The Perfect Storm: Delay, Defenses, and Damages in Catastrophe Property Claims

Melissa M. Sims
Shareholder: Berk, Merchant & Sims PLC
Miami

Meghan C. Moore
Shareholder: Ver Ploeg & Lumpkin, P.A.
Miami

Damian Daley
Partner: Wicker, Smith, O’Hara, McCoooy & Ford, P.A.
Miami

Andrea L. DeField
Associate: Ver Ploeg & Lumpkin, P.A.
Miami

A SURVEY OF FIRST-PARTY BAD FAITH LAW IN SIX STATES AFFECTED BY CATASTROPHIC WEATHER EVENTS

I. NEW JERSEY

A. Cause of Action Arises Out of Common Law.

- New Jersey Courts Hold that First-Party Bad Faith Claims Sound in Contract. The New Jersey Supreme Court holds that “Although the
allegation of an agent's breach of a duty of care carries tort overtones, the contractual relationship between insured and insurer dominates not only the relationship between them, but also that between the insured and the agent.” Pickett v. Lloyd’s, 131 N.J. 457, 470 (N.J. 1993), quoting Weinisch v. Sawyer, 123 N.J. 333, 342 (N.J. 1991). “Accordingly, the cause of action is best understood as one that sounds in contract.” Pickett, 131 N.J. at 470.


B. Available Damages

- In First-Party Bad Faith Claims the recoverable damages are limited to contractual damages. The New Jersey Supreme Court “believe(s) that the familiar principles of contract law will suffice to measure the damages.” Pickett, 131 N.J. at 474.


   o Recovery under New Jersey’s Punitive Damages Act, N.J.S.A. § 2A:15-5.9 et seq. (2005). The act applies to causes of action filed on or after the effective date Oct. 27, 1995. But to recover punitive damages for an insurer’s failure to pay a first-party claim, the insured must show egregious circumstances; for example, it must be shown that the insurer’s conduct was wantonly reckless or malicious. See Polizzi Meats Inc. v. Aetna Life & Cas. Co., 931 F. Supp. 328 (D.N.J. 1996).

C. Who has the Burden of Proof in First-Party Claims and What is the Standard?

- The New Jersey Supreme Court has adopted the standards of other State Supreme Courts:

   o For denial of benefits or refusal to pay cases, the Supreme Court recognized and adopted Rhode Island’s “fairly debatable” standard. This standard requires an 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.” Pickett, 131 N.J. at 473 (Emphasis added).

Essentially, the plaintiff must meet the summary judgment standard as “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.” Pickett, 131 N.J. at 473,

For delayed payment of valid claim cases, the Supreme Court adopted the following test that the Plaintiff must prove:

- “(1) the insurer's conduct [in delaying payment is unreasonable]; and (2) the insurer knows that the conduct is unreasonable or recklessly disregards the fact that the conduct is unreasonable.” Pickett, 131 N.J. at 474, citing Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1275 (Colo. 1985).

In cases where a question as to coverage remains: If factual issues exist as to whether the plaintiff is entitled to coverage the court must dismiss the bad faith claim while allowing the underlying insurance dispute to proceed. See Feit v. Great-West Life and Annuity Ins. Co., No. 03-2948, 2005 U.S. Dist. LEXIS 24686, at *22 (D.N.J. Oct. 18, 2005)

D. Statute of Limitations on Bad Faith Actions

- Absent a provision in the insurance policy or an express statute to the contrary, the statute of limitations applicable to actions on an insurance policy is six years. Gahnney v. State Farm Ins. Co., 56 F. Supp. 2d 491, 495 (D.N.J. 1999). The insurance policy may shorten the limitations period and a one-year period is enforceable. Gahnney, 56 F. Supp. 2d at 495.

- Accrual Date: The statute of limitations accrues on the date of the incident giving rise to the insurance claim, but the period is tolled from the time the insured gives notice until the insurer formally declines liability. Id at 495-96.

E. New Jersey’s Proposed Bad Faith Legislation

2012 - PENDING NEW JERSEY “BAD FAITH” LEGISLATION

Sponsored By: Senator Nicholas P. Scutari of District 22 (Middlesex, Somerset and Union)

Synopsis: Provides private cause of action for bad faith in settlement of insurance claims.

Introduced Pending Technical Review by Legislative Counsel

AN ACT concerning bad faith in the settlement of insurance claims and supplementing Title 17 of the Revised Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1 This Proposed Statute pre-dates Hurricane Sandy as this is the text as of March 13, 2012, and has had no changes since it was introduced in September 2011.
1. **a. As used in this section:**

“Claimant” means an individual, corporation, association, partnership or other legal entity asserting a direct or assigned right to payment by an insurer under an insurance policy, arising out of the occurrence of a contingency or loss covered by the policy.

“Insurance policy” means any insurance policy or contract issued, executed, renewed or delivered in this State pursuant to the provisions of Title 17 of the Revised Statutes.

“Insurer” means any individual, corporation, association, partnership or other legal entity which issues, executes, renews or delivers an insurance policy in this State, or which is responsible for determining claims made under the policy.

**b. A claimant may file** a cause of action against an insurer arising from the insurer’s breach of its duty of good faith and fair dealing, which breach shall include the insurer's failure to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim in which liability has become reasonably clear. Notwithstanding any other law, regulation, or rule to the contrary, the cause of action shall be heard and determined by a judge in a court of competent jurisdiction.

**c. In order to recover damages** in the cause of action provided for in this section, the claimant shall prove that the insurer acted unreasonably in the investigation, evaluation, processing, payment or settlement of the claimant’s claim for coverage under the policy or without a reasonable basis in denying the coverage.

**d. Upon establishing those proofs provided for in subsection c.** of this section, the claimant shall be entitled to:

1. the full amount of damages as determined by the judge, regardless of the coverage limits of the policy;
2. prejudgment interest, reasonable attorney’s fees, and all reasonable litigation expenses from the date of the institution of the action filed pursuant to this section. The prejudgment interest shall be calculated at the rate provided for tort actions, or for non-acceptance of a formal offer for judgment, whichever is higher, as prescribed in the Rules of Court; and
3. punitive damages, when the insurer’s acts or omissions demonstrate, by clear and convincing evidence, actual malice or wanton and willful disregard of any person who foreseeably might be harmed by the insurer's acts or omissions.

2. This act shall take effect immediately and shall apply to all claims filed on or after the effective date.

**STATEMENT**

This bill establishes a private cause of action for insureds or their assignees regarding bad faith settlement practices in the settlement or attempted settlement of claims involving insurance coverage. The bill permits a claimant to file a cause of action against an insurer arising from the insurer’s breach of good faith and fair dealing with the claimant, which breach shall include the insurer’s failure to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim in which liability has become reasonably clear. In this “breach of good faith” cause of action, in order to prevail, the claimant shall prove that the insurer acted unreasonably in the investigation, evaluation, processing, payment, or settlement of the claimant’s claim for coverage or without a reasonable basis in denying the coverage. The bill incorporates into statutory law
New Jersey’s current case law, which recognizes private causes of action in first-party and third-party claims arising out of the bad faith actions of insurance companies which result in harm to their insureds. See Rova Farms, 65 N.J. 474. The bill also reverses the recent holding of the Supreme Court of New Jersey in Wood, 2011 N.J. Lexis 679, (2011), that bad faith breach of contract claims against insurers are actions to which the right to a jury trial attaches; the bill provides that these claims are to be heard and decided by a judge of competent jurisdiction.
II. NEW YORK

A. Cause of Action Arises Out of Common Law.


  o HOWEVER, insureds have causes of action for instances of “egregious tortious conduct” against the insured and the public at large, which allow for punitive damages awards. See Rocanova v. Equitable Life Assurance Soc’y, 83 N.Y.2d 603 (1994).

- Affording a cause of action for Third-Party Bad Faith Claims is well settled in New York common law. “The notion that an insurer may be held liable for the breach of its duty of ‘good faith’ in defending and settling claims over which it exercises exclusive control on behalf of its insured is an enduring principle, well settled in this State's jurisprudence.” Pavia v. State Farm Mut. Auto. Ins. Co., 82 N.Y.2d 445 (N.Y. 1993).

B. Available Damages

- Damages available in First-Party cases. New York Courts have allowed damages in excess of policy proceeds plus interest without creating a bad faith cause of action. See Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y., 2008 NY Slip Op 1418 (N.Y. 2008). The Court of Appeals of New York relied on “well-settled” law that the victim of a breach of contract may recover general damages that are the natural and probable consequences of the breach. Id. The Bi-Economy Court reasoned that the “purpose served by business interruption coverage cannot be clearer” and that limiting the damage to the policy proceeds plus interest “does not place the insured in the position it would have been in had the contract been performed.” Id. at *5.

  o A claim for consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted against an insurer, so long as the damages were “within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting.” Panasia Estates, Inc. v. Hudson Ins. Co., 10 N.Y.3d 200 (2008), (decided with and relying on Bi-Economy).

  o Punitive damages may be recoverable if necessary to vindicate a public right. New York Univ., 87 N.Y.2d at 316, citing Rocanova v. Equitable Life Assurance Soc’y, 83 N.Y.2d at 613. Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as “gross” and “morally reprehensible,” and of “such wanton dishonesty as to imply a criminal indifference to civil obligations.” New York Univ., 87 N.Y.2d at 316-17.

- Damages available in Third-Party Claims

  o Claims of Bad Faith failure to defend. When insurers wrongfully deny coverage, the insured/assignees may recover settlement
amounts so long as a potential liability on the facts known to the insured is shown to exist, culminating in a reasonable settlement amount in view of the possible recovery and degree of probability of claimant’s success against insured. Texacos A/S v. Commercial Ins. Co. of Newark, N.J., 160 F.3d 124, 128 (2d Cir. 1998).

- IF a plaintiff-insured brings a successful third-party claim against an insurer for a bad faith failure to defend, it can recover legal fees and expenses in a bad faith action. Sukup v. State, 19 N.Y.2d 519 (1967).

- HOWEVER, when an insurer commences a declaratory judgment action regarding its duty to defend, casting the insured in a defensive posture, the insured may recover the legal fees and expenses incurred in the coverage dispute. See Mighty Midgets, Inc. v. Centennial Ins. Co., 47 N.Y.2d 12 (1979).

- Claims of Bad Faith refusal to Settle: The Court held if an insurer fails to settle an underlying claim, resulting in an excess judgment against the insured that includes punitive damages, the insurer is NOT liable for any punitive damages awarded against the insured as such a rule is unsound public policy. Soto v. State Farm Insurance Company, 83 N.Y.2d 718 (1994). Thus, New York case law suggests an insurer will not be held liable to its insured for third-party excess damages arising from bad faith refusal to settle in an excess judgment reflecting punitive damages. See Hartford Accid. & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218 (1979).

C. Burden of Proof For First-Party and Third-Party Claims.

- Standard for Claims of First-Party Bad Faith Claims. An action for bad faith required that Plaintiff actually demonstrate that coverage existed and that the insurer failed to pay on its obligation under the policy. See Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y., 10 N.Y.3d 187 (2008). However, without a showing of “egregious tortious conduct,” discussed below, plaintiff is entitled to recovery of general damages that are the natural and probable consequences of the breach. Id.

- Standard for Recovering Punitive Damages in Claims of First-Party Bad Faith. To recover punitive damages as an additional remedy to breach of contract, Plaintiff MUST prove the following:
  - (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 (N.Y. 1961);
  - (3) the egregious conduct must be directed to plaintiff; and

- Standard for Proving Claims of Third-Party Bad Faith Refusal to Defend. Actions for bad faith place the burden on Plaintiff to make “an extraordinary showing of disingenuous or dishonest failure to carry out a contract” on the part of the insurer. Gordon, 334 N.Y.S.2d at 603-04. This requires that the plaintiff show the insurer had no “arguable case” for having refused to
defense the insured. Gordon, 334 N.Y.S.2d at 603-04. (Similar to New Jersey’s “fairly debatable” standard)

- **Standard for Proving Claims of Third-Party Bad Faith Refusal to Settle.** “[P]laintiff must establish that the insurer’s conduct constituted a “gross disregard” of the insured’s interests – that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer.” Pavia v. State Farm Mut. Auto. Ins. Co., 82 N.Y.2d 445, 453-54 (1993).

  o **Proving Third-Party bad faith refusal to settle.** “Plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted. The gross disregard standard . . . strikes a fair balance between two extremes by requiring more than ordinary negligence and less than a showing of dishonest motives.” Pavia, 82 N.Y.2d at 453-54.

  o **The Courts have recognized eight factors when considering the “Gross Disregard Standard.”**
    - 1) **Proper Investigation and/or Evaluation** (See Brown v. United States Fidelity & Guar Co., 314 F.2d 675 (2d Cir. 1963));
    - 2) **Timely Negotiation of a Settlement or Failure to Negotiate** (See State v. Merchants Ins. Co. of New Hampshire, 486 N.Y.S.2d 412 (App. Div. 1985));
    - 3) **Failure to Foresee a Verdict in Excess of the Policy Limits** (See Knobloch v. Royal Globe Ins. Co., 38 N.Y.2d 471 (1976));
    - 4) **Failure to Inform the Insured of Settlement Negotiations** (See Knobloch, 38 N.Y.2d 471);
    - 5) **Attempts to Obtain Contribution to Settlement From the Insured** (See Brockstein v. Nationwide Mut. Ins. Co., 417 F.2d 703 (2d Cir. 1969));
    - 7) **Comparative Financial Risks Between Insured & Insurer** (See Brown, 314 F.2d at 678-79); and
    - 8) **The Insured’s Conduct:** Insured’s fault in delaying or ceasing settlement.

D. **Statute of Limitations for Bad Faith Actions**


- **For First-Party Bad Faith Claims.** The six-year statute of limitations of CPLR § 213(2) also applies to causes of action against an insurance company
for bad faith breach of its contractual duty to pay its insured as § 213(2) governs actions based on a contractual obligation or liability.


- Plaintiffs may assert a claim under General Business Law §349 – Deceptive Business Practices, New York Statutes, which provides a private right of action to recover damages resulting from deceptive business practices. In pertinent part, Section 349 provides:

(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

* * *

(g) This section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state, and shall not supersede, amend or repeal any other law of this state under which the attorney general is authorized to take any action or conduct any inquiry.

(h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase an award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney’s fees to a prevailing plaintiff.

Plaintiff’s Burden Under Section 349. A plaintiff asserting a claim under Section 349 must, at the threshold, demonstrate that the conduct is consumer oriented. In this regard, the conduct need not be repetitive or recurring, but the insurer’s acts or practices must have a broad impact on consumers at large. According to the Court of Appeals, private contract disputes unique to the parties do not fall within the ambit of the statute. See New York Univ, 87 N.Y.2
III. COLORADO

A. What causes of action are available?

• Statutory Bad Faith.

• Bad Faith Arising Out of Common Law.

B. What damages are available?

• Statutory Bad Faith:
  o Statutory bad faith claims are limited to two times the covered benefit plus reasonable attorney’s fee and court costs. Colo. Rev. Stat. § 10-3-1116(1).

• Common Law Bad Faith:
  o Consequential Damages:
    • Bad faith damages sound in tort and thus may include consequential damages and damages for emotional distress. Williams v. Farmers Ins. Grp., Inc., 781 P.2d 156, 159 (Colo. App. 1989).
  o Emotional Distress:
    • Emotional distress, pain and suffering, inconvenience, fear and anxiety, and impairment of the quality of life may be recoverable. See Goodson v. Am. Standard Ins. Co. of Wis., 89 P.3d 409, 415–16 (Colo. 2004).
  o Punitive Damages:
    • Punitive damages may not exceed the amount of actual damages. Goodson, 89 P.3d at 415.
  o Attorney’s Fees:
• Attorney’s fees are generally not recoverable in a common law bad faith suit or the accompanying breach of contract claim. Bernhard v. Farmers Ins. Exch., 915 P.2d 1285, 1287 (Colo. 1996). If the insurer is obligated to provide a defense to its policyholder under a liability policy and fails, however, fees may be recoverable. Id. at 1288, 1291.

  o **Prejudgment Interest:**

• “When an insurer improperly denies a claim, prejudgment interest is permitted on the amount of compensatory damages reflecting the benefit that the insured would have realized under the insurance contract, from the time of the wrongful withholding.” Herod v. Colorado Farm Bureau Mut. Ins. Co., 928 P.2d 834, 838 (Colo. App 1996).

**C. What is the legal standard required to prove bad faith?**

• **Statutory:**

  • “[A]n insurer’s delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action.” Colo. Rev. Stat. § 10-3-115(2).

• **Common Law:**

  • **First Party:** “In addition to proving that the insurer acted unreasonably under the circumstances, a first-party claimant must prove that the insurer either knowingly or recklessly disregarded the validity of the insured’s claim.” Goodson v. Am. Standard Ins. Co. of Wis., 89 P.3d 409, 415 (Colo. 2004).

  • **Standard of Reasonableness:**

    • The reasonableness of an insurer’s conduct is determined objectively. Sanderson v. Am. Family Mut. Ins. Co., 251 P.3d 1213, 1217 (Colo. App. 2010). Furthermore, the “reasonableness of the insurer’s conduct must be determined objectively, based on proof of industry standards. The aid of expert witnesses is often required in order to establish objective evidence of industry standards.” Goodson, 89 P.3d at 415.

  • **Preponderance of the Evidence:** A plaintiff must prove each element of a bad faith claim by a preponderance of the evidence. Goodson, 89 P.3d at 415.

**D. Is there a separate legal standard that must be met to recover punitive damages?**

• Punitive damages are available in “all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct.” Colo. Rev. Stat. § 13-21-102(1)(a). “[W]illful and wanton conduct” means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.” Colo. Rev. Stat. § 13-21-102(1)(b). The plaintiff must prove his or her entitlement to punitive damages beyond a reasonable doubt. Goodson, 89 P.3d at 415–16.

**E. What is the statute of limitations for bringing a bad faith suit?**

• “A bad faith claim accrues when both the nature of the injury and its causes are known or should be known through the exercise of reasonable diligence.” Cork v. Sentry Ins., 194 P.3d 422, 427 (Colo. App. 2008) (citing Colo. Rev. Stat. § 13-80-108(1)).

• Note: NEW LEGISLATION: Pursuant to the recently passed Colorado Homeowners Insurance Reform Act of 2013, effective January 1, 2014, any provision in a homeowner’s insurance policy that requires the insured to bring suit within a shorter time period than the applicable statute of limitations is unenforceable. Colo. Rev. Stat. § 10-4-110.8(12).
IV. FLORIDA

A. What causes of action are available?

- Statutory Bad Faith:
  
  o Florida law provides a statutory first-party bad faith claim. Fla. Stat. § 624.155(1). Florida’s civil remedy statute enumerates practices supporting a first-party bad faith claim and incorporates provisions of other statutes. Fla. Stat. § 624.155(1)(a), (b). For example, the civil remedy statute incorporates portions of Florida’s statute on unfair methods of competition and unfair or deceptive acts or practices. Fla. Stat. § 624.155(1)(a)(1) (providing cause of action for insurer’s violation of Fla. Stat. § 626.9541(1)(i), (o) or (x)).
  
  o The statute states that “any person” may bring such an action when damaged by the insurer’s bad faith conduct. Fla. Stat. § 624.155(1). Accordingly, third parties may bring an action under the statute. Auto-Owners Ins. Co. v. Conquest, 658 So. 2d 928, 929–30 (Fla. 1995).
  
  o Florida’s civil remedy statute provides, “As a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given 60 days’ written notice of the violation. . . .” Fla. Stat. § 624.155(3)(a). The notice must be on a form provided by the Florida Department of Financial Services and contain statutorily specified information. Fla. Stat. § 624.155(3)(b). A bad faith action is precluded if the insurer pays the contractual damages within the 60-day cure period. Fla. Stat. § 624.155(d); Talat Enters., Inc. v. Aetna Cas. & Sur. Co., 753 So. 2d 1278, 1281–82 (Fla. 2000).
  
  o Additionally, a determination of the existence of the insurer’s liability under the policy and the extent of damages owed is a prerequisite to a first-party bad faith claim. Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1276 (Fla. 2000); Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So. 2d 1289, 1291 (Fla. 1991). Litigation is not required to satisfy these prerequisites. Trafalgar at Greenacres Ltd. V. Zurich Am. Ins. Co., 100 So. 3d 1155,1157–58 (Fla. 4th DCA 2012) (citing Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617 (Fla. 1994)). Partial payment may constitute a final determination of liability. Plante v. USF&G Specialty Ins. Co., No. 03-23157, 2004 WL 741382, at *4–5 (S.D. Fla. Mar. 2, 2004). Similarly, payment of the policy limits suffices as a determination of damages. Vest, 753 So. 2d at 1273–74 (quoting Brookins v. Goodson, 640 So. 2d, 110, 112–13 (Fla. 4th DCA 1994)). The statutory notice may be sent before a determination of liability and damages, but the action does not accrue until all the prerequisites are met. Id. at 1275–76.

- Common Law:
  
  o Florida law does not recognize a common law first-party bad faith claim. QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass’n, Inc., 94 So. 3d 541, 548–49 (Fla. 2012).
  
  o Florida law does, however, recognize a common law third-party bad faith cause of action. Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980).

B. What damages are available?
• The damages recoverable in a first-party bad faith action are those that are “the natural, proximate, probable, or direct consequence of the insurer’s bad faith actions.” McLeod v. Cont’l Ins. Co., 591 So. 2d 621, 626 (Fla. 1992), superseded by statute as stated in Time Ins. Co. v. Burger, 712 So. 2d 389, 392 (Fla. 1998) (per curiam); see also Cont’l Ins. Co. v. Jones, 592 So. 2d 240, 241 (Fla. 1992). Fla. Stat. § 624.155(8) provides:

The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common-law cause of action. The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits.

• In the first-party context, recovery for emotional distress is limited to bad faith actions against health insurers where the plaintiff proves “(1) that the bad-faith conduct resulted in the insured’s failure to receive necessary or timely health care; (2) that, based upon a reasonable medical probability, this failure caused or aggravated the insured’s medical or psychiatric condition; and (3) that the insured suffered mental distress related to the condition or the aggravation of the condition.” Burger, 712 So. 2d at 393. These elements must be supported by testimony of a qualified healthcare provider. Id. Florida courts have refused to extend Burger outside the health insurance context. Otero v. Midland Life Ins. Co., 753 So. 2d 579, 580 (Fla. 3d DCA 1999).

• A prevailing plaintiff is entitled to court costs and reasonable attorney’s fees. Fla. Stat. § 624.155(4); see also Jones, 592 So. 2d at 241.

• The statute also provides for punitive damages in certain instances. Fla. Stat. § 624.155(5).

C. What is the legal standard required to prove bad faith in a first party case?

• A claim for statutory bad faith must be supported by proving a violation listed in Fla. Stat. 624.155(1)(a) or (b). The burden of proof is a preponderance of the evidence. See Hack v. Janes, 878 So. 2d 440, 444 (Fla. 5th DCA 2004) (“The preponderance or greater weight of the evidence is the generally accepted burden of proof in civil matters.”).

• Florida courts apply a “totality of the circumstances” test to determine whether the insurer acted fairly and honestly toward its insured and with due regard for the insured’s interests. State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62–63 (Fla. 1995) (rejecting “fairly debatable” standard). Courts consider the following factors in making this determination: “(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.
• Evidence of a general business practice is not required to prevail on a bad faith claim. 
  2006). While the civil remedy statute, Fla. Stat. 624.155(1)(b)(1), incorporates claims 
  that require proof of a general business practice when brought under Fla. Stat § 626.9541, 
  proof of a general business practice is not required when such claims are brought under 
  the civil remedy statute. Id.

D. Is there a separate legal standard that must be met to recover punitive damages?

Fla. Stat. § 624.155(5) provides:

No punitive damages shall be awarded under this section unless the acts giving 
ris e to the violation occur with such frequency as to indicate a general business 
practice and these acts are:

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

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

• Some federal courts have held that the last portion of this section, requiring that costs be 
  posted in advance, is procedural and thus does not apply to a federal diversity action. See, 
  e.g., Ingole v. Certain Underwriters at Lloyd’s of London, No. 8:08-CV-1089-T-27EAJ, 
  29, 2006)). But see First Coast Energy, L.L.P. v. Mid-Continent Cas. Co., 286 F.R.D. 
  624.155(5)).

• While the statute does not define “general business practice,” a plaintiff seeking 
  statutory punitive damages must at least prove “more than acting in the proscribed 
  Auto. Ins. Co., the court held that the plaintiff’s citation of three other reported decisions 
in which the insurer engaged in the same conduct was enough to survive summary 
judgment, but that “[t]o survive a motion for directed verdict, the insured would have to 
demonstrate that [the insurer] engaged in this practice far more frequently than that.” 673 
So. 2d 526, 529 (Fla. 4th DCA 1996).

E. What is the statute of limitations for bringing a bad faith suit?

• A statutory bad faith claim is subject to a four-year statute of limitations. Fla. Stat. § 
  95.11(3)(f); Lopez v. Geico Cas. Co., No. 13-80650-CIV, 2013 WL 4854492, at *3, __ F. 
  Supp. 2d __ (S.D. Fla. Sept. 5, 2013). The statute of limitations begins to run “from the 
time the cause of action accrues,” which is when the last element of the cause of action 
occurs. Fla. Stat. § 95.031(1). This is usually once a determination of liability under the 
policy and the extent of the plaintiff’s damages is made. Lopez, 2013 WL 4854492, at *3 
(citing Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1276 (Fla. 2000); Blanchard v. State 
Farm Mut. Auto. Ins. Co., 575 So. 2d 1289, 1291 (Fla. 1991)).
V. TEXAS

A. What causes of action are available?

- **Statutory:**


- **Common Law:**
  - Texas law recognizes a common law cause of action for first-party bad faith claims. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 52 (Tex. 1997). The cause of action is based on an insurer’s duty of good faith and fair dealing, which emanates from a *special relationship* between an insurer and insured given the parties’ unequal bargaining power and the nature of insurance contracts. Id. (quoting Arnold v. Nat’l Cnty. Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1990)).

  - Thus, a breach of the duty of good faith and fair dealing will give rise to a cause of action in tort that is separate from any cause of action for breach of the underlying insurance contract. Liberty Nat’l Fire Ins. Co. v. Akin, 927 S.W.2d 627, 629 (Tex. 1996); Viles v. Security Nat’l Ins. Co., 788 S.W.2d 566 (Tex. 1990); Arnold, 725 S.W.2d at 167 (holding that a duty on the part of insurers to deal fairly and in good faith with their insureds exists).

B. What damages are available?

- **Damages Available for Statutory First-Party Bad Faith Actions**
  - Pursuant to Tex. Ins. Code § 541.152, a plaintiff who prevails in a statutory bad faith action may obtain:

    (a) . . .
    (1) the amount of actual damages, plus court costs and reasonable and necessary attorney’s fees;
    (2) an order enjoining the act or failure to act complained of; or
    (3) any other relief the court determines is proper.

  (b) Except as provided by Subsection (c), on a finding by the trier of fact that the defendant *knowingly committed the act complained of*, the trier of fact may award an amount *not to exceed three times the amount of actual damages.* (emphasis added)

---

2 In Launius v. Allstate Ins. Co., the court noted a split in Texas law regarding survivability of DTPA actions, with more recent case law holding that there is no survivability, and determined that based on its most recent precedent the Texas Supreme Court would hold that such claims are not survivable. No. 3:06-CV-0579-B, 2007 WL 1135347, at *3–5 (N.D. Tex. Apr. 17, 2007).
(c) Subsection (b) does not apply to an action under this subchapter brought against the Texas Windstorm Insurance Association.

- Pursuant to the DTPA, Tex. Bus. & Com. Code § 17.50(b), a prevailing plaintiff may obtain:

  (1) the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds the conduct was committed intentionally, the consumer may recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages;

  (2) an order enjoining such acts or failure to act;

  (3) orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and

  (4) any other relief which the court deems proper, including the appointment of a receiver or the revocation of a license or certificate authorizing a person to engage in business in this state if the judgment has not been satisfied within three months of the date of the final judgment. The court may not revoke or suspend a license to do business in this state or appoint a receiver to take over the affairs of a person who has failed to satisfy a judgment if the person is a licensee of or regulated by a state agency which has statutory authority to revoke or suspend a license or to appoint a receiver or trustee. Costs and fees of such receivership or other relief shall be assessed against the defendant.

- The DTPA also provides that a prevailing plaintiff is entitled to attorney’s fees and court costs. Tex. Bus. & Com. Code § 17.50(d).

- **Damages Available for Common Law First-Party Bad Faith Actions**

  - An insured who establishes that the insurer breached the duty of good faith and fair dealing is, as with any other tort, entitled to recover all damages proximately caused by the insurer’s actions. Chitsey v. Nat’l Lloyds Ins. Co., 738 S.W.2d 641, 643 (Tex. 1987).

  - Damages for mental anguish, however, are limited to cases where the insurer’s denial or delay in payment of a claim “seriously disrupted the insured’s life.” Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 54 (Tex. 1997).

  - **Attorneys fees are not generally recoverable** in a common law first-party bad faith action. Texas follows the general rule that such recovery is only available if provided for by statute or contract between the parties. Brainard v. Trinity Universal Ins. Co., 216 S.W.3d 809, 817 (Tex. 2006).

C. What is the legal standard required to prove bad faith in a first party case?

- **Statutory Bad Faith:**

  STATUTORY UNFAIR SETTLEMENT PRACTICES - Tex. Ins. Code § 541.060
(a) It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:

(1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;

(2) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of:

(A) a claim with respect to which the insurer's liability has become reasonably clear; or

(B) a claim under one portion of a policy with respect to which the insurer's liability has become reasonably clear to influence the claimant to settle another claim under another portion of the coverage unless payment under one portion of the coverage constitutes evidence of liability under another portion;

(3) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;

(4) failing within a reasonable time to:

(A) affirm or deny coverage of a claim to a policyholder; or

(B) submit a reservation of rights to a policyholder;

(5) refusing, failing, or unreasonably delaying a settlement offer under applicable first-party coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered, except as may be specifically provided in the policy;

(6) undertaking to enforce a full and final release of a claim from a policyholder when only a partial payment has been made, unless the payment is a compromise settlement of a doubtful or disputed claim;

(7) refusing to pay a claim without conducting a reasonable investigation with respect to the claim;

(8) with respect to a Texas personal automobile insurance policy, delaying or refusing settlement of a claim solely because there is other insurance of a different kind available to satisfy all or part of the loss forming the basis of that claim; or

(9) requiring a claimant as a condition of settling a claim to produce the claimant's federal income tax returns for examination or investigation by the person unless:

(A) a court orders the claimant to produce those tax returns;

(B) the claim involves a fire loss; or

(C) the claim involves lost profits or income.
Subsection (a) does not provide a cause of action to a third party asserting one or more claims against an insured covered under a liability insurance policy.

- **Common Law First Party Bad Faith:**

  - The proponent of a first-party bad faith claim must prove that the insurer knew or should have known that it was “reasonably clear” that the claim was covered. *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997). Evidence of a “bona fide coverage dispute” does not rise to the level of bad faith. *Simmons*, 963 S.W.2d at 44. Whether coverage was “reasonably clear” to the insurer is a question of fact for the jury. *Giles*, 950 S.W.2d at 56.

  - An insurer also breaches the duty of good faith and fair dealing by failing to reasonably investigate a claim. *Id.* at 56 n.5.

- While coverage claims and bad faith claims are independent, an insured generally may not prevail on a bad faith claim without first showing that the insurer breached the contract. *Liberty Nat’l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996); *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995).

  - The Texas Supreme Court, however, “has left open the possibility that an insurer’s denial of a claim it was not obliged to pay might nevertheless be in bad faith if its conduct was extreme and produced damages unrelated to and independent of the policy claim.” *Progressive Cnty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005).

**D. Is there a separate legal standard that must be met to recover punitive damages?**

- **STATUTORY PUNITIVE DAMAGES**

  - On a finding by the trier of fact that the defendant *knowingly committed the act complained of*, the trier of fact may award an amount *not to exceed three times the amount of actual damages*. Tex. Ins. Code § 541.152(b).

  - If the trier of fact finds the *conduct was committed intentionally*, the plaintiff may recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award *not more than three times the amount of damages for mental anguish and economic damages*. DTPA, Tex. Bus. & Com. Code § 17.50(b)(1).

- **COMMON LAW PUNITIVE DAMAGES**

  - For common law claims filed on or after September 1, 2003, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence. Tex. Civ. Prac. & Rem. Code § 41.003(a). Exemplary damages may be awarded only if the jury is unanimous in its finding of liability for and the amount of exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.003(d).

  - Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of: (1) (A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to
The limits on exemplary damages do not apply when an insurer knowingly or intentionally commits one of the felonies specified in Tex. Civ. Prac. & Rem. Code § 41.008(c), including forgery, securing execution of document by deception, and fraudulent destruction, removal, or concealment of writing.

E. What is the statute of limitations for bringing a bad faith suit?

- There is a two-year statute of limitations on statutory first-party bad faith claims. A person must bring an action under Chapter 541 of the Texas Insurance Code before the second anniversary of the following: (1) the date the unfair method of competition or unfair or deceptive act or practice occurred; or (2) the date the person discovered or, by the exercise of reasonable diligence, should have discovered that the unfair method of competition or unfair or deceptive act or practice occurred. Texas Ins. Code 541.162(a).

- The limitations period may be extended by 180 days if the plaintiff proves that its failure to bring the action within the statutory time period was caused by the defendant’s engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone bringing the action. Texas Ins. Code 541.162(b). The DTPA has a similar provision. Tex. Bus. & Com. Code § 17.565.


VI. CALIFORNIA

A. Available Causes of Action

California first-party bad faith claims arise out of both common law and legislation.

- Common Law

The body of bad faith law finds its origins in California common law. Since the early 1950s, California case law has developed and refined the concept of breach of the implied covenant of good faith and fair dealing. Keystones of California common law include the following:


- Every insurance contract contains an implicit provision that neither party will do anything to injure the right of the other party to receive the full benefits of the contract. See id.

- Each party to the insurance contract is required to “do everything that the contract presupposes that he will do to accomplish its purpose”. City of Hollister v. Monterey Ins. Co., 165 Cal. App. 4th 455 (Cal. 6th Dist. 2008).


- Bad Faith Legislation

California enacted the Uniform Claims Practices Act in 1972. The act was subsequently codified as Section 790.03 of the California Insurance Code. Section 790.03 specifically enumerates the actions of an insurer that can be deemed unfair and deceptive acts or practices.
Several years after the enactment of the Uniform Claims Practices Act, the California Supreme Court eliminated private causes of action for first and third-party bad faith claims under the Uniform Claims Practices Act. See Moradai-Shalal v. Fireman’s Fund Ins. Cos., 758 P. 2d 58 (Cal. 1988) and Zephyr Park Ltd. v. Superior Court, 262 Cal. Rptr. 106 (Cal. Ct. App. 1989). Not to be deterred, California policyholders sought relief using California's statutory unfair competition law (Bus. & Prof. Code, § 17200 et seq. “UCL”) which governs all businesses.

Recently, the pendulum in California statutory bad faith law took a slight swing in the opposition direction. On August 1, 2013, the California Supreme Court decided Zhang v. Superior Court, essentially finding that an insured may sue an insurer under the UCL based on conduct that violates the Unfair Insurance Practices Act, Cal. Ins. Code § 790 et seq. (the “UIPA”), as long as that conduct also violates another law or legal standard. See Zhang v. Superior Court, 2013 WL 3942607 (Aug. 1, 2013).

B. Available Damages

Damages for bad faith typically include all damages proximately caused by the breach, although the measure of damages varies by state. In California, the following damages are recoverable in a first-party bad faith action, where applicable.

- Consequential Damages
- Emotional Distress
- Reasonable Attorney’s Fees
- Other foreseeable economic losses, i.e. Loss of Use
- Punitive Damages.


C. Burden of Proof in a First-Party Bad Faith Case


“Before an insurer can be found to have acted tortiously (i.e., in bad faith), for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted unreasonably or without proper cause.” Chateau Chamberay Homeowners Ass'n v. Associated Intern. Ins. Co., 90 Cal. App. 4th 335, 347, 108 Cal. Rptr. 2d 776, 784 (Cal. Ct. App. 2001). “The mistaken [or erroneous] withholding of policy benefits, if reasonable or if based on a legitimate dispute as to the insurer's liability under California law, does not expose the insurer to bad faith liability.” Without more, such a denial of benefits is merely a breach of contract. Moreover, the reasonableness of the insurer's decisions and actions must be evaluated as of the time that they were made.” Id.

Proving Bad Faith

D. *Separate Legal Standard for Recovery of Punitive Damages*

Under California law, punitive damages are available on an insured's bad faith claim against an insurer if in addition to proving a breach of the implied covenant of good faith and fair dealing proximately causing actual damages, the insured proves by *clear and convincing* evidence that the insurance company itself engaged in conduct that is oppressive, fraudulent, or malicious. *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F. 3d 1152 (9th Cir. 2002).

E. *Statute of Limitations for First-Party Bad Faith Action*

Under California law, both statutory and common law, first-party bad faith actions must be brought within two years after the discovery of the loss or damage. See *Gourley v. State Farm Mut. Auto Ins. Co.*, 53 Cal. 3d 121 (Cal. 1991); *see also* Cal. C.C.P. §339.