824438 (4th DCA March 3, 2021) the appellate court affirmed the trial court's dismissal with prejudice of a lawsuit against an insurer, finding the policyholder failed to satisfy the statutory requirement that an insured "state with specificity" the policy language and the statutory provisions at issue where the civil remedy notice cited thirty-five statutory provisions and listed nearly every provisions in the insurance policy.

II. THIRD-PARTY STATUTORY BAD FAITH

Similarly, Fla. Stat. § 624.155 authorizes third-party bad faith actions. Fla. Stat. Ann § 624.155. Fla Stat. § 626.9541(1) (i), (o), and (x) also provides a third-party bad faith cause of action under the Florida's Unfair Insurance Trade Practices act. Fla Stat. Ann. § 626.9541 (West 2020).

Just as first-party bad faith actions, Fla. Stat. § 624.155 proscribes the same sixty-day statutory grace period for an insurer to cure the violation. Fla. Stat. § 624.155(3)(a)-(d).

However, there is a conflict of authority as to whether the insurer may satisfy this cure provision simply by tendering a check for its policy limits without achieving a settlement of the underlying claim. *Compare Clauss v. Fortune Insurance Co*., 523 So.2d 1177 (Fla. 5th DCA 1988) (insurer's tender of its policy limits satisfied cure provision of Fla. Stat. § 624.155) *with Hollar v. International Bankers Insurance Co.*, 572 So.2d 937 (Fla. 3d DCA 1991) (insurer's tender of its policy limits did not satisfy damages for claim of third-party bad faith and, therefore, did not constitute sufficient cure).

State Farm Fire & Cas. Co. v. Zebrowski is the leading case in holding that a third party can bring a statutory bad faith action against an insurer pursuant to Fla. Stat. § 624.155(1)(b)(1) after obtaining excess judgment against insured without first obtaining assignment from insured. 706 So. 2d 275 (Fla. 1997). *Allstate Indem. Co. v. Ruiz* similarly holds that that Fla. Stat. § 624.155 does not distinguish between statutory first- and third-party actions. 899 So. 2d 1121, 1126 (Fla. 2005).

III. COMMON LAW

In *Boston Old Colony Insurance Co. v. Gutierrez*, the court held that an insurer is obligated by its fiduciary duty of good faith to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he or she might take to avoid an excess judgment. 386 So.2d 783, 784 (Fla. 1980). Thus, this is the leading case that there is a common law cause of action for third-party bad faith. *Id.*

However, as stated in *McLeod v. Cont'l Ins. Co*., a third party can only assert a bad faith common law cause of action if the insured would have been able to bring the action himself or herself. 591 So. 2d 621, 625 n.6 (Fla. 1992) (noting that a third party asserting common law cause of action for bad faith stands in shoes of insured; insured must sustain recoverable damages for third party to have a cause of action)(superseded by statute on different issue)

The court in *Dunn v. National Security Fire & Casualty Co*. held that punitive damages are recoverable in common law bad faith actions when the conduct of the insurer is "so egregious as to constitute an independent tort." 631 So.2d 1103, 1108 (Fla. 5th DCA 1994).

In *Eres v. Progressive American Ins. Co*., the court awarded Summary Judgment to Defendant, Progressive American Insurance Company, as plaintiff did not raise any possible inference of bad faith. *Eres v. Progressive American Ins. Co,* No. 20-11006 (1lth Cir. 2021).

In *Ellis v. Geico General Insurance Co.*, the court granted Defendants' Motion for Summary Judgment on the basis that the Court found that no reasonable jury could conclude that GEICO operated in bad faith. *Ellis v. Geico Gen. Ins. Co.*, No. 19-cv-61611 (S.D. Fla. May 28, 2021).

IV. BAD FAITH STANDARDS

i. Legal Standard

In third-party and first-party bad faith actions, Fla. Stat. § 624.155(b)(1)–(3) enumerates conduct that exposes an insurer to liability under a statutory bad faith claim in Florida. Fla. Stat. §624.155(b)(1)–(3). An insurer can expose itself to liability by "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 toward its insured and with due regard for her or his interests;" "[m]aking claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;" or "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." *Id.*

The court in *General Star Indem. Co. v. Anheuser-Busch Companies, Inc.*, expressed that the standard for evaluating bad faith claims against insurers for both first-party and third-party claims under the common law and Fla. Stat. §624.155 is "whether the insurer acted fairly and honestly toward its insured with due regard for the insured's interests." 741 So. 2d 1259, 1261 (Fla. 5th DCA 1999). The court also noted that coverage and liability issues must be determined before a bad faith action can commence. *Id.*

The Florida Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Laforet* applied the totality of the circumstances standard in determining whether an insurer acted in bad faith in a third-party bad faith suit. 658 So. 2d 55, 62 (Fla. 1995). In turn, Florida courts evaluate:

> (1) whether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; (2) 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; (3) the substance of the coverage dispute or the weight of legal authority on the coverage issue; (4) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage; and (5) efforts made by the insurer to settle the liability claim in the face of the coverage dispute.

Id.; *see also Kearney v. Auto-Owners Ins. Co.*, 664 F. Supp. 2d 1234 (M.D. Fla. 2009) (applying the same factors in a first-party bad faith action).

ii. Powell Presumption

In *Powell v. Prudential Property & Casualty Insurance Co*., the insured's daughter ran over pedestrians who were walking in the roadway. 584 So.2d 12, 13 (Fla. 3d DCA 1991). In the first thirty days after the accident, the plaintiff sent a series of letters expressing interest in settling and asking about the coverage limits. *Id.* These letters were ignored, until the 53rd day after the accident when the carrier tendered its policy limits. *Id.* This offer was rejected, because a lawsuit had already been filed, and a $250,000 excess verdict resulted. In the bad-faith action, the trial judge granted a directed verdict at the close of evidence, which the District Court of Appeal, Third District, affirmed on appeal. *Id.* at 15.

The *Powell* opinion contains two important holdings that form what practitioners refer to as the "Powell presumption":

> 1. When liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations. *See also Harvey v. GEICO General Insurance Co*., 259 So.3d 1, 7 (Fla. 2018).
>
> 2. Any question about the possible outcome of a settlement effort should be resolved in favor of the insured; the insurer has the burden to show not only that there was no realistic possibility of settlement within policy limits, but also that the insured was without the ability to contribute to whatever settlement figure the parties could have reached. *Powell*, 584 So.2d at 14.

iii. Multiple Insureds: The Farinas/Contreras Scenarios

In *Farinas v. Fla. Farm Bureau Gen. Ins. Co*., the court echoed the Florida Supreme Court and noted that an insurer faced with multiple competing claims must fully investigate all of the claims, keep the insured informed about the claims process, seek to settle as many claims as possible within the policy limits, and minimize the magnitude of possible excess judgments without indiscriminately settling selected claims. 850 So. 2d 555, 560–61 (Fla. 4th DCA 2003).

The court in *Contreras v. U.S. Sec. Ins. Co.* held that, in instances involving multiple insureds, an insurer has an obligation to act in good faith toward all insureds, and the insurer can fulfill that obligation by attempting to obtain a release for both of the insureds. 927 So. 2d 16, 20–21 (Fla. 4th DCA 2006). However, if it becomes clear that the claimant will not release one insured, the insurer has an obligation to do what it can to protect the other insured from an excess judgment. *Id.*

iv. Pattern of Unfair or Deceptive Conduct

Under Fla. Stat. §624.155(1)(a) (1), any person can bring a civil action against an insurer when such person is damaged by a violation of Fla. Stat. §626.9541(1)(i)(3) (Florida's Unfair Claim Settlement Practices Act). Fla. Stat. §624.155(1)(a)(1) creates a civil remedy for violation of a statutory unfair claim settlement practices provision, Fla. Stat. §626.9541(1)(i)). An action

brought under Fla. Stat. §626.9541(1)(i)(3)(a)–(h) requires that the insurer's conduct occur "with such frequency as to indicate a general business practice."

v. Punitive Damages

Under Fla. Stat. § 624.155(5), punitive damages are available in Florida. Fla. Stat. § 624.155(5). Punitive damages may only be awarded if the insurer's actions "occur with such frequency as to indicate a general business practice" and are willful, wanton, and malicious, or in reckless disregard of the rights of a life-insurance beneficiary or of any insured. *Id.*

Any person who pursues a claim under this subsection shall post in advance the costs of discovery. *Id.* Such costs shall be awarded to the authorized insurer if no punitive damages are ultimately awarded to the plaintiff. *Id.*

In *Home Insurance Company v. Owens*, the court held that the degree of conduct required under the statute to support an award of punitive damages is substantially the same as that degree of conduct required to support punitive damage awards in general. 573 So. 2d 343, 345 (Fla. 4th DCA 1990).

V. ATTORNEYS' FEES

Just as in first-party bad faith actions, Fla. Stat. § 624.155(4) provides that attorneys' fees are recoverable for third-party statutory bad faith actions.

The court in *Shook v. Allstate Ins. Co*., upheld a third-party claimant's award of attorney's fees and costs incurred by insured in defense of underlying claim. 498 So. 2d 498, 500–01 (Fla. 4th DCA 1986).

VI. ASSIGNMENT OF RIGHTS AND CONSENT JUDGMENT

i. Assignment of Rights

In *Nationwide Mutual Insurance Co. v. McNulty*, the Florida Supreme Court held that an insured can assign his or her bad faith claim against the insurer to the injured third-party. 229 So.2d 585 (Fla. 1970). Additionally, the court in *Travelers Insurance Co. v. Jones* noted that an insured may assign his or her right to attorneys' fees to a third-party, who may then bring an action against the insurer directly and recover fees. 422 So.2d 1000 (Fla. 4th DCA 1982).

Similarly, the court in *Allstate Insurance Co. v. Regar*, held that an assignee of third-party bad-faith claim was entitled to attorneys' fees under Fla. Stat. § 627.428, even though assignee was not named or an omnibus insured or named beneficiary. 942 So.2d 969, 270 (Fla. 2d DCA 2006). Because the entire cause of action was assigned, the assignee stood in shoes of insured and was entitled to all remedies to which insured would otherwise be entitled to. *Id.*

ii. Consent Judgments

In Fidelity & Casualty Company of New York v. Cope, the Florida Supreme Court announced that any subsequent bad-faith action is extinguished if a claimant releases the insured from liability

for an excess judgment that allegedly resulted from the insurer's bad faith, provided there has not been a prior assignment of the bad-faith action. 462 So.2d 459, 461 (Fla. 1985). The court explained that if an insured is no longer exposed to any loss in excess of the liability policy limits, the insured no longer has any claim against the insurance carrier for bad faith. *Id.*

The court in *Rosen v. Florida Insurance Guaranty Ass'n*, recognized that the insured's obligation or liability continues even after a covenant not to sue, but the claimant agrees not to pursue any rights grounded thereon against the insured. 802 So.2d 291, 297 (Fla. 2001). If coupled with a reservation of the claimant's right to pursue recovery against the insurer, a covenant not to sue or execute does not preclude a subsequent bad-faith action against the carrier. *Id.; see Lageman v. Frank H. Furman, Inc.*, 697 So.2d 981 (Fla. 4th DCA 1997) (insured's failure to assign bad-faith action to claimant before settlement did not preclude bad-faith action when claimant covenanted not to execute consent judgment against insured and settlement agreement demonstrated parties' intent to assign bad-faith action to claimant).

VII. STATUTE OF LIMITATIONS

The Eleventh Circuit in held in *Baranowski v. Geico Gen. Ins. Co*. that, under Florida law, there is a five-year statute of limitations governing actions arising out of contract applied to insured's bad faith claim, rather than a four-year statute of limitations governing intentional torts. 719 F. App'x 933, 935 (11th Cir. 2018). The court made clear that a bad faith action against an insurer in Florida is a matter of contract. *Id.*

Fla. Stat. § 95.11(2)(b) provides that "[a] legal or equitable action on a contract ... founded on a written instrument" has a statute of limitation of five years. Fla. Stat. Ann. § 95.11(2)(b) (West 2018).

Bad Faith Law:
A Brief Survey of Illinois

ILLINOIS

I. FIRST-PARTY STATUTORY BAD FAITH:

In Illinois, a claimant may bring a first-party bad faith action under 215 ILCS 5/155:

> [i]n any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance for the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any of the following amounts:
>
> (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $60,000; or
>
> (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.

215 Ill. Comp. Stat. Ann. 5/155 (West 2004).

However, the statute does not apply to claims of a failure to settle within policy limits. *Cal. Union Ins. Co. v. Liberty Mut. Ins. Co.*, 930 F. Supp. 317, 319–20 (N.D. Ill. 1996).

The key question in a § 155 dispute is whether the insurer's conduct was "unreasonable and vexatious." *John T. Doyle Trust v. Country Mut. Ins. Co*., 380 Ill. Dec. 320, 329 (2014).

The remedies provided in § 155 are only available to the insured or its assignee. *Garcia v. Lovellette*, 265 Ill. App. 3d 724, 728 (2d Dist. 1994).

II. THIRD-PARTY STATUTORY BAD FAITH

Absent assignment, § 155 statutory remedies are not available to third parties who allege bad faith on the part of an insurer. *Yassin v. Certified Grocers of Ill., Inc*., 133 Ill. 2d 458, 466 (1990) ("[a]s a general rule, the remedy embodied in section 155 of the Insurance Code extends only to the party insured and policy assignees. Therefore, the remedy embodied in section 155 of the Insurance Code does not extend to third parties.").

III. COMMON LAW

Illinois does not recognize a common law tort cause of action for bad faith. *Cramer v. Ins. Exch. Agency*, 174 Ill. 2d 513, 526 (1996) ("[w]e hesitate to recognize a new tort where the legislature has constantly acted to remedy a perceived evil in a certain area."). The Illinois Supreme Court expressed additionally, where a plaintiff can prove the elements of a separate common law tort, such as fraud, he or she may bring the separate common law claim. *Id.*

However, the court in *Haddick ex rel. Griffith v. Valor Ins.* held that there is a common law cause of action for failure to settle when a liability insurer breaches its duty to act in good faith in responding to settlement offers. 198 Ill. 2d 409, 413(2001).

IV. BAD FAITH STANDARDS

i. Generally

In Illinois, a claim for violation of § 155 is not available in the absence of coverage under the policy. *Rhone v. First Am. Title Ins. Co*., 401 Ill. App. 3d 802, 815 (1st Dist. 2010) ("[w]here the policy is not triggered, there can be no finding that the insurer acted vexatiously and unreasonably in denying the claim.").

The court in *Transp. Ins. Co. v. Post Express Co.* noted that Illinois bad faith actions are "a contractual claim informed by principles of negligence." 138 F.3d 1189, 1192 (7th Cir. 1998).

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. Vill. of Crestwood*, 784 F. Supp. 2d 988, 998 (N.D. Ill. 2011), *amended in part* (June 13, 2011), *aff'd*, 673 F.3d 715 (7th Cir. 2012).

Bad faith simply means "being unfaithful to the duty or obligation that is owed" to the insured. *Cernocky v. Indem. Ins. Co. of N. Am*., 69 Ill. App. 2d 196, 205–06 (2d Dist. 1966).

The court in *Brocato v Prairie State Farmers Ins. Assn*. held that a prerequisite to any bad faith refusal-to-settle claim is the plaintiff's willingness to settle. 166 Ill. App. 3d 986, 990 (4th Dist. 1988).

The insurer also has no duty to initiate the settlement negotiations. *Stevenson v. State Farm Fire & Cas. Co.*, 257 Ill. App. 3d 179, 186 (1st Dist. 1993).

The court in *O'Neill v. Gallant Ins. Co.* stated that Illinois courts must consider seven factors to determine whether the insurer acted in bad faith: (1) the advice of the insurer's own adjusters; (2) a refusal to negotiate; (3) the advice of defense counsel; (4) communication with the insured in keeping him or her fully aware of the claimant's willingness to settle for the amount of coverage; (5) an adequate investigation and defense; (6) a substantial prospect of an adverse verdict; and (7) the potential for damages to exceed the policy limits. 329 Ill. App. 3d 1166, 1172–76 (1st Dist. 2002).

The Supreme Court of Illinois stated that, in third-party bad faith cases, insurers have a duty to act in good faith and respond to offers of settlement. *Cramer v. Ins. Exch. Agency*, 174 Ill. 2d 513, 524 (1996). If the insurer does not act in good faith in responding to those settlement offers, the insurance company can be liable for the full amount of the judgment against the policy holder, without regard to the policy limits. *Id.* at 525.

In *Geisler v. Everest Nat. Ins. Co.*, the court held that an 18-month delay in payment of defense costs pursuant to medical malpractice policy to doctor involved in medical malpractice litigation was not unreasonable or vexatious because the delay involved payments that were the responsibility of insured hospital pursuant to self-insured retention clause, and the insurer sent doctor a reimbursement payment two weeks after the SIR was exhausted. 366 Ill. Dec. 811, 829 (4th Dist. 2012).

ii. Consequential Damages

215 Ill. Comp. Stat. 5/155 does not limit recovery of consequential damages, so long as the damages were reasonably foreseeable, were within the contemplation of the parties at the time the contract was entered, or arose out of special circumstances known to the parties. *Mohr v. Dix Mut. Cnty. Fire Ins. Co.*, 143 Ill. App. 3d 989, 996 (4th Dist.1986).

However, § 155 does not provide for damages for emotional distress. *Combs v. Ins. Co. of Ill.*, 146 Ill. App. 3d 957, 963–64 (1st Dist.1986).

iii. Punitive Damages

In *Cramer v. Insurance Exchange Agency*, the Illinois Supreme Court held that Illinois does not recognize a general tort of insurer bad faith but that Section 155 of the Insurance Code does not preempt a separate and independent tort action for insurer misconduct, such as common law fraud, at least where the independent tort remedies a different type of harm than the statute does. 174 Ill. 2d 513, 525 (1996).

As a separate tort action, evidence of conduct supporting punitive damages has been described as a "deliberate[ ] [choice] to gamble with [an insured's] financial security" evidencing "utter indifference and a reckless disregard for [the] financial welfare" of an insured faced with a serious

risk of an excess judgment, and permits an award of punitive damages. *O'Neill v. Gallant Ins. Co.*, 329 Ill. App. 3d 1166, 1179–80 (5th Dist.2002).

V. ATTORNEYS' FEES

Pursuant to 215 Ill. Comp. Stat. 5/155, reasonable attorneys' fees are available but must not exceed any one of the following amounts:

> 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs; $60,000; or 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(1) (West 2004).

If the insured was required to file a declaratory judgment action to seek relief under § 155, the insured can recover attorney fees incurred in both the underlying case and the declaratory action. *Statewide Ins. Co. v. Houston Gen. Ins. Co.*, 397 Ill. App. 3d 410, 426 (1st Dist. 2009).

VI. ASSIGNMENT OF RIGHTS

While assignment of rights from an insured to an injured third party is permissible, the court in Phelan by *Phelan v. State Farm Mut. Auto. Ins. Co.* held that such an assignment may result in collusive conduct against the insurer. 114 Ill. App. 3d 96, 102 (1st Dist.1983) ("[s]uch collusive conduct could be raised as a defense to an assigned bad faith claim against an insurance company.").

If a plaintiff in a bad faith action is not the insured, the insured must assign his or her cause of action before the plaintiff can proceed. *Kennedy v. Kiss*, 89 Ill. App. 3d 890, 895 (1st Dist. 1980).

VII. STATUTE OF LIMITATIONS

Pursuant to 735 Ill. Comp. Stat. 5/13-205, the statute of limitations period for a bad faith claim in Illinois is five years. 735 Ill. Comp. Stat. 5/13-205 (West 1982); *McCarter v. State Farm Mut. Auto. Ins. Co.*, 130 Ill. App. 3d 97, 100 (3d Dist.1985).

Additionally, the duty of an insurer 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." *Chandler v. Am. Fire & Cas. Co.*, 377 Ill. App. 3d 253, 257 (4th Dist. 2007).

Bad Faith Law:
A Brief Survey of Michigan

MICHIGAN

I. FIRST-PARTY STATUTORY BAD FAITH:

Michigan has enacted a Uniform Trade Practices Act, Mich. Comp. Laws Ann. § 500.2001-2050, which identifies specifically prohibited conduct. *See* Mich. Comp. Laws Ann. § 500.2026(1) (West 2020).

However, an insured has no statutory private cause of action for violations of the Michigan Uniform Trade Practices Act. *Young v. Michigan Mut. Ins. Co.*, 362 N.W.2d 844, 846 (Mich. Ct. App. 1984).

Under the Uniform Trade Practice Act, Mich. Comp. Laws §500.2001, *et seq.*, that an insurer is liable for penalty interest if it fails to timely pay a claim not reasonably in dispute. *Burnside v. State Farm Fire Cas. Co.*, 528 N.W.2d 749, 753 (Mich. Ct. App. 1995).

While the insured cannot bring a private cause of action, he or she but may be awarded statutory interest on late or withheld insurance benefits at 12 percent per annum. *Safie Enterprises, Inc. v. Nationwide Mut. Fire Ins. Co.*, 381 N.W.2d 747, 751 (Mich. Ct. App. 1985). Interest begins to accrue 60 days following submission of the claimant's satisfactory proof of loss. *Id.*

II. THIRD-PARTY STATUTORY BAD FAITH

Just as in first-party bad faith cases, Michigan does not provide a private statutory cause of action for third parties. *See Safie Enterprises, Inc. v. Nationwide Mut. Fire Ins. Co.*, 381 N.W.2d 747, 751 (Mich. Ct. App. 1985).

III. COMMON LAW

In Michigan, plaintiffs have a cause of action under common law of contracts. *Murphy v. Cincinnati Ins. Co*., 772 F.2d 273, 277 (6th Cir. 1985) (noting that Michigan recognizes contractual obligation on part of insured to act in good faith).

The Michigan Supreme Court has defined bad faith as the "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty." *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.*, 393 N.W.2d 161, 164 (Mich. 1986).

IV. BAD FAITH STANDARDS

i. Generally

The court in *City of Wakefield v. Globe Indem. Co.* held that bad faith by an insurance company for a breach of a duty to settle is something more than negligence, but less than fraud. 225 N.W. 643, 647 (Mich. 1929).

Michigan courts have suggested that an insurer can be liable for bad faith for conducting improper investigations without determining whether coverage must ultimately exist, and have listed factors in determining bad faith, some of which do not imply the existence of coverage. *Murphy v. Cincinnati Ins. Co.*, 576 F. Supp. 542, 543 (E.D. Mich. 1983) *aff'd*, 772 F.2d 273 (6th Cir. 1985) ([a] failure to properly investigate an insurance claim can constitute bad faith"); *Michigan Mun. Risk Mgmt. Auth. v. State Farm Fire & Cas. Co*., 559 F. Supp. 2d 794, 809 (E.D. Mich. 2008) ("Michigan law does recognize an implied contractual duty on the part of the insurer to act in good faith when investigating an insurance claim").

In Michigan, good faith denials, offers of compromise, or other honest errors of judgment by an insurer made in attempts to settle a claim ordinarily are not sufficient to establish bad faith with respect to an insured. *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co*., 393 N.W.2d 161, 165 (Mich. 1986). Additionally, bad faith claims by the insurer generally may not be based on negligence or bad judgment, so long as the actions were made honestly and without concealment. *Id.*

In *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.*, the court also provided the following twelve factors for Michigan courts to consider when determining an insurer defendant's bad faith:

> (1) failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interest of the insured; (2) failure to inform the insured of all settlement offers that do not fall within the policy limits; (3) failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances; (4) failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury; (5) rejection of a reasonable offer of settlement within the policy limits; (6) undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high; (7) an attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits; (8) failure to make a proper investigation of the claim prior to

> refusing an offer of settlement within the policy limits; (9) disregarding the advice or recommendation of an adjuster or attorney; (10) serious and recurrent negligence by the insurer; (11) refusal to settle a case within the policy limits following an excessive verdict when the chances of reversal on appeal are slight or doubtful; and (12) failure to take an appeal following a verdict in excess of the policy limits, where there are reasonable grounds for such an appeal, especially where trial counsel so recommended.

Id. at 165–66.

ii. Consequential Damages

In *Kewin v. Mass. Mut. Life Inc. Co*., the court held that, absent allegation and proof of tortious conduct existing independent of the breach, exemplary damages may not be awarded in common law actions brought for breach of a *commercial* contracts. 295 N.W.2d 50, 53 (Mich. 1980)

Additionally, an insurer's liability for failure to defend its insured is limited to the amount the insured was damaged by the breach of contract. *Stockdale v. Jamison*, 330 N.W.2d 389, 391 (Mich. 1982).

However, exemplary damages are permissible as compensation for emotional pain and suffering under certain limited circumstances. *Jackson Printing Co. v Mitan*, 425 N.W. 2d 791, 795 (Mich. Ct. App. 1988) (emotional damages are awardable where the defendant commits a voluntary act which inspires feelings of humiliation, outrage, and indignity and the conduct must be malicious or so willful and wanton as to demonstrate a reckless disregard of the plaintiff's rights).

The court in *McCahill v. Commercial Union Ins. Co*. further held that, while there is no tort for bad-faith denial of insurance benefits, the emotional distress torts make the underlying bad faith conduct actionable and support damages beyond compensatory. 446 N.W.2d 579, 582 (Mich. Ct. App. 1989) (upholding a $100,000 jury verdict against an insurance company for intentional infliction of emotional distress upon its insured).

iii. Punitive Damages

In *McChesney v. Wilson*, the court held that even when malice is proven, punitive damages are not permitted, which is the general law in Michigan. 93 NW 627, 628 (Mich. 1903).

However, the court in *Kewitt v. Mass. Mut. Life Inc. Co.* clarified that, where an element of damages involves proof of tortious conduct on the part of the defendant that exists independent of the breach, exemplary damages may be recoverable. 295 N.W.2d 50, 55 (Mich. 1980).

V. ATTORNEYS' FEES

Michigan follows the American rule, which provides that attorneys' fees are only recoverable when expressly authorized by a statute, court rule, or a recognized exception, such as a prevailing party provision in the contract between the parties. *Burnside v State Farm Fire & Cas Co*., 528

N.W. 2d 749, 754 (Mich. Ct. App. 1995). Thus, attorneys' fees are generally not available for bad faith actions. *Id.*

However, in *Murphy v. Cincinnati Ins. Co*., the court held that Michigan law permits an award of attorneys' fees as a proper measure of damages arising out of an insured's implied contractual duty to act fairly and reasonably in investigating and refusing to pay an insured's claim. 772 F.2d 273, 277 (6th Cir. 1985).

VI. ASSIGNMENT OF RIGHTS

A third-party, such as a judgment creditor, with a valid assignment of the insured's cause of action against the insurer has a right of direct action for alleged wrongful refusal to settle the claim, which may be by garnishment. *Rutter v. King*, 226 N.W.2d 79, 82 (Mich. Ct. App. 1974).

VII. STATUTE OF LIMITATIONS

Pursuant to Mich. Comp. Laws § 600.5807(8), the statute of limitations for contractual actions is six years. Mich. Comp. Laws § 600.5807(8) (West 2018).

The Supreme Court of Michigan suggested that the bad faith cause of action "originates in the implied covenant of good faith and fair dealing which arises from the contract between the insurer and the insured." *Commercial Union Ins. Co. v. Med. Protective Co*., 393 N.W.2d 479, 482 (Mich. 1986).

Bad Faith Law:
A Brief Survey of Missouri

MISSOURI

I. FIRST PARTY STATUTORY BAD FAITH

Mo. Rev. Stat. § 375.420 creates a statutory claim against insurers for statutory penalties and attorneys' fees for failing to pay a covered loss for a "vexatious refusal" to pay benefits. Mo. Rev. Stat. § 375.420 (West 2020). 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.

Id.

Pursuant to Mo. Rev. Stat. § 375.420, does not provide relief for insureds claiming a vexatious refusal to pay benefits in automobile liability cases. *Id.*

Certain Missouri mutual insurers, such as "all town mutual insurance companies and all farmers' mutual insurance companies possessing a certificate of incorporation from the secretary of state," are excluded from liability under Missouri's vexatious refusal statutes. Mo. Rev. Stat. § 380.511 (West 2020).

The Supreme Court of Missouri held that a liability insurer may be liable over and above its policy limits if it acts in bad faith in refusing to settle the claim against its insured within its policy limits when it has a chance to do so. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 828 (Mo. 2014).

For purposes of the statute, an insurer's failure to pay a claim is "vexatious" when it is "willful and without reasonable cause or excuse, as the facts would have appeared to a reasonable person before trial." *Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39, 42 (Mo. 1976).

II. THIRD-PARTY STATUTORY BAD FAITH

Missouri courts recognize a third-party beneficiary covered under a policy may bring a vexatious refusal to pay claim under Mo. Rev. Stat. § 375.420. *Drury Co. v. Missouri United Sch. Ins. Counsel*, 455 S.W.3d 30, 35 (Mo. Ct. App. 2014) (holding that a third-party subcontractor had standing as third-party beneficiary).

III. COMMON LAW

In Missouri, plaintiffs alleging failure to pay policy benefits do not have a common law action for bad faith available. *Overcast v. Billings Mut. Ins. Co*., 11 S.W.3d 62, 69 (Mo. 2000) (noting that where the legislature intends to preempt a common law claim, it must do so clearly). Thus, plaintiffs seeking relief for an allegation of an insurer failing to pay benefits must pursue a Mo. Rev. Stat. § 375.420 cause of action.

The Missouri Supreme Court in *McCormack Baron Mgmt. Servs., Inc. v. Am. Guarantee & Liab. Ins. Co*, however, suggested that there is a common law cause of action for bad faith refusal to defend in a first-party bad faith action. 989 S.W.2d 168, 170 (Mo. 1999) ("[t]he duty to defend is determined by comparing the language of the insurance policy with the allegations in the complaint.").

Further, there is a first-party bad faith common law cause of action for the failure to settle a third-party claim under a liability policy. *Zumwalt v. Utilities Ins. Co*., 360 Mo. 362, 371, 228 S.W.2d 750, 754 (1950).

The Missouri Supreme Court also noted that Missouri does not recognize a common law cause of action for bad faith in tort. *Duncan v. Andrew Cty. Mut. Ins. Co.*, 665 S.W.2d 13, 18 (Mo. Ct. App. 1983).

IV. BAD FAITH STANDARDS

i. Generally

In Missouri, it is unclear whether an inadequate investigation is vexatious where an adequate investigation would have established the absence of coverage. *Allen v. State Farm Mut. Auto. Ins. Co.*, 753 S.W.2d 616, 620 (Mo. Ct. App. 1988) ("A refusal to pay based on a suspicion that is unsupported by substantial facts is vexatious. The adequacy of an insurer's investigation of a claim

may be considered evidence of vexatiousness. The denial of liability without stating any ground for denial is sufficient to warrant the submission of vexatious damages.").

An insurer will not be liable for vexatious refusal to pay under this statute if the insurer has reasonable cause to believe that there is no liability under its policy. *Grobe v. Vantage Credit Union*, 679 F.Supp. 2d 1020, 1034 (E.D. Mo. 2010).

Further, an insurer is not liable for bad faith if there is any reasonable doubt as to its liability, in absence of conduct clearly reflecting delaying tactics, bad faith, or willful and recalcitrant attitude toward claimant. *Wiener v. Mutual Life Ins. Co. of N. Y.*, 61 F.Supp. 430, 432 (E.D. Mo. 1945).

In Missouri, there is no requirement for a plaintiff to prove a pattern or practice of unfair or deceptive conduct to be successful in a bad faith claim. *Shobe v. Kelly*, 279 S.W.3d 203, 211 (Mo. Ct. App. 2009) (concluding sufficient evidence supported bad faith award without discussing evidence of any unfair or deceptive conduct by insurer).

ii. First Party Legal Standard

To recover under Mo. Rev. Stat. §375.420, the insured must show that: (1) The insured had an insurance policy with insurer; (2) The insurer refused to pay a claim; and (3) The insurer's refusal to pay the claim was without reasonable cause or excuse. *Schubert v. Auto Owners Ins. Co.*, 649 F.3d 817 (8th Cir. 2011).

Bad faith has been defined by the Missouri Supreme Court as "the intentional disregard of the *financial interest* of [the] insured in the hope of escaping the responsibility imposed upon the [insurer] by its policy." *Scottsdale Insurance Company v. Addison Insurance Company*, 448 S.W.3d 818, 828 (Mo. 2014) (en banc) (involving subrogation claim of excess insurer against primary insurer for bad faith refusal to settle claim against insured).

The court in *Groves v. State Farm Mut. Auto. Ins.* held that an insurer's failure to pay a claim is "vexatious" when it is "willful and without reasonable cause or excuse, as the facts would have appeared to a reasonable person before trial" for purposes of Mo. Rev. Stat. §375.420. 540 S.W.2d 39, 42 (Mo. 1976); *Hocker Oil Co. Inc. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510, 523 (Mo. Ct. App. 1999) (holding handling of claim is not vexatious where there is open question of law or fact).

Failing to settle does not constitute bad faith standing alone. Instead, in weighing the belief of a valid defense as to liability or amount of damages, the insurer must consider the interest of the insured in being exonerated from liability. This is accomplished by weighing the strength of the defense, the settlement expenditure by the insurer, and the possible personal exposure of the insured. *Landie v. Century Indem. Co.*, 390 S.W.2d 558, 563 (Mo. Ct. App. 1965).

The court in *Missouri Public Entity Risk Management Fund v. American Cas. Co. of Reading* also noted that an insurer's obligation to act in good faith regarding whether to settle a claim is inherent in the insurance policy. 399 S.W.3d 68, 74 (Mo. Ct. App. W.D. 2013).

iii. Third Party Legal Standard

A bad faith failure to settle claim for a third-party bad faith action requires proof of the following elements: the "insurer: (1) reserves the exclusive right to contest or settle any claim; (2) prohibits the insured from voluntarily assuming any liability or settling any claims without consent; and (3) is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy." *Scottsdale Ins. Co. v. Addison Ins. Co*., 448 S.W.3d 818, 827 (Mo. 2014).

According to the court in *Zumwalt v. Utilities Ins. Co.*, bad faith is a state of mind and mere negligence is not sufficient to state a claim for bad faith in a third-party action. 228 S.W.2d 750, 754 (Mo. 1950).

iv. Consequential Damages

Under Mo. Rev. Stat. §375.420, consequential damages are not available. Mo. Rev. Stat. §375.420 (West 2020). However, consequential damages may be recovered only on the underlying breach of contract claim. *Overcast v. Billings Mut. Ins. Co*., 11 S.W. 3d 62, 67 (Mo. 2000).

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

v. Punitive Damages

Punitive damages are available as provided by statute. Mo. Ann. Stat. § 375.420 (West 2020).

Punitive damages require a showing that the defendant committed a wrongful act, knowing it to be wrongful, without just cause or excuse. *Dyer v. Gen. Am. Life Ins. Co*., 541 S.W.2d 702, 706 (Mo. Ct. App. 1976).

In *Barton v. Farmers Ins. Exch.*, the award for punitive damages against the insurer was improper because the insurer obtained bids for the insured's property repair and was merely being "somewhat slow in moving towards settlement." 255 S.W.2d 451, 457 (Mo. App. 1953).

V. ATTORNEYS' FEES

Under § 375.420, an insured may recover: 20% of the first $1,500 of the loss, 10% of the amount of the loss in excess of $1,500; and reasonable attorneys' fees. Mo. Ann. Stat. § 375.420 (West 2020).

The court in *Tate v. Golden Rule Ins. Co*. noted that an award of attorneys' fees pursuant to § 375.420's vexatious refusal to pay claim is not mandatory and is merely permissive. 859 S.W.2d 831, 835 (Mo. Ct. App. 1993) ("[t]he statute is permissive, not mandatory.").

An insurance company is liable for attorney fees and expenses where it refuses to defend an insured who is in fact covered; this is true even though the company acts in good faith and has reasonable ground to believe there is no coverage under the policy. *Wood v. Safeco Ins. Co. of Am*., 980 S.W.2d 43, 55 (Mo. Ct. App. 1998).

The court in *Travelers Indem. Co. v. Woods* held that it was not improper to solely award attorneys' fees, without awarding damages for vexatious conduct. 663 S.W.2d 392, 397 (Mo. Ct. App. 1983)

In *Shobe v. Kelly*, the court awarded attorneys' fees in an action for actual damages for the improper denial of settlement. 279 S.W.3d 203, 212 (Mo. Ct. App. 2009).

However, in a bad faith action for failure to settle within policy limits, the Missouri Supreme Court rejected a claim for statutory attorneys' fees because a bad faith claim is considered a tort action, not an action on a contract. *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 756 (Mo. 1950).

VI. ASSIGNMENT OF RIGHTS

In Missouri, an action for bad faith refusal to settle is assignable. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 820 (Mo. 2014).

Additionally, a third party may not bring a common law bad faith claim against an insurer absent an assignment of the insured's right to bring such a claim. *Linder v. Hawkeye-Sec. Ins. Co.*, 472 S.W. 2d 412, 415 (Mo. 1971).

In *Bergerson v. Gen. Ins. Co. of Am., of Seattle, Wash.*, the court held that the statutory claim for punitive damages and attorneys' fees for the insured's allegedly vexatious refusal to pay claim could be validly assigned and raised by the assignee. 148 S.W.2d 812, 820 (1941).

VII. STATUTE OF LIMITATIONS

The statute of limitations period for a bad faith claim in Missouri to obtain relief under Mo. Rev. Stat. §375.420 is three years. Mo. Rev. Stat. §516.130(2) (West).

However, since a bad faith refusal to settle claim is considered a tort action, the statute of limitations for this type of action is five years. Mo. Rev. Stat. §516.120 (West); *see also Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 556 (Mo. Ct. App. 1990).

Under Mo. Rev. Stat. §516.110(1), the statute of limitations for a breach of contract action is ten years. Mo. Rev. Stat. §516.110(1) (West); *Spalding v. Stewart Title Guar. Co.*, 463 S.W.3d 770, 775 (Mo. 2015) (en banc).

Bad Faith Law:
A Brief Survey of New Jersey

NEW JERSEY

I. FIRST-PARTY STATUTORY BAD FAITH

The court in *Pickett v. Lloyd's* noted that, to establish a first-party bad faith claim for denial of benefits in New Jersey, a plaintiff must show that no debatable reasons existed for denial of the benefits. 621 A.2d 445, 480 (N.J. 1993). However, under the "fairly debatable" standard, a claimant who could not have established as a matter of law a right to summary judgment on the substantive claim would not be entitled to assert a claim for an insurer's bad faith refusal to pay the claim. *Id.* at 454.

There is no statutory private cause of action under New Jersey's Unfair Trade Practices Act under N.J. Stat. Ann. § 17:29B-1. *Pickett*, 621 A.2d at 468 (the UCSPA "regulatory framework does not create a private cause of action").

II. THIRD-PARTY STATUTORY BAD FAITH

Just as in first-party actions, there is no statutory private cause of action for third-party bad faith actions in New Jersey. *Pickett*, 621 A.2d at 468; *see also* N.J. Stat. Ann. § 17:29B-1 (West 1972).

III. COMMON LAW

The Supreme Court of New Jersey recognizes a common law bad faith cause of action for first-party bad faith actions. *Pickett*, 621 A.2d at 474; *see also Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 323 A.2d 495, 504 (N.J. 1974) (recognizing common law bad faith cause of action for failure to settle claims against insured under liability policy).

The court in *Longworth v. Van Houten*, noted that an insurer has a thirty-day presumptive period to notify the insured of its intentions concerning the settlement offer made by the tortfeasor. 223 N.J. Super. 174, 194, 538 A.2d 414, 424 (App. Div. 1988). The time frame may be extended by extraordinary circumstances but such extensions should be sparingly exercised. *Rutgers Cas. Ins. Co. v. Vassas*, 139 N.J. 163, 173, 652 A.2d 162, 167 (1995).

The court in *Atl. City v. Am. Cas. Ins. Co*. noted that a third-party may pursue a bad faith action against an insurer and can take "complete control, investigation, preparation, and defense" of the claims. 254 F. Supp. 396, 398 (D.N.J. 1966). The third-party, such as a judgment creditor of the insured, is entitled to bring an action for a breach of policy by the insurer that resulted in an excess judgment. *Id.*

IV. BAD FAITH STANDARDS

i. Generally

The court in *Hudson Universal, Ltd. v. Aetna Ins. Co.* held that, for an insurer to have acted in bad faith, coverage must exist for the insured's loss. 987 F. Supp. 337, 342 (D.N.J. 1997). However, in *Price v. New Jersey Mfrs. Ins. Co*., the court noted that an insurer acts in bad faith when "stringing along" an insured for long periods of time in order to render a claim stale that would have otherwise been covered under a policy. 368 N.J. Super. 356, 365 (App. Div. 2004) *aff'd*, 182 N.J. 519, 867 A.2d 1181 (2005).

In commenting on an insurer's breach of its duty of good faith, the court in *Bowers v. Camden Fire Ins. Ass'n* held that an insurer's breach of good faith may be found upon a showing that it has breached its fiduciary obligations, regardless of any malice or will. 51 N.J. 62, 79, 237 A.2d 857 (1968).

The New Jersey Supreme Court in *Wood v. New Jersey Mfrs. Ins. Co*. reemphasized that "every contract in New Jersey contains an implied covenant of good faith and fair dealing [, t]hat is, neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 206 N.J. 562, 577, 21 A.3d 1131 (2011).

ii. First Party Legal Standard

The Supreme Court of New Jersey noted in *Badiali v. N.J. Mfrs. Ins. Grp.* that, to establish a first-party bad faith claim for denial of benefits, a plaintiff must show that no debatable reasons existed for denial of the benefits. 220 N.J. 544, 554, 107 A.3d 1281, 1288 (2015).

Further, the court in *Pickett* held that an insurer's failure to pay a claim for policy benefits constitutes bad faith "when the failure to pay the policy results from a denial or withholding of benefits for reasons that are not even debatably valid and the economic losses sustained by the policyholder are clearly within the contemplation of the insurance company." *Pickett v. Lloyd's*, 131 N.J. 457, 461, 621 A.2d 445, 447 (1993). To succeed on a bad faith denial claim, an insured must not only establish that the claim is covered, but also that coverage is not subject to genuine

dispute, either as a matter of fact or law. *Id.* An insured must also prove the specific economic loss was, in fact, caused by the bad faith denial of coverage. *Id.*

The court in *Raritan Bay Fed. Credit Union v. CUMIS Ins. Soc., Inc*. held that, where the insurer had multiple bases for denying payment, the insured must establish that all the insurer's bases were unreasonable. No. 09-1512, 2010 WL 4292175, at *7 (D.N.J. Oct. 21, 2010) (finding insured's motion for leave to amend its complaint to add a claim for bad faith denial of coverage was futile where it only alleged that one of the insurer's three grounds for denial were unreasonable and absent such allegations, a reasonable basis for the insurer's denial existed).

New Jersey courts have not extended the scope of bad faith claims to include an insurer's behavior surrounding the sale, issuance, or cancellation of a policy. *See NN&R, Inc. v. One Beacon Ins. Group*, No. 03-5011, 2006 WL 1765077, at *11 n.21 (D.N.J. June 26, 2006) (granting an insurer's motion for summary judgment on the insured's bad faith claims relating to the sale, issuance, or cancellation of the policy because New Jersey courts have not extended the scope of bad faith claims beyond the handling and payment of claims, and the insured could not offer any case law or other persuasive authority suggesting otherwise).

iii. Third Party Legal Standard

In third-party bad faith actions, New Jersey courts consider the following factors in determining whether the insurance carrier should have settled within the coverage limits: (1) the insurer's good faith in refusing to pay demands, (2) excessiveness of the demand; (3) the bona fides of one or both parties, (4) the insurer's justification in litigating an issue, (5) the insured's conduct in contributing substantially to the necessity for litigation, (6) the general conduct of the parties, and (7) the totality of the circumstances. *Estate of Leeman v. Eagle Ins. Co*., 309 N.J. Super. 525, 707 A.2d 1037, 1043 (App. Div. 1998).

iv. Punitive Damages

Under N.J. Stat. Ann. §2A:15-5.9, punitive damages are available for bad faith actions against an insured. N.J.S.A. §2A:15-5.12. "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." *Id.* This statute provides that punitive damages are limited to five times compensatory damages or $350,000, whichever is greater. *Id.*

The court in *Pickett* also noted that punitive damages are only available in "egregious circumstances." *Pickett v. Lloyd's*, 131 N.J. 457, 475, 621 A.2d 445, 455 (1993); *see also Miglicio v. HCM Claim Mgmt. Corp*., 288 N.J. Super. 331, 347, 672 A.2d 266, 274 (Law Div. 1995) (holding that the insurer acted with wanton recklessness or maliciousness when it failed to respond to plaintiff's settlement offer, plaintiff's complaint, and refused to agree to the arbitrators valuation).

V. ATTORNEYS' FEES

New Jersey Civil Rule 4:42-9(6) provides that attorney's fees are recoverable "[i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant."

In *Scullion v. State Farm Ins. Co*., the court noted that "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."

345 N.J. Super 431, 438 (App. Div. 2001); *see also Bello v. Merrimack Mut. Fire Ins. Co*., No. A-4750-10T4, 2012 WL 2848642, at *1 (N.J. Super. Ct. App. Div. July 12, 2012) (the question of bad faith "was squarely presented to the jury" and "sufficient evidence was offered and apparently accepted by the jury as credible, supporting its finding of bad faith.").

VI. ASSIGNMENT OF RIGHTS

In *Rova Farms Resort, Inc. v. Investors Ins. Co. of America*, the Supreme Court of New Jersey recognized a cause of action for bad faith by an insured against its liability insurer for an unreasonable refusal to settle a third-party claim within policy limits and exposing the insured to a jury verdict in excess of the policy limits. 65 N.J. 474, 323 A.2d 495 (1974). The court held that a third-party that receives a verdict in excess of a tortfeasor's policy limits may obtain an assignment of the tortfeasor's claim of bad faith against his/her insurer in an effort to recover the entirety of the verdict. *Id.* The court reasoned that the insurer cannot frustrate its purpose to protect the insured from liability within the limits of the contract by a selfish settlement decision which exposes the insured to a judgment beyond the specific monetary protection which his premium has purchased. *Id.*

VII. STATUTE OF LIMITATIONS

New Jersey courts have not addressed the issue of the applicable statute of limitations for common law bad faith claims. However, the statute of limitations for actions under a contract is six years. N.J. Stat. Ann. §2A:14-1.

Bad Faith Law:
A Brief Survey of New York

NEW YORK

I. FIRST-PARTY STATUTORY BAD FAITH

An insurer's conduct is regulated under the New York Insurance Law § 2601, and provides "no insurer doing business in [New York] shall engage in unfair claim settlement practices." N.Y. Ins. Law § 2601 (West 2020).

There is generally no statutory basis for an insured to bring a first-party bad faith claim in New York. *Rocanova v. Equitable Life Assur. Soc. of U.S.*, 83 N.Y.2d 603, 613, 634 N.E.2d 940, 943 (1994) (holding that there is no private cause of action for New York Insurance Law § 2601).

However, New York recognizes a private cause of action under New York General Business Law § 349 for deceptive business practices limited to "marketing schemes" of insurers that had a broad impact on consumers at large, rather than claims handling or settlement practices. *Plavin v. Grp. Health Inc.*, 35 N.Y.3d 1, 10, 146 N.E.3d 1164, 1169, *reargument denied*, 35 N.Y.3d 1007, 149 N.E.3d 442 (2020) (holding that the plaintiffs had a private cause of action under New York General Business Law § 349 because the health insurers' conduct was not "private in nature or a single shot transaction," and "was consumer-oriented in the sense that they . . . affected similarly situated consumers.").

II. THIRD-PARTY STATUTORY BAD FAITH

Just as in first-party actions, there is no statutory private cause of action for third-party bad faith actions in New York. *See Vector Graphics Supply, Inc. v. Nat'l Westminster Bank USA*, No. 21984-92, 1996 WL 397048, at *3 (N.Y. City Ct. Jan. 25, 1996).

III. COMMON LAW

At common law, the court made clear in *Acquista v. New York Life Ins. Co*. that first-party bad faith actions are not cognizable as a separate tort but may support recovery in excess of policy limits under contractual principles. 285 A.D.2d 73, 82, 730 N.Y.S.2d 272, 279 (2001); *see also Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 35, 544 N.Y.S.2d 359, 369 (1989) ("a plaintiff must show more than mere negligence on the part of the insurer to support a bad faith action.")

The court in *N.Y. Univ. v. Cont'l Ins. Co.* noted that, when there has been merely a breach of contract, the remedy is limited to contractual damages, not including punitive or other types of extracontractual damages. 87 N.Y.2d 308, 662 N.E.2d 763, 639 N.Y.S.2d 283 (1995).

However, when there is an independent tort and the tortious conduct is egregious, directed to the insured, and part of a pattern and practice directed toward the public generally, punitive damages may be awarded. *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 196, 886 N.E.2d 127 (2008) ("punitive damages are not available for breach of an insurance contract unless the plaintiff shows both egregious tortious conduct directed at the insured claimant and "a pattern of similar conduct directed at the public generally).

The landmark case of *Gordon v. Nationwide Mutual Insurance Co*. involved a claim of bad faith after a verdict of almost $260,000 was reached following the insurer's refusal to defend liability claims and settle within the $20,000 policy limits. 30 N.Y.2d 427, 430, 285 N.E.2d 849, 334 N.Y.S.2d 601, i, 410 U.S. 942 (1972). The insurer alleged the policy had been canceled prior to the loss. *Id.* at 431, 285 N.E.2d at 850, 334 N.Y.S.2d at 603. It was ultimately determined that the policy had been improperly canceled and the insurer should have defended the claims. *Id.* In ruling that no bad faith had been demonstrated, the court stated, "bad faith requires an extraordinary showing of a disingenuous or dishonest failure to carry out the insurance contract." *Id.* at 438, 285 N.E.2d at 855, 334 N.Y.S.2d at 609.

The court in *Pavia v. State Farm Mut. Auto. Ins. Co.* expressed factors to determine when deciding whether an insurer acted in bad faith in the liability insurance context. 82 N.Y.2d 445, 446, 626 N.E.2d 24 (1993). These factors include whether the insurer's investigatory efforts prevented it from making an informed evaluation of the risk; the likelihood of success on the liability of the underlying action; the potential magnitude of the damages; the financial burden each party may be exposed to as a result of the refusal to settle; whether the insurer properly investigated; any potential defenses; and other evidence which tends to establish or negate the insurer's bad faith in refusing to settle. *Id.*

Lastly, where consequential injury is reasonably foreseeable based on the insurer's breach of its duty of good faith, consequential damages may be recoverable for bad faith. *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 886 N.E.2d 127, 856 N.Y.S.2d 505 (2008) (finding that, where an insurer failed to promptly investigate and pay covered claims in good faith on a business interruption claim, the claim for consequential damages was related to the demise of a business and was foreseeable and recoverable).

IV. BAD FAITH STANDARDS

i. Generally

In New York, an action for bad faith lies in contract law, rather than in tort. *Cont'l Cas. Co. v. Nationwide Indem. Co.*, 16 A.D.3d 353, 355, 792 N.Y.S.2d 434, 435 (2005).

However, when an insurer's conduct is "egregious" a claim can sound in tort for fraud or tortious breach of the duty of care. *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 316, 662 N.E.2d 763, 767 (1995).

In *Pavia v. State Farm Mut. Auto. Ins. Co.*, the court held that every policy for liability insurance implicitly provides the insurer's obligation to exercise good faith in deciding whether to settle a claim against the insured. 82 N.Y.2d 445, 605 N.Y.S.2d 208, 210–211, 626 N.E.2d 24 (1993); *see also Soto v. State Farm Ins. Co.*, 83 N.Y.2d 718, 613 N.Y.S.2d 352, 354, 635 N.E.2d 1222 (1994) (holding that, when an insurer breaches its duty of good faith to settle a claim, it is liable for damages caused by the breach as in instances of it failing to accept a settlement offer in bad faith).

However, the court in *In re September 11 Property Damage Litigation* noted that, since an insurer has discretion to settle whenever and with whomever it chooses, provided it does not act in bad faith, an insurer's pursuit of unilateral settlement is not bad faith in itself. 650 F.3d 145, 147 (2d Cir. 2011) (applying New York law); *see also Sea Tow Services International, Inc. v. St. Paul Fire & Marine Insurance Company*, 211 F. Supp. 3d 528, 529 (E.D. N.Y. 2016), *aff'd*, 699 Fed. Appx. 70 (2d Cir. 2017) (applying New York law) (the insured failed to show that there was any appreciable risk of personal liability to the insured in the event of a unilateral settlement, let alone that the insurer recognized such a risk and chose to disregard it, and the insurer was well within its contractual rights to settle its sole insured out of the lawsuit within policy limits, without also trying to extricate a party that it did not insure and to which it owed no legal obligation).

Bad faith is generally proven by circumstantial evidence. *Reifenstein v. Allstate Ins. Co.*, 92 A.D.2d 715, 716, 461 N.Y.S.2d 104 (1983) (insured stated a cause of action against his automobile insurer for bad-faith refusal to settle, where the element of bad faith could be inferred from the certainty of liability arising out of a one-car accident and the obviousness that the damages would exceed the policy limit, the initial refusal to settle for the policy limit, which was an amount only $500 more than the insurer was willing to pay, the explanation given by insurer to the decedent's family for its refusal to settle, and the delay in making the unconditional offer of the policy limit).

Under New York law, coverage is a prerequisite to a bad faith claim against an insurer. *Redcross v. Aetna Cas. & Sur. Co.*, 260 A.D.2d 908, 913 (1999) ("[i]t has been recognized that bad faith cannot be established when the insurer has an arguable basis for denying coverage."); *Zurich Ins. Co. v. Texasgulf, Inc.*, 233 A.D.2d 180, 180 (1996) (" [bad faith] claim should have been dismissed as a matter of law, since a claim of bad faith must be predicated on the existence of coverage of the loss in question.").

ii. First-Party Legal Standard

The court in *Acquista v. New York Life Ins. Co.* noted that New York is unwilling to adopt the widely accepted tort cause of action for "bad faith" in the context of a first-party claim. 285 A.D.2d

73, 81, 730 N.Y.S.2d 272, 278 (2001). The court vouched for a 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." *Id.*

In *N.Y. Univ. v. Cont'l Ins. Co*., the court expressed a four-part test in determining whether an insurer is liable for bad faith in a breach of contract:

> (1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth in *Walker v. Sheldon*, 10 N.Y.2d 401, 404–405, 179 N.E.2d 497, 223 N.Y.S.2d 488, *supra*; (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally.
>
> 87 N.Y.2d 308, 316, 662 N.E.2d 763 (1995).

Bad faith exists, according to *Griffith Oil Co., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, where the alleged wrong is morally culpable, or is actuated by evil and reprehensible motives, and these requirements cannot be met where the insurer has an arguable case for denying coverage. 15 A.D.3d 982, 983, 789 N.Y.S.2d 352, 354 (2005).

Further, there must be a pattern and practice directed toward the public in generally. *See* N.Y. Ins. Law § 349; *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 316, 662 N.E.2d 763 (1995).

iii. Third-Party Legal Standard

According to *Pavia v. State Farm*, to be liable for bad faith in a third-party action, the insurer's conduct must constitute a "gross disregard" of the insured's interests. 82 N.Y.2d 445, 454, 626 N.E.2d 24, 605 N.Y.S.2d 208 (1993) (holding that liability of an insurer to a third-party only arises where the liability is clear and the potential recovery against the insured far exceeds the insurance coverage).

Relating to a failure to accept a settlement offer, "[t]he bad-faith equation must include consideration of all of the facts and circumstances relating to whether the insurer's investigatory efforts prevented it from making an informed evaluation of the risks of refusing settlement." *Id.*

In *Browdy v. State-Wide Ins. Co.*, the court noted that an injured third-party, after obtaining a judgment in excess of the policy limits, does not have a cause of action against the insurer for failure to settle within the policy limits, even if that person can show bad faith on the insurer's part, because had the action against the insured been settled within the policy limits, the injured party would still have received less than would be realized by payment of the policy limits after a judgment in excess of them. 56 Misc. 2d 610, 613, 289 N.Y.S.2d 711 (Sup. Ct. 1968). Also, in this situation, the injured party is not an intended beneficiary of the policy. *Id.*

iv. Punitive Damages

N.Y. Ins. Law § 2601 does not provide a statutory avenue for punitive damages in a bad faith action. *See N.Y. Univ. v. Cont'l Ins. Co*, 87 N.Y.2d 308, 314, 662 N.E.2d 763 (1995).

In New York, punitive damages are available in a bad faith breach of contract action only when there is a separate actionable claim as an independent tort available. *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 662 N.E.2d 763, 639 N.Y.S.2d 283 (1995). The tortious conduct must be of an egregious nature, must be directed to the insured, and must be part of a pattern and practice directed toward the public generally. *Id.*

In the context of third-party bad faith actions, punitive damages are only available in instances where the insurer's actions evince a "conscious or knowing indifference to the probability of an excess verdict" in the underlying action. *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 399 (2d Cir. 2000) (applying N.Y. law).

V. ATTORNEYS' FEES

In New York, N.Y. Gen. Bus. Law § 349 governs attorneys' fees to deceptive acts and practices, prescribing that a "court may award reasonable attorney's fees to a prevailing plaintiff." N.Y. Gen. Bus. Law § 349 (h) (West 2020).

However, in *N.Y. Univ. v. Cont'l Ins. Co*., the court noted that "it is well established [in New York] that an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy." 87 N.Y.2d 308, 324, 662 N.E.2d 763, 772 (1995).

Further, attorneys' fees will be unavailable unless contemplated by the parties at the time of contracting. *Panasia Estates v. Hudson Ins. Co*., 10 N.Y.3d 200, 203, 886 N.E.2d 135 (2008) (holding that that consequential damages are recoverable for breach of the covenant of good faith and fair dealing in an insurance contract if the damages were within the contemplation of the parties, as the probable result of a breach at the time of, or prior to, contracting).

VI. ASSIGNMENT OF RIGHTS

The court in *Home Ins. Co. v. United Servs. Auto. Ass'n* held that a bad-faith claim is generally considered assignable, including to the injured party, and the assignee is entitled to seek recovery of the amount of the excess verdict and is not limited to the amount it paid for the assignment. 262 A.D.2d 452, 454, 692 N.Y.S.2d 121, 123 (1999).

However, an assignee may not maintain such an action against the tortfeasor's insurer, where the insurer had an arguable basis on which to disclaim coverage. *Bennion v. Allstate Ins. Co.*, 284 A.D.2d 924, 925, 727 N.Y.S.2d 222, 225 (2001).

Similarly, the court in *Daus v. Lumbermen's Mut. Cas. Co.* held that an insured's assignee is estopped from contending that a liability insurer acted in bad faith by failing to settle a claim on

the insured's behalf within policy limits, where it was the insured's own statements that led to the insurer's initial refusal to settle. 241 A.D.2d 665, 666, 659 N.Y.S.2d 584, 585 (1997).

VII. STATUTE OF LIMITATIONS

Pursuant to N.Y. C.P.L.R. § 213(2), the statute of limitations that apply to breach of contract actions is six years. N.Y. C.P.L.R. § 213 (2020).

The six-year limitations period applies to claims against an insurer based on its contractual duty to indemnify its insured and for a bad faith refusal to settle. *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 31, 544 N.Y.S.2d 359 (1989).

However, the court in Varga v. Liberty Mut. Ins. Co. held that, in the presence of a contractual limitations provision in the policy for only two years, a claim for first-party bad faith is controlled by that provision. 157 A.D.2d 1007, 550 N.Y.S.2d 487 (1990) (noting that "the broad language of the two-year contractual limitation period is binding).

Bad Faith Law:
A Brief Survey of Pennsylvania

PENNSYLVANIA

I. FIRST-PARTY STATUTORY BAD FAITH

In Pennsylvania, an insured can file a statutory first-party bad faith action against his or her insurer under 42 Pa. C.S.A. § 8371 (2020). Under § 8371, a court may take all the following actions if it finds that the insurer acted in bad faith toward the insured:

> (1) Award interest on the amount of the claim from the date the claim was made by the insured 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.
>
> *Id.*

In citing 42 Pa. C.S.A. § 8371, the Supreme Court of Pennsylvania noted in *Rancosky v. Washington Nat'l Ins. Co.* that, to recover in a bad faith action against an insurer, the plaintiff must present clear and convincing evidence: (1) that the insurer did not have a reasonable basis for denying benefits under the policy, and (2) that the insurer knew of or recklessly disregarded its lack of a reasonable basis. 642 Pa. 153, 164, 170 A.3d 364, 370 (2017); *Condio v. Erie Ins. Exch.*, 2006 PA Super 92, ¶ 14, 899 A.2d 1136, 1143 (2006).

II. THIRD-PARTY STATUTORY BAD FAITH

Absent assignment, a third-party cannot bring a bad faith claim under the Pennsylvania bad faith statute. *T.A. v. Allen*, 2005 PA Super 49, ¶ 9, 868 A.2d 594, 599 (2005); *Brown v. Candelora*, 708 A.2d 104, 107 (Pa. Super. Ct. 1998).

The court in Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co. held that a third-party bad faith claim is not viable if the plaintiff does not prevail in the underlying claim. 193 F.3d 742, 744 (3d Cir. 1999) (applying Pennsylvania law).

III. COMMON LAW

Pennsylvania does not recognize an independent common law cause of action for bad faith against a first-party insurer. *Romano v. Nationwide Mutual Fire Ins. Co.*, 435 Pa. Super. 545, 552, 646 A.2d 1228, 1232 (1994).

However, the court in *Cowden v. Aetna Cas & Sur. Co.*, held that there is a common law cause of action for insurers that fail to settle liability insurance claims. *Cowden v. Aetna Cas. & Sur. Co.*, 389 Pa. 459, 468, 134 A.2d 223, 227 (1957) ("if the insurer's handling of the claim, including a failure to accept a proffered settlement, was done in such a manner as to evidence bad faith on the part of the insurer in the discharge of its contractual duty.").

The court in *Brown v. Candelora* expressly states that third parties may not bring a direct action against an insurer for bad faith under any theory. 708 A.2d 104, 106 (Pa. Super. Ct. 1998).

IV. BAD FAITH STANDARDS

i. Generally

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

Pennsylvania courts have required coverage as a prerequisite to bringing a bad faith action. While certain Pennsylvania courts have allowed claims for bad faith failure to investigate, these claims have proceeded only where the denial of coverage was found to be wrongful. *Green Mach. Corp. v. Zurich Am. Ins. Grp.*, 2001 WL 1003217, at *7 (E.D. Pa. Aug. 24, 2001) *aff'd sub nom. Green Mach. Corp. v. Zurich-Am. Ins. Grp.*, 313 F.3d 837 (3d Cir. 2002) ("[b]ecause this Court has determined that there was no coverage, a bad faith claim cannot survive summary judgment.").

In the insurance context, the court in *Lublin v. American Financial Group, Inc.* held that bad faith encompasses any frivolous or unfounded refusal to pay proceeds of a policy that imports a dishonest purpose, and means a breach of a known duty of good faith and fair dealing, through some motive of self-interest or ill will. 960 F. Supp. 2d 534, 539 (E.D. Pa. 2013).

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. 1994).

The court in *Rancosky v. Washington Nat. Ins. Co.* described bad faith conduct to include the "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." 2015 PA Super 264, 130 A.3d 79, 94 (2015), *aff'd and remanded sub nom. Rancosky v. Washington Nat'l Ins. Co.*, 642 Pa. 153, 170 A.3d 364 (2017).

For liability claims, an insurer engages in bad faith conduct when it "refuses to settle a claim that could have been resolved within policy limits without a bona fide belief that it has a good possibility of winning." *Birth Center v. St. Paul Cos., Inc*., 567 Pa. 386, 390, 787 A.2d 376, 379 (2001).

An insurer is required to engage in "an intelligent and objective appraisal of the case in order to best determine the advisability of settlement." *Brown v. Candelora*, 708 A.2d 104, 109 (Pa. Super. Ct. 1998).

To constitute bad faith, it is not necessary that the insurer's conduct be fraudulent; however, mere negligence or bad judgment is not "bad faith." *Padilla v. State Farm Mut. Auto. Ins. Co.*, 31 F. Supp. 3d 671, 675 (E.D. Pa. 2014).

Additionally, a delay attributable to the uncertainty of the claim's value or the insurer's need to investigate further does not constitute bad faith. *Great Lakes Reinsurance (UK) PLC v. Stephens Garden Creations, Inc.*, 119 F. Supp. 3d 297, 306 (E.D. Pa. 2015).

ii. Consequential Damages

The court in *Birth Center v. St. Paul Cos., Inc.*, expressed that "the insurer is liable for the known and/or foreseeable compensatory damages of its insured that reasonably flow from the insurer's bad faith conduct." *Birth Center v. St. Paul Companies, Inc*., 567 Pa. 386, 390, 787 A.2d 376, 379 (2001).

There are no emotional distress damages available in 42 Pa. C.S.A. § 8371.

Although emotional damages are not generally available under *D'Ambrosio v. Pennsylvania Nat. Mut. Ins. Co*., 494 Pa. 501 (1981), the court in *Fair v. State Farm Mut. Ins. Co.* suggested that emotional distress claims can be brought against an insurer in cases of extreme and outrageous conduct that results in bodily harm, or in which serious emotional disturbance was likely to result. 18 Pa. D. & C. 4th 78, 82–83 (Ct. Com. Pl. 1992).

iii. Punitive Damages

Punitive damages are expressly available to plaintiffs under 42 Pa. C.S.A. § 8371 (2).

Under Pennsylvania law, punitive damages against insurer under bad faith statute are circumscribed by Restatement (Second) of Torts and the insurer's conduct must be wanton, reckless willful or oppressive. *Anderson v. Nationwide Ins. Enter*., 187 F. Supp. 2d 447, 460 (W.D. Pa. 2002).

The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct; just as criminal sanctions are calibrated to comport with the gravity of the offender's conduct, so should the amount of the punitive damages imposed on a defendant reflect the accepted view that some wrongs are more blameworthy than others. *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 230 (3d Cir. 2005) (applying Pennsylvania law and discussing constitutional limitations on punitive damages awards).

Further, the court in *Hollock v. Erie Ins. Exch*. held that, where a particularly egregious act results in only a small amount of economic damages, a greater ratio of punitive to compensatory damages may be accepted. 2004 PA Super 13, ¶ 26, 842 A.2d 409, 419 (2004).

V. ATTORNEYS' FEES

In Pennsylvania, pursuant to 42 Pa. C.S.A. § 8371(3), attorneys' fees are available. 42 Pa. C.S.A. § 8371(3) (2020).

In determining fees, the court must consider the following:

> (1) time and effort reasonably expended by the attorney in the litigation; (2) quality of services rendered; (3) results achieved and benefits conferred upon the class or upon the public; (4) magnitude, complexity, and uniqueness of the litigation; and (5) whether the receipt of a fee was contingent upon success.

Birth Center v. St. Paul Companies, Inc., 727 A.2d 1144, 1160 (Pa. Super. Ct. 1999), *decision aff'd*, 567 Pa. 386, 787 A.2d 376 (2001) and (disapproved of on other grounds by, *Mishoe v. Erie Ins. Co*., 573 Pa. 267, 824 A.2d 1153 (2003)).

The court in *Birth Center* further specified that the calculation of fees and costs should begin with the actual number of hours spent in pursuing the claim multiplied by a reasonable rate; both the number of hours and the rate per hour must be calculated on a basis reasonably reflective of the relevant market and the magnitude, complexity and uniqueness of the claim and the related task. *Id.* at 1161.

VI. ASSIGNMENT OF RIGHTS

A cause of action for bad faith on the part of the insurance company is assignable by the insured to third parties. *T.A. v. Allen*, 2005 PA Super 49, ¶ 9, 868 A.2d 594, 599 (2005).

42 Pa. C.S.A. § 8371 only applies to insureds, so a third-party cannot sue for bad faith without an assignment from the insured. *Johnson v. Beane*, 541 Pa. 449, 455, 664 A.2d 96, 99 (1995)

VII. STATUTE OF LIMITATIONS

Pursuant to 42 Pa. C.S.A. § 5524, a two-year statute of limitations applies to bad faith actions against an insurer. *Ash v. Continental Ins. Co*., 593 Pa. 523, 932 A.2d 877 (2007).

The court in *Rancosky v. Washington Nat. Ins. Co.* held that the two-year statute of limitations for a bad faith claim against an insurer premised on its inadequate investigation began to run when

the insurer communicated to the insured the results of its inadequate investigation. 2015 PA Super 264, 130 A.3d 79, 99 (2015), *aff'd and remanded sub nom. Rancosky v. Washington Nat'l Ins. Co*., 642 Pa. 153, 170 A.3d 364 (2017).

Bad Faith Law:
A Brief Survey of Texas

TEXAS

In Texas, first-party insurance plaintiffs may seek exemplary damages for bad faith under Chapter 541 of the Texas Insurance Code, Texas's Deceptive Trade Practices-Consumer Protection Act ("DTPA"), or common law. Plaintiffs are only allowed one recovery, and must elect to take any exemplary damages awarded under the limitations of Chapter 541 and the "DTPA," or under the general limitations for exemplary damages in the Texas Civil Practice & Remedies Code. *Wait Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex. 1998).

I. FIRST-PARTY STATUTORY BAD FAITH

Texas allows an insured to bring a statutory bad faith claim under Chapter 541 of the Texas Insurance Code. Prohibited conduct giving rise to a statutory claim under this law includes:

- Misrepresenting a material fact or policy provision relating to coverage.
- Failure to attempt, in good faith, a prompt, fair and equitable settlement when coverage on a claim has become clear.
- Failure to provide an explanation of a denial.
- Failure to affirm or deny coverage, or submit a reservation of rights, within a reasonable time.
- Unreasonably delaying settlement on the basis that other coverage may be available, or third parties are reasonable except as specifically provided in the policy.

• Failure to pay a claim without conducting a reasonable investigation.

Tex. Ins. Code § 541.060 (West 2020).

An insurer found liable under Chapter 541 of the Texas Insurance Code may be liable for: (1) Actual damages; (2) Court costs and attorneys fees; and (3) Treble damages (if the insurer acted "knowingly"). Tex. Ins. Code § 541.152.

Additionally, any violation of the Chapter 541 of the Texas Insurance Code is also made actionable through Section 17.50(a) (4) of the Texas Business & Commercial Code, the Deceptive Trade Practices Act ("DTPA"). Section 17.46 of the DTPA provides an additional list of deceptive trade practices that are actionable, such as representing that an agreement confers rights that it does not have. The DTPA authorizes an action where a consumer, including an insured, has relied to his detriment on a false, deceptive, unfair or misleading act or practice, and such reliance was a producing cause of damages. *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 99 (Tex. 1994).

An insured generally cannot recover policy benefits as "actual damages" for an insurer's alleged violation of the Texas Insurance Code or DTPA absent a finding that the insured had a contractual right to the benefits under the insurance policy. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018). In *Menchaca*, the Texas Supreme Court categorized the situations in which there *could* be a bad faith finding in the absence of a breach of contract, including (1) an insurer's statutory violation causes the loss of policy benefits, (2) the insurer's statutory violation caused the insured to lose that contractual right to policy benefits, and (3) the insurer's statutory violation caused an injury independent of the loss of policy benefits. The Court affirmed the rule that the insured is entitled to no recovery despite an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no independent injury.

The Texas Supreme Court held in *Tex. Mut. Ins. Co. v. Ruttiger* held that workers' compensation claimants do not have a cause of action under the Texas Insurance Code or DTPA based upon alleged unfair or deceptive claims handling as their exclusive remedies are provided in the Texas Workers' Compensation Act. 381 S.W.3d 430, 444–46 (Tex. 2012).

II. THIRD-PARTY STATUTORY BAD FAITH

In Texas, a third-party cannot bring a bad faith claim under the Texas bad faith statute and bad faith claims under chapter 541 of the Insurance Code and the DTPA are not assignable. *PPG Indus., Inc. v. JMB/Houston Ctr. Partners, Ltd*., 146 S.W.3d 79, 92 (Tex. 2004).

III. COMMON LAW

In Texas, an insurance company has a duty of good faith and fair dealing in handling its insureds' first-party claims. *Arnold v. Nat'l Co. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987).

An insurer may be liable for damages for breach of its duty of good faith and fair dealing when the insurer fails to attempt to effectuate a settlement where its liability has become

reasonably clear or where it fails to reasonably investigate a claim in order to determine whether its liability is reasonably clear. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997); *U.S. Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268 (Tex. 1997) (changing the common law bad faith standard from "no reasonable basis" to "reasonably clear liability.")

The insurer's duty of good faith stems from the existence of a special relationship between the insurer and the insured. *Giles*, 950 S.W.2d at 52. As such, a third-party claimant cannot bring an action to enforce an insurance policy directly against an insurer, or at least not until it has been established, by judgment or agreement, that the insured has a legal obligation to pay damages to the third-party claimant. *Angus Chem. Co. v. IMC Fertilizer, Inc*., 939 S.W.2d 138, 138 (Tex. 1997).

In the context of workers' compensation actions, the Texas Supreme Court in *Tex. Mut. Ins. Co. v. Ruttiger* held that an insurer's duty of good faith is not applicable given the exclusive remedies set forth within the Workers Compensation Act. 381 S.W.3d 430, 444 (Tex. 2012).

IV. BAD FAITH STANDARDS

i. Generally

The preliminary question in bad faith cases is always whether there was a breach of the policy. If the contract of insurance was not breached, extra-contractual claims are generally barred as a matter of law in the absence of extreme conduct by the insurer. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018). In most circumstances, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract *Liberty Nat. Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996). The Texas Supreme Court recently reaffirmed the existence of a narrow universe of hypothetical cases where no amount is owed on the claim, but statutory bad faith may still exists; however, cases establishing such an exception have yet to reach the Court. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018).

The Texas Supreme Court in *Universe Life Ins. Co. v. Giles* developed the modern standard of an insurer's common law duty of good faith and fair dealing with its insured: (1) the insurer's liability to pay under the policy was reasonably clear; and (2) a reasonable insurance company, having conducted an investigation of the claim, would have known that its liability was reasonably clear and there was no basis to deny or compromise the claim. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 55 (Tex. 1997).

In the context of cases that involve an allegation of failure to settle a third-party claim against its insured, Tex. Ins. Code § 541.060 is triggered. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253, 262 (Tex. 2002). A Texas court will evaluate if: (1) the offer must be within the scope of policy coverage; (2) the offer must be within policy limits; (3) the offer must provide for a full release of claims against the insured; (4) the terms of the offer must be such that an ordinarily prudent insurer would accept it considering the likelihood and degree of insured's potential exposure to excess judgment; and (5) the offer must provide a reasonable time to evaluate the settlement offer. *Id.*; Tex. Ins. Code § 541.060.

In both a statutory and common law bad faith actions, a single act in violation to the requirements or elements is enough to make a claim actionable. *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 134 (Tex. 1988) (frequency is not a requirement with respect to a statutory claim). Thus, a pattern or practice of unfair or deceptive conduct is not necessary to prove to be successful in a bad faith claim. *Id.*

ii. Consequential Damages

The Texas Supreme Court made consequential damages available when an insured establishes that the insurer breached the duty of good faith and fair dealing. *Chitsey v. National Lloyds Ins. Co.*, 738 S.W.2d 641, 643 (Tex. 1987). Plaintiffs in a bad faith suit are entitled to recover all damages proximately caused by the insurer's actions. *Id.*

In Texas, emotional distress damages from mental anguish are available if the insurer's actions were from willful conduct and resulted in physical injury. *Arnold v. Nat'l County Mut. Fire. Ins. Co.*, 725 S.W.2d 165, 168 (Tex. 1987). However, emotional distress damages may not be recovered without proof of willful or grossly negligent conduct. Tex. Ins. Code § 541.152(b); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 435 (Tex. 1995).

At common law, emotional distress damages may be recoverable, but are limited to actions when the denial or delay of a claimant's payment has seriously disrupted the insured's life. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 78 (Tex. 1997).

iii. Punitive Damages

Punitive damages are available to plaintiffs under Tex. Bus. & Com. Code § 17.50(b)(1) and Tex. Ins. Code § 541 if the insurer's improper conduct was done either knowingly or intentionally. Tex. Bus. & Com. Code §17.50(b)(1) (2020); Tex. Ins. Code § 541. 152 (b). Under either the claimant may seek up to three times the amount of economic damages. *Id.*

At common law, punitive damages are available when the breach of duty of good faith and fair dealing is accompanied by malicious, intentional, fraudulent, or grossly negligent conduct. *State Farm Fire and Cas. Co.*, 963 S.W.2d 42, 47 (Tex. 1998).

V. ATTORNEYS' FEES

In Texas, an insurance claimant plaintiff may recover its fees for recovery under a claim for breach of contract, or the Tex. Ins. Code § 541.152(a)(1), or the DTPA under Tex. Bus. & Com. Code § 17.50(d). Under the DTPA, however, the plaintiff can only be awarded attorneys' fees if the court awards actual damages. *Guzman v. Ugly Duckling Car Sales*, 63 S.W.3d 522, 526 (Tex. App.—San Antonio 2001, *pet. denied*). Attorneys' fees are not otherwise recoverable unless provided for by statute or contract. *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77 (Tex. 1992).

Although attorneys' fees are not normally recoverable under a common law claim of bad faith they may be recovered when the action is joined, as it almost always is, with an action on the policy. *Grapevine Excavation, Inc. v. Maryland Lloyd's*, 35 S.W.3d 1, 5 (Tex. 2000).

VI. ASSIGNMENT OF RIGHTS

In Texas, bad faith claims under the state's statutory provisions are not assignable. *PPG Indus., Inc. v. JMB/Houston Ctr. Partners, Ltd*., 146 S.W.3d 79, 92 (Tex. 2004).

The court in *Lexington Ins. Co. v. S.H.R.M. Catering Servs., Inc* held that the assignment of an unliquidated personal injury claim was invalid because it would contravene the "proportionate liability framework for general maritime tort." *Lexington Ins. Co. v. S.H.R.M. Catering Servs., Inc.*, 567 F.3d 182, 185 (5th Cir. 2009).

VII. STATUTE OF LIMITATIONS

Under the Tex. Bus. & Com. Code § 17.50 and Tex. Ins. Code § 541, an action must be brought within two years after the date of the false or deceptive act occurred, or within two years after the consumer discovered or should have discovered it. Tex. Bus. & Com. Code Ann. §17.565; Tex. Ins. Code Ann. §541.162. However, the limitations period may be extended for 180 days if the plaintiff proves that the failure to timely commence the action was caused by the defendant knowingly engaging in conduct intended to cause delay. Tex. Bus. & Com. Code Ann. §17.565; Tex. Ins. Code Ann. §541.162(b).

There is a two-year statute of limitations for common law bad faith claims. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 829 (Tex. 1990); Tex. Civ. Prac. & Rem. Code §16.003(a).

The statute of limitation does not begin to run on insured's good faith and fair dealing claim against insurer until the underlying insurance contract claims are finally resolved. *Arnold v. Nat'l Cty. Mut. Fire Ins. Co*., 725 S.W.2d 165, 168 (Tex. 1987), *holding modified by Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826 (Tex. 1990).

Bad Faith Law:

Abbreviated Survey of Other States

AK, CA, CO, CT, DE, GA, HI, IN, KS, KY, LA, NC, OH, SC, VT, WV, WI, WY

ALASKA

I. FIRST-PARTY STATUTORY BAD FAITH

No. There is no first-party statutory bad faith private right of action under Alaska's Unfair Claim Settlement Practices Act. Alaska Stat. Ann. § 21.36.125.

II. THIRD-PARTY STATUTORY BAD FAITH

No. There is no third-party statutory bad faith private right of action under Alaska's Unfair Claim Settlement Practices Act. Alaska Stat. Ann. § 21.36.125.

III. COMMON LAW

Yes. Alaska recognizes a common law cause of action for bad faith against a first-party insurer. *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1157 (Alaska 1989); *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1039 (Cal. 1973).

No. In Alaska, there is no third-party common law cause of action. In O.K. Lumber Co. v. Providence Wash. Ins. Co., the court concluded that there is no common law tort duty of good faith and fair dealing running from a liability insurer to an injured claimant in the absence of a contractual relationship. *O.K. Lumber Co. v. Providence Wash. Ins. Co.*, 759 P.2d 523 (Alaska 1988).

IV. BAD FAITH STANDARDS

To maintain a bad faith claim under Alaska law, an insured must show the insurance company's refusal to honor a claim be made without a reasonable basis. *Hillman v. Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1324 (Alaska 1993).

i. Consequential Damages

Yes. Consequential damages are available in Alaska for (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).

ii. Punitive Damages

Yes. To support punitive damages, the wrongdoer's conduct must be "outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another." *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1158 (Alaska 1989); *Sturm, Ruger & Co., Inc., v. Day*, 594 P.2d 38, 46 (Alaska 1979).

V. ATTORNEYS' FEES

Yes. In Alaska, attorneys' fees are recoverable by prevailing party. *Hillman v. Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1324 (Alaska 1993); Civil Rule 82(a).

VI. ASSIGNMENT OF RIGHTS

Yes. In Alaska, the insured in a bad faith action can assign his or her claims to a third-party. *O.K. Lumber Co. v. Providence Wash. Ins. Co.*, 759 P.2d 523, 525 (Alaska 1988).

VII. STATUTE OF LIMITATIONS

Yes. Under AS 09.10.053, the statute of limitations for breach of contract claims is three years. *McDonnell v. State Farm Mut. Auto. Ins. Co.*, 299 P.3d 715, 726 (Alaska 2013). Under AS 09.10.070, the statute of limitations for tort claims must be brought within two years.

CALIFORNIA

VIII. FIRST-PARTY STATUTORY BAD FAITH

No. There is no private right of action under Cal. Ins. Code §790.03(h). *Moradi-Shalal v. Fireman's Fund Ins. Cos*., 46 Cal. 3d 287, 313 (1988).

IX. THIRD-PARTY STATUTORY BAD FAITH

Yes. Third parties have a statutory bad faith cause of action under Cal. Ins. Code §11580. *Hand v. Farmers Ins. Exch.*, 23 Cal. App. 4th 1847, 1859 (1994).

X. COMMON LAW

Yes. 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, 1039 (Cal. 1973).

California also recognizes a cause of action for third-party bad faith claims. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 35–36 (1995).

XI. BAD FAITH STANDARDS

An insured must show two things in order to maintain a bad faith claim under California law: (1) Benefits due under the policy were withheld; and (2) The reason for withholding the benefits was unreasonable or without proper cause. *Gruenberg v. Aetna Ins. Co*., 510 P.2d 1032, 1037 (Cal. 1973).

An insurer also acts in bad faith when it fails to act reasonably in processing and handling a claim. *Richardson v. Employers Liability Assurance Co*., 25 Cal. App. 3d 232, 245 (1972) (holding that an insurer acts in bad faith when it knows there is coverage but denies the claim anyway).

iii. Consequential Damages

Yes. Consequential damages are available in California, provided they are reasonably foreseeable. Cal. Civ. Code § 3300 (West 2020); *Gruenberg v. Aetna Ins. Co*., 510 P.2d 1032, 1041 (Cal. 1973).

Further, emotional distress damages are available in California. Cal. Civ. Code § 3333 (West 2020); *Gruenberg v. Aetna Ins. Co*., 510 P.2d 1032, 1041 (Cal. 1973).

iv. Punitive Damages

Yes. Punitive damages are available in California under Cal. Civ. Code §3294 "[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Cal. Civ. Code § 3294 (West 2020); *Mock v. Mich. Millers Mut. Ins. Co*., 4 Cal. App. 4th 306, 329 (1992).

XII. ATTORNEYS' FEES

Yes. In California, attorneys' fees are available only if there is a finding of bad faith, and only those fees allocable to pursuing the breach of contract claim. *McGregor v. Paul Revere Life Ins*., 369 F.3d 1099, 1101 (9th Cir. 2004) (holding attorneys' fees can be recovered in appeal of bad faith case).

XIII. ASSIGNMENT OF RIGHTS

Yes. In California, the insured in a bad faith action can assign his or her claims to a third-party. *Essex Ins. Co. v. Five Star Dye House, Inc.*, 38 Cal. 4th 1252, 1265 (2006).

XIV. STATUTE OF LIMITATIONS

Yes. The statute of limitations in California for actions involving a breach of contract is four years. Cal. Code Civ. Proc. §337 (West 2020). However, under Cal. Code Civ. Pro. §339(1), an action in breach of the implied covenant of good faith and fair dealing is two years.

COLORADO

I. FIRST-PARTY STATUTORY BAD FAITH

Yes. In Colorado, C.R.S. §10-3-1115(1)(a) provides that, [a] person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant." C.R.S. §10-3-1115(1)(a) (West 2017); *Pierce v. Capitol Life Ins. Co.*, 806 P.2d 388, 390 (Colo. App. 1990).

II. THIRD-PARTY STATUTORY BAD FAITH

No. An injured third-party may not bring a statutory bad faith claim against an insurer in Colorado. *Schnacker v. State Farm Mut. Auto. Ins. Co*., 843 P.2d 102. 108 (Colo. App. 1992).

III. COMMON LAW

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

IV. BAD FAITH STANDARDS

In Colorado, an "insurer's delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action," for first-party statutory claims. C.R.S. §10-3-1115(2) (West 2020).

In first-party common law actions, the insured must establish that the insurer acted unreasonably under the circumstances and that the insurer acted knowingly or with reckless disregard as to the validity of the insured's claim. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1275 (Colo. 1985).

However, in third-party actions, the standard of conduct in a third-party bad faith action against an insurer is based on general principles of negligence. *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1140 (Colo. 1984).

i. Consequential Damages

Yes. Consequential damages are available in Colorado if the bad faith action proximately caused the insured's loss of damages such as earnings and future earnings. *Munoz v. State Farm Mut. Auto. Ins. Co.*, 968 P.2d 126, 131 (Colo. App. 1998).

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

ii. Punitive Damages

Yes. Punitive damages are awarded in Colorado and the Court has discretion to give the insured increased damages if a party acts willfully. C.R.S. § 13-21-102(3)(a) (West 2020); *Tait v. Harford Underwriters Ins. Co*., 49 P.3d 337, 339 (Colo. App. 2001).

V. ATTORNEYS' FEES

Yes. Under Colorado statute providing remedies for unreasonable delay or denial of insurance benefits, attorneys' fees are a component of damages, and the only factual finding the jury must make with respect to the plaintiff's statutory claim is whether the covered benefit was unreasonably delayed or denied. *Etherton v. Owners Ins. Co*., 82 F. Supp. 3d 1190 (D. Colo. 2015); Colo. Rev. Stat. Ann. § 10-3-1116(1).

VI. ASSIGNMENT OF RIGHTS

Yes. In Colorado, the insured in a bad faith action can assign his or her claims to a third-party. *Nunn v. Mid-Century Insurance Co*., 244 P.3d 116, 121 (Colo. 2010).

VII. STATUTE OF LIMITATIONS

In Colorado, the two-year statute of limitations governing general tort claims applies to bad faith cases. C.R.S. §13-80-102 (West 2020). Additionally, a three-year statute of limitations applies to claims for breach of contract. C.R.S. §13-80-101 (West 2020).

CONNECTICUT

I. FIRST-PARTY STATUTORY BAD FAITH

Connecticut Unfair Insurance Practices Act ("CUIPA") and the Connecticut Unfair Trade Practices Act ("CUTPA") authorize an insured to bring a bad faith claim against an insurer. The CUIPA lists nineteen (19) categories of conduct that may be deemed to qualify as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. *See* Conn. Gen. Stat. §38a-816.

II. THIRD-PARTY STATUTORY BAD FAITH

No. Third-parties may not maintain a statutory claim for bad faith against an insurer. *Carford v. Empire Fire & Marine Ins. Co.*, 891 A.2d 55, 58 (Conn. App. Ct. 2006)(explaining that Connecticut courts repeatedly have held that "the existence of a contract between the parties is a necessary antecedent to any claim of breach of the duty of good faith and fair dealing.")

III. COMMON LAW

Yes. Connecticut law recognizes a common law implied covenant of good faith and fair dealing owed by an insurer to its insured. *Watrous v. Peerless Ins. Co.*, 2015 WL 7268891, at *2 (Conn. Super. Ct. Oct. 20, 2015)

IV. BAD FAITH STANDARDS

"Bad faith is defined as the opposite of good faith, generally implying a design to mislead or to deceive another.... [B]ad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.... [I]t contemplates a state of mind affirmatively operating with furtive design or ill will." *Hutchinson v. Farm Family Casualty Ins. Co.*, 273 Conn. 33, 43 n. 4 (2005). "Bad faith in general implies both 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." *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.*, 269 Conn. 424, 433, 849 A.2d 382 (2004).

i. Consequential Damages

Yes. "Consequential damages" caused by alleged intentional "bad faith" conduct of an insurer is permitted under the CUTPA. *See Carpentino v. Transp. Ins. Co.*, 609 F. Supp. 556, 563 (D. Conn. 1985).

ii. Punitive Damages

Yes. The CUTPA expressly permits recovery of punitive damages for violations of the CUTPA. *See* Conn. Gen. Stat. §42-110g.

V. ATTORNEYS' FEES

Yes. Connecticut law expressly authorizes in an action against an insurer upon a contract of insurance issued or delivered in Connecticut to a resident thereof or to a corporation authorized to do business in Connecticut, if the insurer has failed for thirty days after demand prior to the commencement of the action to make payment in accord with the terms of the contract, and it appears to the court that such refusal was "vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include such fee in any judgment that may be rendered in such action". *See* Conn. Gen. Stat. §38a-274.

VI. STATUTE OF LIMITATIONS

The statute of limitations for claims under CUTPA is three years from the occurrence of the violation of the statute. *See* Conn. Gen. Stat. § 42-110g(f). CUIPA is silent as to the statute of limitations, but in a CUTPA claim based on CUIPA violations, the CUTPA statute of limitations is applied. *Lees v. Middlesex Ins. Co.*, 219 Conn. 644, 654, 594 A.2d 952 (1991).

DELAWARE

I. FIRST-PARTY STATUTORY BAD FAITH

No. Delaware has adopted an unfair claim settlement practices statute and it requires that an insurer act in good faith to effectuate a prompt, fair, and equitable settlement of claims in which liability is reasonably clear. 18 Del. Code Ann. § 2304(16)(f). The statute is silent on whether an aggrieved can bring a private cause of action but Delaware Courts have held that there is no private cause of action under the statute. *Yardley v. U.S. Healthcare, Inc.*, 693 A.2d 1083 (Del. 1997).

II. THIRD-PARTY STATUTORY BAD FAITH

No. Delaware has adopted an unfair claim settlement practices statute and it requires that an insurer act in good faith to effectuate a prompt, fair, and equitable settlement of claims in which liability is reasonably clear. 18 Del. Code Ann. § 2304(16)(f). The statute is silent on whether an aggrieved can bring a private cause of action but Delaware Courts have held that there is no private cause of action under the statute. *Yardley v. U.S. Healthcare, Inc.*, 693 A.2d 1083 (Del. 1997).

III. COMMON LAW

Yes. In Delaware, a first-party bad faith action is recognized as based on breach of contractual obligations. *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 264 (Del. 1995). The Delaware Supreme Court held that an insurer can be liable for a "lack of good faith, or the presence of bad faith" "where the insured can show that the insurer's action was 'clearly without any reasonable justification.'" *Id.*

Yes. Delaware recognizes a common law bad faith action in third-parties. *Corrado Bros., Inc. v. Twin City Fire Ins. Co.*, 562 A.2d 1188, 1192 (Del. 1989).

IV. BAD FAITH STANDARDS

To maintain a bad faith claim under Delaware law, an insured must show the insurance company's refusal to honor its contractual obligation was "clearly without any reasonable justification." *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 264 (Del. 1995).

v. Consequential Damages

Yes. Consequential damages are available in Delaware for breach of the implied contractual obligation of good faith. Enrique v. State Farm Mutual Automobile Ins. Co., 142 A.3d 506, 512 (Del. 2016).

vi. Punitive Damages

Yes. To support punitive damages, the insurer's conduct must be intentional, egregious, or malicious breach of contract. *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 265 (Del. 1995).

V. ATTORNEYS' FEES

Yes. In Delaware, attorneys' fees are recoverable under 18 Del. Code Ann. § 4102. The statute provides that when a judgment is rendered against an insurer upon any policy of property insurance, the court shall allow plaintiff reasonable attorney's fees.

VI. ASSIGNMENT OF RIGHTS

Yes. In California, the insured in a bad faith action can assign his or her claims to a third-party. Connelly *v. State Farm Mutual Automobile Ins. Co.*, 135 A.3d 1271, 1273 (Del. 2016).

VII. STATUTE OF LIMITATIONS

Yes. Under 10 Del.C. § 8106, the statute of limitations for breach of contract claims is three years. The statute of limitations on a bad faith claim begins to run when an excess judgment becomes final and non-appealable. *Connelly*, at 1272.

GEORGIA

I. FIRST-PARTY STATUTORY BAD FAITH

In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer. *See* Ga. Code Ann. § 33-4-6. The action for bad faith shall not be abated by payment after the 60 day period nor shall the testimony or opinion of an expert witness be the sole basis for a summary judgment or directed verdict on the issue of bad faith. *See* Ga. Code Ann. § 33-4-6.

II. THIRD-PARTY STATUTORY BAD FAITH

Generally, bad faith claims under the Georgia insurance code are available only as between insureds and their insurers; however, statute governing insurers' duties with respect to settlement of motor vehicle liability policy claims allows third parties to bring bad faith claims directly against insurers in certain limited circumstances. *See* Ga.Code Ann. § 33-4-7; *comm,* 779 S.E.2d 459 (Ga. Ct. App. 2015)

III. COMMON LAW

Yes, Georgia courts allow tort actions for breach of fiduciary duties between an insured and its insurer, but only in the context of defending or settling a third-party claim on behalf of the insured. *See Prime Mgmt. Consulting & Inv. Services, LLC v. Certain Underwriters at Lloyd's London*, 2007 WL 4592099, at *5 (N.D. Ga. Dec. 28, 2007).

IV. BAD FAITH STANDARDS

Under Georgia law, the standard of conduct that governs an insurer's duty to settle is bad faith or negligence. *See Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 580 S.E.2d 519 (2003). Judged by the standard of the ordinarily prudent insurer, the insurer is negligent in failing to settle if the ordinarily prudent insurer would consider choosing to try the case created an unreasonable risk. *Id*. The rationale is that the interests of the insurer and insured diverge when a plaintiff offers to settle a claim for the limits of the insurance policy. *Id*. The insured is interested in protecting itself against an excess judgment; the insurer has less incentive to settle because litigation may result in a verdict below the policy limits or a defense verdict. *Id*.

Generally, it is for the jury to "decide whether the insurer, in view of the existing circumstances, has accorded the insured the same faithful consideration it gives its own interest." *See Southern Gen. Ins. Co. v. Holt*, 262 Ga. 267, 268-269 (1), 416 S.E.2d 274 (1992).

i. Consequential Damages

An insurance company may be liable for the entire excess judgment entered against its insured based on the insurer's bad faith or negligent refusal to settle a claim within the policy limits. *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 684, 580 S.E.2d 519, 521 (2003). Georgia law is unclear as to whether consequential damages for an insurer's bad faith or negligent failure to settle are recoverable.

ii. Punitive Damages

Georgia's bad faith statute is the exclusive remedy for any penalty against the insurer, unless the insured establishes an additional "special relationship" beyond the contractual relationship. *Globe Life & Acc. Ins. Co. v. Ogden*, 182 Ga. App. 803, 357 S.E.2d 276 (1987) (affirming summary judgment on first-party claim for punitive damages because no special relationship existed).

V. ATTORNEYS' FEES

Yes. *See* Ga. Code Ann. § 33-4-6.

VI. ASSIGNMENT OF RIGHTS

Yes. Insureds have the right to assign a bad faith cause of action for failure to settle. *Canal Indem. Co. v. Greene*, 593 S.E.2d 41, 46 (Ga. Ct. App. 2003). However, statutory penalties and punitives damages for bad faith cannot be assigned. *Id*. at 46.

VII. STATUTE OF LIMITATIONS

Under Georgia law, a party has six years within which to bring suit on insurance policy, since public policy of Georgia as expressed by legislature is that actions on contracts shall be brought within six years. *See* Ga. Code Ann. § 9-3-24.

HAWAII

I. FIRST-PARTY STATUTORY BAD FAITH

No. There is no private right of action under HI Rev Stat § 431:13-101 (2013).

II. THIRD-PARTY STATUTORY BAD FAITH

No. Third parties do not have a statutory bad faith cause of action under HI Rev Stat § 431:13-101 (2013).

III. COMMON LAW

Yes. Hawaii recognizes a common law cause of action for bad faith against a first-party insurer. *Best Place, Inc. v. Penn America Ins. Co.*, 920 P.2d 334, 341 (Haw. 1996). Hawaii follows the standards set forth in *Gruenberg v. Aetna Ins. Co*., 510 P.2d 1032 (Cal. 1973).

Yes. In Hawaii, there is a legal duty, implied in third party insurance contracts, that an insurer must act in good faith in dealing with the insured, and breach of that duty of good faith gives rise to independent tort cause of action. *Best Place, Inc.*, at 346.

IV. BAD FAITH STANDARDS

Hawaii uses the *Gruenberg* test to determine bad faith. The insured need not show a conscious awareness of wrongdoing or unjustifiable conduct, nor an evil motive or intent to harm the insured. An unreasonable delay in payment of benefits will warrant recovery for compensatory damages. *Best Place, Inc.*, at 347.

vii. Consequential Damages

Yes. Consequential damages are available in Hawaii. *Best Place, Inc*., at 346.

Further, emotional distress damages are available in Hawaii because Hawaii follow *Gruenberg*. *Gruenberg v. Aetna Ins. Co*., 510 P.2d 1032, 1041 (Cal. 1973).

viii. Punitive Damages

Yes. Punitive damages are available in Hawaii if the evidence reflects "something more" than the conduct necessary to establish the tort. The plaintiff must prove by clear and convincing evidence that "the defendant has acted wantonly or oppressively or with such malice as implied 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, Inc. v. Penn America Ins. Co.*, 920 P.2d 334, 348 (1996); *Masaki v. General Motors Corp.*, 780 P.2d 566, 572 (1989) (citing *Bright v. Quinn*, 20 Haw. 504, 512 (1911)).

V. ATTORNEYS' FEES

Yes. In Hawaii, attorneys' fees are available pursuant to statute. Haw. Rev. Stat. § 431:10-242.

VI. ASSIGNMENT OF RIGHTS

No. A claim against the insurer for general damages based on bad faith is not assignable. *Sprague v. California Pacific Bankers & Ins. Ltd.*, 74 P.3d 12 (Haw. 2003).

VII. STATUTE OF LIMITATIONS

Yes. If the tort of bad faith sounds in contract, then it is subject to six years under Haw. Rev. Stat. § 657-1. However, under Haw. Rev. Stat. § 657-7, if a claim for bad faith is construed as a tort cause of action, then it is subject to the two year statute of limitations period.

INDIANA

I. FIRST-PARTY STATUTORY BAD FAITH

No. In Indiana, there is no statutory cause of action for a first-party insured against an insurer for bad faith under Indiana's Administrative Code § 27-4-1-4.5.

II. THIRD-PARTY STATUTORY BAD FAITH

No. Similarly, in Indiana, there is no statutory cause of action for a third-party against an insurer for bad faith under Indiana's Administrative Code § 27-4-1-4.5.

III. COMMON LAW

Yes. Indiana recognizes a common law cause of action for bad faith. An insurer has a legal duty to deal in good faith with its insured. *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002); *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 520 (Ind. 1993).

IV. BAD FAITH STANDARDS

To establish a bad faith claim in Indiana, an insured must establish with clear and convincing evidence, that the insurer had knowledge that there was no legitimate purpose for denying liability. *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002); *Ind. Ins. Co. v. Plummer Power Mower & Tool Rental, Inc.*, 590 N.E.2d 1085, 1093 (Ind.Ct.App.1992). A finding of bad faith requires evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will. *Johnston v. State Farm Mut. Auto. Ins.*, 667 N.E.2d 802, 805 (Ind. Ct. App. 1996).

i. Consequential Damages

Yes. Consequential damages are available in Indiana. The party seeking damages must prove by a preponderance of the evidence that the breach was the cause in fact of its loss. *Rockford Mut. Ins. Co. v. Pirtle*, 991 N.E.2d 60, 67 (Ind. Ct. App. 2009); *Thor Elec., Inc. v. Oberle & Assocs., Inc.*, 741 N.E.2d 373, 381 (Ind. Ct. App. 2004).

ii. Punitive Damages

Yes. In Indiana, punitive damages may be awarded 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 fact of law, honest error or judgment, overzealousness, mere negligence, or other human failing." *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 521 (Ind. 1993).

V. ATTORNEYS' FEES

Generally, no. In the absence of statute or agreement/stipulation, Indiana follows the "American Rule" which requires each party to the litigation pay their own counsel fees. *Liberty Mut. Ins. Co. v. OSI Industries, Inc.*, 831 N.E.2d 192, 205 (Ind. Ct. App. 2005).

VI. ASSIGNMENT OF RIGHTS

Yes. In Indiana, the insured in a bad faith action can assign his or her claims to a third-party. *Araiza v. Chrysler Ins. Co.*, 699 N.E.2d 1162, 1163 (Ind. Ct. App. 1998).

VII. STATUTE OF LIMITATIONS

In Indiana, there is a two-year statute of limitations period for a bad faith claim, but an insurance policy's contractual limitation can validly shorten the time frame. *Reveliotis v. State Farm Ins. Co.*, 2004 U.S. Dist. LEXIS 14115 (N.D. Ind. 2004).

KANSAS

I. FIRST-PARTY STATUTORY BAD FAITH

No. Kansas has adopted an unfair claim settlement practices statute and it requires that an insurer act in good faith to effectuate a prompt, fair, and equitable settlement of claims in which liability is reasonably clear. Kan. Stat. Ann. § 40-2404(9)(f). The Kansas Supreme Court held that no private right of action is afforded to insureds under the statute. *Spencer v. Aetna Life & Casualty Ins. Co.*, 227 Kan. 914 (1980).

II. THIRD-PARTY STATUTORY BAD FAITH

No. Kansas has adopted an unfair claim settlement practices statute and it requires that an insurer act in good faith to effectuate a prompt, fair, and equitable settlement of claims in which liability is reasonably clear. Kan. Stat. Ann. § 40-2404(9)(f). The Kansas Supreme Court held that no private right of action is afforded to insureds under the statute. *Spencer v. Aetna Life & Casualty Ins. Co.*, 611 P.2d 149, 158 (Kan. 1980).

III. COMMON LAW

Generally no. The Supreme Court of Kansas has declined to recognize the tort of bad faith in first party cases. Kansas recognizes a first party breach of contract action. *Spencer v. Aetna Life & Casualty Ins. Co.*, 611 P.2d 149, 158 (Kan. 1980). There is an implied covenant of good faith and fair dealing in every contract under Kansas law. Wade v. Emcasco Ins. Co. 483 F.3d 657, 666 (10th Cir. 2007).

Yes. Kansas recognizes a common law third-party cause of action for bad faith. *Glenn v. Fleming*, 799 P.2d 79, 90 (Kan. 1990).

IV. BAD FAITH STANDARDS

The liability of the insurer for negligence or bad faith ultimately depends on the circumstance of the case and must be determined by various factors. Those factors include:

- The strength of the claimant's case on the issues of liability and damages;

- Attempts by the insurer to induce the insured to contribute to a settlement;
- Failure of the insurer to properly investigate;
- The insurer's rejection of the advice of its own attorney or agent;
- Failure of the insurer to inform the insured of a compromise offer;
- The amount of financial risk which each party is exposed;
- The fault of the insured in inducing the insurer's rejection of a compromise offer by misleading it on the facts; and
- Any other factors tending to establish or negate bad faith. *Gruber v. Estate of Marshall*, 482 P.3d 612, 619 (Ct. App. Kan. 2021); *Bollinger v. Nuss*, 449 P.2d 502 (1969).

iii. Consequential Damages

Yes. Consequential damages are available in Kansas flowing from the bad faith conduct of the insurer and caused by the insurer's breach of contract. Mo. Med. Ins. Co. v. Wong, 676 P.2d 113, 124 (Kan. 1984).

iv. Punitive Damages

Generally no, punitive damages are available only if there is an independent tort indicating the presence of malice, fraud, or wanton disregard for the rights of others. *Guarantee Abstract & Title Co., Inc. v. Interstate Fire and Cas. Co. Inc*, 652 P.2d 665, 667 (1982).

V. ATTORNEYS' FEES

Yes. K.S.A. 40-256 provides that the insurance company must pay attorneys' fees for an insured who obtains a judgment against it where the company refused to pay the full amount of loss without just cause or excuse. K.S.A. 40-908 provides attorneys' fees may be recovered by a plaintiff where judgment is rendered against a company on a policy insuring property against certain losses. *Spencer v. Aetna Life & Casualty Ins. Co.*, 227 Kan. 914, 923 (1980).

VI. ASSIGNMENT OF RIGHTS

Yes. In Kansas, an assignment is valid for bad faith claims, so long as, there is no collusion between the insured and the assignee. *Glenn v. Fleming*, 247 Kan. 296, 318-19 (1990). A defendant can assign his rights to a plaintiff if the insurance company negligently refused to settle or acted in bad faith. *Id.*, at 316-17.

VII. STATUTE OF LIMITATIONS

In Kansas, there is a five-year statute of limitations period for breach of contract claims. Kan. Stat. Ann § 60-511. If the claim is based on an independent tort, the statute of limitations is two years under Kan. Stat. Ann § 6-513.

KENTUCKY

I. FIRST-PARTY STATUTORY BAD FAITH

Yes. In Kentucky, there are statutory grounds for a first-party bad faith cause of action. Ky. Rev. Stat. Ann. § 304.12-230.

II. THIRD-PARTY STATUTORY BAD FAITH

Yes. An injured third-party may bring a statutory bad faith claim against an insurer in Kentucky for violation of the UCSPA. *Grundy v. Manchester Ins. & Indem. Co.*, 425 S.W.2d 735, 737 (Ky. 1968).

III. COMMON LAW

Yes. Kentucky recognizes a common law cause of action for a first-party bad faith cause of action against an insurer. *Id.*

No. In Kentucky, third parties may not bring claims for common law bad-faith because they are not parties to the contract that contains the duty of good faith. *Id.*

IV. BAD FAITH STANDARDS

An insured must prove three elements in order to prevail against an insurance company for alleged refusal to pay the insured's claim: 1) insurer must be obligated to pay the claim under the terms of the policy; 2) the insurer must lack a reasonable basis in law or fact for denying the claim; and 3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for which such a basis existed. *Wittmer v. Jones*, 864 S.W.2d 885, 890 (1993).

iii. Consequential Damages

Yes. Consequential damages are available in Kentucky. *Wittmer v. Jones*, 864 S.W.2d 885, 890 (1993).

In Kentucky, damages are available for emotional distress and mental anguish. *Id.* at 889.

iv. Punitive Damages

Yes. The punitive damage statute in Kentucky provides the standard of conduct required for punitive damages is oppression, fraud, or malice. KRS 411.184(2). There must be sufficient evidence of intentional misconduct or reckless disregard of the rights of an insured or a claimant to warrant submitting the right to award punitive damages to the jury. *Wittmer* at 890.

V. ATTORNEYS' FEES

Yes. Under KRS 304.12-235(3), "if an insurer fails to settle a clam within the time prescribed in subsection (1) of this section and the delay was *without reasonable foundation*, the insured person….shall be entitled to be reimbursed for his reasonable attorney's fees incurred." *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 454-55 (1997).

VI. ASSIGNMENT OF RIGHTS

Yes. Third parties may bring bad-faith claims by assignment. *Grundy v. Manchester Ins. & Indem. Co.*, 425 S.W.2d 735, 737 (Ky. 1968). A cause of action for tort is not assignable, but the rule does not apply to torts founded upon contracts and growing out of contractual relations, such as insured' right of action against liability insurer for bad faith in negotiating settlement with injured person, and insured's assignment of such cause of action to injured person was valid. *Id.*; KRS 411.140.

VII. STATUTE OF LIMITATIONS

In Kentucky, there is a five-year statute of limitations governing bad faith cases. KRS 413.120. Additionally, a fifteen-year statute of limitations applies to claims for breach of contract. KRS 413.120.

LOUISIANA

I. FIRST-PARTY STATUTORY BAD FAITH

Yes. Insureds in Louisiana have a cause of action in a first-party statutory bad faith action under La. Rev. Stat. Ann. §§22:1892 and 22:1973.

II. THIRD-PARTY STATUTORY BAD FAITH

Yes. In some circumstances, third-parties have a statutory cause of action against an insurer under La. Rev. Stat. Ann. §§ 22:1892 and §22:1973(B).

III. COMMON LAW

No. There is no common law action for bad faith in Louisiana.

IV. BAD FAITH STANDARDS

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

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

La. Rev. Stat. Ann. § 22:1973(B).

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

i. Consequential Damages

Yes. In Louisiana, La. Rev. Stat. Ann. § 22:1973(C) allows for the recovery of general or "special damages" that stem from the insurer's breach.

Moreover, emotional distress damages are recoverable 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).

ii. Punitive Damages

Yes. Punitive damages are recoverable in an amount not to exceed two times the damages sustained or $5000, whichever is greater. La. Rev. Stat. Ann. § 22:1892; *Sher v. Lafayette Ins. Co.*, 998 So. 2d. 201, 208 (La. 2008).

V. ATTORNEYS' FEES

Yes. Attorneys' fees are available "for [an] insurer's arbitrary and capricious failure to pay claim within 30 days after receipt of satisfactory written proofs and demand are recoverable. La. Rev. Stat. Ann. § 22:658; *Dickerson v. Lexington Ins. Co.*, 556 F.3d 290, 297 (5th Cir. 2009).

VI. STATUTE OF LIMITATIONS

In Louisiana, the statute of limitations for a tort is one year and for breach of contract is ten years. *Hebert v. Hill*, 37,208 (La. App. 2 Cir. 5/14/03); 855 So. 2d 768, 770; *We Sell Used Cars, Inc. v. United Nat'l Ins. Co.*, 30,671 (La. App. 2 Cir. 6/24/98); 715 So. 2d 656.

NORTH CAROLINA

I. FIRST-PARTY STATUTORY BAD FAITH

Yes. The a first-party claim by an insured against an insurer for bad faith is actionable under the North Carolina Unfair Claims Settlement Practices statute. *See* N.C. Gen. Stat. Ann. § 58-63-15. Section 58-63-15(11) contains a number of subsections setting forth different examples of ways an insurance company commits an unfair trade practice. A violation of any one of these subsections constitutes an unfair or deceptive act or practice under Chapter 75. *DENC, LLC v. Philadelphia Indem. Ins. Co.*, 426 F. Supp. 3d 151, 155 (M.D.N.C. 2019). Determining whether certain conduct is "an unfair or deceptive practice" under N.C. Gen. Stat. § 75-1.1 "is a question of law for the court." *Gray v. N. Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 67, 529 S.E.2d 676, 681 (2000)

II. THIRD-PARTY STATUTORY BAD FAITH

No. North Carolina does not recognize cause of action for third-party claimants against insurer of adverse party based on unfair and deceptive trade practices. *See* G.S. § 75-1.1; *see also Wilson v. Wilson*, 468 S.E.2d 495 (N.C. Ct. App. 1996).

III. COMMON LAW

Yes. Under North Carolina's common law, an insurer is required to act in good faith in exercising its right to settle a claim against the insured. *See Alford v. Textile Insurance Co.*, 248 N.C. 224, 229, 103 S.E.2d 8, 12 (1958). The insurer must give due regard to the interests of the insured, *see Abernethy v. Utica Mutual Insurance Company*, 373 F.2d 565 (4th Cir.1967), but this does not mean that the insurer must give more consideration or weight to the interests of the insured than its own interests. When an insured brings an action against its insurer for indemnity, the insured bears the burden of showing that the settlement was made in good faith. *See Insurance Co. v. Chantos*, 293 N.C. 431, 445, 238 S.E.2d 597, 607 (1977); *Nationwide Mut. Ins. Co. v. Pub. Serv. Co. of N. Carolina, Inc.*, 435 S.E.2d 561, 564 (N.C. Ct. App. 1993).

IV. BAD FAITH STANDARDS

To prevail on a claim of bad faith in the insurance context, a complainant must establish that there was: 1) a refusal to pay after recognition of a valid claim; 2) "bad faith"; and 3) "aggravating or outrageous conduct." *Topsail Reef Homeowners Ass'n v. Zurich Specialties London, Ltd.*, 11 Fed.Appx. 225, 237, 2001 WL 565317 (4th Cir. May 25, 2001). " 'Bad faith' means not based on a legitimate, 'honest disagreement' as to the validity of the claim. 'Aggravated conduct' is defined to include fraud, malice, gross negligence, insult ... willfully, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights." *Id.*

i. Consequential Damages

Yes. When an action for breach of contract is brought, the damages recoverable in such an action are those that "naturally flow from the breach, and such special or consequential damages as are reasonably presumed to have been within the contemplation of the parties at the time they made the contract, as the probable result of a breach of it." *Burch v. Lititz Mut. Ins. Co.*, 2013 WL 6080191, at *9 (E.D.N.C. Nov. 19, 2013).

ii. Punitive Damages

Yes. Generally, punitive or exemplary damages are not recoverable for mere breach of contract, unless contract is to marry under North Carolina law; however, under some circumstances, recovery of punitive damages on claims for tortious, bad-faith refusal to settle

under insurance policy is permitted, even though refusal to settle is also breach of contract. *Dailey v. Integon Gen. Ins. Corp*., 331 S.E.2d 148 (N.C. Ct. App. 1985)

V. ATTORNEYS' FEES

Yes. North Carolina Statute, section 75-16.1 provides that in any suit instituted by a person who alleges that the defendant violated 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that: (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

VI. ASSIGNMENT OF RIGHTS

No. As a general rule, North Carolina allows causes of action to be assigned to third parties. *In re Welch*, 494 B.R. 654, 660 (Bankr. E.D.N.C. 2013). However, assignments of personal tort claims are void as against public policy because they promote champerty. *Id*. Personal tort claims, assignment of which is prohibited by the public policy of North Carolina, include fraud, conspiracy to commit fraud, defamation, abuse of process, malicious prosecution, bad faith refusal to settle an insurance claim, breach of fiduciary duty, tortious breach of contract, and unfair and deceptive trade practices. *Id*.

VII. STATUTE OF LIMITATIONS

Pursuant to North Carolina Statute, § 1-52, a three (3) year statute of limitations applies to any action based upon a contract, obligation or liability arising out of a contract. *Forshaw Indus., Inc. v. Insurco, Ltd.*, 2 F. Supp. 3d 772 (W.D.N.C. 2014)(Insured's claims for bad faith, fraud, negligence, and negligent misrepresentation all accrued, and North Carolina's three-year statute of limitations began to run, when it received insurers' letter informing it that it would not be reimbursed under its insurance policies).

OHIO

VIII. FIRST-PARTY STATUTORY BAD FAITH

No. In Ohio, there is no statutory cause of action for a first-party insured against an insurer for bad faith. *Strack v. Westfield Cos.*, 33 Ohio App. 3d 336, 338, 515 N.E.2d 1005, 1008 (1986).

IX. THIRD-PARTY STATUTORY BAD FAITH

No. Similarly, in Ohio, there is no statutory cause of action for a third-party against an insurer for bad faith. *Strack v. Westfield Cos.*, 33 Ohio App. 3d 336, 338, 515 N.E.2d 1005, 1008 (1986).

X. COMMON LAW

Yes. In Ohio, "an insurer has the duty to act in good faith in the handling and payment of the claims of its insured. A breach of this duty will give rise to a cause of action in tort against the insurer." *Hoskins v. Aetna Life Ins. Co*., 6 Ohio St. 3d 272, 452 N.E.2d 1315, Syl. Pt. 1 (Ohio 1983).

XI. BAD FAITH STANDARDS

To establish a bad faith claim in Ohio, an insured must establish that an insurer's refusal to pay the claim "is not predicated upon circumstances that furnish reasonable justification therefore." *Zoppo v. Homestead Ins. Co*., 71 Ohio St. 3d 552, 557, 644 N.E.2d 397, 400 (1994). An insured does not need to establish that an insurer's failure to pay the claim was intentional, as intent is not an element of bad faith. *Id.*

v. Consequential Damages

Yes. Consequential damages are available in Ohio flowing from the bad faith conduct of the insurer and caused by the insurer's breach of contract. *Zoppo v. Homestead Ins. Co*., 71 Ohio St. 3d 552, 559, 644 N.E.2d 397, 402 (1994).

In Ohio, emotional distress damages are recoverable. *LeForge v. Nationwide Mut. Fire Ins. Co*., 82 Ohio App.3d 692, 700 (Ohio App. 1992).

vi. Punitive Damages

Yes. In Ohio, "punitive damages may be recovered against an insurer who breaches his duty of good faith in refusing to pay a claim of its insured upon adequate proof." *Hoskins v. Aetna Life Ins. Co*., 6 Ohio St.3d 272, 277 (Ohio 1993).

XII. ATTORNEYS' FEES

Yes. "Attorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted." *Zoppo v. Homestead Ins. Co*., 71 Ohio St. 3d 552, 559, 644 N.E.2d 397, 402 (1994).

XIII. ASSIGNMENT OF RIGHTS

Yes. In Ohio, the insured in a bad faith action can assign his or her claims to a third-party. *Andrade v. Credit Gen. Ins. Co.*, No. 2000CA00002, 2000 WL 1751304, at *4 (Ohio Ct. App. Nov. 20, 2000).

XIV. STATUTE OF LIMITATIONS

In Ohio, there is a four-year statute of limitations period for bad faith actions against an insurer. *Plant v. Ill. Emp'rs Ins. of Wausau*, 20 Ohio App. 3d 236, 485 N.E.2d 773 (1984) (claim for breach of duty of good faith was independent of policy, and therefore not subject to twelve-month limitations period contained in policy)

SOUTH CAROLINA

I. FIRST-PARTY STATUTORY BAD FAITH

No. While South Carolina's Improper Claim Practices Act outlines certain acts and claim practices by an insurer that are prohibited, the Act does not create a private cause of action for first-party insurance claimants. *See* S.C. Code Ann. § 38-59-20; *see also Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Co*., 241 F. Supp. 2d 572 (D.S.C. 2002).

II. THIRD-PARTY STATUTORY BAD FAITH

No. South Carolina does not recognize a third-party action for bad faith refusal to pay insurance benefits. *Kleckley v. Northwestern Nat'l Cas. Co.*, 330 S.C. 277, 498 S.E.2d 669 (1998). Third parties do not have a private right of action under S.C.Code Ann. § 38-59-20. *Gaskins v. Southern Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 541 S.E.2d 269 (Ct.App.2000). Instead, third parties are entitled to administrative review before the Chief Insurance Commissioner. *See Kleckley v. Northwestern National Casualty Company, supra*; S.C.Code Ann. § 38-59-30 (Supp.1999); *see also Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 415, 556 S.E.2d 371, 377 (2001).

III. COMMON LAW

Yes. "[T]here is an implied covenant of good faith and fair dealing in every insurance contract that neither party will do anything to impair the other's rights to receive benefits under the contract." *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 473 S.E.2d 52, 53 (1996).

IV. BAD FAITH STANDARDS

In general, "[a]n 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." *Cock-N-Bull Steak House, Inc. v. Gen. Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727, 730 (1996).

i. Consequential Damages

Yes. "[I]f 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." *Tadlock, 473 S.E.2d at 53*

ii. Punitive Damages

Yes. Under South Carolina law, an insured may recover punitive damages from an insurer for fraudulent breach of insurance contract accompanied by a fraudulent act, and may recover attorney's fees from insurer for bad-faith unreasonable refusal to pay benefits, and may recover excess judgment rendered against him based on insurer's bad-faith negligent refusal to settle or defend. *Robertsen v. State Farm Mut. Auto. Ins. Co.*, 464 F. Supp. 876 (D.S.C. 1979); *see also Univ. Med. Associates of Med. Univ. of S.C. v. UnumProvident Corp.*, 335 F. Supp. 2d 702 (D.S.C. 2004) (explaining in South Carolina, actual damages are not limited by the contract and if the plaintiff can demonstrate that the insurer's actions were willful or in reckless disregard of the insured's rights, she can recover punitive damages).

V. ATTORNEYS' FEES

Yes. S.C.Code § 38-59-40 provides that an insurer is liable to the policy holder for "all reasonable attorneys' fees for the prosecution of the case against the insurer" if the trial judge finds the refusal to pay the policyholder's claim was "without reasonable cause or in bad faith." Furthermore, "[d]etermination of an insurer's liability for attorneys' fees pursuant to section 38-59-40 is a matter for decision by the trial judge." *Ocean Winds*, 241 F.Supp.2d at 578.

VI. ASSIGNMENT OF RIGHTS

Yes. Under South Carolina law, right of action is assignable if, and only if, same action would survive to assignor's personal representative in event of assignor's death. Code S.C. § 15-5-90; *Schneider v. Allstate Ins. Co.*, 487 F. Supp. 239 (D.S.C. 1980)

VII. STATUTE OF LIMITATIONS

A three-year statute of limitations is applicable to actions on any policy of insurance. *See* S.C. Code Ann. §15-3-530.

VERMONT

I. FIRST-PARTY STATUTORY BAD FAITH

No. In Vermont, there is no statutory cause of action for a first-party insured against an insurer for bad faith in Vermont's Insurance Trade Practices Act. Vt. Stat. Ann. tit. 8 § 4724; *Wilder v. Aetna Life & Cas. Ins. Co.*, 433 A.2d 309, 310 (Vt. 1981).

II. THIRD-PARTY STATUTORY BAD FAITH

No. Similarly, in Vermont, there is no statutory cause of action for a third-party against an insurer for bad faith in Vermont's Insurance Trade Practices Act. Vt. Stat. Ann. tit. 8 § 4724; *Wilder v. Aetna Life & Cas. Ins. Co.*, 433 A.2d 309, 310 (Vt. 1981).

III. COMMON LAW

Yes. Vermont recognizes a contractual bad faith claim based on a violation of the covenant of good faith and fair dealing. *Peerless Ins. Co. v. Frederick*, 869 A.2d 112, 116 (Vt. 2004).

IV. BAD FAITH STANDARDS

To establish a bad faith claim in Vermont, an insured must establish that "(1) the insurance company had no reasonable basis to deny benefits of the policy, and (2) the company knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim." *Bushey*, 164 Vt. at 402, 670 A.2d at 809; accord *Peerless Ins. Co. v. Frederick*, 2004 VT 126, ¶ 13, 177 Vt. 441, 869 A.2d 112.

If a claim is "fairly debatable," the insurer is not guilty of bad faith even if it is ultimately determined to have been mistaken. *Bushey*, 164 Vt. at 402, 670 A.2d at 809; see *Chateau Chamberay Homeowners Ass'n v. Assoc. Int'l Ins. Co.*, 108 Cal. Rptr. 2d 776, 784 (Cal. Ct. App. 2001).

i. Consequential Damages

Yes. 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).

In Vermont, emotional distress damages are recoverable. *Phillips v. Aetna Life Ins. Co.*, 473 F.Supp. 984, 988 (D. Vt. 1979). *Id.*, at 989.

ii. Punitive Damages

Yes. In Vermont, Punitive damages are recoverable for a breach of contract if the conduct constituting the breach is also a tort for which punitive damages are recoverable. *Id.*, at 988-989.

V. ATTORNEYS' FEES

Yes. Absent a statutory or contractual provision, parties generally bear their own attorney's fees. Courts have discretionary power to award attorney's fees but "only in exceptional cases and for dominating reasons of justice." *Monahan v. GMAC Mortg. Corp.*, 893 A.2d 298, 322 (2005); *DJ Painting, Inc. v. Baraw Enters.*, 776 A.2d 413, 419 (2001).

VI. STATUTE OF LIMITATIONS

In Vermont, there is a six year statute of limitations period for bad faith actions against an insurer. *Benson v. MVP Health Plan, Inc.*, 186 Vt. 97, 100 (Vt. 2009).

WEST VIRGINIA

I. FIRST-PARTY STATUTORY BAD FAITH

Yes. There is a private right of action under W. Va.Code 33-11-4(1)(a).

II. THIRD-PARTY STATUTORY BAD FAITH

No. Third parties do not have a statutory bad faith cause of action under W. Va.Code § 33–11–4a.

III. COMMON LAW

Yes. West Virginia recognizes a common law cause of action for bad faith against a first-party insurer. *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323 (1986); *Loudin v. National Liability & Fire Ins. Co.*, 228 W.Va. 34 (2011).

No. A third-party does not have a cause of action against an insurance carrier for common law breach of implied covenant of good faith and fair dealing or for common law breach of fiduciary duty. *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 504 S.E.2d 893 (1998).

IV. BAD FAITH STANDARDS

"Evidence should establish that the conduct in question constitutes more than a single violation of W.Va.Code § 33–11–4(9), 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, so that, viewing the conduct as a whole, the finder of fact is able to conclude that the 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." *Mills v. Watkins*, 528 S.E.2d 877, 883 (W.Va. 2003); *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 504 S.E.2d 893, 902 (1998).

ix. Consequential Damages

Yes. "When a policyholder substantially prevails in a property damage suit against an insurer, the policyholder is entitled to damages for net economic loss caused by the delay in settlement, as well as an award for aggravation and inconvenience." *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 330 (1986)

Further, emotional distress damages are available in West Virginia. *Id.*

x. Punitive Damages

Yes. Punitive damages are available in West Virginia if the insurer's refusal to pay on a claim is accompanied by a malicious intention to injure or defraud. *Id.* The policyholder must establish a high threshold of actual malice in the settlement process. *Id.*

V. ATTORNEYS' FEES

Yes. In West Virginia, reasonable attorneys' fees are available. *Id.* at 329.

VI. ASSIGNMENT OF RIGHTS

Yes. In West Virginia, the insured in a bad faith action can assign his or her claims to a third-party. *Strahin v. Sullivan*, 220 W. Va. 329, 647 S.E.2d 765, 772-774 (2007).

VII. STATUTE OF LIMITATIONS

Yes. The statute of limitations in West Virginia for both statutory and common law bad faith claims is one year. *Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 506 S.E.2d 608 (1998); *Noland v. Virginia Insurance Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23 (2009).

WISCONSIN

I. FIRST-PARTY STATUTORY BAD FAITH

No. There is not a private right of action under Wis. Admin. Code §INS 6.11. *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 307 N.W.2d 256 (1981).

II. THIRD-PARTY STATUTORY BAD FAITH

No. Third parties do not have a statutory bad faith cause of action under Wis. Admin. Code §INS 6.11. *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 307 N.W.2d 256 (1981).

III. COMMON LAW

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

IV. BAD FAITH STANDARDS

To establish a caim 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. *Anderson v. Cont'l Ins. Co.*, 271 N.W.2d 368, 377 (Wis. 1978).

xi. Consequential Damages

Yes. Consequential damages are available in Wisconsin. *DeChant v. Monarch Life Ins. Co.*, 200 Wis.2d 559 (1996).

Further, emotional distress damages are available in Wisconsin. A recovery for emotional distress caused by an insurer's bad faith refusal to pay a claim should be allowed only when the distress is severe and substantial other damage is suffered apart from the loss of the contract benefits and the emotional distress. *Anderson v. Cont'l Ins. Co.*, 271 N.W.2d 368, 378 (Wis. 1978).

xii. Punitive Damages

Yes. Punitive damages are available in Wisconsin. *Anderson v. Cont'l Ins. Co.*, 271 N.W.2d 368, 379 (Wis. 1978).

V. ATTORNEYS' FEES

Yes. Attorney's fees are recoverable by a prevailing party in a first-party bad faith action as compensatory damages resulting from the insurer's bad faith. *DeChant v. Monarch Life Ins. Co.*, 200 Wis.2d 559, 577 (1996).

VI. ASSIGNMENT OF RIGHTS

Yes. In Wisconsin, the insured in a bad faith action can assign his or her claims to a third-party. *Nichols v. U. S. Fidelity & Guaranty Co.*, 37 Wis. 2d 238, 155 N.W.2d 104 (1967).

VII. STATUTE OF LIMITATIONS

Yes. Under Wis. Stat. §893.57, the statute of limitations is two years for bad faith. *Warmka v. Hartland-Cicero Mutual Ins. Co.*, 136 Wis.2d 31, 400 N.W.2d 923 (1987).

WYOMING

I. FIRST-PARTY STATUTORY BAD FAITH

No. In Wyoming, there is no statutory cause of action for a first-party insured against an insurer for bad faith. Wyo. Stat. § 26-13-124; *Herrig v. Herrig*, 844 P.2d 487, 494 (Wyo. 1992).

II. THIRD-PARTY STATUTORY BAD FAITH

No. Similarly, in Wyoming, there is no statutory cause of action for a third-party against an insurer for bad faith. Wyo. Stat. § 26-13-124; *Herrig v. Herrig*, 844 P.2d 487, 494 (Wyo. 1992).

III. COMMON LAW

Yes. A common law cause of action for bad faith against a first party insurer is recognized in Wyoming. *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855, 860-61 (Wyo. 1990).

Yes. A common law cause of action for bad faith against a third-party insurer is recognized in Wyoming. *Herrig v. Herrig*, 844 P.2d 487, 492 (Wyo. 1992).

IV. BAD FAITH STANDARDS

The test Wyoming uses to determine bad faith is the objective standard whether the validity of the denied claim was not "fairly debatable." *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855, 860 (Wyo. 1990). To establish a bad faith claim in Wyoming, 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. *Id.*

iii. Consequential Damages

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

iv. Punitive Damages

Yes. In order for punitive damages to be awarded for the tort of bad faith, there must be a showing of wanton or willful misconduct. *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855, 860-61 (Wyo. 1990).

V. ATTORNEYS' FEES

Yes. Attorney's fees may be awarded under Wyo. Stat. §26-15-124(c).

VI. ASSIGNMENT OF RIGHTS

Yes. In Wyoming, the insured in a bad faith action can assign his or her claims to a third-party. Herrig v. Herrig, 844 P.2d 487, 492 (Wyo. 1992).

VII. STATUTE OF LIMITATIONS

In Wyoming, a property owner can bring an action for breach of contract within ten years from the date the property owner knows of the existence for the cause of action. Withing four years for an injury to the rights of the plaintiff, not arising on contract. Wyo. Stat. § 1-3-105.