



Bad Faith Laws for Property/Casualty Claims

*A review of the law on first- and third-party bad
faith liability in all 50 states*

As of January 1, 2008 with select updates on new laws

Prepared by Gen Re and Edwards Angell Palmer & Dodge LLP

About the Authors



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Jim represents national and international clients in major insurance and reinsurance litigation and arbitration matters. He is an accomplished trial lawyer and has tried jury and non-jury cases in federal and state courts, administrative proceedings and numerous arbitrations throughout the United States. His practice includes representation and counseling in matters involving both property and casualty and life and health reinsurance, insolvencies, coverage issues, agents and brokers, surety issues, and life insurance, as well as a large variety of other insurance matters. Jim has also represented clients in complex commercial litigation involving a wide range of substantive areas, including contract disputes, securities, creditors' rights, real estate, employment discrimination, publishing, advertising, franchising, fraud, and other business torts. Along with several of his Edwards Angell Palmer & Dodge colleagues, Jim is listed in the Euromoney's Legal Group's Guide to the world's leading insurance and reinsurance lawyers and in Chambers' *America's Leading Lawyers for Business*. He is also listed in *Who's Who in America* and *Who's Who in American Law*.



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Elaine takes a client-centered approach to the practice of law. An experienced commercial litigator, Elaine knows that there is no rote formula for success. Thus, she envisions the result her client desires to achieve, then develops an aggressive, individualized, and cost-effective plan to make that vision a reality.

Over the last 25 years as a trial and appellate advocate and negotiator, Elaine's clients have run the gamut from Fortune 100 companies to governmental entities and non-profit corporations. Rated AV by Martindale-Hubbell, Elaine represents and counsels insurance companies, real estate developers, banks, corporations, and individuals in federal and state courts and before administrative agencies. In addition, Elaine has served as outside general counsel to a municipal housing authority for several years. In 2007, the members of the Florida Bar selected Elaine as a "Super Lawyer," one of the top members of the Bar.

Since 2002, Elaine has been resident in the firm's Florida office. She serves on the firm's Professional Development and Teamwork and Diversity Committees.

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We express our appreciation to Jim Shanman, Elaine James, and the professional staff at Edwards Angell Palmer & Dodge for the state law summaries contained in this survey. For more about the firm, see page 6.

For More Information

If you have any questions about this law survey, please contact your Gen Re account executive or the law firm of Edwards Angell Palmer & Dodge. For underwriting questions, you can also contact Bob Button at 203 328 5933 or at rbutton@genre.com, or for marketing questions, contact Deborah Colantuoni, our Business Development Specialist for Auto and General Liability, at 203 328 5409 or dcolantu@genre.com. For claims-related questions, you can contact Art Harris at 203 328 5397 or aharris@genre.com.



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Deborah is a Senior Vice President in our Treaty Department in Stamford. Deborah is the Business Development Specialist for Auto and General Liability and is also a Treaty account executive with marketing responsibilities for companies in the Northeast and the Midwest.



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Art is a Vice President in Gen Re's Claims Department in Stamford. He is also Claims Counsel and Manager of the Claim Litigation Unit. The Unit is responsible for evaluating reinsurance coverage issues and managing arbitrations and lawsuits, as well as handling litigation involving environmental and toxic tort claims.

The vast majority of insurance claims are handled in the normal course of business without any complaints or litigation. However, the claims that do evolve into bad faith lawsuits—even those relatively favorably settled or disposed of—demand considerable financial and staff resources. For those few claims that do culminate in a plaintiff's verdict, the financial punishment for bad faith often exceeds \$1 million and carries negative publicity and regulatory repercussions for the insurer.

This survey from Edwards Angell Palmer & Dodge LLP summarizes the legal theories, standards, damages and defenses to bad faith claims in all states. No lines of business or jurisdictions are immune. Personal lines in particular tend to provide the most activity, but we are aware of large bad faith cases in commercial lines and even professional liability. Insurers are most susceptible when they deny coverage, reject settlement offers and withhold or delay payments. These actions do not always violate the law. But when they demonstrate malice or lack a reasonable basis, depending on the state, the insurer may have acted in bad faith.

Laws do not convey the whole bad faith story. The environment in a particular state can drive claim frequency and severity as much as statutes and court opinions. The claim environment is difficult to capture in a formal survey. This is where the experience of insurers and reinsurers can be very helpful. By merging actual claim experience with the laws, insurers can get a more comprehensive and accurate picture of bad faith exposures. In our 2004 edition of this survey, we identified California and Florida as presenting the most challenging legal environments, and that is still true today.

Gen Re also published research on Florida auto claims and bad faith in our publication: "Multiple Claimants/Inadequate Limits—How to Protect Your Insureds and Minimize Bad Faith Exposure" (*Insurance Issues*, November 2007).

Recent trends in the law point to a greater frequency of bad faith claims. Many state legislatures are considering expansions of policyholder remedies, and several proposals have been enacted. Insurers anticipate a continued lobbying effort—for and against enlarging bad faith law. This underscores how quickly laws can change. On a frequent basis state legislators and regulators revise laws, and courts issue new opinions interpreting them. Therefore, this survey may not be current in the next year or even the next month. With this caveat in mind, we comment on the law as it stood as of January 1, 2008.

We encourage you to call your Gen Re claim representative or the law firm of Edwards Angell Palmer & Dodge to discuss any law or claim environment discussed in this publication. More importantly, we encourage you to maintain and support professional claim staff to apply the laws and reach appropriate claim decisions on the losses that the staff adjusts. There is no replacement for an educated, experienced claim staff with the resources and commitment it needs to handle claims in this complex legal environment. Bad faith is too costly to do anything less.

Gen Re

Edwards Angell Palmer & Dodge LLP

Trends in Insurance Bad Faith

by Gen Re's Claims Department

The signs on the horizon point to a more fertile environment for bad faith claims. State legislatures are expanding the legal avenues available to policyholders to pursue bad faith actions. Courts are more frequently permitting bad faith claims when insurers deny their defense duties on close coverage issues. The only developments favorable to the insurance industry emerge from the U.S. Supreme Court's rulings containing punitive damage awards. We examine these trends and what they mean for insurers.

1. States Are Expanding Legal Avenues for Bad Faith

One backlash from the 2004–2005 hurricane seasons was a frenzy of state activity on bad faith laws. Fueled largely by state trial bar associations, more than a dozen states debated legislation to create or expand causes of action for bad faith. Two measures passed in 2007, in Washington and Maryland, and we expect other states will resume consideration of proposals in 2008.

In Washington, S. 5726 codified the existing “unreasonableness” standard and enlarged the amounts recoverable by permitting treble damage awards. The “unreasonableness” standard is not new or unusual; *treble damages* for unreasonable conduct are unusual. A voter referendum put the law into effect. The Maryland law, S. 389, created an administrative remedy for first-party bad faith where all costs, fees and additional penalties (limited in amount) may be recovered. Previously, insureds could only sue for breach of contract under non-liability coverages. At the same time courts can expand remedies, as we saw in the New York *Bi-Economy Market* case (see survey notes in New York). After decades of limiting recovery to contract proceeds, the state's highest court granted certain consequential damages in a first-party bad faith case.

Insurers are bracing for another round of legislative fights over expanding bad faith law. Colorado, Minnesota and Florida are 2008 battlegrounds. Insurers need to know the new legal rules to adapt their practices and remain compliant. Overall, this trend translates into more bad faith claims in some states, and higher costs from those claims.

2. Coverage Denials Create More Bad Faith Exposure

When an insurer denies a claim for lack of coverage, there is always the risk of a bad faith response. Many large verdicts follow an insurer's refusal to defend or pay a claim. Recently we have noticed more bad faith awards where the insurer had very sound reasons for denying coverage. In other words, the coverage decision was a close call, but the insurer was heavily penalized for a wrong answer on the duty to defend.

The *Bombar v. West American Ins. Co.* case in Pennsylvania illustrates the dilemma insurers face in the claim trenches.¹ The litigation involved a Products/Completed-Operations exclusion and a forklift with improperly installed safety devices. The policy language had been tightened in response to adverse court decisions, and hence had not yet been interpreted by state appellate courts. The new wording excluded failure to warn

Sample Bad Faith Awards

A few mega-verdicts may reach the U.S. Supreme Court, but many more bad faith awards and settlements are paid by insurers on a daily basis. Here are a handful from those reported on the Internet and Lexis/Nexis in 2006–2007, some of which are on appeal:

- > \$28.4 million—Auto Insurance—Kentucky
- > \$2.5 million—Homeowners Insurance—Mississippi
- > \$20 million—Dramshop—Pennsylvania
- > \$3 million—Auto Insurance—Oklahoma
- > \$3 million—Homeowners Insurance—California
- > \$2 million—Businessowners (Property) Insurance—Wisconsin
- > \$7.9 million—Medical Malpractice Insurance—Pennsylvania
- > \$8 million—Auto Insurance—Indiana
- > \$1.25 million—Auto Insurance—Florida
- > \$2.3 million—Homeowners Insurance—Ohio
- > \$4.5 million—Commercial Property Insurance—Pennsylvania
- > \$3 million—Auto Insurance—Georgia

Several of the original verdicts were actually larger than noted above, but judges reduced the amounts in conformance with the *State Farm* guideposts. There were also many verdicts under \$1 million. Finally, we found many defense verdicts where bad faith was not found. Unfortunately, even when the insurer wins on bad faith, it has already paid substantial defense costs.

claims, and stated that products needing further repair were still deemed complete. The insurer denied a defense, forcing the insured to defend itself. The insured lost the negligence suit, resulting in an award of \$2.4 million. After the insured filed suit and won on bad faith, the final amount due from the insurer was \$12 million.

Similar scenarios play out in a variety of general liability, property, auto and homeowners claims. We report several such cases involving construction defects, criminal acts and other GL losses in our *Casualty Matters* newsletter. In each case a coverage denial resulted in a bad faith lawsuit. This trend demonstrates the value of coverage expertise and that even well-informed coverage decisions occasionally can have unfavorable results for the insurer.

3. U.S. Supreme Court Contains Punitive Damages

The high court's 2003 *State Farm v. Campbell* ruling has helped curtail excessive punitive damage awards against insurers and insureds.² In that decision, the Supreme Court held that a \$145 million punitive award on \$1 million compensatory damages violated due process. In ruling on the relative size of punitive damages, the Court did not offer any definitive or "bright line" ratio, but did provide these guideposts:

- > Punitives that exceed compensatory damages by too great a multiple are disproportionate and might not pass constitutional muster.
- > A 4-to-1 ratio might be "close to the line of constitutional impropriety."
- > The larger the compensatory award, the lower the constitutionally permissible punitive award.
- > Punitives must be "reasonable and proportionate" to the harm and general damages recovered.

We have not seen any research quantifying the effects of *State Farm*, but anecdotal evidence can be found in jury instructions and court opinions. Judges often cite the decision when reducing punitive damages. Some of that benefit falls on insurers.

The Supreme Court may provide more guidance on punitive damage limits in the *Exxon Valdez* case, which it accepted for review in 2007.³ This challenge is to a \$2.5 billion punitive award (already reduced from \$5 billion) on \$287 million in compensatory damages. The company had already paid \$3.5 billion in clean-up costs, settlements and fines. The issues on appeal concern the availability of punitive damages under maritime and pollution laws, and whether the amount is excessive under those laws and due process. Since *State Farm*, the high court has consistently struck large punitive awards. Although the *Exxon* ruling could rest wholly on maritime law, the Court may opine on the amount of punitive damages—and that could be helpful to insurers in bad faith cases.

In Closing

Bad faith exposure exists in all states and in all lines of insurance. The rules across the states vary, and hence the risk of a bad faith verdict and large award vary as well. However, one thing is constant. The more resources are devoted to claim handling, the better the claim decision and the lower the bad faith risk. A step as simple as obtaining an outside counsel's opinion on a coverage issue can lead to a more informed decision and potentially reduce the bad faith exposure. We hope that this legal survey similarly leads to more informed decisions in this very complex area of insurance. ☐

Endnotes

¹ 2007 Pa. Super. LEXIS 2171.

² 538 U.S. 408 (2003).

³ *Exxon Shipping Co. v. Grant Baker*, No. 07-219.

About the Law Firm

Edwards Angell Palmer & Dodge (EAPD) is a firm of approximately 600 lawyers across 11 offices in the United States and the United Kingdom. On January 1, 2008, EAPD merged with the internationally recognized UK law firm Kendall Freeman. Together we offer a full array of legal services worldwide with a mission to create value by providing superior legal advice and business counsel to protect and advance the interests of our clients.

At EAPD, we believe that we succeed only when our clients succeed. Our culture of respect and professional excellence is a key factor in how we respond to our clients' needs.

- In 2007, EAPD was recognized for excellence in 11 areas of practice by *Chambers USA*. In 2008, Kendall Freeman was recognized in nine areas by *Chambers UK*.
 - * *Chambers USA* areas include: Antitrust, Corporate/M&A, Banking and Finance, Labor & Employment; Litigation: General Commercial; Private Equity: Buyouts & Venture Capital Investment; Real Estate; Insurance; Dispute Resolution and Transactional and Regulatory.
 - * *Chambers UK* areas include: Insurance: General Claims; Insurance: Noncontentious; Insurance: Reinsurance, Insurance Insolvency; Aviation: Insurance and Litigation, Restructuring/Insolvency, Public International Law and Defamation/Reputation Management.
- ▷ Dow Jones, *Private Equity Analyst* ranked EAPD the 13th Most Active Law Firm, with over 200 transactions closed in 2006.
- ▷ *Best Lawyers in America* recognized 50 EAPD partners in its 2007 publication.
- ▷ *Reactions* magazine, a leading insurance publication, ranked EAPD first in the United States in the areas of Insolvency, Corporate Contracts, and Policy Drafting.
- ▷ EAPD is ranked among the nation's top bond counsel and underwriters counsel in Thomson Financial's 2007 rankings.

Known for forging close relationships with our clients, we have aligned our core areas of practice to meet their legal and business objectives. Whether the legal issue involves high stakes litigation, complex securities, bankruptcy, intellectual property, real estate development, public finance, estate planning and fiduciary services, tax, or other legal services, our extensive business knowledge of these industry segments makes us value-added members of the client's team.

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Using this Survey

by Edwards Angell Palmer & Dodge LLP

Edwards Angell Palmer & Dodge prepared this survey of bad faith, or extra-contractual, law to provide a useful resource for people interested in the law governing bad faith claims against insurers in the United States, the District of Columbia, Puerto Rico, and/or the U.S. Virgin Islands. There is a separate chart for each jurisdiction.

First-Party Claims

In many jurisdictions, but not all, the law applicable to bad faith claims by an insured against its insurer varies, depending on whether the claim is based upon insurer conduct in connection with a first-party's policy or a third-party's claim. The first part of each chart addresses the bad faith law applicable to first-party claims, i.e., claims by insureds against their insurers. The issues addressed include the insured's burden of proof to establish bad faith and the scope of obtainable damages.

- > Section A deals with bad faith law involving non-liability insurance claims, such as first-party disability policies or fire policies.
- > Section B deals with the law governing insureds' claims under liability insurance policies.

Third-Party Claims

A third-party claim is brought against an insurer by someone other than the insured; e.g., a person or entity alleges that an insurer acted in bad faith by denying a claim under a liability policy, which the third-party had against an insured, either in its own right or as an assignee of the insured.

The second part of each chart addresses third-party claims and whether they are permitted under the law of the particular jurisdiction. The chart for each jurisdiction also addresses whether an excess insurer can assert a bad faith claim against a primary insurer. Many states do not recognize a direct cause of action by an excess insurer, but they follow the doctrine of equitable subrogation, under which an excess insurer is deemed to stand in the shoes of the insured to the extent that a claim exceeds the primary policy's limits.

In addition, the charts list defenses that might be available to an insurer for bad faith claims. It is important to note, however, that defenses can vary depending on the facts of each specific case.

Extra-contractual law is a continually developing discipline. Thus, the applicable law can vary according to the facts unique to a claim. While this survey is intended to provide a starting point for ascertaining the bad faith law in a particular jurisdiction, it is by no means an ending point. Accordingly, the authors urge everyone who uses this survey to continue his or her research beyond the citations listed here. ☞

First-Party Claims

(A) Non-Liability Insurance Policies

ALABAMA

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under common law and statute. The Alabama Supreme Court permits common law bad faith tort actions against insurers. Alabama recognizes a tort claim arising out of an insurer's intentional, but not negligent, misconduct in wrongfully refusing to settle. <i>Chavers v. Nat'l. Sec. Fire & Cas. Co.</i>, 405 So. 2d 1 (Ala. 1981). To establish an actionable tort, an insured must prove either that there is (1) no lawful basis for the refusal, coupled with actual knowledge of that fact or (2) an intentional failure to determine whether there was any lawful basis for such refusal. <i>Id.</i> at 7. "No lawful basis" means that the insurer lacks a legitimate or arguable reason for failing to pay the claim. <i>Nat'l. Ins. Assoc. v. Sockwell</i>, 829 So. 2d 111, 126 (Ala. 2002). "Coupled with actual knowledge" implies conscious wrongdoing, dishonest purpose, and breach of a known duty with a self-interested motive. <i>Id.</i> at 126. "An intentional failure to determine whether there was any lawful basis for refusal" implies that the claim must be properly investigated and the results of the investigation must be subjected to a cognitive evaluation and review. <i>Id.</i> An insurer's reckless indifference to facts or proof submitted by the insured will lead to the conclusion that the insurer had knowledge of, or reckless disregard for, a legitimate basis for the claim. <i>Id.</i> If a lawful basis for denial of the claim existed, the insurer cannot be held liable for the tort of bad faith. <i>Id.</i></p> <p>A cause of action for a bad faith refusal to pay an insurance claim also exists under Code of Alabama section 27-12-24 (2007), which provides that "no insurer shall, without just cause, refuse to pay or settle claims arising under coverages provided by its policies in this state and with such frequency as to indicate a general business practice in this state." <i>Id.</i> A "general business practice is evidenced by: (1) a substantial increase in the number of complaints against the insurer received by the insurance department; (2) a substantial increase in the number of lawsuits against the insurer or its insureds by claimants; and (3) other relevant evidence." <i>Id.</i> See <i>Williams v. State Farm Mut. Auto. Ins. Co.</i>, 886 So. 2d 72, 75 (Ala. 2003).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The plaintiff in a bad faith refusal case has the burden of proving:</p> <ul style="list-style-type: none"> a) an insurance contract between the parties and a breach thereof by the defendant; b) an intentional refusal to pay the insured's claim; c) the absence of any reasonably legitimate or arguable reason for that refusal; d) the insurer's actual knowledge of the absence of any legitimate or arguable reason. <p>In addition, a plaintiff that relies on the intentional failure to determine the existence of a lawful basis must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to pay the claim. <i>Nat'l. Ins. Assoc.</i>, 829 So. 2d at 127 (quoting <i>Nat'l. Sec. Fire & Cas. Co. v. Bowen</i>, 417 So. 2d 179, 183 (Ala. 1982)).</p> <p>A plaintiff/insured must establish that the claim is either a "normal" or "abnormal" case of bad faith. A plaintiff's burden of proof in the "normal" bad faith case is the standard applied to a directed verdict. The "abnormal" or "extraordinary" bad faith case is limited to situations in which the plaintiff produces evidence that the insurer intentionally or recklessly failed to investigate the plaintiff's claim; intentionally or recklessly failed to properly subject the plaintiff's claim to a cognitive evaluation or review; created its own debatable reason for denying the plaintiff's claim; or relied on an ambiguous portion of the policy as a lawful basis to deny the plaintiff's claim. <i>Singleton v. State Farm Fire & Cas. Co.</i>, 928 So. 2d 280, 287 (Ala. 2005); <i>State Farm Fire & Cas. Co. v. Slade</i>, 747 So. 2d 293, 306 (Ala. 1999).</p>
<p>What Damages Can Be Recovered?</p>	<p>In addition to compensatory damages, the insured may recover damages for punitive and/or extracontractual damages if an insurance company knowingly or maliciously refuses to pay a legitimate insurance claim. <i>Gilbert v. Alta Health & Life Ins. Co.</i>, 276 F.3d 1292, 1296 (11th Cir. 2001); <i>Employees' Benefit Ass'n v. Grissett</i>, 732 So. 2d 968, 978 (Ala. 1998).</p>

First-Party Claims

(B) Liability Insurance Policies

ALABAMA (cont'd)

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. A plaintiff can establish a bad faith refusal to pay an insurance claim by asserting an “ordinary” bad faith claim, or an “extraordinary” bad faith claim. <i>Acceptance Ins. Co. v. Brown</i>, 832 So. 2d 1, 15 (Ala. 2001) (quoting <i>Nat’l. Sec. Fire & Cas. Co.</i> 417 So. 2d at 183). To succeed on an ordinary claim, the plaintiff must prove a bad faith nonpayment without any reasonable grounds for dispute. <i>Acceptance Ins. Co.</i>, 832 So. 2d at 15. An extraordinary bad faith claim exists when the insurer recklessly or intentionally fails to properly investigate a claim or fails to subject the results of its investigation to a cognitive evaluation. <i>Id.</i> (quoting <i>Employees’ Benefit Ass’n</i>, 732 So. 2d at 976). Extraordinary claims are limited to cases in which the plaintiff produced substantial evidence showing that the insurer: (1) intentionally or recklessly failed to investigate the plaintiff’s claim; (2) intentionally or recklessly failed to properly subject the plaintiff’s claim to a cognitive evaluation or review; (3) created its own debatable reason for denying the plaintiff’s claim; or (4) relied on an ambiguous portion of the policy as a lawful basis to deny the plaintiff’s claim. <i>Acceptance Ins. Co.</i>, 832 So. 2d at 15 (quoting <i>State Farm Fire & Cas. Co.</i>, 747 So. 2d at 307-08).</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>To recover on an “ordinary” bad faith claim, the plaintiff must prove: (1) the existence of an insurance contract; (2) an intentional refusal to pay the claim; and (3) the absence of any lawful basis for the refusal and the insurer’s knowledge of that fact or the insurer’s intentional failure to determine whether there is any lawful basis for its refusal. <i>Acceptance Ins. Co.</i>, 832 So. 2d at 15 (quoting <i>Nat’l. Sec. Fire & Cas. Co.</i>, 417 So. 2d at 183.) The standard is that applied to a directed verdict.</p> <p>To recover on an “extraordinary” bad faith claim, for which there is a lesser standard, the plaintiff must prove that the insurer failed to investigate properly the claim or subject the results of the investigation to a cognitive evaluation and review and that the insurer breached the contract for insurance coverage with the insured when it refused to pay the insured’s claim. <i>Acceptance Ins. Co.</i>, 832 So. 2d at 15 (quoting <i>State Farm Fire & Cas. Co.</i>, 747 So. 2d at 318).</p>
<p>What Damages Can Be Recovered?</p>	<p>Compensatory and punitive damages are available to a plaintiff who succeeds on a bad faith claim. <i>Acceptance Ins. Co.</i>, 832 So. 2d at 18. Compensatory damages may include attorneys’ fees and mental-anguish damages, upon a showing of some quantifiable effect of the plaintiff’s suffering from mental anguish. <i>Id.</i> at 23. An award of punitive damages requires a showing that the insurance company acted with malice, willfulness, or a wanton or reckless disregard for the rights of others. <i>Id.</i></p>

Third-Party Claims

ALABAMA CODE	<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>YES, a third party can bring a direct action against an insurer, but only under the limited circumstances when the insurer has undertaken a “new and independent obligation” directly with a nonparty to the insurance contract in its efforts to negotiate a settlement of the third party’s claim. <i>Williams</i>, 886 So. 2d at 75; <i>Howton v. State Farm Mut. Auto. Ins. Co.</i>, 507 So. 2d 448, 450 (Ala. 1987). A new and independent obligation exists when the insurer enters into a contract with, or commits a tort against, a third-party claimant. <i>Williams</i>, 886 So. 2d at 75. The <i>Williams</i> court found that the insurer did not create a new and independent obligation during negotiations with its insured. <i>Id.</i> at 76. Because the insured did not accept the insurer’s proposed payment for the loss of the insured’s farming equipment, there was not a new and independent obligation sufficient to support a third-party suit. <i>Id.</i></p>
	<p>If So, What Is the Third Party’s Burden of Proof?</p>	<p>A third party has the burden of proving the existence of a direct contractual relationship with the insurance company. <i>Williams</i>, 886 So. 2d at 76. <i>See also State Farm Fire & Cas. Co.</i>, 747 So. 2d at 304.</p>
	<p>What Damages Can Be Recovered?</p>	<p>An insurer, which undertakes a new and independent obligation directly with a third party, will be liable for the tort of bad faith refusal to settle to the same extent as it would be to a first party plaintiff. <i>See Howton</i>, 507 So. 2d at 451.</p>
	<p>Can the Insured Assign Rights to a Third Party?</p>	<p>NO, as to a tort claim. Alabama courts have held that one cannot assign the right to recover for a personal tort. <i>Miller v. Jackson Hosp. and Clinic</i>, 776 So. 2d 122, 125 (Ala. 2000) (explaining that one cannot assign a personal injury action to another); <i>Lowe v. Fullford</i>, 442 So. 2d 29, 32 (Ala. 1983) (finding that a beneficiary’s estate is not entitled to damages from a decedent’s wrongful death action if the beneficiary died before commencement of the action).</p> <p>As to contract claims, Alabama courts have explained that the policy language will govern whether the insured can assign rights to a third party. <i>Gen. Agents Ins. Co. v. Compton</i>, 921 F. Supp. 716, 723 (N.D. Ala. 1996). If an insured fails to obtain its insurer’s consent before assigning its rights to another party as required by contract, the insurer will not be liable to the third party. <i>Id.</i> at 723.</p>
<p>Excess Insurers</p>		
	<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>NO, an excess insurer cannot bring a claim of bad faith against a primary insurer. <i>Fed. Ins. Co. v. Travelers Cas. & Sur. Co.</i>, 843 So. 2d 140, 143 (Ala. 2002), <i>aff’d per curiam</i>, 310 F.3d 707 (Ala. 2002). A primary insurer does not owe a duty of good faith to an excess insurer unless a contrary contractual obligation exists. <i>Id.</i> at 143. An excess insurer cannot assert an equitable subrogation claim against a primary liability insurer for bad faith in handling the insured’s claim if the insured is not subject to a personal loss. <i>Id.</i> at 145.</p>
<p>Defenses</p>		
	<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>“The statute of limitations for bad faith claims arising on or after January 9, 1985, is two years.” <i>Jones v. ALFA Mut. Ins. Co.</i>, 875 So. 2d 1189, 1193 (Ala. 2003) (<i>quoting Alfa Mut. Ins. Co. v. Smith</i>, 540 So. 2d 691, 692 (Ala. 1988)).</p> <p>A health insurer can defend against bad faith refusal to pay claims brought under Code of Alabama section 27-12-24 by asserting ERISA preemption. <i>Walker v. S. Co. Servs., Inc.</i>, 279 F.3d 1289, 1293-94 (11th Cir. 2002), <i>reh’g en banc denied sub nom.</i>, <i>Walker v. Provident Life & Acc. Ins. Co.</i>, 34 Fed. App’x 393 (11th Cir. 2002), <i>cert. denied</i>, 537 U.S. 824 (2002). An insurer can defend against a bad faith cause of action on the grounds that it had a reasonable basis for denial of the claim because a legitimate question of liability existed. <i>Federated Guar. Life Ins. Co. v. Wilkins</i>, 435 So. 2d 10, 12-13 (Ala. 1983) (finding that insurer’s denial of coverage on the basis of suicide was not bad faith where the policy expressly excluded such coverage.) An insurer can also defend against bad faith claims on the grounds that the insured made a material misrepresentation or omission on his or her application for coverage. <i>Johnson v. Centennial Life Ins. Co.</i>, 705 So. 2d 490, 492 (Ala. Ct. App. 1997).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. The Supreme Court of Alaska has held that a legal duty to act in good faith in dealing with an insured's claim is implied in an insurance contract, and violation of that duty of good faith is a tort. <i>State Farm Fire & Cas. Co. v. Nicholson</i>, 777 P.2d 1152 (Alaska 1989). Alaska has an Unfair Claims Settlement Practices Act, which forbids insurers from engaging in certain acts and practices, ALASKA STAT. § 21.36.125 (2007), but the Alaska Supreme Court has held that there is neither an express nor an implied private cause of action against an insurer that violates this act. <i>O.K. Lumber Co v. Providence Wash. Ins. Co.</i>, 759 P.2d 523 (Alaska 1998).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Tort liability may be imposed if the insurer fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy. <i>State Farm Fire & Cas. Co.</i>, 777 P.2d at 1156.</p>
<p>What Damages Can Be Recovered?</p>	<p>Consequential and punitive damages can be recovered for breach of the insurer's duty to act in good faith with the insured. <i>Id.</i> at 1152. Punitive damages can be recovered if the wrongdoer's act is outrageous or a gross deviation from an acceptable standard of reasonable conduct. <i>Id.</i> at 1158.</p>

ALASKA

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Alaska recognizes a common law action by an insured for its insurer's failure to settle a claim within the policy limits of a liability policy. <i>Schultz v. Travelers Indem. Co.</i>, 754 P.2d 265 (Alaska 1988).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The Alaska Supreme Court has ruled that, if a plaintiff makes a policy limits demand and there is a high likelihood that a verdict will be rendered against the insured in excess of the coverage provided by the insurance policy, the insurer has a duty to offer the limits of the insurance coverage as settlement. <i>Schultz</i>, 754 P.2d at 265.</p>
<p>What Damages Can Be Recovered?</p>	<p>Consequential damages and attorneys' fees can be recovered in an action for failure to settle a claim. <i>Schultz</i>, 754 P.2d at 265. Punitive damages are available in a tort claim on a showing of outrageous conduct. <i>State Farm Fire & Cas. Co.</i>, 777 P.2d at 1158.</p>

Third-Party Claims

ALASKA (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. The Supreme Court of Alaska has ruled that an injured plaintiff, who is not a party to the contract, does not have a direct cause of action against a tortfeasor's insurer. <i>Severson v. Severson's Estate</i> , 627 P.2d 649 (Alaska 1981).
	If So, What Is the Third Party's Burden of Proof?	See above.
	What Damages Can Be Recovered?	See above.
	Can the Insured Assign Rights to a Third Party?	YES. The Supreme Court of Alaska has ruled that the insured's cause of action for breach of the implied covenant of good faith and fair dealing can be assigned to an injured third-party claimant. <i>O.K. Lumber Co.</i> , 759 P.2d 523.
Excess Insurers		
Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES , under equitable subrogation. An excess insurer is entitled to equitable subrogation of the insured's rights and may make the same bad faith claims that the insured could have made. <i>R.W. Beck & Assoc. v. City and Borough of Sitka</i> , 27 F.3d 1475 (9th Cir. 1994).	
Defenses		
What Defenses Can Be Asserted Against a Bad Faith Claim?	The Alaska Supreme Court has ruled that an insurer's negligent breach of contract cannot form the basis of a tort action. <i>Alaska Pac. Assurance Co. v. Collins</i> , 794 P.2d 936 (Alaska 1990). The insurer may present evidence pertaining to the reasonableness of the insured's conduct as a defense. <i>Petersen v. Mut. Life Ins. Co.</i> , 803 P.2d 406 (Alaska 1990).	

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. An insured can recover for bad faith practices if the insurer intentionally breached the implied covenant of good faith and fair dealing in an insurance contract by denying the insured the security and protection that is the object of the insurance relationship. <i>Hawkins v. Allstate Ins. Co.</i>, 733 P.2d 1073, 1079-80 (Ariz. 1987.), <i>cert. denied</i>, 484 U.S. 874, <i>reh'g denied</i>, 484 U.S. 972 (1987) <i>citing Rawlings v. Apodaca</i>, 726 P.2d 576 (Ariz. 1986)). Arizona law forbids unfair claim settlement practices but does not expressly provide a private right or cause of action for an insured. ARIZ. REV. STAT. § 20-461D (2007). The Arizona Supreme Court has held that a person who was damaged by unlawful practices can bring a claim for those violations. <i>Sparks v. Republic Nat'l Life Ins. Co.</i>, 647 P.2d 1127 (Ariz. 1982), <i>cert. denied</i>, 459 U.S. 1070 (1982).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To establish a prima facie case of bad faith, the insured must prove that the insurer acted intentionally, not inadvertently or mistakenly, and dealt unfairly or dishonestly with the claim or failed to give equal consideration to the insured's interests. <i>Hawkins</i>, 733 P.2d at 1086-87. An inquiry into bad faith involves both a subjective analysis, focusing on whether the insurer knew that its conduct was unreasonable or acted with such disregard for the insured that such knowledge could be imputed to it, and an objective analysis, focusing on whether the insurer acted unreasonably. <i>Lopez v. Allstate Ins. Co.</i>, 282 F. Supp. 2d 1095 (D. Ariz. 2003).</p>
<p>What Damages Can Be Recovered?</p>	<p>In Arizona, an insured can recover both compensatory and punitive damages, but Arizona law requires a higher standard of proof for punitive damages than for compensatory damages. <i>Hawkins</i>, 733 P.2d at 1086-87. Punitive damages can be recovered only when clear and convincing evidence of a defendant's evil motive exists. <i>Id.</i> at 1086-87.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. An insured under a liability policy can recover in tort for bad faith practices if the insurer intentionally breached the implied covenant of good faith and fair dealing. <i>Farmers Ins. Exch. v. Henderson</i>, 313 P.2d 404 (Ariz. 1957). "[W]hen the insurer is defending litigation against the insured, employs attorneys to represent the interests of both and has sole power and opportunity to make a settlement which would result in the protection of the insured against excess liability, common honesty demands that it not be moved by partiality to itself...A violator of this rule of equality of consideration cannot be said to have acted in good faith." <i>Id.</i> at 406.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To establish a prima facie case of bad faith, the insured must prove that the insurer acted intentionally, not inadvertently or mistakenly, and that the insurer dealt unfairly or dishonestly with the claim or failed to give equal consideration to the insured's interests. <i>Hawkins</i>, 733 P.2d at 1086-87.</p>
<p>What Damages Can Be Recovered?</p>	<p>In Arizona an insured can recover both compensatory and punitive damages, but Arizona law requires a higher standard of proof for punitive damages than for compensatory damages. <i>Id.</i> at 1086-87. Punitive damages can be recovered only when there exists clear and convincing evidence of a defendant's evil motive. <i>Id.</i></p>

Third-Party Claims

ARIZONA (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. In Arizona, the duty to settle is intended to benefit the insured, not the injured claimant, thus precluding a direct action by a third party for bad faith refusal to settle. <i>Page v. Allstate Ins. Co.</i> , 614 P.2d 339 (Ariz. Ct. App. 1980).
	If So, What Is the Third Party's Burden of Proof?	Not applicable.
	What Damages Can Be Recovered?	Not applicable.
	Can the Insured Assign Rights to a Third Party?	An insured may enter into an agreement with a third-party claimant, consenting to liability and assigning the insured's breach of contract and bad faith claims against the insurer to the third party in exchange for an agreement not to execute against the insured. <i>Himes v. Safeway Ins. Co.</i> , 66 P.3d 74 (Ariz. Ct. App. 2003).
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES , under equitable subrogation. The Arizona Supreme Court has ruled that a primary insurance carrier does not owe a direct duty of good faith and fair dealing to an excess insurance carrier. <i>Twin City Fire Ins. Co. v. Super. Court</i> , 792 P.2d 758 (Ariz. 1990). However, the court reasoned that an excess carrier has an adequate remedy under the doctrine of equitable subrogation, under which it steps into the shoes of, and gains all the rights of, the insured. <i>Id.</i> at 759.
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	To avoid liability for bad faith, an insurer may show that the claim is "fairly debatable," but the insurer's belief in the claim's debatability is a question of fact for the jury to determine. <i>Lopez</i> , 282 F. Supp. 2d 1095. If the plaintiff fails to offer evidence that casts doubt on the defendant's belief that the claim is debatable, then the court can enter judgment as a matter of law. <i>Id.</i>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. The Arkansas Supreme Court has recognized a common law cause of action for bad faith. <i>Aetna Cas. & Sur. Co. v. Broadway Arms Corp.</i>, 664 S.W.2d 463 (Ark., 1984) (recognizing bad faith claim for failure to pay fire insurance policy benefits for property claims). In addition, Arkansas statutory law provides a limited private cause of action when an insurer fails to pay the losses within the time specified in the policy after demand is made. ARK. CODE ANN. § 23-79-208(a)(1) (2007).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>An action for bad faith for failure to pay policy benefits arises when an insurer engages, without a good faith defense, in affirmative misconduct, that is "dishonest, malicious and oppressive in an attempt to avoid its liability under an insurance policy." <i>Aetna Cas. & Sur. Co.</i>, 664 S.W. 2d at 465 (involving fire insurance). The conduct must be "carried out with a state of mind characterized by hatred, ill will, or a spirit of revenge." <i>Columbia Nat'l Ins. Co. v. Freeman</i>, 64 S.W.3d 720 (Ark. 2002) (involving property insurer). Actual malice means that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge; it may be inferred from conduct and surrounding circumstances. <i>Richison v. Boatman's Ark., Inc.</i>, 981 S.W.2d 112 (Ark. Ct. App. 1998) (involving life insurance).</p>
<p>What Damages Can Be Recovered?</p>	<p>Arkansas Code section 23-79-208(a)(1) provides that, in addition to the amount of the loss, the insurer shall be liable to pay the holder of the policy or his or her assigns twelve percent damages upon the amount of the loss, together with all reasonable attorneys' fees for the prosecution and collection of the loss. The Arkansas Code also provides a limited private cause of action where an insurer fails to pay the losses within the time specified in the policy after demand is made. ARK. CODE ANN. § 23-79-208(a)(1). Punitive damages can be recovered in a bad faith action when the insurer's affirmative conduct was dishonest, malicious or oppressive. <i>Viking Ins. Co. v. Jester</i>, 836 S.W.2d 371 (Ark. 1992). Attorneys' fees can be recovered in statutory bad faith actions. ARK. CODE ANN. § 23-79-208(a)(1). Arkansas courts do not appear to have addressed whether attorneys' fees can be recovered in a common law bad faith claim.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under common law. Arkansas recognizes a common law cause of action for bad faith by a liability insurer. <i>Aetna Cas. & Ins. Co.</i>, 664 S.W. 2d at 465 ("[b]ad faith may give rise to either first or third party claims"); <i>McCall v. S. Farm Bureau Cas. Ins. Co.</i>, 501 S.W.2d 223 (Ark. 1973) (recognizing bad faith claim by insured against automobile insurer for failure to settle a third party claim under liability policy).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>An insurer will also be liable for any excess verdict resulting from fraud, bad faith or negligence. <i>Members Mut. Ins. Co. v. Blissett</i>, 492 S.W.2d 429 (Ark. 1973).</p>
<p>What Damages Can Be Recovered?</p>	<p>Arkansas courts have not addressed whether Arkansas Code section 23-79-208 applies to third party claims. <i>Grubbs v. Credit Gen. Ins. Co.</i>, 942 S.W.2d 249 (Ark. 1997) (declining to address the issue).</p>

Third-Party Claims

ARKANSAS (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. A third party may not bring a direct action for common law bad faith against an insurer. <i>Bell v. Kan. City Fire & Marine Ins. Co.</i> , 616 F. Supp. 1305 (W.D. Ark. 1985).
	If So, What Is the Third Party's Burden of Proof?	Not applicable.
	What Damages Can Be Recovered?	Not applicable.
	Can the Insured Assign Rights to a Third Party?	Arkansas courts appear not to have addressed this issue.
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	Arkansas courts appear not to have addressed this issue.
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	Where a good faith dispute exists as to the amount due, an insurer's refusal to pay a claim is not bad faith. <i>Stevenson v. Union Standard Ins. Co.</i> , 746 S.W.2d 39 (Ark. 1988). A claim for bad faith cannot be based upon good faith denial, offers to compromise a claim, or other honest errors of judgment by the insurer. The claim also cannot be based upon negligence or bad judgment, as long as the insurer is acting in good faith. <i>Aetna Cas. & Sur. Co.</i> , 664 S.W.2d 463; <i>Richison</i> , 981 S.W.2d 112.

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. An insurer must act fairly and in good faith when handling a claim made by its insured, and the insurer has a duty not to unreasonably withhold payments due under a policy of insurance. The insurer's duty is considered to be unconditional and independent of the performance of the insured's contractual obligations. <i>Gruenberg v. Aetna Ins. Co.</i>, 9 Cal. 3d 566 (1973). See also <i>Egan v. Mut. of Omaha Ins. Co.</i>, 24 Cal. 3d 809 (1979), appeal dismissed & cert. denied, 445 U.S. 912 (1980). The California Unfair Claim Practices Act, CAL. INS. CODE §§790–790.15 does not provide a private cause of action to a first party. <i>Tricor Calif., Inc. v. Super. Ct.</i>, 220 Cal. App. 3d 880 (1990). An insurer can be liable in tort for bad faith if it acts unreasonably or without proper cause in withholding benefits. <i>Chateau Chamberay Homeowners Ass'n v. Associated Int'l. Ins. Co.</i>, 90 Cal. App. 4th 335, 347 (Ct. App. 2001).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Whether the insurer's conduct amounts to bad faith is a factual question dependent upon the facts and circumstances of each case. The insured's burden of proof is the preponderance of the evidence standard, i.e., more likely true than not. CAL. EVID. CODE §§115, 500.</p>
<p>What Damages Can Be Recovered?</p>	<p>Under a contract theory, if the insurer breaches the policy, the insured may recover all consequential damages that were reasonably foreseeable when the policy was issued. See CAL. CIV. CODE §3300.</p> <p>In tort, the insured may recover all damages proximately caused by the insurer's bad faith. See CAL. CIV. CODE §3333. Damages can include attorneys' fees as part of the economic loss proximately caused by the tort. <i>Brandt v. Super. Ct.</i>, 37 Cal. 3d 813 (1985). See also <i>McGregor v. Paul Revere Life Ins. Co.</i>, 369 F.3d 1099, 1101 (9th Cir. 2004) (holding attorneys' fees can be recovered in appeal of bad faith case). Punitive damages may be awarded for an insurer's tortious bad faith only if the insurer is proven, by clear and convincing evidence, to have acted with malice, oppression, or fraudulent intent. CAL. CIV. CODE §§3294 (a) & (c). See also <i>Mock v. Mich. Millers Mut. Ins. Co.</i>, 4 Cal. App. 4th 306 (1992).</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. The duty of good faith and fair deciding is implied in every contract of insurance. <i>Waller v. Truck Ins. Exch.</i>, 11 Cal. 4th 1 (1995). See also <i>Comunale v. Traders & Gen. Ins. Co.</i>, 50 Cal. 2d 654 (1958); <i>Martin v. Hartford Accident and Indem. Co.</i>, 228 Cal. App. 2d 178 (1964). There is no private right of action for violating the California Unfair Claim Practices Act, <i>Waller</i>, 11 Cal. 4th at 35.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>

CALIFORNIA

Third-Party Claims

CALIFORNIA (cont'd)

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>YES. A third party who is either a judgment creditor of an insurer's insured or a third party beneficiary of the insurance contract may bring a direct bad faith action in tort or contract against an insurer. <i>Hand v. Farmers Ins. Exch.</i>, 23 Cal. App. 4th 1847 (Cal. Ct. App. 1994) (third party must be judgment creditor); <i>Diamond Woodworks, Inc. v. Argonaut Ins. Co.</i>, 135 Cal. Rptr. 2d 736 (Cal. Ct. App. 2003) (third party beneficiary for whose benefit the policy was issued has a right to seek recovery in tort for insurer's bad faith), <i>rev'd on other grounds</i>, <i>Simon v. San Paolo U.S. Holding Co.</i>, 35 Cal. 4th 1159, 1182-83 (Cal. 2005). See CAL. INS. CODE § 11580 (b)(2). The California Unfair Claim Practices Act does not provide a private cause of action to a third party. <i>Moradi-Shalal v. Fireman's Fund Ins. Cos.</i>, 46 Cal. 3d 287 (Cal. 1988).</p>
<p>If So, What is the Third Party's Burden of Proof?</p>	<p>Third-party judgment creditor must prove, by a preponderance of the evidence, that the insurer unreasonably refused to settle the case for an amount within the policy limits. CAL. EVID. CODE §§ 115, 500; <i>Comunale v. Traders & Gen. Ins. Co.</i>, 50 Cal. 2d 654 (Cal. 1958).</p>
<p>What Damages Can Be Recovered?</p>	<p>The third-party judgment creditor can recover the entire judgment from the insurer, even if the judgment exceeds the policy limits. <i>Comunale</i>, 50 Cal. 2d at 661. However, the judgment creditor cannot recover defense costs and interest for the insurer's failure to defend unless the insured has assigned that claim to the third-party judgment creditor. <i>San Diego Housing Comm'n v. Indus. Indem. Co.</i>, 116 Cal. Rptr. 2d 103 (Cal. Ct. App. 2002).</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. The insured's rights can be transferred to a third party, if the third party has become a judgment creditor of the insured. The third party then "stands in the shoes" of the insured in any action against the insurer. <i>Comunale</i>, 50 Cal. 2d at 662.</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. An excess carrier may bring a bad faith claim against the primary insurer under the doctrine of equitable subrogation. See <i>Commercial Union Assurance Cos. v. Safeway Stores, Inc.</i>, 26 Cal. 3d 912 (Cal. 1980).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>If there is no potential for coverage and the insurer properly denied the claim under the policy, there is no cause of action for breaching the implied covenant of good faith and fair dealing. <i>Waller</i>, 11 Cal. 4th at 35-36. Moreover, if the insurer acted reasonably under the facts and circumstances of the case, for example by denying benefits owing to a genuine dispute about the existence of coverage, the insurer is not liable for bad faith even though it might be liable for breach of contract. <i>Chateau Chamberay Homeowners Ass'n</i>, 90 Cal. App 4th at 347. See <i>Kransco v. Am. Empire Surplus Lines Ins. Co.</i>, 23 Cal. 4th 390 (Cal. 2000).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. There is a cause of action under common law. <i>Herod v. Colo. Farm Bureau Mut. Ins. Co.</i>, 928 P.2d 834 (Colo. Ct. App. 1996) (involving property insurance). COLORADO REVISED STATUTES § 10-3-1113 codifies the tort of bad faith. This statute regulates claims practices and unfair methods of competition by insurers. It does not create a private cause of action based on alleged violations. Rather, the statute sets forth standards of care. 7A Colo. Prac., <i>Personal Injury Torts and Insurance</i> § 46.24 (2d ed.). A workers' compensation claimant may also bring an action in tort for bad faith by an insurer. <i>Brodeur v. Am. Home Assur. Co.</i>, 2007 WL 2917129 *5 (Colo. 2007) (citing <i>Travelers Ins. Co. v. Savio</i>, 706 P.2d 1258, 1273-74 (Colo.1985)).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The determination of whether the insurer's delay or denial was reasonable under a first-party insurance policy is based on whether the insurer knew that its delay or denial was unreasonable or the insurer recklessly disregarded the fact that its delay or denial was unreasonable. COLO. REV. STAT. ANN. § 10-3-1113; <i>Herod</i>, 928 P.2d at 834 (involving property insurance). To recover in such cases, the plaintiff must prove the insurer did not have a reasonable basis for denying policy benefits and that it knew of, or recklessly disregarded, the absence of a reasonable basis for such denial. <i>Id.</i> at 835. An objective standard is used to establish that the insured's conduct was unreasonable, requiring proof of the standards of conduct in the industry. <i>Travelers Ins. Co.</i>, 706 P.2d at 1273-74. Expert testimony usually is required to establish the standard of care in the handling of claims, so the jury can compare the insurer's acts or omissions to the standard for first-party coverage.</p>
<p>What Damages Can Be Recovered?</p>	<p>Punitive damages can be recovered in a bad faith claim if the breach is accompanied by fraud, malice, or willful and wanton conduct. <i>Ballow v. Phico Ins. Co.</i>, 878 P.2d 672 (Colo. 1994). It is a question of law whether the evidence presented is sufficient to warrant submission of the question of punitive damages to the jury. <i>See Surdyka v. DeWitt</i>, 784 P.2d 819 (Colo. Ct. App. 1989) (involving general liability policy). An insured cannot recover attorneys' fees in a bad faith claim or the underlying breach of contract claim. <i>Allstate Ins. Co. v. Huizar</i>, 52 P.3d 816 (Colo. 2002). If proximately caused by the insurer's bad faith, damages for economic loss, including lost earnings and loss of future earnings, can be recovered. <i>D.C. Concrete Mgmt., Inc. v. Mid-Century Ins. Co.</i>, 39 P.3d 1205 (Colo. App. 2001). Consequential damages and damages for emotional distress can be recovered; substantial property or economic loss is not a prerequisite. <i>Goodson v. Am. Standard Ins. Co.</i>, 89 P.3d 409 (Colo. 2004); <i>Williams v. Farmers Ins. Group</i>, 781 P.2d 156 (Colo. Ct. App. 1989), <i>reh'g denied sub. nom.</i>, <i>Farmers Group, Inc. v. Williams</i>, 805 P.2d 419 (Colo. 1991).</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. There is a cause of action under common law. <i>See Rederscheid v. Comprecare, Inc.</i>, 667 P.2d 766 (Colo. Ct. App. 1983) (finding that the holder of a policy, providing first party protection, can maintain an action against a policy vendor, for failing, in bad faith, to deliver the bargained-for services). A breach of the implied covenant of good faith and fair dealing subjects the insurer to liability in tort. <i>Brodeur v. Am. Home Assur. Co.</i>, 2007 WL 2917129 at *5.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>General principles of negligence apply to bad faith claims arising from liability coverage. Whether an insurer has breached its duties of good faith and fair dealing with its insured depends upon the reasonableness of the insurer's conduct under the circumstances. COLORADO REV. STAT. ANN. § 10-3-1113; <i>Farmers Group, Inc. v. Trimble</i>, 691 P.2d 1138 (Colo. 1984), <i>appeal after remand</i>, 768 P.2d 1243 (Colo. Ct. App. 1988), <i>cert. dismissed</i> (Colo. 1988), <i>overruled on different grounds by Goodson</i>, 89 P.3d 409 (Colo. 2004). Evidence of intentional misconduct, actual dishonesty, fraud, or concealment is not a prerequisite to recovering for breaching a liability insurance contract in bad faith. <i>Id.</i> at 1142. Furthermore, a judgment in excess of the policy limits is not a condition precedent to a claim of bad faith breach of an insurance contract. <i>Id.</i></p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>

Third-Party Claims

COLORADO (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. Colorado has declined to recognize a third party cause of action for bad faith against an insurer. <i>Schnacker v. State Farm Mut. Auto. Ins. Co.</i> , 843 P.2d 102 (Colo. Ct. App. 1992).
	If So, What Is the Third Party's Burden of Proof?	Not applicable.
	What Damages Can Be Recovered?	Not applicable.
	Can the Insured Assign Rights to a Third Party?	YES. The U.S. District Court for the District of Colorado issued a decision under Colorado law that denied direct action by judgment creditors of insured against insurer, but noted lack of assignment. <i>Cassidy v. Millers Cas. Ins. Co.</i> , 1 F. Supp. 2d 1200 (D. Colo. 1998) (pursuant to Colorado common law, without an assignment of insured's rights, third parties do not have standing to maintain an action against an insurer for bad faith breach of insurance contract).
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	NO. There is no statutory or common law basis for an excess insurer to bring a bad faith claim. <i>See Keefner v. U.S. Fire Ins. Co.</i> , 1991 WL 2233 (D. Colo. 1991) (notes that, while some courts have held that the primary insurer owed the excess carrier the duty to attempt to settle within the primary policy limits, Colorado has not accepted or rejected this view.)
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	The prosecution of an appeal based on the advice of counsel is not bad faith, even where the plaintiff presents testimony that the appeal had no chance of prevailing. <i>Brandon v. Sterling Colo. Beef Co.</i> , 827 P.2d 559 (Colo. Ct. App. 1991). When an insurer has the right to deny benefits, a claim for bad faith may be moot or without merit as a matter of law. <i>Jarnagin v. Banker's Life and Cas. Co.</i> , 824 P.2d 11 (Colo. Ct. App. 1991).

Gen Re Note

As we go to print, the Colorado Legislature passed a first-party bad faith bill. The bill, HB 1407, provides that an insured whose claim is unreasonably delayed or denied may sue to recover attorneys' fees, costs and up to twice the covered benefit. The Governor has not yet signed the measure.

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under statute. Insurance practices are subject to concurrent regulation by the Connecticut Unfair Insurance Practices Act (“CUIPA”), CONN. GEN. STAT. § 38a-816, and the Connecticut Unfair Trade Practices Act (“CUTPA”), CONN. GEN. STAT. § 42-110b - 42-110q. By statute, first-party claimants may bring actions for the following types of conduct: (1) misrepresenting pertinent facts or insurance policy provisions relating to coverages; (2) failing to act with reasonable promptness on communications regarding claims arising under insurance policies; (3) failing to implement reasonable standards for the prompt investigation of claims; (4) refusing to pay claims without conducting a reasonable investigation; (5) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; and (6) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions by such insureds. When an insurer fails to deal fairly and in good faith with its insured by refusing, without proper cause, to pay its insured for a loss covered by the policy, such conduct gives rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. <i>Grand Sheet Metal Products Co. v. Prot. Mut. Ins. Co.</i>, 375 A.2d 428 (Conn. Super. Ct. 1977).</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>The burden of proof for a statutory cause of action is set forth in CUTPA. Conn. Gen. Stat. § 42-110g(a). Under CUTPA, the plaintiff need not claim that the insurer’s practices violated the law, but only that the insurer engaged in unfair or deceptive acts and practices and that the plaintiff lost money as a result of those practices. <i>Sportsmen’s Boating Corp. v. Hensley</i>, 474 A.2d 780 (Conn. 1984). An insurer’s failure to deal with its insured fairly and in good faith and refusal, without proper cause, to compensate its insured for a loss covered by the policy, give rise to a cause of action in tort. <i>Grand Sheet Metal Products Co.</i>, 375 A.2d at 428.</p>
<p>What Damages Can Be Recovered?</p>	<p>Compensatory damages can be recovered in a tort action. <i>Grand Sheet Metal Products Co.</i>, 375 A.2d at 428. The plaintiff may recover for emotional damages which have a physical manifestation. <i>Block v. Pascucci</i>, 149 A. 210 (Conn. 1930). CUTPA creates a statutory right to recover actual and punitive damages. CONN. GEN. STAT. § 42-110g. Under CUTPA, the plaintiff can recover actual damages and, at the court’s discretion, punitive damages and attorneys’ fees.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under statutory and common law. CUIPA and CUTPA create a statutory cause of action. CONN. GEN. STAT. §§ 42-110b to 42-110q. An insured can also assert a cause of action for breach of contract and breach of the implied covenant of good faith and honest judgment. <i>Hoyt v. Factory Mut. Liab. Ins. Co.</i>, 179 A. 842 (Conn. 1935).</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>The burden of proof for a statutory cause of action is set forth in CONN. GEN. STAT. § 42-110g(a). In a tort action for breach of the implied covenant of good faith and fair dealing, the insured must prove that the insurer did not use the care and diligence which a person of ordinary prudence would exercise in the management of her own business. <i>Hoyt</i>, 179 A. at 842.</p>
<p>What Damages Can Be Recovered?</p>	<p>Actual and punitive damages can be recovered. CONN. GEN. STAT. § 42-110g(a). In a breach of contract action, the insured can recover compensatory damages, including any excess judgment for wrongful failure to settle. <i>Hoyt</i>, 179 A. at 842.</p>

Third-Party Claims

CONNECTICUT (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. CUIPA does not permit a third-party claimant to bring an action against an insurer. <i>Asmus Elec., Inc. v. G.M.K. Contractors, LLC</i> , 2005 WL 758126 at *3 (Conn. Super. Ct. Feb. 25, 2005).
	If So, What Is the Third Party's Burden of Proof?	Not applicable.
	What Damages Can Be Recovered?	Not applicable.
	Can the Insured Assign Rights to a Third Party?	YES. The insured can assign his cause of action against the insurer for negligence and for breach of contract to pay a specified amount. <i>Turgeon v. Shelby Mut. Plate Glass & Cas. Co.</i> , 112 F. Supp. 355, 355-56 (D. Conn. 1953).
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES , under equitable subrogation. An excess insurer can pursue a claim for breach of duty against a primary insurer through the doctrine of equitable subrogation. <i>Westchester Fire Ins. Co. v. Allstate Ins. Co.</i> , 672 A.2d 939 (Conn. 1996).
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	<p>In CUTPA/CUIPA cases, the predominant defense is a denial that the insurer violated either section 38a-816(6) of CUIPA which prohibits unfair settlement practices and requires a showing that unfair settlements are part of the insurer's general business practice. Courts have held that a single claim does not satisfy this requirement. On March 8, 2007, an amendment to CUIPA was proposed to (i) eliminate the requirement that a person alleging an unfair claim settlement practice establish that prohibited actions were committed or performed with such frequency as to indicate a general business practice, and (ii) prohibit an insurer from failing to adhere to its standards for the prompt investigation of a claim. On March 9, 2007, the proposed draft was presented to the Connecticut Legislature Joint Committee on the Judiciary. On March 16, 2007, a public hearing was held. H.B. No. 6065, 2007 Sess. (Conn. 2007).</p> <p>Usually courts hold that the contract has not been breached if the underlying claim is outside the scope of the policy.</p> <p>An attitude or state of mind, denoting honesty of purpose, freedom from intention to defraud and, generally speaking, faith to one's duty or obligation is a defense to a claim for breach of the duty of good faith and fair dealing. <i>Boisvert v. Great Am. Ins. Co.</i>, 1994 Conn. Super. LEXIS 1718 (Conn. Super. Ct. 1994) (citing <i>Buckman v. People Express, Inc.</i>, 205 Conn. 166, 171 (Conn. 1987)).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. The Supreme Court of Delaware recognizes a contract-based cause of action for bad faith in the non-liability, first party context when a claim is denied or payment on a claim is unreasonably delayed, and the insurer has no reasonable basis for the denial/delay. <i>See Tackett v. State Farm Fire & Cas. Ins. Co.</i>, 653 A.2d 254, 265 (Del. 1995) (“[A] cause of action for the bad faith delay, or the nonpayment, of an insured’s claim in a first-party insured-insurer relationship is cognizable under Delaware law as a breach of contractual obligations”). Essentially, the “bad faith” claim in the first party, non-liability insurance policy scenario is a claim for a breach of the duty of good faith and fair dealing. <i>See Colonial Ins. Co. v. Sudler</i>, 1997 WL 1048174 at *3 (Del. Super. Ct. Sept. 25, 1997).</p> <p>There is no statutory basis for a bad faith claim. Note, however, that a specific Delaware statute concerns unreasonable delay in processing auto insurance claims. <i>See DEL. CODE ANN. tit. 21, § 2118B</i> (2007). Also, in Delaware, such claims can be pursued under the Consumer Fraud Act. <i>See Crowhorn v. Nationwide Mut. Ins. Co.</i>, 2001 WL 695542 (Del. Super. Ct. Apr. 26, 2001).</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>“Where an insurer fails to investigate or process a claim or delays payment in bad faith, it is in breach of the implied obligations of good faith and fair dealing underlying all contractual obligations.” <i>Tackett</i>, 653 A.2d at 264 (citation omitted). “A lack of good faith, or the presence of bad faith, is actionable where the insured can show that the insurer’s denial of benefits was ‘clearly without any reasonable justification.’” <i>Id.</i> <i>See also Casson v. Nat’l. Ins. Co.</i>, 455 A.2d 361 (Del. Super. Ct. 1982).</p>
<p>What Damages Can Be Recovered?</p>	<p>In <i>Tackett</i>, the Supreme Court allowed the insured to recover the benefits owed, plus interest. <i>See Tackett</i>, 653 A.2d at 264-65. The <i>Tackett</i> court also noted that punitive damages may be recovered for an insurer’s bad faith, under a heightened burden of proof. The insured must show that the denial of benefits was “particularly egregious,” meaning that the insurer acted in a “willful or malicious” manner. <i>Tackett</i>, 653 A.2d at 265-66.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. “[T]he liability of an insurance carrier to its policyholder in excess of policy limits is based on the tortious conduct of the insurance carrier, which under the policy has sole control of the defense.” <i>Stilwell v. Parsons</i>, 145 A.2d 397, 402 (Del. 1958). <i>See also McNally v. Nationwide Ins. Co.</i>, 815 F.2d 254, 259 (3d Cir. 1987) (same; applying Delaware law).</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>“The insurer is liable if it fail[ed] to use good faith or due care in settlement negotiations with plaintiff prior to trial. When a judgment in excess of the policy limits might be obtained by the claimant, the good faith standard is satisfied only if the insurer acts in the same way as would a ‘reasonable and prudent man with the obligation to pay all of the recoverable damages.’ The reasonable insurer standard must be applied on the basis of what such a hypothetical actor would do ‘in the light of the insurer’s expertise in the field.’” <i>McNally</i>, 815 F.2d at 259 (quoting 7C John Allen Appleman, <i>Insurance Law and Practice</i>, § 4711 at 395 (Berdal ed. 1979)).</p>
<p>What Damages Can Be Recovered?</p>	<p>The insured can recover the amount of the excess judgment, plus interest thereon. Punitive damages can be awarded if “the insurer’s breach is particularly egregious.” <i>Sommerville v. Colonial Ins. Co.</i>, 2001 WL 34075420 at *2 (Del. C.P. Aug. 30, 2001) (citation omitted), <i>re-trial denied</i> 2001 WL 34075417 (Del. C.P. Sept. 26, 2001). The traditional punitive damages analysis is applied to bad faith claims. “Punitive damage is only appropriate if after a close examination of defendant’s conduct it is found to be ‘outrageous,’ because of ‘evil motive’ or ‘reckless indifference to the rights of others. . . . Mere inadvertence, mistake or errors of judgment which constitute mere negligence will not suffice.’” <i>See id.</i></p>

Third-Party Claims

DELAWARE (cont'd)

Can a Third Party Assert a Bad Faith Claim?	NO. See <i>Hostetter v. Hartford Ins. Co.</i> , 1992 WL 179423 at *7 (Del. Super. Ct. July 13, 1992) (holding that third party could not assert bad faith claim against insured under third-party beneficiary theory). However, a judgment debtor of an insured can sue an insurer for bad faith failure to settle if the judgment debtor obtains an assignment from the insured. See, e.g., <i>Rowlands v. Phico Ins. Co.</i> , 2000 WL 1092134 (D. Del. July 27, 2000).
If So, What Is The Third Party's Burden of Proof?	See above.
What Damages Can Be Recovered?	See above.
Can the Insured Assign Rights to a Third Party?	Delaware courts have not addressed the assignment of a first party bad faith claim. However, an insured can assign a third party "failure to settle" claim to a judgment debtor. <i>Rowlands</i> , 2000 WL 1092134 at *15.
Excess Insurers	
Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	NO. Absent a contrary contractual provision, a primary insurer owes no duty to an excess carrier. <i>Hoechst Celanese Corp. v. Nat'l. Union Fire Ins. Co.</i> , 1993 WL 603360 at *2 (Del. Super. Ct. Nov. 16, 1993).
Defenses	
What Defenses Can Be Asserted Against a Bad Faith Claim?	A reasonable justification for denying coverage is a defense to a bad faith claim. <i>Sommerville</i> , 2001 WL 34075420 at *2.

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>UNDECIDED. There is a conflict among the courts in the District of Columbia as to whether bad faith refusal to provide insurance coverage is a tort. The District of Columbia Court of Appeals has not yet resolved this issue. Some courts have held that the tort of bad faith exists for an insurance company's breach of its legal duty to process and pay claims expeditiously and in good faith. <i>Washington v. Group Hospitalization, Inc.</i>, 585 F. Supp. 517, 520 (D.D.C. 1984) ("Group Hospitalization"), <i>declined to follow by Fireman's Fund Ins. Co. v. CTIA</i>, 480 F. Supp. 2d 7 (D.D.C. 2007); <i>Am. Registry of Pathology v. Ohio Cas. Ins. Co.</i>, 401 F. Supp. 2d 75 (D.D.C. Sept. 26, 2005); <i>Washington v. Govt'. Employees Ins. Co.</i>, 769 F. Supp. 383 (D.D.C. Apr 2, 1991). See also <i>Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.</i>, 743 F.2d 932, 946 (D.C. Cir. 1984). However, other courts in the District have refused to recognize a cause of action for the bad faith refusal to pay an insurance claim. <i>American Registry of Pathology</i>, 2005 WL 3273564 at *3; <i>Washington v. Gov't Employees Ins. Co.</i>, 769 F. Supp. 383 (D.D.C. 1991).</p> <p>Without deciding whether the District's courts recognize a tort of bad faith, the Court of Appeals has stated that the "bad faith tort is grounded on the covenant of good faith and fair dealing that is implicit in all contracts, supplemented by the idea that insurance contracts have special characteristics that warrant heightened liability for breach of that covenant." <i>Messina v. Nationwide Mut. Ins. Co.</i>, 998 F.2d 2, 5 (D.C. Cir. 1993) (regarding no-fault insurance). The Court of Appeals held that the Consumer Protection Act, D.C. CODE §§ 28-3901—3911 (2004), applies to liability insurance policies. <i>Athridge v. Aetna Cas. & Sur. Co.</i>, 351 F.3d 1166 (D.C. Cir. 2003), <i>reh'g denied by 87 Fed. App'x 186</i> (D.C. Cir. 2004). The Consumer Protection Act is violated when a person misrepresents a material fact, which has a tendency to mislead, or fails to state a material fact if such failure tends to mislead. D.C. CODE §§ 28-3904(e)-(f) (2004); <i>Athridge</i>, 351 F.3d at 1175.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>In a bad faith claim, the insured must show that the insurer did not have a reasonable basis for denying benefits under the policy and that it knew or recklessly disregarded its lack of a reasonable basis when it denied the claim. See, e.g., <i>Transp. Revenue Mgmt. v. First N.H. Inv. Svcs. Corp.</i>, 886 F. Supp. 884, 892 (D.D.C. 1995); <i>Group Hospitalization</i>, 585 F. Supp at 520. The insurer need not act fraudulently. <i>Id.</i></p> <p>In a court action, as opposed to an administrative action, under the Consumer Protection Act, the plaintiff must prove that she was damaged. <i>Athridge</i>, 351 F.3d at 1176.</p>
<p>What Damages Can Be Recovered?</p>	<p>Courts which have recognized a tort of bad faith have held that an insured can recover punitive damages if the insurer's acts are oppressive or in willful disregard of the insured's rights. <i>Group Hospitalization</i>, 585 F. Supp. at 521-22. Attorneys' fees can be recovered in certain exceptional situations when the insurer acted vexatiously, wantonly or for oppressive reasons. <i>Eureka Inv. Corp, N.V.</i>, 743 F.2d at 946. Attorneys' fees can be recovered if no-fault insurance benefits were not promptly paid and were overdue. <i>Messina</i>, 998 F.2d at 5 (based on D.C. CODE ANN. § 31-2410 (2001), which applies only to no-fault motor vehicle insurance). An award under the Consumer Protection Act can include reasonable attorneys' fees and punitive damages. D.C. CODE § 28-3905(k)(1) (2004).</p>

First-Party Claims

(B) Liability Insurance Policies

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">DISTRICT OF COLUMBIA (cont'd)</p> <p>Can the Insured Assert a Bad Faith Claim?</p>	<p>UNDECIDED. There is a conflict among the courts of the District of Columbia as to whether the District of Columbia recognizes a tort of bad faith refusal to provide insurance coverage. See, e.g., <i>Am. Nat'l. Red Cross v. Travelers Indem. Co. of R.I.</i>, 896 F. Supp. 8 (D.D.C. 1995) (in a case involving a CGL policy, the court held that there is no tort of bad faith in the District of Columbia). But see <i>Cent. Armature Works, Inc. v. Am. Motorists Ins. Co.</i>, 520 F. Supp. 283 (D.D.C. 1980) (recognizing a bad faith claim under a multi-peril policy). The Court of Appeals has not yet resolved this issue, and it has recognized the direct conflict. <i>Athridge v. Aetna Cas. and Surety Co.</i>, 2001 WL 214212 (D.D.C. 2001), <i>aff'd. in part and rev'd in part</i>, 351 F.3d 1166 (D.C. Cir. 2003), <i>reh'g denied by</i> 87 Fed. App'x 186 (D.C. Cir. 2004). The Court of Appeals held that the Consumer Protection Act, D.C. CODE §§ 28-3901–3911 (2004), applies to liability insurance policies. <i>Athridge</i>, 351 F.3d at 1175.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The courts which recognized bad faith claims, held that insurers have a duty to consider their insureds' interests at least as much as their own when determining whether to settle claims against insureds. See, e.g., <i>Am. Motorists Ins. Co.</i>, 520 F. Supp. at 292. Further, "an insurer has additional obligations to its insured which subject it to more stringent standards of conduct than those normally imposed on parties to a contract." <i>Id.</i> A court action, as opposed to an administrative action, under the Consumer Protection Act requires a showing that the plaintiff suffered damages. <i>Athridge</i>, 351 F.3d at 1176.</p>
<p>What Damages Can Be Recovered?</p>	<p>Punitive damages can be awarded if the insurer's actions were oppressive or in willful and wanton disregard of the insured's rights. <i>Cent. Armature Works</i>, 520 F. Supp. at 292, <i>disagreed with by Interstate Fire & Cas. Co., Inc. v. 1218 Wisconsin, Inc.</i>, 136 F.3d 830, (D.C. Cir. 1998) (holding that awarding punitive damages for a bad-faith breach of an insurance contract, in particular, breach of the duty to pay defense costs, is inappropriate because the breach does not "involve the type of heightened conflict of interest between insurer and insured that gives rise to a fiduciary duty in other insurance situations—for example, when an insurer is involved in settlement of a third-party claim or directs the actual course of the defense").</p> <p>An award under the Consumer Protection Act can include reasonable attorneys' fees and punitive damages. D.C. CODE § 28-3905(k)(1) (2004).</p>

Third-Party Claims

MEMORANDUM FOR CLIENT

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. Even if a court recognized a tort claim for bad faith refusal to pay insurance benefits, a third party would not be permitted to recover on such a claim as it is not a party to the insurance contract, and thus there is no implied covenant of good faith and fair dealing between the insurer and the third party. <i>Messina</i>, 998 F.2d 2; <i>Cambridge Holdings Group, Inc. v. Fed. Ins. Co.</i>, 357 F. Supp. 2d 89, 95 (D.D.C. Jul. 7, 2004).</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>Courts in the District of Columbia appear not to have addressed this issue.</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>Courts in the District of Columbia appear not to have addressed this issue.</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can defend a bad faith claim, asserting that it did not respond immediately to a claim, by demonstrating that no past experience or body of interpretation guided the parties. <i>Eureka Inv. Corp.</i>, 743 F.2d at 946.</p>

First-Party Claims

(A) Non-Liability Insurance Policies

FLORIDA

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under statute. In Florida, an insured has a civil remedy against an insurer for “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.” FLA. STAT. § 624.155(1)(b)(1) (2007); <i>Plante v. U.S.F.&G. Specialty Ins. Co.</i>, 2004 WL 741382 at *2 (S.D. Fla. Mar. 2, 2004) (quoting FLA. STAT. § 624.155(1)(b)(1)), <i>reconsideration denied</i>, 2004 WL 1429932 (S.D. Fla. 2004). Florida does not recognize a common law cause of action for first party bad faith. <i>Time Ins. Co., Inc. v. Burger</i>, 712 So. 2d 389, 391 (Fla. 1998).</p> <p>Two conditions must be met before a bad faith action is filed. First, a judicial determination that the defendant breached the underlying contract and an adjudication of damages in favor of the plaintiff and against the defendant, or some other resolution regarding the plaintiff’s damages, are required. <i>Vest v. Travelers Ins. Co.</i>, 753 So. 2d 1270, 1276 (Fla. 2000) (citing <i>Blanchard v. State Farm Mut. Auto. Ins. Co.</i>, 575 So. 2d 1289 (Fla. 1991)). Second, plaintiff must give 60 days written notice of the alleged statutory violation to the Department of Insurance and the defendant. <i>Vest</i>, 753 So. 2d at 1275 (citing FLA. STAT. § 624.155(3)(a)).</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>The insured has the burden of demonstrating that, under the totality of the circumstances, the insurer failed to attempt in good faith to settle the insured’s claim when it could have done so, if it had acted fairly and honestly toward its insured and with due regard for the insured’s interests. FLA. STAT. § 624.155. Florida Courts consider three (3) factors in section 624.155 claims: (1) the insurer’s efforts to resolve the coverage dispute promptly or limit any potential prejudice to the insured; (2) the substance of the coverage dispute or the weight of legal authority on the coverage issue; and (3) the insurer’s diligence and thoroughness in investigating the facts specifically pertaining to coverage. <i>State Farm Mut. Auto. Ins. Co. v. LaForet</i>, 658 So. 2d 55, 63 (Fla. 1995) (citing <i>John J. Jerue Truck Broker, Inc. v. Ins. Co. of N. Am.</i>, 646 So. 2d 780, 783 (Fla. Dist. Ct. App. 1994), <i>review denied</i>, 654 So. 2d 919 (Fla. 1995)). See also <i>Pozzi Window Co. v. Auto-Owners Ins.</i>, 446 F.3d 1178, 1188 (11th Cir. 2006) (applying Florida law in first party bad faith claim against commercial general liability insurer).</p>
<p>What Damages Can Be Recovered?</p>	<p>The damages the insured can recover in a first-party bad faith action include general damages, court costs, and reasonable attorneys’ fees. FLA. STAT. § 624.155(4). Punitive damages can be recovered only if “the acts giving rise 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.” FLA. STAT. §§ 624.155(5)(a)-(c). An insured seeking punitive damages must post the costs of discovery in advance so that the insurer can recover such costs if punitive damages are not awarded. <i>Id.</i></p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. The action proceeds under the analysis set forth above for non-liability bad faith claims under FLA. STAT. §§ 624.155.</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>YES. Under Florida Statutes section 624.155(1)(b)(1), a third-party claimant has a right of action if the third party has a judgment in excess of the policy limits against the first-party insured. <i>Macola v. Gov't Employees Ins. Co.</i>, 953 So. 2d 451, 456 (Fla. 2006), <i>reh'g denied</i> (2007) (citing <i>State Farm Fire & Cas. Co. v. Zebrowski</i>, 706 So. 2d 275, 277 (Fla. 1997), <i>reh'g denied</i> (1998)); Further, the definition of "person" includes an insured. FLA. STAT. § 624.04. Accordingly, an insured is a person who can bring an action for a civil remedy against an insurer. FLA. STAT. § 624.155</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>A third party has the same burden as a first-party insured under a non-liability policy. Florida courts consider five (5) factors in evaluating a third-party claim under section 624.155: (1) whether the insurer reserved the right to deny coverage if a defense was provided; (2) efforts or measures taken by the insurer to resolve the coverage dispute promptly or 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 light of the coverage dispute. <i>State Farm Mut. Auto. Ins. Co. v. LaForet</i>, 658 So. 2d 55, 63 (1995) (citing <i>Robinson v. State Farm Fire & Cas. Co.</i>, 583 So. 2d 1063, 1068 (Fla. Dist. Ct. App. 1991)).</p>
<p>What Damages Can Be Recovered?</p>	<p>Same damages as those for a first-party insured.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. In several Florida cases, an insured assigned his or her interest in a insurance policy to a third party, without restriction. <i>See, e.g., Lexington Ins. Co. v. Simkins Indus.</i>, 704 So. 2d 1384 (Fla. 1988); <i>Professional Consulting Servs. v. Hartford Life & Accident Ins. Co.</i>, 849 So. 2d 446 (Fla. Dist. Ct. App. 2003).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. Florida now permits an excess insurer to bring a cause of action against a primary insurer for equitable subrogation arising from the excess insurer's payment of a claim. <i>Progressive Am. Ins. Co. v. Nationwide Ins. Co.</i>, 949 So. 2d 293, 294 (Fla. Dist. Ct. App. 2007) (citing <i>Ranger Ins. Co. v. Travelers Indem. Co.</i>, 389 So. 2d 272, 274-75 (Fla. Dist. Ct. App. 1980) (holding that excess insurer is subrogated to the insured's rights against a primary insurer for breach of the primary insurer's good-faith duty to settle)). <i>See also Galen Health Care v. Am. Cas. Co.</i>, 913 F. Supp. 1525, 1531 (M.D. Fla. 1996).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>Florida cases do not mention any specific defenses available for an action brought under Florida Statutes § 624.155. However, note that Florida does not recognize comparative bad faith as an affirmative defense. <i>National Prop. & Cas. Ins. Co. v. King</i>, 568 So. 2d 990 (Fla. Dist. App. 1990). Further, "an insured's consent to go to trial does not <i>ipso facto</i> constitute an absolute defense to a bad faith action." <i>U.S. Fire Ins. Co. v. Morrison Assurance Co.</i>, 600 So. 2d 1147, 1152-53 (Fla. Dist. Ct. App. 1992) (holding primary insurer, which has full control of litigation, including deciding whether case should be tried or settled, must act in good faith).</p>

Gen Re Note

Gen Re's recent product reviews, *Insurancemagazine.com* will follow the industry's lead in offering a "bad faith" rating. The rating will be based on the insurer's bad faith record. This state presents the greatest and largest bad faith exposure, although all states are currently in the "watch" category. For more information on the Bad Faith ratings in Florida, see Gen Re's publications, "Multiple Causes of Action Available to Insureds to Protect Their Interests and Minimize Bad Faith Exposure" (Insurance Issues, November 2009), and "Insurance Regulation Features: The Top and How to Act on Them" (Insurance Issues, December 2009).

First-Party Claims

(A) Non-Liability Insurance Policies

GEORGIA	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under statute. Code of Georgia annotated section 33-4-6(a) (2007) allows an insured to bring a claim against the insurer for bad faith when the insurer fails to pay a covered loss within sixty (60) days of the demand for payment.</p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Section 33-4-6 requires the insured to prove that: (1) the loss is covered by the insurance policy; (2) the insurer failed to pay the loss within sixty days after the policyholder demand payment; and (3) the insurer refused to pay in bad faith. The insured bears the burden of proving bad faith, "which is defined as any frivolous and unfounded refusal in law or in fact to comply with the demand of the policyholder to pay according to the terms of the policy." <i>Ga. Farm Bureau Mut. Ins. Co. v. Williams</i>, 597 S.E.2d 430 (Ga. Ct. App. 2004), cert. denied (Sept. 7, 2004). An insurer cannot abate an action for bad faith by paying the claim after the sixty day period expires. Likewise, "the testimony or opinion of an expert witness [cannot] be the sole basis for a summary judgment or directed verdict on the issue of bad faith." GA. CODE ANN. § 33-4-6(a).</p>
	<p>What Damages Can Be Recovered?</p>	<p>In addition to the amount of the claimed loss, damages can include "not more than 50 percent of the liability of the insurer for the loss or \$5,000.00, whichever is greater, and all reasonable attorneys' fees for the prosecution of the action against the insurer." GA. CODE ANN. § 33-4-6(a). The attorneys' fees claim must be substantiated by expert testimony on the reasonable value of the services rendered. <i>Id.</i> The trial court "shall have the discretion, if it finds the jury verdict fixing attorneys' fees to be greatly excessive or inadequate, to review and amend the portion of the verdict fixing attorneys' fees without the necessity of disapproving the entire verdict." <i>Id.</i> Punitive damages cannot be awarded. <i>Howell v. S. Heritage Ins. Co.</i>, 448 S.E.2d 275, 276 (Ga. Ct. App. 1994). See also <i>Estate of Thornton v. Unum Life Ins. Co.</i>, 445 F. Supp. 2d 1379, 1383 (N.D. Ga. 2006) (applying Georgia law).</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, but in tort, rather than under Code of Georgia Annotated section 33-4-6. In Georgia, an insurer can be held liable for the excess judgment entered against an insured if the insurer negligently or in bad faith refuses to settle a claim within the policy limits. See <i>Cotton States Mut. Ins. Co. v. Brightman</i>, 580 S.E.2d 519, 521 (Ga. 2003); <i>McCall v. Allstate Ins. Co.</i>, 310 S.E.2d 513, 514-15 (Ga. 1984).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>In order to prove negligent refusal to settle, an insured must show "by a preponderance of the evidence that [the insurer] failed to use that degree of care which is exercised by an ordinary prudent insurer under the same or similar circumstances." <i>Great Am. Ins. Co. v. Int'l. Ins. Co.</i>, 753 F. Supp. 357, 363 (M.D. Ga. 1990) accord <i>Cotton States Mut. Ins. Co.</i>, 580 S.E.2d at 521 ("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"). Likewise, an insured can prove "bad faith refusal to settle . . . by demonstrating that [the insurer's] decision not to settle the case was arbitrary and capricious." <i>Great Am. Ins. Co.</i>, 753 F. Supp. at 363. "[A]n insurer's bad faith depends on whether the insurance company acted reasonably in responding to a settlement offer." <i>Id.</i> "Bad faith is not simply bad judgment or negligence, but it imports a dishonest purpose or some moral obliquity, and [it] implies conscious doing of wrong, and means breach of known duty through some motive of interest or ill will." <i>Nguyen v. Lumbermans Mut. Cas. Co.</i>, 583 S.E.2d 220, 223-24 (Ga. 2003).</p>
<p>What Damages Can Be Recovered?</p>	<p>The insured can recover the amount of the excess judgment. <i>Cotton States Mut. Ins. Co.</i>, 580 S.E.2d at 521.</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. Generally, a third party cannot assert a bad faith claim against a tortfeasor's insurer. See <i>King v. Atlanta Cas. Ins. Co.</i>, 631 S.E.2d 786, 788-89 (Ga. Ct. App. 2006) (citing <i>Richards v. State Farm Mut. Ins. Co.</i>, 555 S.E.2d 506, 507 (Ga. Ct. App. 2001)). See also <i>Owens v. Allstate Ins. Co.</i>, 455 S.E.2d 368, 369 (Ga. Ct. App. 1995). However, after obtaining a judgment against an insured, a third party can accept an assignment of the insured's bad faith claim and pursue the insurer directly. See <i>id.</i> See also <i>Cotton States Mut. Ins. Co.</i>, 580 S.E.2d at 520 (noting that the insured had assigned his bad-faith-failure-to-settle claim to his judgment creditor, who then sued the insurance company for bad faith failure to settle.).</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>The third party's burden of proof is the same as the first party's. See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>NO, with respect to claims for statutory penalties under Code of Georgia Annotated section 33-4-5. See <i>Canal Indem. Co. v. Greene</i>, 593 S.E.2d 41, 46 (2003) (“[C]laims for statutory penalties pursuant to O.C.G.A. § 33-4-5 may not be assigned.”). But see <i>Blue Cross & Blue Shield v. Bennett</i>, 477 S.E.2d 442, 444 (Ga. Ct. App. 1996) (noting, in dicta, that when an insured assigns all benefits and payments due under an insurance policy to a third party, the third party becomes the “holder of the policy for all purposes related to enforcing the right to the assigned benefits under O.C.G.A. § 33-4-6”).</p> <p>YES, with respect to non-statutory causes of action in tort for compensatory damages for loss of property resulting from an insurer's bad faith failure to settle. See <i>Canal Indem.</i>, 593 S.E.2d 46; <i>Richards</i>, 555 S.E.2d at 507-08.</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES. Georgia courts have upheld the right of an excess insurer to bring suit against a primary insurer for negligent or bad faith refusal to settle. See <i>Home Ins. Co. v. N. River Ins. Co.</i>, 385 S.E.2d 736, 740 (Ga. Ct. App. 1989). Accord <i>Great Am. Ins. Co.</i>, 753 F. Supp. at 363.</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can assert that it had reasonable grounds to contest a claim. See <i>Roland v. Ga. Farm Bureau Mut. Ins. Co.</i>, 462 S.E.2d 623, 625 (Ga. 1995).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

HAWAII	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Hawaii recognizes a common law cause of action for breach of insurer's duty to act in good faith and fairly in the handling of an insured's claim. See <i>Best Place, Inc. v. Penn Am. Ins. Co.</i>, 920 P.2d 334, 337-41 (Haw. 1996). The insurer has a duty not to unreasonably withhold payments due under an insurance policy. <i>Id.</i> at 346-47. There is no statutory bad faith cause of action. <i>Id.</i> at 341. The Hawaii Unfair Claims Practices Act does not provide a private right of action. <i>Id.</i> at 338-39; HAW. REV. STAT. §§ 431:13-101, 13-107 (2007).</p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The insured must demonstrate by a preponderance of the evidence that the insurer handled the insured's claim in bad faith without proper cause. <i>Reassure Am. Life Ins. Co. v. Rogers</i>, 248 F. Supp. 2d 974, 987 (D. Haw. 2003). Bad faith is determined by examining the reasonableness of the insurer's conduct. See <i>Best Place</i>, 920 P.2d at 346-47. An unreasonable delay in payment is sufficient to support a first party claim. <i>Id.</i> at 347. The insured need not show a conscious awareness by the insurer of wrongdoing or unjustifiable conduct, nor an evil motive or intent to harm the insured. <i>Id.</i></p>
	<p>What Damages Can Be Recovered?</p>	<p>An insured can recover all damages proximately caused by the insurer's bad faith. <i>Id.</i> at 346-47. Punitive damages are available upon proof, by clear and convincing evidence, that the insurer: (a) acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; and/or (b) engaged in willful misconduct or with such want of care as would raise a presumption of conscious indifference to consequences. <i>Id.</i> Attorneys' fees are generally not recoverable. <i>Olokele Sugar Co. v. McCabe, Hamilton & Renny Co.</i>, 487 P.2d 769, 771 (Haw. 1971).</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Hawaii does not distinguish between liability and non-liability policies. See <i>Best Place</i>, 920 P.2d at 347.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. The Hawaii Supreme Court has held that direct third-party actions against an insurer are prohibited unless the third party first obtains a judgment against or settlement with the insured. <i>Olokele Sugar Co</i>, 487 P.2d at 770. See also <i>Executive Risk Indem., Inc. v. Pac. Educ. Services, Inc.</i>, 451 F. Supp. 2d 1147, 1156 (D. Haw. 2006); <i>Young v. Car Rental Claims, Inc.</i> 255 F. Supp. 2d 1149, 1154 (D. Haw. 2003). However, an intermediate appellate court has held that an injured third-party claimant was an intended third party beneficiary of a commercial general liability policy's medical payments coverage. <i>Hunt v. First Ins. Co. of Haw.</i>, 922 P.2d 976, 980 (Haw. Ct. App. 1996). Hawaii's Unfair Claims Practices Act does not provide a private right of action for a third party. HAW. REV. STAT. §§ 431:13-101, 13-107.</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. An insured can assign its claim for breach of contract against its insurer. <i>Cuson v. Md. Cas. Co.</i>, 735 F. Supp. 966, 970 (D. Haw. 1990). Tort claims for damages that are personal in nature, however, are generally not assignable. <i>Id.</i> at 969. See also <i>Sprague v. Calif. Pac. Bankers & Ins. Ltd.</i>, 74 P.3d 12, 23 (Haw. 2003).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>Hawaii courts appear not to have addressed this issue. <i>But see Pac. Employers Ins. Co. v. Servco Pac. Inc.</i>, 273 F. Supp. 2d 1149, 1159 (D. Haw. 2003) (holding that an excess insurer had stated possible claims for equitable indemnity or contribution against the primary insurer).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can assert the reasonableness of its actions in handling or settling the insured's claim or case. See <i>Wailur Assocs. v. Aetna Cas. & Sur. Co.</i>, 183 F.R.D. 550, 556 (D. Haw. 1998). Conduct based on a reasonable interpretation of the insurance contract does not constitute bad faith. <i>Allen v. Scottsdale Ins. Co.</i>, 307 F. Supp. 2d 1170, 1180 (D. Haw. 2004). An erroneous decision to deny a claim is not bad faith, as bad faith implies unfair dealing rather than mistaken judgment. <i>Id.</i> It should be noted that an insurer cannot assert comparative negligence as an affirmative defense. <i>Wailur Assocs.</i>, 183 F.R.D. at 561.</p>

First-Party Claims

(A) Non-Liability Insurance Policies

IDAHO	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Under Idaho common law, a first-party insured can state a tort claim for bad faith. <i>State Farm Fire & Cas. Co. v. Trumble</i>, 663 F. Supp. 317, 319 (D. Idaho 1987). The Idaho Unfair Claims Settlement Practices Act, IDAHO CODE ANN. § 41-1329 (2007), does not establish a private right of action. <i>Walston v. Monumental Life Ins. Co.</i>, 923 P.2d 456, 461 (Idaho 1996). A first-party insured's bad faith claim arises from the "special relationship" between the insurer and the insured which "justifies the recognition of a covenant of good faith and fair dealing." See <i>White v. Unigard</i>, 730 P.2d 1014, 1019 (Idaho 1986).</p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>A first-party insured must show: (1) the insurer intentionally and unreasonably denied or withheld payment; (2) the claim was not fairly debatable; (3) the denial or failure to pay was not the result of a good faith mistake; and (4) the resulting harm is not fully compensable by contract damages. <i>Robinson v. State Farm Mut. Auto. Ins. Co.</i>, 45 P.3d 829, 832 (Idaho 2002) (citing <i>Simper v. Farm Bureau Mut. Ins. Co.</i>, 974 P.2d 1100, 1103 (Idaho 1999)). Further, consequential damages can be recovered if the damages "may reasonably be supposed to have been within the contemplation of the parties at the time of making the contract as a probable result of a breach thereof, or, as sometimes stated, such as were reasonably foreseeable and within the contemplation of the parties at the time they made the contract." <i>Suits v. First Sec. Bank</i>, 713 P.2d 1374, 1381 (Idaho 1985).</p>
	<p>What Damages Can Be Recovered?</p>	<p>By statute, punitive damages can be recovered if the insured proves, "by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted." IDAHO CODE ANN. § 6-1604. Idaho law limits the amount of non-economic damages. IDAHO CODE ANN. § 6-1603. An insured can recover attorney fees if: (1) the insured has provided proof of loss as required by the insurance policy and (2) the insurance company failed to pay an amount justly due under the policy within 30 days of such proof of loss. <i>Martin v. State Farm Mut. Auto. Ins. Co.</i>, 61 P.3d 601, 604 (Idaho 2002).</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under the common law. The same standards apply to bad faith claims under liability and non-liability insurance policies</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. Under Idaho law, "it is well established that absent a contractual or statutory provision authorizing the action, an insurance carrier cannot be sued directly and cannot be joined as a party defendant." <i>Graham v. State Farm Mut. Auto. Ins. Co.</i>, 67 P.3d 90, 92 (Idaho 2003) (citing <i>Pocatello Indus. Park Co. v. Steel W., Inc.</i>, 621 P.2d 399, 407 (Idaho 1980)). Idaho law does not permit a third-party claimant to bring an action for bad faith against an insurance carrier. <i>Graham</i>, 67 P.3d at 92 (citing <i>Hettwer v. Farmers Ins. Co.</i>, 797 P.2d 81, 82 (Idaho 1990)).</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>Idaho courts have not expressly held that assignment is permitted or prohibited. Cases involving assignment are analyzed on other grounds. <i>See, e.g., Exterovich v. City of Kellogg</i>, 80 P.3d 1040, 1041 (Idaho 2003).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>NO. Under Idaho law, "a direct action by insurance carriers against the alleged insurer of a tortfeasor is not permitted." <i>Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co.</i>, 971 P.2d 1142, 1146 (Idaho 1998). In <i>Stonewall</i>, the Court rejected the excess insurer's claims of equitable subrogation and held, in part, that the excess insurers should have sought indemnification from their insured, who could have brought a direct action against the defendant insurer. <i>Stonewall</i>, 971 P.2d at 1145-46.</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>Under Idaho law, an insurer can avoid liability to a plaintiff who has made out a <i>prima facie</i> case for first party bad faith if the insurer can demonstrate that (1) the validity of the insured's claim was reasonably in dispute and therefore fairly debatable and (2) any delay in paying the claim resulted from an honest mistake. <i>See Robinson</i>, 45 P.3d at 833.</p> <p>Generally, any relevant evidence disproving the elements of bad faith will be admitted. <i>Simper</i>, 974 P.2d at 1103 (discussing the four elements of bad faith claim).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">ILLINOIS</p> <p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under statute. Claims for breach of the duty of good faith and fair dealing are preempted by an Illinois statute that authorizes courts to grant attorney fees and other costs, plus the lesser of \$60,000 or 60% of the amount that the court or jury finds the insured is entitled to recover from the insurer. 215 ILL. COMP. STAT. 5/155 (2004) (claims for first party benefits under work-related health, life and disability insurance policies are preempted by ERISA). See <i>O'Neil v. Unum Life Ins. Co.</i>, 2002 WL 31356453 at *2 (N.D. Ill. 2002). With the statutory right to a cause of action established pursuant to 215 Illinois Compiled Statutes 5/155, a first-party claimant can bring an action against an insurer when the liability of a company on a policy is at issue, the amount of loss payable under a policy is contested or there is an unreasonable delay in settling a claim. The insured may recover if it appears to the court that the insurer's action or delay is "vexatious and unreasonable." 215 ILL. COMP. STAT. 5/155.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The burden of proof for a statutory cause of action is set forth in 215 Illinois Compiled Statutes 5/155, with a list of improper conduct.</p>
<p>What Damages Can Be Recovered?</p>	<p>Punitive damages cannot be recovered for an insurer's negligent breach of the duty of good faith and fair dealing. 215 Illinois Compiled Statutes 5/155 limits recovery to actual damages, plus reasonable attorneys' fees, other costs and the lesser of \$60,000 or 60% of the amount which the court or jury finds the insured is entitled to recover from the insurer. When the insurer's conduct exceeds mere negligence and its refusal to settle within policy limits is attributable to utter indifference and reckless disregard for the policyholder, punitive damages can be awarded. <i>O'Neill v. Gallant Ins. Co.</i>, 769 N.E.2d 100, 109 (Ill. App. Ct. 2002).</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under statute. The Illinois statute allowing attorneys' fees and penalties for an insurer's vexatious and unreasonable denial of a claim or delay in settling applies to third party liability insurance as well as to first party insurance. <i>Prisco Serena Sturm Architects, Ltd. v. Liberty Mut. Ins. Co.</i>, 126 F.3d 886, 894 (7th Cir. 1997). The statute does not apply to claims for failure to settle within policy limits. <i>Calif. Union Ins. Co. v. Liberty Mut. Ins. Co.</i>, 930 F. Supp. 317, 319-20 (N.D. Ill. 1996). Illinois recognizes a common law cause of action for failure-to-settle claims. <i>Id.</i> at 319-20.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The burden of proof for a statutory cause of action may be found in 215 Illinois Compiled Statutes 5/155, which contains a list of improper conduct by insurers.</p>
<p>What Damages Can Be Recovered?</p>	<p>Pursuant to 215 Illinois Compiled Statutes 5/155, recovery is limited to actual damages, plus reasonable attorneys' fees, other costs and the lesser of \$60,000 or 60% of the amount which the court or jury finds the party is entitled to recover against the company. Punitive damages can be recovered when the insurer acted with utter indifference and reckless disregard for the policyholder. <i>O'Neill</i>, 769 N.E.2d at 109.</p>

Third-Party Claims

Can a Third Party Assert a Bad Faith Claim?	NO. The statute applies only to the party insured and policy assignees. <i>Yassin v. Certified Grocers of Ill.</i> , 551 N.E.2d 1319 (Ill. 1990).
If So, What is the Third Party's Burden of Proof?	Not applicable.
What Damages Can Be Recovered?	Not applicable.
Can the Insured Assign Rights to a Third Party?	YES. The insured can assign rights to a third party, and the assignee can bring suit against an insurer for "vexatious and unreasonable" conduct under 215 Illinois Compiled Statutes 5/155. <i>Aabye v. Security Conn. Life Ins. Co.</i> , 586 F. Supp. 5, 8 n.2 (N.D. Ill. 1984).
Excess Insurers	
Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	UNDECIDED. Illinois courts are divided as to whether primary insurers have a duty to excess insurers to act reasonably and in good faith in attempting to settle claims within their respective policy limits. <i>Liberty Mut. Ins. Co. v. Am. Home Assurance Co.</i> , 348 F. Supp. 2d 940, 954 (N.D. Ill. 2004). <i>Compare Schal Bovis, Inc. v. Cas. Ins. Co.</i> , 732 N.E.2d 1082, 1090 (Ill. App. 1999) (finding that a primary insurer owed an excess insurer a direct duty of good faith) with <i>U.S. Fire Ins. Co. v. Zurich Ins. Co.</i> , 768 N.E.2d 288, 300 (Ill. App. 2002) (holding that Illinois law does not impose a duty of good faith on a primary insurer for the benefit of an excess carrier).
Defenses	
What Defenses Can Be Asserted Against a Bad Faith Claim?	Insurer's conduct is not vexatious and unreasonable if: (1) a bona fide dispute exists concerning the scope and application of coverage; (2) the insurer asserts a legitimate policy defense; (3) the claim presents genuine legal or factual issues regarding coverage; or (4) the insurer has taken a reasonable legal position on an unsettled issue of law. <i>Traum v. Equitable Life Assurance Soc'y</i> , 240 F. Supp. 2d 776, 790 (N.D. Ill. 2002).

First-Party Claims

(A) Non-Liability Insurance Policies

INDIANA	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Indiana law recognizes a legal duty, implied in all insurance contracts, for the insurer to deal in good faith with its insured. An insurer that denies liability knowing there is no rational, principled basis for doing so has breached its duty. <i>Masonic Temple Ass'n of Crawfordsville v. Ind. Farmers Mut. Ins. Co.</i>, 779 N.E.2d 21, 26 (Ind. Ct. App. 2002) (involving property insurance). The obligation of good faith and fair dealing in discharging the insurer's contractual obligation includes the obligation to refrain from: (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into settling his claim. <i>Erie Ins. Co. v. Hickman</i>, 622 N.E.2d 515, 519 (Ind. 1993); <i>Masonic Temple Ass'n of Crawfordsville</i>, 779 N.E.2d at 26.</p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To prove bad faith, the plaintiff must establish, with clear and convincing evidence, that the insurer knew there was no legitimate basis for denying liability. <i>Masonic Temple Ass'n of Crawfordsville</i>, <i>Id.</i> at 26.</p>
	<p>What Damages Can Be Recovered?</p>	<p>A finding of bad faith permits an insured to recover all damages, including emotional damages, proximately caused by the insurer's conduct. <i>Patal v. United Fire & Cas. Co.</i>, 80 F. Supp. 2d 948, 959 (N.D. Ind. 2000). Punitive damages may be awarded if there is clear and convincing evidence that the defendant acted with malice, fraud, negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence or other human failing. <i>Masonic Temple Ass'n of Crawfordsville</i>, 779 N.E.2d at 26.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Indiana law does not differentiate between liability and non-liability policies. <i>See Freidline v. Shelby Ins. Co.</i>, 774 N.E.2d 37, 40 (Ind. 2002).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. An injured party who is not in privity with the insurer and is merely a judgment creditor does not have standing to bring an action for negligent failure to settle. Note, however, that when a judgment within the policy limits has been entered and the insurance company refuses to honor its policy, the insured has a cause of action against the insurance company to enforce its policy. <i>Bennett v. Slater</i>, 289 N.E.2d 144, 146 (Ind. Ct. App. 1972).</p>
<p>If So, What is the Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. See <i>Bennett</i>, 289 N.E.2d at 146-47 (noting that the insured had not assigned his claim against the insurer for negligent failure to settle).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>Indiana courts appear not to have addressed this issue. However, a federal court predicted that the Indiana Supreme Court likely would recognize an excess insurer's cause of action against a primary insurer under equitable subrogation for bad faith or the negligent defense of a claim against the insured. <i>PHICO Ins. Co. v. Aetna Cas. and Sur. Co.</i>, 93 F. Supp. 2d 982, 989 (S.D. Ind. 2000).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can allege that there was a good faith dispute about whether the insured had a valid claim. Poor judgment and negligence do not amount to bad faith; rather, the additional element of conscious wrongdoing (dishonest purpose, moral obliquity, furtive design or ill will) must be present. <i>Masonic Temple Ass'n of Crawfordsville</i>, 779 N.E.2d at 29 (involving property insurance). See also <i>Eli Lilly and Co. v. Zurich Am. Ins. Co.</i>, 405 F. Supp. 2d 948, 957 (S.D. Ind. 2005) (holding "mere negligence, mistake of fact or law, honest error, or poor judgment do not amount to bad faith"). Furthermore, failure to investigate diligently is not a sufficient basis for a bad faith claim. <i>Worth v. Tamarack Am.</i>, 47 F. Supp. 2d 1087, 1102 (S.D. Ind. 1999).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

IOWA	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under common law. The Iowa Supreme Court has recognized an insured's cause of action against its insurer in tort for bad faith. <i>Bremer v. Wallace</i>, 728 N.W.2d 803, 805 (Iowa), <i>reh'g denied</i> (Mar. 27, 2007) (discussing <i>Dolan v. Aid Ins. Co.</i>, 431 N.W.2d 790, 794 (Iowa), <i>reh'g denied</i> (Dec. 16, 1988)).</p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To demonstrate bad faith, an insured must show: (1) the insurer had no reasonable basis for denying benefits under the policy; and (2) the insurer knew of or recklessly disregarded the lack of reasonable basis for denying the claim. <i>Chadima v. Nat'l. Fid. Life Ins. Co.</i>, 55 F.3d 345, 347-48 n.6 (8th Cir. 1995); <i>Dolan</i>, 431 N.W.2d at 794. <i>See also Bellville v. Farm Bureau Mut. Ins. Co.</i>, 702 N.W.2d 468, 473 (Iowa), <i>reh'g denied</i> (Aug. 29, 2005). The first element is objective, while the second is subjective. <i>Bellville</i>, 702 N.W.2d at 473. Factors to be considered include whether the insurer denied its insured's claim without proper investigation and evaluation. <i>Dolan</i>, 431 N.W.2d at 794. However, the insurer is entitled to debate a "fairly debatable" claim and to conduct an investigation before proffering a settlement. <i>Id.</i></p>
	<p>What Damages Can Be Recovered?</p>	<p>The insured may recover punitive damages for malice, fraud, gross negligence, or an illegal act. <i>Dolan</i>, 431 N.W.2d at 793. Damages can be awarded for emotional distress upon a showing of severe mental suffering. <i>Nassen v. Nat'l States Ins. Co.</i>, 494 N.W.2d 231, 237-38, (Iowa 1992), <i>reh'g denied</i>, (Jan. 22, 1993).</p>

(B) Liability Insurance Policies

	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. The Iowa Supreme Court allows common law actions against insurers for bad faith investigation, defense and failure to settle within policy limits. <i>Wierck v. Grinnell Mut. Reinsurance Co.</i>, 456 N.W.2d 191, 194-95 (Iowa 1990), <i>reh'g denied</i> (June 15, 1990); <i>Kooyman v. Farm Bureau Mut. Ins. Co.</i>, 315 N.W.2d 30, 34-35 (Iowa 1982). It is bad faith for an insurance company to act irresponsibly in settlement negotiations concerning the part of the claim that exceeds the policy limits, or to factor policy limits into its consideration of settlement offers. <i>Wierck</i>, 456 N.W.2d at 195. An insurer is free, however, to reject an offer that it would have rejected if the offer had been within the policy limits. <i>Id.</i></p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The insured must establish that the insurer made or rejected a settlement offer in bad faith. <i>Id.</i> at 195. Bad faith arises when an insurer rejects an offer solely because of the policy limits, exposing the insured to an unreasonable risk. <i>Id.</i> More than an error in judgment is required to establish bad faith. <i>Kooyman</i>, 315 N.W.2d at 35. Indifference to the insured's interests can be evidenced by an insured's failure to adequately investigate a case. <i>Id.</i> An insurer's failure to advise its insured of the status of settlement negotiations is indicative of indifference and thus of bad faith. <i>Loudon v. State Farm Mut. Ins. Co.</i>, 360 N.W.2d 575, 579 (Iowa Ct. App. 1984)</p>
	<p>What Damages Can Be Recovered?</p>	<p>Compensatory and punitive damages are available. <i>Hayes Bros, Inc. v. Economy Fire & Cas. Co.</i>, 634 F.2d 1119, 1124 (8th Cir. 1980). Punitive damages can be awarded only upon a showing that the insurer acted in willful or reckless disregard of the insured's rights. <i>Id.</i> at 1124. An insurer can be required to pay more than its policy limits if its misconduct irresponsibly exposed the insured to unreasonable risk in excess of policy limits. <i>Wierck</i>, 456 N.W.2d at 195.</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. A third-party claimant cannot bring a bad faith action against a tortfeasor's insurer. <i>Bates v. Allied Mut. Ins. Co.</i>, 467 N.W.2d 255, 259 (Iowa 1991); <i>Long v. McAllister</i>, 319 N.W.2d 256, 262 (Iowa 1982).</p> <p>(Note: <i>Bates</i> involved a third-party plaintiff with an underinsurance policy, but language in the case appears to prohibit all third party bad faith actions against insurers.)</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>Not Applicable.</p>
<p>What Damages Can Be Recovered?</p>	<p>Not Applicable.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. Iowa courts allow the insured to assign its rights against its insurer to a third party. <i>Johnson v. Am. Family Mut. Ins. Co.</i>, 674 N.W.2d 88, 90 (Iowa 2004). See generally <i>Loudon v. State Farm Mut. Auto. Ins. Co.</i>, 360 N.W.2d 575 (Iowa 1984).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>Iowa courts appear not to have addressed this issue. An excess carrier might, however, be entitled to indemnity from a primary insurer for costs it incurs defending an underlying action, which the primary insurer wrongfully refuses to defend for the common insured. <i>Farm & City Ins. Co. v. U.S. Fid. & Guar. Co.</i>, 323 N.W.2d 259, 261 (Iowa 1982).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>The policy's limitation on the time for commencing suit can bar a bad faith claim that arises from an insurer's investigation and denial of a claim when the plaintiff seeks the benefits of the policy as part of the relief demanded. <i>Ingrim v. State Farm Fire & Cas. Co.</i>, 249 F.3d 743, 746-47 (8th Cir. 2001). The Iowa Supreme Court has recognized the insured's acquiescence, through counsel, in the insurer's negotiation procedures as a defense to a bad faith suit. <i>Kohlstedt v. Farm Bureau Mut. Ins. Co.</i>, 139 N.W.2d 184, 186 (Iowa 1965). An insurer can contest a claim for bad faith on the basis that the claim was "fairly debatable." See <i>Bellville</i>, 702 N.W.2d at 473 (citing <i>Morgan v. Am. Family Mut. Ins. Co.</i>, 534 N.W.2d 92, 97 (Iowa 1995), overruled on other grounds, <i>Hamm v. Allied Mut. Ins. Co.</i>, 612 N.W.2d 775 (Iowa 2000)). "Where an objectively reasonable basis for denial of claim actually exists, the insurer cannot be held liable for bad faith as a matter of law." <i>Morgan</i>, 534 N.W.2d at 97.</p>

First-Party Claims

(A) Non-Liability Insurance Policies

KANSAS	Can the Insured Assert a Bad Faith Claim?	NO. Kansas does not recognize a tort of bad faith. <i>Spencer v. Aetna Life & Cas. Ins. Co.</i> , 611 P.2d 149, 158 (Kan. 1980). See also <i>Cont'l. Cas. Co. v. Multiservice Corp.</i> , 2007 WL 843851 at *1 (D. Kan. 2007). The issue of “bad faith” in Kansas appears to be limited to “failure to settle” cases in the liability insurance context (see below).
	If So, What Is the Insured’s Burden of Proof?	Not applicable.
	What Damages Can Be Recovered?	Not applicable.

(B) Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?	YES. If an insurance policy explicitly gives the insurer exclusive control over the right to settle, “an insured cannot complain that the insurer settles or refuses to settle within policy limits absent a showing of bad faith or negligence on the part of the insurer.” <i>Associated Wholesale Grocers v. Americold Corp.</i> , 934 P.2d 65, 93 (Kan. 1997). However, the “primary and an excess insurer[s] owe the insured an implied duty of good faith, [and] the specific contractual duties owed by each are defined in their respective policies.” <i>Id.</i> at 93. Cases in Kansas concerning the duty of an insurer to settle actions against the insured focus on the failure of the insurer to accept or initiate a settlement offer. <i>Miller v. Sloan</i> , 978 P.2d 922, 928 (Kan. 1999).
If So, What Is the Insured’s Burden of Proof?	Kansas courts apply the following factors to determine whether an insurer was negligent or acted in bad faith by denying coverage: (1) whether the insured was able to obtain a reservation of rights; (2) the insurer’s efforts to resolve the coverage dispute promptly or limit any potential prejudice to the insured; (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 pertinent to coverage; and (5) the insurer’s efforts to settle the liability claim in light of the coverage dispute. <i>Associated Wholesale Grocers</i> , 934 P.2d at 78.
What Damages Can Be Recovered?	An insurer that acts negligently or in bad faith by failing to settle a case is liable for the full amount of the insured’s resulting loss. <i>Sours v. Russell</i> , 967 P.2d 348, 351 (Kan. Ct. App. 1998) (citing <i>Levier v. Koppenheffer</i> , 879 P.2d 40, 47 (Kan. Ct. App. 1994)). Lost income and lost profits can be recovered as consequential damages arising from an insurer’s failure to pay without just cause or excuse. <i>Mo. Med. Ins. Co., v. Wong</i> , 676 P.2d 113, 124 (Kan. 1984); <i>Pac. Employee Ins. Co. v. P.R. Hoidale Co.</i> , 789 F. Supp. 1117, 1124 (D. Kan. 1992). Attorneys’ fees can be recovered in certain circumstances. See KAN. STAT. ANN. § 40-256 (2007); <i>Pac. Employee Ins.</i> , 789 F. Supp. at 1124. Punitive damages can be recovered only if the insured can prove the insurer committed an independent tort accompanied by malice, fraud or wanton disregard of others.

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. Because Kansas does not recognize a tort of bad faith, "a plaintiff who seeks damages from an insurer under a third party bad faith action must bring the action as a contract claim . . . Thus, implicit in the discussion of a bad faith breach of contract action is the necessity of a contract." <i>Aves by ex rel. Aves v. Shah</i>, 906 P.2d 642, 648 (Kan. 1995).</p>
<p>If So, What is the Third Party's Burden of Proof?</p>	<p>Not applicable.</p>
<p>What Damages Can Be Recovered?</p>	<p>Not applicable.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>Although there does not appear to be a Kansas case in which this issue is specifically addressed, the Court of Appeals has decided cases in which the assignee of a judgment debtor sued the judgment debtor's insurer for bad faith failure to settle. <i>See, e.g., Snodgrass v. State Farm Mut. Auto. Ins. Co.</i>, 804 P.2d 1012 (Kan. Ct. App. 1991).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. An excess insurer may assert a claim against a primary insurer under principles of equitable subrogation. <i>Ins. Co. of N. Am. v. Med. Protective Co.</i>, 768 F.2d 315, 320 (10th Cir. 1985); <i>Pac. Employers Ins. Co.</i> 789 F. Supp. at 1121.</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>"An insurance company should not be required to settle a claim when there is a good faith question as to whether there is coverage under its insurance policy. If there is no coverage, there is no fiduciary relationship between the tortfeasor and the insurance company." <i>Snodgrass</i>, 804 P.2d at 166. An insurer can also claim that its conduct was reasonable. <i>Johnson v. Westhoff Sand Co., Inc.</i>, 62 P.3d 685, 697 (Kan. Ct. App.), <i>review denied</i> (April 29, 2003).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

KENTUCKY	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. In <i>Wittmer v. Jones</i>, 864 S.W.2d 885, 889-90 (Ky. 1993), the Kentucky Supreme Court recognized a bad faith cause of action based on application of provisions of the Kentucky Unfair Claims Settlement Act, KY. REV. STAT. ANN. § 304.12-230 (2002) (noting that a private right of action is available through application of KY. REV. STAT. ANN. § 446.070 (2002)). The Kentucky Unfair Claims Settlement Act lists fifteen types of unfair practices. KY. REV. STAT. ANN. § 304.12-230. In addition to the statute-based cause of action for bad faith, Kentucky recognizes contract actions, <i>Allstate Ins. Co. v. Coffey</i>, 796 F. Supp. 1017, 1018 (E.D. Ky. 1992), and first party insurance tort actions, <i>Deaton v. Allstate Ins. Co.</i>, 548 S.W.2d 162, 164 (Ky. Ct. App. 1977).</p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To succeed on a claim that the insurer failed in bad faith to pay the insured's claim the insured must prove: (1) the insurer was obligated to pay the claim; (2) the insurer did not have a reasonable basis in law or fact for denying the claim; and (3) the insurer knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. <i>Wittmer</i>, 864 S.W.2d at 890.</p>
	<p>What Damages Can Be Recovered?</p>	<p>Consequential and punitive damages can be recovered in tort when an insurance company acts in bad faith in dealing with its insured. <i>Curry v. Fireman's Fund Ins. Co.</i>, 784 S.W.2d 176, 178 (Ky. 1989). There must be sufficient evidence of intentional misconduct or reckless disregard of the rights of an insured to submit the punitive damages issue to a jury. <i>Wittmer</i>, 864 S.W.2d at 890.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Bad faith causes of action are recognized in the context of liability insurance policies. See <i>Wittmer</i>, 864 S.W.2d at 885-91; <i>Terrell v. W. Cas. & Sur. Co.</i>, 427 S.W. 2d 825, 827 (Ky. Ct. App. 1968) (holding Kentucky recognizes tort actions against liability insurers who act in bad faith). The Kentucky Unfair Claims Settlement Act lists fifteen types of unfair practices. KY. REV. STAT. ANN. § 304.12-230. In addition to the statute-based cause of action for bad faith, Kentucky recognizes contract actions, <i>Allstate Ins. Co. v. Coffey</i>, 796 F. Supp. 1017, 1018 (E.D. Ky. 1992), and first party insurance tort actions, <i>Deaton v. Allstate Ins. Co.</i>, 548 S.W.2d 162, 164 (Ky. Ct. App. 1977).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To succeed on a claim that the insurer failed in bad faith to pay the insured's claim the insured must prove: (1) the insurer was obligated to pay the claim; (2) the insurer did not have a reasonable basis in law or fact for denying the claim; and (3) the insurer knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. <i>Wittmer</i>, 864 S.W.2d at 890.</p>
<p>What Damages Can Be Recovered?</p>	<p>Consequential and punitive damages can be recovered in tort when an insurance company acts in bad faith in dealing with its insured. <i>Curry v. Fireman's Fund Ins. Co.</i>, 784 S.W.2d 176, 178 (Ky. 1989). There must be sufficient evidence of intentional misconduct or reckless disregard of the rights of an insured to submit the punitive damages issue to a jury. <i>Wittmer</i>, 864 S.W.2d at 890.</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>YES. The Kentucky Supreme Court has ruled that the Kentucky Unfair Claims Settlement Practices Act (KY. REV. STAT. ANN. § 304.12-230, as supported by KY. REV. STAT. ANN. § 446.070) creates a private right of action for a third-party claimant against an insurance company. <i>Rawe v. Liberty Mut. Fire Ins. Co.</i>, 462 F.3d 521, 526 (6th Cir. 2006) (citing <i>State Farm Mut. Auto. Ins. Co. v. Reeder</i>, 763 S.W. 2d 116, 117 (Ky. 1989)).</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>In order to prevail against an insurance company for refusing in bad faith to pay the insured's claim, the insured must prove: (1) the insurer was obligated to pay the claim; (2) the insurer did not have a reasonable basis in law or fact for denying the claim; and (3) the insurer knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. <i>Wittmer</i>, 864 S.W.2d at 890.</p>
<p>What Damages Can Be Recovered?</p>	<p>Consequential and punitive damages can be recovered in tort when an insurance company acts in bad faith in dealing with its insured. <i>Curry</i>, 784 S.W.2d at 178. There must be sufficient evidence of intentional misconduct or reckless disregard of the rights of an insured to submit the punitive damages issue to a jury. <i>Wittmer</i>, 864 S.W.2d at 890.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. An insured may assign her action for breach of the insurance contract to a third party. <i>Terrell</i>, 427 S.W. 2d at 827.</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. The court may give restitution to the excess insurer to prevent the unjust enrichment of the defendant insurer, under the doctrine of equitable subrogation. <i>Commercial Standard Ins. Co. v. Am. Employers Ins. Co.</i> 209 F. 2d 60, 66 (6th Cir. 1954).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can defend an action for bad faith by a showing that the claim was debatable on the law or the facts. See <i>Wittmer</i>, 864 S.W.2d at 890.</p>

First-Party Claims

(A) Non-Liability Insurance Policies

LOUISIANA	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under statute. Louisiana Revised Statutes Annotated section 22:1220 requires all insurers to act in good faith, imposing an “affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both.” Any breach of this duty will result in liability for damages. <i>Sultana Corp. v. Jewelers Mut. Ins. Co.</i>, 860 So. 2d 1112, 1117 (La. 2003) (discussing § 22:1220). Louisiana Revised Statutes Annotated § 22:658 applies to all insurance policies other than life, health and accident policies, and requires an insurer to pay any claim within thirty days of satisfactory proof of loss.</p>
	<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>In order to recover on a bad faith claim, the insured has the burden of proving that the insurer received satisfactory proof of loss and that the insurer’s actions were arbitrary, capricious or without probable cause. <i>Reed v. State Farm Mut. Auto. Ins. Co.</i>, 857 So. 2d 1012, 1020 (La. 2003) (uninsured motorist claim) (citing <i>Hart v. Allstate Ins. Co.</i>, 437 So. 2d 823, 827 (La. 1983)). The insured need not demonstrate that he was damaged; proof of actual damages is not a prerequisite to the recovery of penalties for an insurer’s breach of the statutory duties of good faith and fair dealing. <i>Sultana Corp.</i>, 860 So. 2d at 1117.</p>
	<p>What Damages Can Be Recovered?</p>	<p>Under Louisiana Revised Statutes Annotated § 22:1220, in addition to any general or special damages, an insurer can be penalized “in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater.” If the failure to pay is found to be “arbitrary, capricious, or without probable cause,” an insurer that does not pay a claim within thirty days after receipt of satisfactory proof of loss shall be subject to a penalty, in addition to the amount of the loss, of fifty percent (50%) damages on total amount of loss or one thousand dollars (whichever is greater); attorneys’ fees and costs are also awarded. LA. REV. STAT. ANN. § 22:658 (applying to all policies other than life, health and accident). See also <i>Aymond v. Commercial Union Ins. Co.</i>, 469 So. 2d 435, 439 (La. Ct. App. 1985) (discussing § 22:658).</p>

Gen Re Note

The 50% penalty statute, Sec. 22:658, was discussed in the *Sher v. Lafayette Ins. Co.* flood exclusion ruling from the Louisiana Supreme Court. Before *Katrina*, the penalty for violating the prompt claim payment statute was 25% of the loss, but the Legislature raised the amount to 50% in 2006. Attorneys’ fees and costs are also payable for a violation. While the court denied recovery for mental anguish, the decision reminds insurers that non-compliance with claim payment laws can still be costly.

First-Party Claims

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under statute. Louisiana Revised Statutes Annotated section 22:1220 requires all insurers to act in good faith, imposing an “affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both.” Any breach of this duty will result in liability for damages. An insurer’s unwarranted refusal to accept a settlement offer within the policy limits, which results in a judgment against the insured that exceeds the policy limits, may constitute breach of the implied covenant of the contract, and expose the insurer to liability in excess of the policy limits. <i>Wooten v. Central Mut. Ins. Co.</i>, 166 So. 2d 747, 750 (La. Ct. App. 1964). Louisiana Revised Statutes Annotated section 22:658, which applies to all insurance policies other than life, health and accident policies, requires an insurer to pay any claim within thirty days of satisfactory proof of loss.</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>An insured “has the burden of proving the insurer received satisfactory proof of loss as a predicate to a showing that the insurer was arbitrary, capricious, or without probable cause.” <i>Reed</i>, 857 So. 2d at 1020. The insured must prove that the “insurer knowingly committed actions which were completely unjustified, without reasonable or probable cause or excuse.” <i>Holt v. Aetna Cas. & Sur. Co.</i>, 680 So. 2d 117, 130 (La. Ct. App.), <i>reh’g denied</i> (Sept. 19, 1996). Several factors determine whether a liability insurer acted in bad faith: (1) the probability of the insured’s liability; (2) the adequacy of the insurer’s investigation of the claim; (3) the extent of damages recoverable in excess of policy coverage; (4) rejection of offers in settlement after trial; (5) the extent of the insured’s exposure as compared to that of the insurer; and (6) the nondisclosure of relevant factors by the insured or insurer. <i>Cousins v. State Farm Mut. Auto Ins. Co.</i>, 294 So. 2d 272, 275 (La. Ct. App.), <i>reh’g denied</i> (May 30, 1974). See also <i>Brown ex rel. Tracy v. Liberty Mut. Fire Ins. Co.</i>, 168 Fed. App’x 558, 562-63 (5th Cir. 2006) (applying Louisiana law).</p>
<p>What Damages Can Be Recovered?</p>	<p>An insurer may be liable for damages in excess of the policy limits caused by its bad faith refusal to settle within the policy limits. <i>Wooten, supra</i>. Attorneys’ fees may be awarded if bad faith resulted in an excess judgment against the insured and the insured had to employ an attorney to protect his interests and to oppose the insurer’s bad faith. <i>Md. Cas. Co. v. Dixie Ins. Co.</i>, 622 So. 2d 698, 703 (La. Ct. App. 1993). Under Louisiana Revised Statutes Annotated section 22:1220, in addition to any general or special damages, a penalty may be awarded against the insurer “in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater.” If the failure to pay is found to be “arbitrary, capricious, or without probable cause,” an insurer that does not pay a claim within thirty days after receipt of satisfactory proof of loss shall be subject to a penalty of twenty-five percent (25%) damages on total amount of loss or one thousand dollars (whichever is greater) in addition to the amount of the loss. LA. REV. STAT. ANN. § 22:658 (applying to all policies other than life, health and accident).</p>

Third-Party Claims

LOUISIANA (cont'd)	<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>YES. Louisiana Revised Statutes Annotated section 22:1220 provides a method for third parties to recover damages caused by insurers. <i>Manuel v. La. Sheriff's Risk Mgmt. Fund</i>, 664 So. 2d 81, 85 (La. 1995). See also <i>Theriot v. Midland Risk Ins. Co.</i>, 694 So. 2d 184, 187 (La. 1997). The Louisiana Supreme Court held that the insurer's obligation to act in good faith does not derive from contract, but is separate and distinct from the contractual requirements, and the insurer's duty applies to insured and non-insured claimants. <i>Manuel</i>, 664 So. 2d at 85.</p>
	<p>If So, What Is The Third Party's Burden Of Proof?</p>	<p>Only the knowing commission by the insurer of the specific acts listed in Louisiana Revised Statutes Annotated section 22:1220-B can support a private cause of action by a third-party claimant. <i>Theriot</i>, 694 So. 2d at 187. These acts include: (1) misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue; (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 concerning the applicable prescriptive period; and (5) failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause. <i>Id.</i></p>
	<p>What Damages Can Be Recovered?</p>	<p>The recoverable damages are the same as for first-party bad faith. See above.</p>
	<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. <i>Keith v. Comco Ins. Co.</i>, 574 So. 2d 1270, 1276, writ denied, 577 So. 2d 16 (La. 1991).</p>
Excess Insurers		
	<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. Although a primary insurer does not owe a duty of care or good faith to an excess carrier, an excess carrier can recover from the primary insurer on a theory of equitable subrogation. <i>Great S.W. Fire Ins. Co. v. CNA Ins. Cos.</i>, 557 So. 2d 966, 970-71 (La. 1990).</p>
Defenses		
	<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can defend against a bad faith claim by demonstrating a reasonable and legitimate question as to the extent and causation of a claim and/or the insured's failure to produce satisfactory proof of loss or facts sufficient to apprise the insurer of its fault and damages. <i>Reed v. State Farm Mut. Auto. Ins. Co.</i>, 857 So. 2d 1012, 1020 (La. 2003). Losing a lawsuit against its insured does not necessarily indicate that the insurer acted in bad faith; bad faith exists only when the insurer's failure to pay was arbitrary, capricious or without probable cause. <i>Reed v. U.S. Fid. & Guar. Co.</i>, 302 So. 2d 354, 358 (La. Ct. App. 1974).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under statute and common law. The Supreme Judicial Court of Maine has recognized a cause of action for an insurer's breach of its contractual duty to act in good faith, but it expressly refused to adopt an independent tort action for such a breach. <i>Marquis v. Farm Family Mut. Ins. Co.</i>, 628 A.2d 644, 652 (Me. 1993). See also <i>Gardner v. Podiatry Ins. Co.</i>, 2007 WL 1170774 at *8 (D. Me. 2007). Pursuant to Maine Revised Statutes Annotated title 24-A, section 2436-A (2007), a first-party claimant may bring a cause of action for: (1) knowingly misrepresenting to an insured pertinent facts or policy provisions relating to coverage at issue; (2) failing to acknowledge and review claims, which may include payment or denial of a claim, within a reasonable time following receipt of written notice by the insurer of a claim by an insured arising under a policy; (3) threatening to appeal an arbitration award in favor of an insured for the sole purpose of compelling the insured to accept a settlement less than the arbitration award; (4) failing to affirm or deny coverage, reserving any appropriate defenses, within a reasonable time after having completed its investigation related to a claim; or (5) without just cause, failing to effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear. The insured can assert a claim against an insurer for failure to pay within the statutorily prescribed time period, under the late payment of claims statute.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Under Maine Revised Statutes Annotated title 24-A, section 2436-A, a claimant must establish that the insurer acted "without just cause." This requires proof that the insurer refused to settle claims without a reasonable basis for contesting liability, the amount of any damages, or the extent of any injuries claimed.</p>
<p>What Damages Can Be Recovered?</p>	<p>Traditional contract, including general and consequential damages, remedies are available for a breach of the contractual duty to act in good faith. <i>Marquis</i>, 628 A.2d at 652. The legislature has provided additional remedies in the late payment of claims statute, Maine Revised Statutes Annotated title 24-A, section 2436, and the unfair claims practices statute, Maine Revised Statutes Annotated title 24-A, section 2436-A, both of which provide for statutory interest on damages and attorneys' fees. See <i>Marquis</i>, 628 A.2d at 652.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. The insured can bring a claim for breach of the covenant of good faith and fair dealing, as well as violations of Maine's unfair claims practices statute, Maine Revised Statutes Annotated title, 24-A, section 2436-A, and late payment of claims statute, Maine Revised Statutes Annotated title, 24-A, section 2436. <i>Anderson v. Va. Sur. Co.</i>, 985 F. Supp. 182, 185 (D. Me. 1998).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To prevail on a cause of action for breach of the duty of good faith and fair dealing, an insured must establish that the insurer had no reasonable basis for its actions. <i>Tait v. Royal Ins. Co.</i>, 913 F. Supp. 621, 626, 628 (D. Me. 1996) (considering whether the insurer had a reasonable basis for refusing to consent to the settlement agreement or for contesting the claim). Under Maine Revised Statutes Annotated title 24-A, section 2436-A, a claimant must establish that the insurer acted "without just cause." This requires proof that the insurer refused to settle claims without a reasonable basis for contesting liability, the amount of any damages, or the extent of any injuries claimed.</p>
<p>What Damages Can Be Recovered?</p>	<p>Traditional remedies for breach of contract are available to the insured for an insurer's breach of its contractual duty to act in good faith. <i>Anderson</i>, 985 F. Supp. at 185. Additional remedies are set forth in the late payment of claims statute, Maine Revised Statutes Annotated title 24-A, section 2436, and the unfair claims practices statute, Maine Revised Statutes Annotated title 24-A, § 2436-A, both of which provide for statutory interest and attorneys' fees.</p>

Third-Party Claims

MAINE (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. A liability insurance policy does not obligate an insurer to act in good faith toward a third-party claimant. <i>Stull v. First Am. Title Ins. Co.</i> , 745 A.2d 975, 979 (Me. 2000); <i>Linscott v. State Farm Mut. Auto. Ins. Co.</i> , 368 A.2d 1161, 1163-64 (Me. 1977). See also <i>Reid v. Key Bank</i> , 821 F.2d 9, 12 (1st Cir. 1987).
	If So, What Is The Third Party's Burden Of Proof?	Not applicable.
	What Damages Can Be Recovered?	Not applicable.
	Can the Insured Assign Rights to a Third Party?	YES. Maine generally allows tort claims to be assigned to third parties. See <i>Elliott v. Hanover Ins. Co.</i> , 711 A.2d 1310, 1311-12 (Me. 1998) (considering a third-party tort claimant's reach and apply action against the insurer).
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	Maine courts appear not to have addressed this issue.
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	Under Maine Revised Statutes Annotated title 24-A, section 2436-A, an insurer can argue that it had a reasonable basis to contest liability, amount of damages and/or the extent of any injuries claimed, or that it reviewed claims within a reasonable time. See also <i>Tait</i> , 913 F. Supp. at 626, 628. An insurer may assert non-coverage as a defense to an action brought by an insured or an insured's assignee. <i>Elliott</i> , 711 A.2d at 1313.

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, in an administrative proceeding. In 2003, the Maryland Legislature amended the Unfair Claim Settlement Practices Act, Annotated Code of Maryland Insurance, section 27-301 (2007), to provide an administrative cause of action for first party claims. MD. CODE ANN., INS. § 27-1001 (2007).</p> <p>In Maryland, an insurer's bad faith failure to pay a first-party claim is not a tort. <i>Johnson v. Fed. Kemper Ins. Co.</i>, 536 A.2d 1211, 1213 (Md. Ct. Spec. App. 1987). See also <i>Schaefer v. Aetna Life & Cas. Co.</i>, 910 F. Supp. 1095, 1100 (D. Md. 1996). However, a first-party insured can sue for breach of contract. <i>Johnson</i>, 536 A. 2d at 1213.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Annotated Code of Maryland, Insurance, section 27-303(9) lists an insurer's failure to act in good faith under Annotated Code of Maryland, Insurance, section 27-1001 as an unfair claim settlement practice. Although it provides an administrative cause of action for first party claims, the statute does not specify the burden of proof.</p>
<p>What Damages Can Be Recovered?</p>	<p>Under Annotated Code of Maryland, Insurance, section 27-1001(e)(2)(i)-(ii), the Maryland Insurance Administration will consider awarding actual damages, interest, attorneys' fees and litigation costs. The revised statute does not indicate if punitive damages can be recovered.</p> <p>An insured can recover damages, which either arise naturally from breach of contract or arise from a breach the parties contemplated might result when they entered into the contract. <i>Johnson</i>, 536 A.2d at 1213. In an action solely for breach of contract, punitive damages cannot be awarded, even if the plaintiff can show malice. <i>Id.</i></p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Maryland recognizes a cause of action for a liability insurer's failure to settle a third-party claim against its insured within policy limits. <i>State Farm Mut. Ins. Co. v. White</i>, 236 A.2d 269, 273 (Md. 1967).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Maryland courts apply a good faith test, which requires the insured to show that the insurer's refusal to settle was not an informed judgment based on honesty and diligence. <i>White</i>, 236 A.2d at 273.</p>
<p>What Damages Can Be Recovered?</p>	<p>Compensatory damages may be awarded if the insurer has acted in bad faith. See <i>White</i>, 236 A.2d at 273. Maryland allows punitive damages. <i>Murphy v. Edmonds</i>, 601 A.2d 102 (Md. 1992) (holding that gross negligence is the standard for awarding punitive damages). But see <i>Owens Ill., Inc. v. Zenobia</i>, 601 A.2d 633 (Md. 1992) (holding that a showing of actual malice is the standard for allowing an award of punitive damages).</p>

Gen Re Note

The 2007 law and 2008 regulations create an administrative avenue for first-party bad faith actions, which could ultimately lead to the courthouse. This is a new exposure and process in Maryland, and it will take time to see how bad faith claims evolve.

Third-Party Claims

MARYLAND (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. The Court of Appeals of Maryland has ruled that the insurer's obligation to settle a claim within policy limits runs only to its insured, and a tort judgment creditor cannot recover amounts in excess of the policy limits from a debtor's insurance company. <i>Bean v. Allstate Ins. Co.</i> , 403 A.2d 793, 795-96 (Md. 1979).
	If So, What Is The Third Party's Burden Of Proof?	Not applicable.
	What Damages Can Be Recovered?	Not applicable.
	Can the Insured Assign Rights to a Third Party?	YES. An insured can assign to a third party his cause of action for bad faith failure to settle. <i>Med. Mut. Liab. Ins. Co. v. Evans</i> , 622 A.2d 103, 117 (Md. 1993).
	Excess Insurers	
Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES , under equitable subrogation. Maryland courts have ruled that an excess carrier may recover from a primary carrier for bad faith failure to settle a claim within the primary policy limits on an equitable subrogation theory. <i>Fireman's Fund v. Cont'l Ins. Co.</i> , 519 A.2d 202, 204 (1987).	
Defenses		
What Defenses Can Be Asserted Against a Bad Faith Claim?	The insurer may use the following acts or circumstances to show it acted in good faith: the severity of the plaintiff's injuries would not give rise to the likelihood of a verdict in excess of policy limits; the insurer conducted a proper and adequate investigation of the circumstances surrounding the claim; and/or the insurer did not act with a greater concern for its monetary interests than for the insured's. <i>White</i> , 236 A.2d at 273.	

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Massachusetts recognizes common law and statutory claims by insureds against their insurers. <i>Green v. Blue Cross and Blue Shield</i>, 713 N.E.2d 992, 996 (Mass. App. Ct.), review denied, 720 N.E.2d 469 (Mass. 1999).</p> <p>Massachusetts law does not differentiate between non-liability and liability insurance policies in terms of statutory liability. See section on liability insurance policies below for analysis.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Massachusetts law does not differentiate between non-liability and liability insurance policies. See section on liability insurance policies below for analysis.</p>
<p>What Damages Can Be Recovered?</p>	<p>Massachusetts law does not differentiate between non-liability and liability insurance policies. See section on liability insurance policies below for analysis.</p>

MASSACHUSETTS

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Massachusetts courts recognize both a common law and statutory claim for bad faith by an insured against its liability insurer. An insured can sue its insurer under a common law claim for failing to act in good faith in conducting the defense of the insured. <i>Sullivan v. Utica Mut. Ins. Co.</i>, 788 N.E.2d 522, 536 (Mass. 2003); <i>Hartford Cas. Ins. Co. v. N.H. Ins. Co.</i>, 628 N.E.2d 14, 16 (Mass. 1994).</p> <p>Chapter 93A of the General Laws of Massachusetts permits consumers to sue defendants engaged in “unfair or deceptive acts or practices in the conduct of any trade or commerce.” MASS. GEN. LAWS CH. 93A, §§ 2, 9 (2007); <i>Van Dyke v. St. Paul Fire and Marine Ins. Co.</i>, 448 N.E.2d 357, 360 (Mass. 1983). Section 11 of chapter 93A permits businesses to sue defendants engaged in unfair acts. MASS. GEN. LAWS CH. 93A, § 11.</p> <p>Chapter 176D of the General Laws of Massachusetts defines unfair or deceptive acts or practices by insurance companies. MASS. GEN. LAWS CH. 176D. The Commissioner of Insurance has exclusive authority to enforce chapter 176D. <i>Id.</i> However, the lack of a private right of action under chapter 176D does not preclude an individual from suing an insurer, as that right exists under chapter 93A. MASS. GEN. LAWS CH. 93A, §§ 9, 176D; <i>Van Dyke</i>, 448 N.E.2d at 360.</p> <p>A violation of chapter 176D constitutes a <i>per se</i> violation of section 9 of chapter 93A. MASS. GEN. LAWS CH. 93A, § 9; 1979 Mass. Acts 406. The <i>per se</i> rule is not applicable, however, to business claimants. For business claimants, a violation of chapter 176D is merely evidence of a violation of chapter 93A. <i>Polaroid Corp. v. Travelers Indem. Co.</i>, 610 N.E.2d 912, 922 (Mass. 1993).</p>
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First-Party Claims

(B) Liability Insurance Policies

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">MASSACHUSETTS (cont'd)</p> <p>If So, What Is the Insured's Burden of Proof?</p>	<p>The principal basis for a bad faith claim or unfair claims handling complaint is General Laws of Massachusetts Chapter 176D, section 3(9). This statute catalogs 14 separate actions that constitute <i>per se</i> violations of chapter 93A by an insurance company and evidence of chapter 93A violations for a business plaintiff. The most common are:</p> <ul style="list-style-type: none"> (a) refusing to pay claims without conducting a reasonable investigation based upon all available information; (b) failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; (c) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds. <p>An objective standard, i.e., whether an insurer acted "reasonably," is used to determine whether an insurer acted in bad faith. <i>Hartford Cas. Ins. Co.</i>, 628 N.E.2d at 16. See also <i>Taveras v. Rodriguez</i>, 2000 WL 174901 at *2 (Mass. App. Div. 2000) (quoting <i>Demeo v. State Farm Mut. Auto. Ins. Co.</i>, 649 N.E.2d 803, 804 (Mass. App. Ct. 1995)). <i>Accord M. DeMatteo Const. Co. v. Century Indem. Co.</i>, 182 F. Supp. 2d 146, 163 (D. Mass. 2001).</p>
<p>What Damages Can Be Recovered?</p>	<p>Any person "injured" by another person's unfair or deceptive act or practice, or any person whose "rights are adversely affected" by a violation of General Laws of Massachusetts chapter 176D, section 3(9), may recover under chapter 93A. The measure of damages for a nonwillful violation of chapter 93A is the claimant's actual damages, defined as the foreseeable loss to the claimant caused by an insurer's violation of chapter 176D. In cases alleging bad faith claims-handling practices, the foreseeable loss is typically the interest on the amount of the judgment or settlement in the underlying tort action for the period during which the insurer wrongfully withheld the funds. <i>Clegg v. Butler</i>, 676 N.E.2d 113, 114 (Mass. 1997). If a court finds that an unfair or deceptive trade practice was willful or knowing, it can award up to three, but no less than two, times the actual damages. MASS. GEN. LAW. CH. 93A, § 9(3). A plaintiff who prevails on her claim is entitled to recover attorneys' fees incurred in prosecuting the chapter 93A case. An adverse impact on a person's rights, which does not amount to a traditional injury, is compensable if the court finds that the insurer violated General Laws of Massachusetts chapter 176D, section 3(a). Nonconsumer plaintiffs bringing claims under General Laws of Massachusetts chapter 93A, section 11 must show a loss of money or property arising from the unfair and deceptive practice, as opposed to the underlying cause of action.</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>YES. See above, section on first-party liability insurance policies.</p> <p>Massachusetts law no longer differentiates between first- and third-party claims. Parties other than the purchaser of insurance can have standing to bring a chapter 93A, section 9 claim against an insurer. <i>See, e.g., Van Dyke v. St. Paul Fire & Marine Ins. Co.</i>, 448 N.E.2d 357 (1983) (direct claim permitted by patient against physician's malpractice insurer under General Laws of Massachusetts chapter 93A, section 9 and chapter 176D, section 3(a), but entry of summary judgment for defendant affirmed on other grounds); <i>Whyte v. Conn. Mut. Life Ins. Co.</i>, 818 F.2d 1005 (1st Cir. 1987) (beneficiary permitted to sue deceased's life insurer for violation of General Laws of Massachusetts chapter 93A, section 9 and chapter 176D, section 3(9)).</p>
<p>If So, What Is The Third Party's Burden Of Proof?</p>	<p>See above, section on first-party liability insurance policies.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above, section on first-party liability insurance policies.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>Massachusetts courts do not appear to have addressed this issue.</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. The Massachusetts Supreme Judicial Court has held that, as a general rule, an excess insurer can state a claim based on equitable subrogation but has no right of direct action against a primary insurer. <i>Hartford Cas. Ins. Co.</i>, 628 N.E.2d at 18. <i>See also RLI Ins. Co. v. Gen. Star Indemn. Co.</i>, 997 F. Supp. 140, 146 (D. Mass. 1998). Excess insurers can sue primary insurers under section 11 of chapter 93A for a violation of section 2 of that chapter, but not under section 9 of chapter 93A for a violation of chapter 176D, section 3(9). <i>RLI</i>, 997 F. Supp at 150.</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer's denial of coverage or refusal to defend an insured based on a reasonable interpretation of the policy does not constitute an unfair claim settlement practice in violation of chapter 93A. <i>Rischitelli v. Safety Ins. Co.</i>, 671 N.E.2d 1243, 1244 (Mass. 1996). When "[i]n good faith, [an insurer] relied upon a plausible, although ultimately incorrect, interpretation of its policy," it did not engage in an unfair or deceptive act. <i>Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co.</i>, 545 N.E.2d 1156, 1160 (Mass. 1989). <i>See also Lumbermens Mut. Cas. Co. v. Y.C.N. Transp. Co.</i>, 705 N.E.2d 297, 301 (Mass. App. Ct. 1999). Chapters 93A and 176D are not violated when an insurer rightfully declines to defend an insured. <i>Timpson v. Transamerica Ins. Co.</i>, 669 N.E.2d 1092, 1098-99, <i>review denied</i>, 674 N.E.2d 246 (Mass. 1996).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

MICHIGAN	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Under Michigan law, an insurer has a contractual obligation to act in good faith toward its insured. <i>Murphy v. Cincinnati Ins. Co.</i>, 772 F.2d 273, 276 (6th Cir. 1985). However, bad faith breach of an insurance contract is not a tort. <i>Kewin v. Mass. Mut. Life. Ins. Co.</i>, 295 N.W.2d 50, 52-54 (Mich. 1980). There is no private cause of action under Michigan's Uniform Trade Practices Act, Michigan Compiled Laws section 500.2026 (2007). <i>Young v. Mich. Mut. Ins. Co.</i>, 362 N.W.2d 844, 846 (Mich. Ct. App. 1984), <i>appeal denied</i> (Oct. 2, 1985), <i>Accord Crossley v. Allstate Ins. Co.</i>, 400 N.W.2d 625, 627 (Mich. Ct. App. 1986). <i>See also Soc'y of St. Vincent De Paul v. Mt. Hawley Ins. Co.</i>, 49 F. Supp. 2d 1011, 1020 (E.D. Mich. 1999).</p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>In order to constitute bad faith, more than negligence but less than fraud is required. <i>Beck v. Mich. Basic Prop. Ins. Ass'n</i>, 2003 WL 887690 at *4 (Mich. Ct. App. 2003) (unpublished).</p>
	<p>What Damages Can Be Recovered?</p>	<p>Absent proof that the parties contemplated, at the time of execution of policy, recovery for damages for emotional distress, there can be no such award. <i>Kewin</i>, 409 Mich. at 418. Attorneys' fees cannot be recovered. <i>Burnside v. State Farm Fire and Cas. Co.</i>, 426, 528 N.W.2d 749, 751 (Mich. Ct. App. 1995), <i>appeal denied</i>, <i>Burnside v. State Farm Fire and Cas. Co.</i>, 539 N.W.2d 508 (Mich. 1995). Further, if the insurance benefits are not paid within 60 days after the insurer receives satisfactory proof of loss, the insured will also recover interest at the rate of 12% per year. MICH. COMP. LAWS. § 500.2006(4).</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Michigan recognizes that an insurer has a duty to act in good faith with respect to its insured's interests when negotiating settlements. <i>Auman v. Fed. Ins. Co.</i>, 266 N.W.2d 457, 458 (Mich. Ct. App. 1978). <i>See also Commercial Union Ins. Co. v. Med. Protective Co.</i>, 393 N.W.2d 479, 482 (Mich. 1986). Although no Michigan court has recognized an independent tort claim for bad faith in the context of a liability policy, an insurer is liable to its insured for a judgment exceeding policy limits when the insurer, having exclusive control of defending and settling the suit, acts in bad faith and refuses to settle within policy limits. <i>Id.</i> at 482. An insured's suit against its insurer "originates in the implied covenant of good faith and fair dealing which arises from the contract between the insurer and the insured." <i>Id.</i></p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Negligence is not enough. <i>Med. Protective Co.</i>, 393 N.W.2d at 479. The insured must prove conduct by the insurer that is more than negligent; but the insured need not prove fraud. <i>Commercial Union Ins. v. Liberty Mut. Ins. Co.</i>, 357 N.W.2d at 866 (Mich. Ct. App. 1984), <i>aff'd</i>, 393 N.W.2d 161 (Mich. 1986).</p>
<p>What Damages Can Be Recovered?</p>	<p>The insured may bring an action for the damages he suffers as a result of an insurer's failure to act in good faith. <i>See Auman</i>, 266 N.W.2d at 457. An insurer is liable to its insured for a judgment exceeding the policy limits when the insurer refuses in bad faith to settle within the policy limits. <i>Med. Protective Co.</i>, 393 N.W.2d at 479. Additionally, 12% interest accrues 60 days after the insurer receives satisfactory proof of loss of any third party tort claim. MICH. COMP. LAWS. § 500.2006(4). <i>See also Medley v. Canady</i>, 337 N.W.2d 909, 913 (Mich. Ct. App. 1983).</p>

Third-Party Claims

Can a Third Party Assert a Bad Faith Claim?	NO. The duty to use good faith in attempting to settle a claim runs only to the insured. <i>Liimatta v. Lukkari</i> , 460 N.W.2d 251, 252 (Mich. Ct. App. 1990). See also <i>Posluns v. Auto Owners Ins. Co.</i> , 2003 WL 21186633 at*1 (Mich. App. 2003) (unpublished), <i>appeal denied</i> , 671 N.W.2d 53 (Mich. 2003).
If So, What Is The Third Party's Burden Of Proof?	See above.
What Damages Can Be Recovered?	See above.
Can the Insured Assign Rights to a Third Party?	YES. <i>Ward v. Detroit Auto. Inter-Ins. Exch.</i> , 320 N.W.2d 280, 283 (Mich. Ct. App. 1982).
Excess Insurers	
Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES , under equitable subrogation. Although a primary carrier does not owe a direct duty to the excess carrier to act in good faith in defending and settling a claim within the policy limits, the excess insurer has a cause of action in equitable subrogation against the primary carrier. <i>Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.</i> , 393 N.W.2d 161. See also <i>Med. Protective Co.</i> , 393 N.W.2d at 485 n.5 (“[w]e decline to state that, under certain conditions, a direct duty of good faith and due care from a primary insurer toward an excess insurer is inappropriate”).
Defenses	
What Defenses Can Be Asserted Against a Bad Faith Claim?	An insurer may refuse to pay a claim and avoid paying interest on the claim if the claim is reasonably in dispute. <i>Angott v. Chubb Group Ins.</i> , 717 N.W.2d 34, 350-51 (Mich. Ct. App. 2006), <i>appeal denied</i> , <i>Kilby v. Chubb Group</i> , 723 N.W.2d 825 (Mich. 2006).

First-Party Claims

(A) Non-Liability Insurance Policies

MINNESOTA	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>NO. The Supreme Court of Minnesota has ruled that extra-contractual damages cannot be recovered for breach of contract except in exceptional cases where the breach is accompanied by an independent tort. A malicious or bad-faith motive in breaching a contract does not convert a contract action into a tort action. <i>Haagenson v. Nat'l. Farmers Union Prop. and Cas. Co.</i>, 277 N.W.2d 648, 652 (Minn. 1979). See also <i>Elder v. Allstate Ins. Co.</i>, 341 F. Supp. 2d 1095, 1105-06 (D. Minn. 2004) (applying Minnesota law in a breach of contract action against an automobile insurer). Minnesota has adopted an Unfair Claims Practices Act. MINN. STAT. § 72A.201 (2007). The Act provides for administrative enforcement and does not create a private cause of action. <i>Morris v. Am. Family Mut. Ins. Co.</i>, 386 N.W.2d 233, 235 (Minn. 1986).</p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Minnesota does not recognize an action in tort for bad faith breach of the insurance contract. <i>Haagenson</i>, 277 N.W.2d at 652. Minnesota's Unfair Claims Settlement Practices Act lists a number of acts by an insurer that would constitute a violation.</p>
	<p>What Damages Can Be Recovered?</p>	<p>Extra-contractual damages cannot be recovered for breach of contract except in exceptional cases where the breach is accompanied by an independent tort. <i>Haagenson</i>, 277 N.W.2d at 653. See also <i>Elder</i>, 341 F. Supp. 2d at 1105-06. However, attorneys' fees can be recovered when the insurer breaches its duty to defend. <i>In re Silicone Implant Ins. Coverage Litig.</i>, 667 N.W.2d 405, 422 (Minn. 2003), <i>reh'g denied</i> (Sept. 29, 2003).</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. A liability insurer that controls the right to settle claims against its insured may be liable for a judgment in excess of the policy limits for failing to exercise good faith in considering offers to settle the claim within policy limits. <i>Short v. Dairyland Ins. Co.</i>, 334 N.W.2d 384, 385 (Minn. 1983).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The insurer breaches its duty of good faith when the insured is clearly liable, the insurer refuses to settle within the policy limits, and the decision not to settle within the policy limits is not made in good faith and is not based upon a reasonable belief that the amount demanded is excessive. <i>Short</i>, 334 N.W.2d at 388. The duty of good faith entails an obligation to view the situation as though no policy limits were applicable to the claim and to give equal consideration to the insured's financial exposure. <i>Id.</i></p>
<p>What Damages Can Be Recovered?</p>	<p>An insurer's bad faith renders it liable for any excess amount above the policy limits. <i>Id.</i> at 387. Minnesota law allows a punitive damages award when a party acts with deliberate disregard for the rights or safety of others, but punitive damages are not allowed in breach of contract cases absent an independent tort. <i>In re Silicone Implant Ins. Coverage Litig.</i>, 652 N.W.2d 46 (Minn. Ct. App. 2002), <i>aff'd in part, rev'd in part on other grounds</i>, 667 N.W.2d 405, 422 (Minn. 2003), <i>reh'g denied</i> (Sept. 29, 2003). Breach of the implied covenant of good faith is not an independent tort in Minnesota, and punitive damages may not be recovered from insurers that breach their contractual obligations in bad faith. <i>Id.</i></p>

Gen Re Note

Minnesota just enacted a new bad faith law after considerable negotiation and compromise by interested groups. The new law, SF 2822, takes effect on August 1, 2008, and applies only to first-party claims. The law authorizes damages and attorneys' fees, but caps them at \$250,000 and \$100,000, respectively; punitive damages are not permitted. The new law establishes a "reasonable basis" standard for denying claims, and allows insurers to conduct fraud or fire investigations without violating the statute. This recent change is not reflected in this survey, so please keep this new law in mind when considering first-party bad faith in Minnesota.

Third-Party Claims

Can a Third Party Assert a Bad Faith Claim?	NO. A judgment creditor does not have a direct cause of action against an insurer for bad faith refusal to settle within the policy limits, and it must obtain an assignment of the insured's bad faith claim. <i>Lange v. Fid. & Cas. Co. of N.Y.</i> , 185 N.W.2d 881, 886-87 (Minn. 1971).
If So, What is the Third Party's Burden of Proof?	Not applicable.
What Damages Can Be Recovered?	Not applicable.
Can the Insured Assign Rights to a Third Party?	YES. Minnesota permits an insured to assign his bad faith cause of action against an insurance carrier to the injured claimant. <i>Lange</i> , 185 N.W.2d at 886-87.
Excess Insurers	
Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES , under equitable subrogation. The Supreme Court of Minnesota has ruled that an excess insurer is subrogated to the insured's rights against a primary carrier for breach of the primary insurer's good faith duty to settle. <i>Cont'l. Cas. Co. v. Reserve Ins. Co.</i> , 238 N.W.2d 862, 865 (Minn. 1976). The alleged bad faith of the primary insurer is an issue of fact and must be tried, and a finding of liability against the insured is a condition precedent to any recovery by the excess carrier. <i>Id.</i> at 865.
Defenses	
What Defenses Can Be Asserted Against a Bad Faith Claim?	An insurer may validly decline an offer of settlement within the policy limits if good faith exists on either of two grounds: (1) the insurer in good faith believed its insured was not liable; or (2) even if the liability of its insured was uncertain, the insurer believed in good faith that a settlement at the proposed figure was greater than the amount the jury would award as damages. <i>Short v. Dairyland Ins. Co.</i> , 334 N.W.2d 384, 388 (Minn. 1983) (quoting <i>Boerger v. Am. Gen. Ins. Co.</i> , 100 N.W.2d 133, 135 (Minn. 1959)).

First-Party Claims

(A) Non-Liability Insurance Policies

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">MISSISSIPPI</p> <p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. A common law cause of action for bad faith exists in Mississippi. <i>Vaughn v. Monticello Ins. Co.</i>, 838 So. 2d 983, 988 (Miss. Ct. App. 2001); <i>Wilson v. State Farm Fire and Cas. Co.</i>, 761 So. 2d 913, 921 (Miss. Ct. App. 2000). The elements of a bad faith claim are: (1) an insurer's intentional refusal to pay the insured's claim with reasonable promptness; and (2) absence of any arguable reason for the insurance company's refusal to pay with reasonable promptness. <i>Blue Cross & Blue Shield v. Campbell</i>, 466 So. 2d 833, 847 (Miss. 1984). There is no statutory basis for a bad faith claim.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The insured must prove that the insurer's conduct was worse than merely negligent. <i>Liberty Mut. Ins. Co. v. McKneely</i>, 862 So. 2d 530, 534 (Miss. 2003). Bad faith is an intentional tort, requiring a showing of more than mere negligence. <i>Universal Life Ins. Co. v. Veasley</i>, 610 So. 2d 290, 295 (Miss. 1992).</p>
<p>What Damages Can Be Recovered?</p>	<p>Compensatory damages can be recovered in a bad faith action. <i>Andrew Jackson Life Ins. Co. v. Williams</i>, 566 So. 2d 1172, 1174 (Miss. 1990). Under Mississippi law, in order for a punitive damages claim for bad faith to go to a jury, a judge must find that: (1) the insurance company did not have a "legitimate or arguable reason to deny payment of the claim;" and (2) that the plaintiff made a "showing of malice, gross negligence, or wanton disregard of the rights of the insured." <i>Vaughn</i>, 838 So. 2d at 988. Four factors are applied in determining the amount of punitive damages: (1) the amount should punish the insurer and deter it from engaging in similar actions in the future; (2) the amount should serve as a deterrent for others; (3) the amount should account for the insurer's financial worth; and (4) the amount should compensate the plaintiff for his or her public service in holding the insurer accountable. <i>United Am. Ins. Co. v. Merrill</i>, 2007 WL 2493905 at *22 (Miss. 2007). In the absence of statute, attorneys' fees cannot be recovered unless the insurer committed such a gross or willful wrong as to justify the infliction of punitive damages. <i>State Farm Fire and Cas. Co. v. Simpson</i>, 477 So. 2d 242, 253 (Miss. 1985). A plaintiff may recover damages for emotional distress in connection with a bad faith claim, if they do not result from ordinary negligence and if the plaintiff proves some sort of physical manifestation of injury or demonstrable physical harm. <i>Am. Bankers' Ins. Co. v. Wells</i>, 819 So. 2d 1196, 1209 (Miss. 2001).</p>

First-Party Claims

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. In order to prevail in a bad faith claim against an insurer, the insured must show that the insurer: (1) lacked an arguable or legitimate basis for denying the claim; (2) that the insurer committed a willful or malicious wrong; or (3) acted with gross and reckless disregard for the insured's rights. <i>Liberty Mut. Ins. Co. v. McKneely</i>, 862 So. 2d 530, 533 (Miss. 2003), <i>reh'g denied</i> (Sept. 2, 2004); <i>State Farm Mut. Auto. Ins. Co. v. Grimes</i>, 722 So. 2d 637, 641 (Miss. 1998). There is no statutory basis for a bad faith claim.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The burden of proof is the same as for claims under non-liability policies, set forth above.</p>
<p>What Damages Can Be Recovered?</p>	<p>Compensatory damages can be recovered in a bad faith action. <i>Andrew Jackson Life Ins. Co.</i>, 566 So. 2d at 1174. The insured may also recover for emotional damages as long as she can prove more than ordinary negligence and a physical manifestation. <i>Stewart v. Gulf Guar. Life Ins. Co.</i>, 846 So. 2d 192, 200 (Miss. 2002), <i>reh'g denied</i> (May 29, 2003). Punitive damages can be awarded only if the insurer acted with malice, gross negligence or reckless disregard for the insured's rights. See <i>Gordon v. Nat'l. States Ins. Co.</i>, 851 So. 2d 363, 366 (Miss.), <i>reh'g denied</i>, (Aug. 14, 2003). If the insurer had a legitimate or arguable reason to deny payment of the claim, then the trial judge, after reviewing all the evidence, should refuse to give a punitive damage instruction. <i>Stewart</i>, 846 So. 2d at 200; <i>Pioneer Life Ins. Co. v. Moss</i>, 513 So. 2d 927, 929 (Miss. 1987). Attorneys' fees are not to be awarded unless a statute or other authority so provides. A bad faith claim sounds in contract. Thus, attorneys' fees are generally not awarded absent provision for such in the contract or a finding of conduct so outrageous as to support an award of punitive damages. <i>Sentinel Indust. Contracting Corp. v. Kimmins Indust. Serv.</i>, 743 So. 2d 954, 971 (Miss. 1999); <i>Garner v. Hickman</i>, 733 So. 2d 191, 198 (Miss. 1999).</p>

Third-Party Claims

MISSISSIPPI (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. <i>Myers v. Miss. Farm Bureau Mut. Ins. Co.</i> , 749 So. 2d 1173 (Miss. Ct. App. 1999). See also <i>Davidson v. Davidson</i> , 667 So. 2d 616, 621 (Miss. 1995).
	If So, What Is The Third Party's Burden Of Proof?	Not applicable.
	What Damages Can Be Recovered?	Not applicable.
	Can the Insured Assign Rights to a Third Party?	YES. Bad faith claims are actions to recover damages that are assignable under Mississippi statutes, and an assignee may sue for punitive damages. <i>Kaplan v. Harco Nat'l. Ins. Co.</i> , 716 So. 2d 673, 677 (Miss. Ct. App.), cert. denied, 726 So. 2d 594 (Miss. 1998); Miss. CODE ANN. §§ 11-7-3, 11-7-7 (2007).
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES. Courts applying Mississippi law generally have held that an excess insurer that incurs costs and expenses defending an insured may recover from a primary insurer that wrongfully refused to defend the insured. <i>Liberty Mut. Ins. Co. v. U.S. Fid. and Guar. Ins. Co.</i> , 756 F. Supp. 953, 957 (S.D. Miss. 1990).
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	<p>The insurer's mistaken belief that the insured failed to disclose a material fact to the insurer's agent regarding the insured's claim is a valid defense to a claim for punitive damages for refusal to make payment on policy. However, after the insurer becomes aware that the insured made disclosure, the insurer cannot avail itself of the mistake defense if it continues to deny claim. <i>Dixie Ins. Co. v. Mooneyhan</i>, 684 So. 2d 574, 583 (Miss. 1996), <i>reh'g denied</i> (Sept. 12, 1996).</p> <p>Advice of counsel may be another defense to a bad faith claim, <i>Blue Cross & Blue Shield of Miss., Inc. v. Campbell</i>, 466 So. 2d 833, 846 n.1 (Miss. 1984), but an insurer cannot rely on unfounded advice of counsel and expect that it can deny valid claims for coverage with impunity. <i>Murphree v. Fed. Ins. Co.</i>, 707 So. 2d 523, 533 (Miss. 1997) ("[A]dvice of counsel is but one factor to be considered in deciding whether the carrier's reason for denying a claim was arguably reasonable"), <i>reh'g denied</i> (Mar. 26, 1998).</p> <p>The insured's material, false statement in the insurance policy application is a defense to bad a faith claim inasmuch as it provides sufficient reason for the insurer to cancel the policy. <i>Reserve Life Ins. Co. v. McGee</i>, 444 So. 2d 803, 808 (Miss. 1983).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Missouri has enacted a statutory scheme that allows an insured to assert a claim for “vexatious refusal to pay” against the provider of non-liability insurance. Under Missouri Revised Statutes section 375.296 (2007), an insured can sue an insurer for vexatious refusal to pay “if the insurer has failed or refused for a period of thirty days after due demand therefor prior to the institution of the action, suit or proceeding, to make payment under and in accordance with the terms and provisions of the contract of insurance, and it shall appear from the evidence that the refusal was vexatious and without reasonable cause.” Under such circumstances, the “court or jury may, in addition to the amount due under the provisions of the contract of insurance and interest thereon, allow the plaintiff damages for vexatious refusal to pay and attorneys’ fees as . . . [f]ailure of an insurer to appear and defend any action, suit or other proceeding shall be deemed prima facie evidence that its failure to make payment was vexatious without reasonable cause.” <i>Id.</i></p> <p>Under Missouri Revised Statutes section 375.420, “[i]n any action against any insurance company to recover the amount of any loss under a policy of automobile, fire, cyclone, lightning, life, health, accident, employers’ liability, burglary, theft, embezzlement, fidelity, indemnity, marine or other insurance except 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 attorney’s fee; and the court shall enter judgment for the aggregate sum found in the verdict.” The Missouri Supreme Court noted that “[t]he difference between the two statutes appears to be that section 375.296 applies even when the insurance company ‘delays’ payment under a policy.” <i>Overcast v. Billings Mut. Ins. Co.</i>, 11 S.W.3d 62, 66 n.3 (Mo. 2000). The Missouri courts have not adopted the tort of bad faith in the context of first party, non-liability insurance policies. <i>See Koehrer v. Am. Motorists Ins. Co.</i>, 931 S.W.2d 898, 898 (Mo. Ct. App. 1996) (“[T]he tort of bad faith does not exist in Missouri with respect to first party claims by an insured against an insurance company”), <i>reh’g denied</i>, (Oct. 17, 1996), <i>transfer denied</i>, (Nov. 19, 1996).</p>
<p>If So, What is the Insured’s Burden of Proof?</p>	<p>To sustain a cause of action under Missouri Revised Statutes sections 375.296 and 375.420, “the plaintiff must show that the insurer’s refusal to pay the loss was willful and without reasonable cause, as the facts would appear to a reasonable and prudent person before trial.” <i>Dewitt v. Am. Family Mut. Ins. Co.</i>, 667 S.W.2d 700, 710 (Mo. 1984). <i>See also Dhyne v. State Farm Fire and Cas. Co.</i>, 188 S.W.3d 45, 457 (Mo. 2006) (applying elements of an action for vexatious refusal to pay under section 375.420), <i>modified</i>, (Apr. 11, 2006). “The existence of a litigable issue, either factual or legal, does not preclude a vexatious penalty where there is evidence the insurer’s attitude was vexatious and recalcitrant. Direct and specific evidence to show vexatious refusal is not required. The jury can base a finding of vexatious delay upon its consideration of all the facts and circumstances in the case.” <i>Dewitt</i>, 667 S.W.2d at 710.</p>

First-Party Claims

(A) Non-Liability Insurance Policies revised

MISSOURI (cont'd)	<p>What Damages Can Be Recovered?</p> <p>In the first party, non-liability context, where the claim “is by the insured against the insurance company for the policy benefit; the insured’s remedy is limited to that provided by the law of contract plus, if Section 375.420 applies, the enhancements provided by the statute.” <i>Overcast</i>, 11 S.W.3d at 68. Thus, the insured can recover “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 attorney’s fee.” MO. REV. STAT. § 375.420.</p> <p>Without directly deciding the issue, the Missouri Supreme Court has noted that, under the “vexatious refusal to pay” statute, in a number of cases courts have imposed attorneys’ fees without an additional award of damages. <i>DeWitt</i>, 667 S.W.2d at 711. “[The] statute on its face is permissive, not mandatory. The question of whether any penalty will be awarded, and if so, how much, is a matter of pure discretion.” <i>Id.</i></p>
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(B) Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?	<p>YES. Missouri courts recognize a common law cause of action for an insurer’s bad faith refusal to settle a claim within policy limits. <i>Zumwalt v. Utils. Ins. Co.</i>, 228 S.W. 2d 750, 753 (Mo. 1950). In this context, the insured’s cause of action lies in tort. <i>Truck Ins. Exch. v. Prairie Framing, LLC</i>, 162 S.W.3d 64, 94 (Mo. Ct. App.), <i>reh’g denied</i> (Mar. 29, 2005), <i>transfer denied</i>, (May 31, 2005). “The tort is only available for bad faith refusal to settle a claim made by a third party against the insured and is not available for first-person coverages.” <i>United States v. Conservation Chem. Co.</i>, 653 F. Supp. 152, 184 (W.D. Mo. 1986).</p>
If So, What Is the Insured’s Burden of Proof?	<p>The elements of the tort of bad faith failure to settle are: “(1) the liability insurer has assumed control over negotiation, settlement, and legal proceedings brought against the insured; (2) the insured has demanded that the insurer settle the claim brought against the insured; (3) the insurer refuses to settle the claim within the liability limits of the policy; and (4) in so refusing, the insurer acts in bad faith, rather than negligently.” <i>State Farm Fire & Cas. Co. v. Metcalf</i>, 861 S.W.2d 751, 756 (Mo. App. 1993).</p>
What Damages Can Be Recovered?	<p>An insured can recover the amount of the excess judgment from an insurer that acted in bad faith. <i>Zumwalt</i>, 228 S.W.2d at 753; <i>Metcalf</i>, 861 S.W.2d at 756. Punitive damages cannot be awarded unless the insured shows “that the defendant maliciously, willfully, intentionally or recklessly injured the plaintiffs.” <i>Zumwalt</i>, 228 S.W.2d at 756.</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>YES. Missouri Revised Statutes section 379.200 provides: "Upon the recovery of a final judgment against any person, firm or corporation by any person . . . for loss or damage on account of bodily injury or death, or damage to property if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company . . . and the defendant." <i>Linder v. Hawkeye Sec. Ins. Co.</i>, 472 S.W.2d 412, 414 (Mo. Ct. App. 1971) ("Hawkeye I"), <i>cert. denied</i>, <i>Haynes v. Linder</i>, 405 U.S. 950 (1972). However, "a judgment creditor has no standing to sue the liability insurer for excess monies over and above policy limits, based upon the alleged bad faith of the insurer to its insured in failing to defend or settle." <i>Haynes v. Hawkeye Sec. Ins. Co.</i>, 579 S.W.2d 693, 699 (Mo. Ct. App. 1979) ("Hawkeye II"). A third party can sue both the insurer and the insured in an "action at law, triable to a jury, for the tort of civil conspiracy of [the insured] and [the insurer] to settle and release [the insured's] claim for bad faith refusal to defend and settle." <i>Id.</i> at 703.</p>
<p>If So, What Is The Third Party's Burden Of Proof?</p>	<p>The third party must prove a civil conspiracy, which, under Missouri law, is comprised of: "(1) two or more persons, and for this purpose a corporation is a person; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." <i>Dickey v. Johnson</i>, 532 S.W.2d 487, 502 (Mo. Ct. App. 1975). The elements of a civil conspiracy are present if "(1) The two or more persons are [the insured] and [the insurer]; (2) The object or purpose to be accomplished was to deprive the [third party] of any possibility of collecting [his] judgment, interest and costs; (3) The meeting of the minds is shown by the execution of [insured's] release, direct payment to him, and a stipulation of dismissal of his claim against [the insurer], which are also (4) overt acts; and (5) resultant damage to the [third party] by depriving [him] of the chance to recover on [his] judgments from any <i>proceeds</i> of [the insured's] claim." <i>Id.</i></p>
<p>What Damages Can Be Recovered?</p>	<p>A third party can recover the amount of his judgment, interest, costs and punitive damages. <i>Id.</i></p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES, in Missouri state, but not federal, courts. Missouri state courts recognize "that a cause for bad faith refusal to settle may be assigned to a judgment creditor by the insured or his trustee in bankruptcy." <i>Ganaway v. Shelter Mut. Ins. Co.</i>, 795 S.W.2d 554, 564 (Mo. Ct. App. 1990). <i>See also Freeman v. Basso</i>, 128 S.W.3d 138, 143 (Mo. Ct. App. 2004) (concerning assignment of a malpractice claim and noting that <i>Ganaway</i> "remains good law"). However, applying Missouri law, the Eighth Circuit Court of Appeals has held that a cause of action for bad faith failure to settle is not assignable. <i>Quick v. Nat'l. Auto.</i>, 65 F.3d 741, 747 (8th Cir. 1995), <i>cert. denied</i>, 516 U.S. 1153 (1996).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>Missouri courts appear not to have addressed this issue.</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can avoid bad faith liability by demonstrating a reasonable cause or excuse for its refusal to pay. <i>State ex rel. John Hancock Mut. Life Ins. Co. v. Hughes</i>, 152 S.W.2d 132, 134 (Mo. 1941).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">MONTANA</p> <p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, by statute. Common law bad faith actions against insurers were abolished by Montana Code Annotated section 33-18-242, (3) (2007). Actions against the insurer are now limited to breach of contract, fraud and violations of the Montana Unfair Trade Practices Act. See MONT. CODE ANN. § 33-18-242 (holding compensatory and punitive damages preempted by ERISA's private enforcement provision). See <i>Elliot v. Fortis Benefits Ins. Co.</i>, 337 F.3d 1138 (9th Cir. 2003), cert. denied, 540 U.S. 1090. With the statutory cause of action established pursuant to Montana Code Annotated section 33-18-242, first-party claimants may now bring actions for the following types of conduct: (1) misrepresenting pertinent facts relating to coverage at issue; (2) refusing to pay claims without a reasonable investigation based upon all information; (3) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; (4) neglecting to attempt in good faith to effectuate prompt, fair and equitable settlements of claims; (5) attempting to settle claim on the basis of an application which was altered without notice to insured; or (6) failing to settle claims promptly. MONT. CODE ANN. § 33-18-201. However, an insurer will not be liable if it had a reasonable basis in law or fact for contesting the claim. MONT. CODE ANN. § 33-18-242(5). See also <i>Watters v. Guaranty Nat. Ins. Co.</i>, 3 P.3d 626 (Mont. 2000), overruled on other grounds, <i>Shilhanek v. D-2 Trucking, Inc.</i>, 70 P.3d 721 (Mont. 2003). A common law bad faith cause of action still exists for improper, pre-claim conduct. <i>Thomas v. N.W. Nat'l. Ins. Co.</i>, 973 P.2d 804 (Mont. 1998).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To state a statutory claim for bad faith, the plaintiff must prove that the insurer did not have a reasonable basis for denying benefits under its insurance policy. MONT. CODE ANN. § 33-18-242. A common law claim can be brought only if it involves events that occurred prior to the handling of an insurance claim. <i>Williams v. Union Fid. Life Ins. Co.</i>, 123 P.3d 213 (Mont. 2005) (citing <i>Thomas</i>, 973 P.2d at 809). In addition, the insured must demonstrate that a "special relationship" exists between the parties. <i>Id.</i> at 810. In order to establish such a relationship, the insured must meet a five-element test under the <i>Story</i> standard. If the threshold test is met, then the party may proceed to recovery. <i>Story v. City of Bozeman</i>, 791 P.2d 767 (Mont. 1990). The elements are: "(1) the contract must be such that the parties are in inherently unequal bargaining positions; [and] (2) the motivation for entering the contract must be a non-profit motivation, i.e., to secure peace of mind, security, future protection; [and] (3) ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party "whole"; [and] (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability." <i>Id.</i> at 776.</p>
<p>What Damages Can Be Recovered?</p>	<p>The insured may recover damages for emotional distress. <i>Stephens v. Safeco Ins. Co.</i>, 852 P.2d 565 (Mont. 1993). In Montana, "even in the absence of an independent tort, punitive damages may be awarded for breach of contract where a 'special relationship' exists between the parties." Montana treats the insurer and the insured as falling within this "special relationship" status for purposes of recovering punitive damages. William S. Dodge, <i>The Case for Punitive Damages in Contracts</i>, 48 <i>Duke L. J.</i> 629, 647-48 (1999). A statutory right of recovery for actual and punitive damages also exists pursuant Montana Code Annotated sections 33-18-242(1) and 33-18-242(4), respectively. On January 25, 2007, proposed legislation was introduced to amend the damages portion of section 33-18-242 by removing the different degrees of mental and emotional distress and by labeling them all punitive damages pursuant to section 27-1-221. The Montana Legislature Joint Committee on the Judiciary approved the amendment; however, the draft failed to pass after a second reading on April 4, 2007. An award of punitive damages must be supported by a showing of clear and convincing evidence of actual fraud or actual malice. MONT. CODE ANN. §27-1-221.</p>

First-Party Claims

(B) Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?	YES , under statute. "An insured . . . has an independent cause of action against an insurer for actual damages caused by the insurer's violation of subsection (1), (4), (5), (6), (9) or (13) of §33-18-201." <i>O'Fallon v. Farmers Ins. Exch.</i> , 859 P.2d 1008 (Mont. 1993). Common law bad faith tort actions were abolished by Montana Code Annotated section 33-18-242(3). Cause of action is not assignable. MONT. CODE ANN. § 33-18-242 (3).
If So, What Is the Insured's Burden of Proof?	The burden of proof for a statutory cause of action may be found in Montana Code Annotated section 33-18-242.
What Damages Can Be Recovered?	Statutory rights to recover actual and punitive damages are established by Montana Code Annotated sections 33-18-242(1) and 33-18-242(4), respectively.

Third-Party Claims

MONTANA (cont'd)

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>YES, under statute. “[A] third-party claimant has an independent cause of action against an insurer for actual damages caused by the insurer’s violation of subsection (1), (4), (5), (6), (9) or (13) of §33-18-201.” <i>O’Fallon v. Farmers Ins. Exch.</i>, 859 P.2d 1008 (Mont. 1993). <i>See also</i> MONT. CODE ANN. §33-18-242(1). A third-party claimant who alleges a violation of subsections (4) and (6) of Montana Code Annotated section 33-18-201, and has been damaged as a result of those violations, is a “third-party claimant” within the meaning of Montana Code Annotated section 33-18-242. A third party cannot bring a direct tort action at common law.</p>
<p>If So, What Is The Third Party’s Burden Of Proof?</p>	<p>The initial requirements set forth in Montana Code Annotated section 33-18-201 must be met before a third-party claimant can prevail; <i>i.e.</i>, a showing that lack of good faith in settlement negotiations or other unfair trade practices are the general business practices of that particular (insurer) company. <i>Klaudt v. Flink</i>, 658 P.2d 1065 (Mont. 1983).</p>
<p>What Damages Can Be Recovered?</p>	<p>Both compensatory and punitive damages can be recovered. <i>Gibson v. W. Fire Ins. Co.</i>, 682 P.2d 725 (Mont. 1984). A plaintiff must show by clear and convincing evidence that the defendant committed fraud or acted with malice. MONT. CODE ANN. § 27-1-221.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES on property damage claims. NO on tort claims. A property damage claim is assignable in Montana. However, Montana law has long held that a cause of action growing out of a personal right, such as a tort, is not assignable. <i>Youngblood v. Am. States Ins. Co.</i>, 866 P.2d 203, 206 (Mont. 1993).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>Montana courts appear not to have addressed this issue. An excess insurer issue was presented to the Montana Supreme Court in <i>St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co.</i>, 847 P.2d 705 (Mont. 1993). A party argued that the excess insurer’s rights become subrogated to the rights of the insured and that, when a primary carrier, in bad faith, fails to settle within policy limits, resulting in a judgment in excess of policy limits, the excess insurer is entitled to maintain an action for bad faith against the primary carrier. However, because the party making the argument was the underinsurance carrier, and not an excess carrier, the court would not entertain the argument. <i>Id.</i></p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>Montana has rejected “comparative fault” as a defense in bad faith cases. <i>Stephens v. Safeco Ins. Co.</i>, 852 P.2d 565 (Mont. 1993). In first-party bad faith cases, attorney-client privilege may be raised as a defense. <i>Palmer by Diacon v. Farmers Ins. Exch.</i>, 861 P.2d 895 (Mont. 1993). When the insurer’s attorney does not represent the interests of the insured in the underlying case, communications between the insurer and its counsel are protected by the attorney-client protection in first-party bad faith actions against the insurer. <i>Palmer</i>, 861 P.2d at 895. In first-party bad faith cases involving group health plans, the health insurer may defend the bad faith claim by arguing that the action is preempted by ERISA. <i>See Elliot v. Fortis Benefits Ins. Co.</i>, 337 F.3d 1138 (9th Cir. 2003), <i>cert. denied</i>, 540 U.S. 1090; <i>Greany v. West. Farm Bureau Life Ins. Co.</i>, 973 F.2d 812, 819 (9th Cir. 1992).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. The Nebraska Supreme Court has held that an injured policyholder, who is a beneficiary of or a covered person under the policy, may bring a cause of action in tort against the policyholder's insurer for failure to settle the policyholder's claim. <i>Braesch v. Union Ins. Co.</i>, 464 N.W.2d 769 (Neb. 1991). A Nebraska statute lists 16 prohibited claims settlement practices and acts which the Director of Insurance enforces. NEB. REV. STAT. § 44-1540 (2006).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To state a claim for first party bad faith, the plaintiff must show the absence of a reasonable basis for denying the benefits of the insurance policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. <i>Braesch</i>, 464 N.W.2d at 769.</p>
<p>What Damages Can Be Recovered?</p>	<p>All damages proximately caused by the tortious conduct of the insurer, including damages for mental distress, can be recovered. <i>Braesch</i>, 464 N.W.2d at 769. Under Nebraska law, punitive, vindictive or exemplary damages are not allowed. <i>Miller v. Kingsley</i>, 230 N.W.2d 472 (1975).</p>

NEBRASKA

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Nebraska recognizes a cause of action for an insurer's bad faith in refusing to settle a claim with a third party. <i>Olson v. Union Fire Ins. Co.</i>, 118 N.W.2d 318 (Neb. 1962).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>While an insurer is obligated to use due care and reasonable diligence to investigate a claim, the standard for recovery in a third party bad faith case is showing some level of intentional wrong-doing. <i>Braesch</i>, 464 N.W.2d at 769. "The liability of an insurer to pay in excess of the face of the policy accrues when the insurer, having exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within the policy limit." <i>Olson</i>, 118 N.W.2d at 318.</p>
<p>What Damages Can Be Recovered?</p>	<p>All damages proximately caused by the tortious conduct of the insurer, including damages for mental distress, can be recovered. <i>Braesch</i>, 464 N.W.2d at 769. Under Nebraska law, punitive, vindictive or exemplary damages are not allowed. <i>Distinctive Printing and Packaging Co. v. Cox</i>, 443 N.W.2d 566, 574 (Neb. 1989).</p>

Third-Party Claims

NEBRASKA (cont'd)	<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. However, if an insurance policy so provides, a judgment creditor, which has not been able to execute on the judgment, would have an action against the insurer to the same extent that the insured would have if he had paid the judgment. <i>Kleinschmit v. Farmers Mut. Hail Ins. Assoc.</i>, 101 F.2d 987 (8th Cir. 1939) (holding judgment creditor had standing to prosecute the action for wrongful failure to settle his claim within policy limits).</p>
	<p>If So, What Is The Third Party's Burden Of Proof?</p>	<p>See above.</p>
	<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
	<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. See <i>Olson</i>, 118 N.W.2d at 318.</p>
Excess Insurers		
	<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. The Nebraska Supreme Court has recognized the doctrine of equitable subrogation for every party who was compelled to pay the debt of a third person to protect his own rights or interest, and equitable subrogation permits an excess carrier to recover from a primary carrier in a successful bad faith claim. <i>Cagle, Inc. v. Sammons</i>, 254 N.W.2d 398, 403 (Neb. 1977).</p>
Defenses		
	<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>The insurer may assert that it exercised due care and diligence and exercised the diligence, care and skill ordinarily employed by persons in the insurance industry. <i>Hadenfeldt v. State Farm Mut. Auto. Ins. Co.</i>, 239 N.W.2d 499 (Neb. 1976). Insurers in Nebraska have wide latitude to investigate claims and resist false or unfounded attempts to obtain funds not available under the insurance contract. Responsible behavior that does not rise to the level of intentional or reckless conduct will not be deemed to breach the standard of care to the policyholder. <i>Braesch</i>, 464 N.W.2d at 769.</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Where an insurer fails to deal fairly and in good faith with its insured by refusing without proper cause to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. The duty does not arise from the terms of the insurance contract; it is imposed by law. <i>Hart v. Prudential Prop. and Cas. Ins. Co.</i>, 848 F. Supp. 900 (D. Nev. 1994). In addition, NEV. REV. STAT. § 686A.310 designates certain activities which will be deemed unfair practices in settling insurance claims if an insurer engages in them “with such frequency as to indicate a general business practice.” This section now provides a separate, private right of action for a first-party claimant. This statute did not codify the common law tort of bad faith. While the statute and the common law may overlap to a limited extent, the statute reaches different conduct than that which is contemplated by the common law tort. <i>Hart, supra</i>.</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>Unreasonably denying the benefits of a policy gives rise to a cause of action for common law bad faith. Common law bad faith cannot be proven simply by alleging a violation of the statute. <i>Hart, supra</i>. If an insurer refuses “without proper cause” to compensate an insured for a loss covered by the policy, the insurer acts in bad faith. <i>Hummel v. Cont’l Cas. Ins. Co.</i>, 254 F. Supp. 2d 1183 (D. Nev. 2003). Additionally, to establish a prima facie case of bad faith refusal to pay an insurance claim, the plaintiff must prove that the insurer had no reasonable basis for disputing coverage, and that the insurer knew, or recklessly disregarded the fact, that there was no reasonable basis for disputing coverage. <i>Powers v. United Services Auto. Assoc. and USAA</i>, 962 P.2d 596 (Nev. 1998). In contrast, the Nevada Unfair Practices Act proscribes specific actions of an insurer, which are deemed to be unfair irrespective of whether they are related to a denial of insurance benefits. <i>Hart, supra</i>.</p>
<p>What Damages Can Be Recovered?</p>	<p>Recovery of consequential damages is allowed where there has been a showing of bad faith by the insurer. <i>Hart, supra</i>. Compensatory damages are possible for injury due to anxiety, worry, mental and emotional distress. <i>Farmers Home Mut. Ins. Co. v. Fiscus</i>, 725 P.2d 234 (Nev. 1986). A jury may award punitive damages where the defendant has been guilty of fraud, malice, or oppression. NEV. REV. STAT. 42.010. Oppression has been defined as a “conscious disregard for the rights of others which constitute[s] an act of subjecting plaintiffs to cruel and unjust hardship.” <i>Ainsworth v. Combined Ins. Co. of Am.</i>, 763 P.2d 673 (Nev. 1988), <i>cert. denied</i>, 493 U.S. 958 (1989).</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Under both common and statutory law. Nevada law does not appear to differentiate between liability and non-liability policies. See <i>United States Fid. & Guar. Co. v. Peterson</i>, 540 P.2d 1070 (Nev. 1975). See above.</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>

Third-Party Claims

NEVADA (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. Nevada law does not afford a direct cause of action to a third-party claimant against a tortfeasor's insurer for bad faith refusal to settle a claim. <i>Tweet v. Webster</i> , 614 F. Supp. 1190 (D. Nev. 1985). See also <i>Hart, supra</i> ; <i>Gunny v. Allstate Ins. Co.</i> , 830 P.2d 1335 (Nev. 1992) (N.R.S. 686A.310 creates no private right of action in favor of third-party claimants against an insurer).
	If So, What Is the Third Party's Burden of Proof?	See above.
	What Damages Can Be Recovered?	See above.
	Can the Insured Assign Rights to a Third Party?	YES. Nevada permits a judgment creditor to execute upon a judgment debtor's cause of action. <i>Denham v. Farmers Ins. Co.</i> , 262 Cal. Rptr. 146 (Cal. Ct. App. 1989).
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	Nevada courts do not appear to have addressed this issue.
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	If the insurance company's interpretation of the contract was reasonable, there is no basis for concluding that it acted in bad faith. <i>Hart, supra</i> . (Insurance company, which relied on legal advice from acknowledged expert in the field of fire insurance law cannot be charged with bad faith). Bad faith is the essence of a cause of action in tort for bad faith breach of contract and reliance on the advice of counsel is a defense. <i>Mann v. Glens Falls Ins. Co.</i> , 418 F. Supp. 237 (D. Nev. 1974), <i>rev'd</i> , 541 F.2d 819 (9th Cir. 1976).

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. New Hampshire recognizes bad faith claims against insurers, based on the obligation of good faith and fair dealing implied in every contract. <i>Lawton v. Great S.W. Fire Ins. Co.</i>, 118 N.H. 607 (1978). New Hampshire, however, does not recognize a first party tort claim for bad faith. <i>Id.</i> There is no direct statutory remedy for bad faith. N.H. REV. STAT. ANN. § 417 generally regulates “unfair” insurer conduct and practices. N.H. REV. STAT. ANN. § 417:4 (XV) specifically defines unfair claim settlement practices by insurers, but it does not permit private rights of action. <i>See Shaheen v. Preferred Mut. Ins. Co.</i>, 668 F. Supp 716 (D.N.H.1987). Only the Insurance Commissioner has standing to bring an action against an insurer under this statute. <i>Id.</i> However, an aggrieved insured may request administrative relief from the Commissioner under the statute. <i>Arouchon v Whaland</i>, 119 N.H. 923 (1979). A private right of action against an insurer under the New Hampshire Consumer Protection Act also is not allowed. <i>See</i> N.H. REV. STAT. ANN. § 358-A; <i>Bell v. Liberty Mut. Ins. Co.</i>, 146 N.H. 190 (2001), <i>preempted on other grounds by National Banking Act</i>, SPGGC, LLC v. Ayotte, 443 F. Supp. 2d 197 (D.N.H. 2006), <i>aff’d</i>, 488 F.3d 525 (1st Cir. 2007).</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>The insured must prove that the insurer’s failure to pay or delay in payment was a breach of contract. <i>Lawton v. Great S.W. Fire Ins. Co.</i>, <i>supra</i>. To the extent that the insurer’s conduct was a breach of its contractual obligation of good faith and fair dealing, the insured must provide evidence that, when investigating and adjusting the insured’s claim, the insurer calculatedly, advertently and unreasonably denied payment. <i>DeVries v. St. Paul Fire and Marine Ins. Co.</i>, 716 F.2d 939 (1st Cir. 1983). “Calculated and not inadvertent” lies somewhere between unreasonable conduct and negligent conduct. <i>Id.</i> at 942. The burden of persuasion is on the insured, which must meet a preponderance of the evidence standard. <i>Id.</i> In deciding whether an insurer has breached its obligation of good faith and fair dealing, the jury applies the reasonableness standard. <i>Id.</i> at 943.</p>
<p>What Damages Can Be Recovered?</p>	<p>The insured may recover specific consequential damages if the insured can prove that: the damages were a reasonably foreseeable consequence of the breach when the policy was entered into; the insured could not have reasonably avoided or mitigated said damages; and the damages claimed flow from the breach of the insurer’s duty. <i>Bell v. Liberty Mut. Ins. Co.</i>, 146 N.H. 190 (2001); <i>Lawton v. Great S.W. Fire Ins. Co.</i>, <i>supra</i>; <i>Drop Anchor Realty Trust v. Hartford Fire Ins. Co.</i>, 126 N.H. 674 (1985). New Hampshire does not allow punitive damage awards. N.H. REV. STAT. § 507:16. An attorneys’ fees award may be warranted if an insurer acts in bad faith by fomenting unnecessary litigation. <i>Lawton v. Great S.W. Fire Ins. Co.</i>, 118 N.H. 607 (1978). Because a first party bad faith action sounds in contract, damages for mental distress cannot be recovered. <i>Id.</i></p>

NEW HAMPSHIRE

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. New Hampshire recognizes a common law cause of action, under a negligence standard. The insurer has a duty of reasonable care in the settlement of a third-party liability claim. Thus, a bad faith claim in tort may be stated against the insurer for negligent failure to settle or defend a claim against its insured. <i>Stateline Steel Erectors, Inc. v. Shields</i>, 837 A.2d 285 (N.H. 2003); <i>Dumas v. State Farm Mut. Auto Ins.</i>, 111 N.H. 43 (1971).</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>Insured must prove that the insurer failed to exercise due care in defending or settling a claim against the insured. <i>Dumas</i>, 111 N.H. at 43. Inquiry is whether insurer acted reasonably under the circumstances. A court will weigh the interests of the insured and insurer based on the terms of the policy and the other facts of the case in determining whether the insurer exercised due care. The standard of proof is preponderance of the evidence. <i>Id.</i></p>
<p>What Damages Can Be Recovered?</p>	<p>All damages incurred by the insured as a result of the insurer’s negligent failure to settle can be recovered. The insured must prove causation and damages. <i>Bell v. Liberty Mut. Ins. Co.</i>, 146 N.H. 190 (2001). New Hampshire does not allow punitive damage awards. N.H. REV. STAT. § 507:16.</p>

Third-Party Claims

NEW HAMPSHIRE (cont'd)	Can a Third Party Assert a Bad Faith Claim?	YES. The insurer has a duty to exercise reasonable care in the settlement of a third-party liability claim. <i>Shaheen v. Preferred Mut. Ins. Co.</i> , 668 F. Supp. 716, 719 (D.N.H. 1987). A third-party claimant may bring a common law tort action for negligent failure to settle if the insured assigns its rights under the policy at issue to the third party. <i>Stateline Steel Erectors</i> , 837 A.2d at 285.
	If So, What Is the Third Party's Burden of Proof?	The burden of proof is a preponderance of the evidence that the insurer breached its duty of reasonable care in defense or settlement of a claim, causing damages for the third party. <i>Shaheen</i> , 668 F. Supp. at 719.
	What Damages Can Be Recovered?	The aggrieved third party may recover all damages incurred as a result of an insurer's negligent failure to settle. The third party must prove causation and the damages. <i>Dumas</i> , 111 N.H. at 43.
	Can the Insured Assign Rights to a Third Party?	YES. New Hampshire generally allows tort claims to be assigned. <i>Jordan v. Gillen</i> , 44 N.H. 424 (1862). This includes third-party insurance claims. See <i>Dumas v. State Mut'l Auto Ins. Co.</i> , <i>supra</i> .
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES , under equitable subrogation. While the primary insurer does not owe a duty to the excess insurer to exercise due care, an excess insurer may bring an action for negligent failure to settle within underlying policy limits based on a theory of equitable subrogation. <i>Stateline Steel Erectors</i> , 837 A.2d at 285. The excess insurer must prove that the primary insurer acted unreasonably in failing to settle. <i>Allstate Ins. Co. v. Reserve Ins. Co.</i> , 116 N.H. 806 (1976). Damages are measured by the difference between the amount the insured ultimately recovers and the underlying policy limits (i.e., the exposure of the excess insurer). <i>Id.</i>
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	Depending on the type of underlying policy and cause of action asserted, the insurer can assert defenses specific to the burdens of proof described above (e.g., that it acted reasonably in investigation, adjustment, defense, or settlement, or that it acted with due care, etc.). See, e.g., <i>DeVries v. St. Paul</i> , <i>supra</i> . An insurer can also defend a bad faith action by asserting that the insured failed to perform a condition precedent to recovery or that the insured materially misrepresented or omitted a fact or facts, related to the insurer's investigation and adjustment of the insured's claim.

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Although there is no statutory cause of action for bad faith, an insured can assert a bad faith claim under New Jersey case law. <i>Pickett v. Lloyd's</i>, 621 A.2d 445 (N.J. 1993); <i>Van Holt v. Liberty Mut. Fire Ins. Co.</i>, 163 F.3d 161 (3d Cir. 1998); <i>Polizzi Meats, Inc. v. Aetna Life & Cas. Co.</i>, 931 F. Supp. 328 (D.N.J. 1996). In <i>Rova Farms Resort, Inc. v. Investors Ins. Co.</i>, 323 A.2d 495 (1974), the New Jersey Supreme Court first recognized the right of an insured to pursue a cause of action for bad faith against a liability insurer based upon the insurer's unreasonable refusal to settle a third party claim within the policy limits. In <i>Pickett</i>, 621 A.2d at 445, the New Jersey Supreme Court expanded the holding in <i>Rova</i> by including a cause of action for a bad faith refusal to pay benefits under a first-party property insurance policy. Deemed to be the seminal case for bad faith claims in New Jersey, <i>Pickett</i> held that, although one need not characterize the cause of action as either a tort or contractual claim, the cause of action is "best understood as one that sounds in contract." <i>Id.</i> at 452.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The insured's burden of proof is the "fairly debatable" standard. Under this standard, an insured would need to establish: (1) a lack of a reasonable basis for denying coverage; and (2) knowledge or reckless disregard of the lack of a reasonable basis for the denial. <i>Id.</i> at 453. When explaining the application of the "fairly debatable" standard, the court mentioned the summary judgment litmus test and stated "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." <i>Id.</i> at 454. Accordingly, simple negligence or mistake is not enough to maintain a cause of action for bad faith. <i>Id.</i>; see also <i>Polizzi</i>, 931 F. Supp. at 328.</p>
<p>What Damages Can Be Recovered?</p>	<p>Because the cause of action is rooted in contract law, <i>Pickett</i> held that contract law principles should apply in determining damages. <i>Pickett</i>, 621 A.2d at 454. Accordingly, a breaching party is responsible for all foreseeable consequential damages resulting from the breach. <i>Id.</i> Punitive damages are not available unless the insured proves that the insurer acted with wanton recklessness or maliciously. <i>Id.</i> at 455. Damages for negligent infliction of emotional distress cannot be awarded in a bad faith cause of action. <i>Id.</i> N.J. STAT. ANN. § 2A:15-59.1 permits the recovery of costs and fees, upon proof that the insurer mounted frivolous defense.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. New Jersey courts have not distinguished between bad faith claims for liability and non-liability policies. Accordingly, an insured may maintain a bad faith claim against its insurer under a liability insurance policy. <i>Universal-Rundle Corp. v. Commercial Union Ins. Co.</i>, 725 A.2d 76 (N.J. 1999); see also <i>Frankel v. St. Paul Fire and Marine Ins. Co.</i>, 759 A.2d 869 (N.J. 2000).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Under New Jersey case law, the same "fairly debatable" standard applies to bad faith claims, whether the claim is brought in connection with a liability policy or a non-liability policy. <i>Universal-Rundle Corp.</i>, 725 A.2d at 89-90.</p>
<p>What Damages Can Be Recovered?</p>	<p>As in bad faith claims under non-liability policies, only consequential damages can be recovered in a bad faith claim based on a liability insurance policy. <i>Frankel</i>, 759 A.2d at 872. Punitive damages are only available for wantonly reckless or malicious misconduct. <i>Pickett</i>, 621 A.2d at 455.</p>

Third-Party Claims

NEW JERSEY (cont'd)	Can a Third Party Assert a Bad Faith Claim?	YES. New Jersey courts permit a third party to assert a cause of action for bad faith. <i>Hudson Universal Ltd. v. Aetna Cas. & Sur. Co.</i> , 987 F. Supp. 337 (D.N.J. 1997); <i>Universal Rundle</i> , 725 A.2d at 89-90.
	If So, What Is the Third Party's Burden of Proof?	The <i>Hudson</i> court held that <i>Pickett's</i> "fairly debatable" standard also applied to third party claims, noting that the rationale underlying the standard was premised "upon the potential in terrorem effect of bad faith litigation upon the insurer." <i>Hudson</i> , 987 F. Supp. at 341 (quoting <i>Polizzi</i> , 931 F. Supp. at 334); see also <i>G-I Holdings v. Hartford Fire Ins. Co.</i> , 2007 WL 842009 (D.N.J. 2007) (holding that "[i]n order to impose 'bad faith' liability the insured must demonstrate that no debatable reasons existed for denial of the benefits available under the policy").
	What Damages Can Be Recovered?	Again, because a bad faith cause of action is rooted in contract law, only consequential damages can be awarded in bad faith claim. <i>Pickett</i> , 621 A.2d at 454. Punitive damages are available only where conduct is "wantonly reckless" or "malicious." <i>Id.</i> at 455.
	Can the Insured Assign Rights to a Third Party?	YES. If the insured affirmatively assigns his right to bring a bad faith claim to a third party, New Jersey will permit the assignee to proceed. <i>Maertin v. Armstrong World Indus., Inc.</i> , 241 F. Supp. 2d 434, 454 (D.N.J. 2002) (citing <i>Murray v. Allstate Ins. Co.</i> , 507 A.2d 247, 250 (1986)). However, the bad faith claim must specifically be assigned. A settlement agreement that assigns a party's "rights to the insurance proceeds," but does not specifically assign the party's interest in a third party action against the insurer, will not suffice. <i>Maertin</i> , 241 F. Supp. 2d at 454; <i>Murray</i> , 507 A.2d at 250.
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES. New Jersey courts permit an excess insurer to bring a bad faith cause of action against a primary insurer, which controls the insured's defense. See, e.g., <i>American Centennial Ins. Co. v. Warner-Lambert Co.</i> , 681 A.2d 1241 (N.J. 1995); <i>Baen v. Farmers Mutual Fire Ins. Co.</i> , 723 A.2d 636 (N.J. App. Div. 1999). The courts, in these cases, have reasoned that the primary insurer is, in effect, the insured's agent or fiduciary, thereby giving the excess insurer the right to invoke rights under the doctrine of equitable subrogation. <i>Baen</i> , 723 A.2d at 642; <i>American Centennial Ins. Co.</i> , 681 A.2d at 1246.
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	The primary insurer can defend a third party bad faith claim by asserting that its conduct was reasonable. See, e.g., <i>Miller v. New Jersey Ins. Underwriting Ass'n</i> , 427 A.2d 135 (N.J. Super. 1981).

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under common law and statute. Under common law, bad faith generally is a “hybrid action, not exclusively grounded in either contract or tort.” <i>Charter Svcs., Inc. v. Principal Mut. Life Ins. Co.</i>, 868 P.2d 1307, 1313 (N.M. Ct. App.), <i>cert. denied</i>, 882 P.2d 21 (N.M. 1994). However, an insured may not recover on a bad faith claim without a separate finding that the insurer had a contractual duty to pay under the policy. <i>Id.</i> Once the contract claim is established, an insured can assert a tort claim for unreasonable delay or failure to pay under the insurance contract. <i>Id.</i> at 1313. New Mexico’s Unfair Insurance Practices Act allows a private cause of action against an insurer for unfair methods of competition or unfair or deceptive acts or practices. N.M. STAT. ANN. §§ 59A-16-1—59A-16-30 (2007).</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>The determination of whether an insurer has acted reasonably or not is based upon an objective standard. <i>Jackson Nat’l. Life Ins. Co. v. Receconi</i>, 827 P.2d 118 (N.M. 1992). To recover on a bad faith tort claim, an insured must show evidence of a frivolous or unfounded refusal to pay claims due the insured. <i>Chavez v. Chenoweth</i>, 553 P.2d 703, 709 (N.M. Ct. App. 1976). “Unfounded” means “an arbitrary or baseless refusal to pay, lacking any arguable support in the wording of the insurance policy or the circumstances surrounding the claim.” <i>Jackson Nat’l. Life</i>, 827 P.2d at 134. To recover under New Mexico’s Unfair Insurance Practices Act, one of the following must be demonstrated: (1) misrepresentation of pertinent facts or policy provisions relating to coverages at issue; (2) failure to adopt and implement reasonable standards for the prompt investigation and processing of claims; (3) failure to affirm or deny coverage of claims within a reasonable time after proof of loss is submitted; (4) failure to attempt in good faith to effectuate prompt, fair and equitable settlements after liability has become reasonably clear; or (5) when the amount claimed reasonably approximated the amount ultimately recovered, compelling the filing of litigation to recover under the policy by offering substantially less than the amounts ultimately recovered. N.M. STAT. ANN. § 59A-16-20 (2007).</p>
<p>What Damages Can Be Recovered?</p>	<p>Actual damages and costs may be awarded under New Mexico’s Unfair Insurance Practices Act. N.M. STAT. ANN. § 59A-16-30 (2004). An insured may be awarded attorneys’ fees and costs as part of the loss resulting from a breach of duty if the insurer unreasonably failed to pay the claim. N.M. STAT. ANN. § 39-2-1 (2004); <i>Jackson Nat’l.</i>, 827 P.2d at 135-36. Punitive damages may be awarded against an insurer in a common law bad faith case only when the insurer’s conduct was in reckless disregard for the interests of the plaintiff, was based on a dishonest judgment, or was otherwise malicious, willful, or wanton. <i>Sloan v. State Farm Mut. Auto. Ins. Co.</i>, 85 P.3d 230 (2004). The question of whether punitive damages can be awarded in a statutory cause of action remains unanswered in New Mexico. <i>Hovet v. Allstate Ins. Co.</i>, 89 P.3d 69, 77 (N.M. 2004).</p>

First-Party Claims

(B) Liability Insurance Policies

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">NEW MEXICO (cont'd)</p> <p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under common law and statute. New Mexico recognizes that under a contract of insurance there is an implied covenant of fair dealing that creates an obligation for the parties to act in good faith. <i>Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.</i>, 690 P.2d 1022, 1024 (N.M. 1984). New Mexico's Unfair Insurance Practices Act allows a private cause of action against an insurer for unfair methods of competition or unfair or deceptive acts or practices. N.M. STAT. ANN. §§ 59A-16-1—59A-16-30 (2004).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>An insured must show that "the insurer's refusal to settle was based on a dishonest judgment." <i>Sloan</i>, 85 P.3d 230, 237. An insurer must give the interests of the insured at least the same consideration as its own interests. <i>Id.</i> When there is a substantial likelihood of recovery in excess of the policy limits, an insurer's unwarranted refusal to settle is a breach of the implied covenant of good faith and fair dealing. <i>Dairyland Ins. Co. v. Herman</i>, 954 P.2d 56 (N.M. 1997), <i>reh'g denied</i>, (Feb. 10, 1998). An insurer's negligence in defending a lawsuit against its insured is not actionable, but can be an element of a claim for bad faith; the insured must show the insurer breached its duty through motive of interest or ill will. <i>Ambassador, supra</i>. To recover under New Mexico's Unfair Insurance Practices Act, one of the following must be demonstrated: misrepresentation of pertinent facts or policy provisions relating to coverages at issue; failure to adopt and implement reasonable standards for the prompt investigation and processing of claims; failure to affirm or deny coverage of claims within a reasonable time after proof of loss is submitted; failure to attempt in good faith to effectuate prompt, fair and equitable settlements once liability has become reasonably clear; or compelling the filing of litigation to recover under the policy by offering substantially less than the amounts ultimately recovered when the original claims were for amounts reasonably similar to the amounts ultimately recovered. N.M. STAT. ANN. § 59A-16-20 (2004).</p>
<p>What Damages Can Be Recovered?</p>	<p>If an insurer refuses to accept a reasonable settlement offer within the policy limits, it will be liable for the entire judgment against the insured, even if it is above the limits. <i>Dairyland, supra</i>.</p> <p>In most cases in which a plaintiff proves a bad faith claim against her insurer, she can recover punitive damages as well. <i>Sloan, supra</i>. An insured may be awarded attorneys' fees and costs if the insurer acted unreasonably by failing to pay the claim. N.M. STAT. ANN. § 39-2-1 (2004). Actual damages and costs may be awarded under New Mexico's Unfair Insurance Practices Act. N.M. STAT. ANN. § 59A-16-30. The question of whether punitive damages can be awarded in a statutory cause of action remains unanswered in New Mexico. <i>Hovet v. Allstate Ins. Co.</i>, 89 P.3d 69, 77 (N.M. Apr. 8, 2004).</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>YES, under statute. New Mexico's Unfair Insurance Practices Act provides a statutory private cause of action against an insurer for unfair methods of competition or unfair or deceptive acts or practices. N.M. STAT. ANN. §§ 59A-16-1—59A-16-30 (2004). The New Mexico Supreme Court held that an automobile accident victim has the right to bring a claim under the Unfair Claims Practice section of the Insurance Code. <i>Hovet v. Allstate Ins. Co.</i>, 89 P.3d 69 (N.M. 2004) (restricting this decision to victims of automobile accidents, under automobile insurance policies). An injured third party does not have a common law right to recover from a tortfeasor's liability insurer for a bad faith refusal to settle. <i>Hovet v. Lujan</i>, 66 P.3d 980, 983-84 (N.M. Ct. App. 2003), <i>aff'd</i>, 89 P.3d 69 (N.M. 2004).</p>
<p>If So, What is the Third Party's Burden of Proof?</p>	<p>To recover under New Mexico's Unfair Insurance Practices Act, one of the following must be demonstrated: misrepresentation of pertinent facts or policy provisions relating to coverages at issue; failure to adopt and implement reasonable standards for the prompt investigation and processing of claims; failure to affirm or deny coverage of claims within a reasonable time after proof of loss is submitted; no attempt in good faith to effectuate prompt, fair and equitable settlements after liability has become reasonably clear; or compelling the filing of litigation to recover under the policy by offering substantially less than the amounts ultimately recovered when the original claims were for amounts reasonably approximate to the amounts ultimately recovered. N.M. STAT. ANN. § 59A-16-20 (2007).</p>
<p>What Damages Can Be Recovered?</p>	<p>Actual damages and costs may be awarded under New Mexico's Unfair Insurance Practices Act. N.M. STAT. ANN. § 59A-16-30. The question of whether punitive damages can be awarded in a statutory cause of action remains unanswered in New Mexico. <i>Hovet</i>, 89 P.3d at 77.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. An insured may assign the right to bring a bad faith claim to a third party. <i>Rummel v. Lexington Ins. Co.</i>, 945 P.2d 970 (N.M. 1997).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. An excess insurer can sue a primary insurer on a subrogation claim, by standing in the shoes of the insured. <i>Design Professionals Ins. Cos. v. St. Paul Fire and Marine Ins. Co.</i>, 940 P.2d 1193 (N.M. Ct. App. 1997).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can defend against a bad faith claim by demonstrating that there is no potential for insurance coverage. <i>Marshall v. Providence Washington Ins. Co.</i>, 951 P.2d 76 (N.M. Ct. App. 1997). An insurer's incorrect decision to refuse benefits does not constitute a bad faith tort claim; to prevail, plaintiff must show that as there was no reasonable basis for denying the claim. <i>Winters v. Transamerica Ins. Co.</i>, 194 F.3d 1321 (10th Cir. 1999). An insurer is not liable for a statutory cause of action if it "objectively exercises good faith and fairly attempts to settle its cases on a reasonable basis and in a timely manner." <i>Hovet</i>, 89 P.3d at 78.</p>

First-Party Claims

(A) Non-Liability Insurance Policies

NEW YORK

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>NO. New York does not recognize an independent tort cause of action for an insurer's alleged bad faith avoidance of a valid insurance claim. <i>Acquista v. New York Life Ins. Co.</i>, 285 A.D.2d 73 (N.Y. App. Div. 2001). Because the insured cannot be held liable for damages in excess of policy limits as a result of the conduct of a non-liability insurer, New York courts view an insurer's breach of a non-liability policy differently than an insurer's bad faith refusal to settle a third-party claim against an insured under a liability policy. <i>Halpin v. Prudential Ins. Co.</i>, 4201 N.E.2d 171 (N.Y. 1979); <i>see also Topiwala v. New York Life Ins. Co.</i>, 464 N.Y.S.2d 184 (N.Y. App. Div. 1983). When the insured seeks the benefit of the policy terms, a claim that an insurer failed to honor its obligation is generally considered a breach of contract action. However, an insurer's egregious conduct may support a claim in tort, such as fraud or tortious breach of a duty of care separate and apart from the failure to fulfill its contractual obligation. <i>New York Univ. v. Cont'l Ins. Co.</i>, 662 N.E.2d 763 (N.Y. 1995). If an insured can allege a valid cause of action in tort independent of the insurance contract, an insurer's egregious conduct may support a claim for punitive damages in certain circumstances.</p> <p>Although N.Y. Ins. LAW §2601 prohibits insurers from engaging in unfair claim settlement practices, there is no statutory or common law private cause of action for such practices. <i>Rocanova v. Equitable Life Assur. Soc'y</i>, 634 N.E.2d 940 (N.Y. 1994).</p> <p>However, if the insurer's conduct has a broad impact on consumers at large and is not unique to the parties to that contract, as a consumer, an insured can assert a private cause of action under the consumer protection statute, NEW YORK GEN. BUS. §349, for unlawful deceptive acts or practices in conducting a business or furnishing a service. <i>N.Y. Univ. v. Cont'l</i>, <i>supra</i>. Such a cause of action by insureds has been upheld in "vanishing premium" life insurance cases. <i>See, e.g., Gaidon v. Guardian Life Ins. Co.</i>, 725 N.E.2d 598 (N.Y. 1999), <i>aff'd</i>, 750 N.E.2d 1078 (N.Y. 2001). Subscribers to healthcare insurance plans can also sue for unlawful deceptive business practices. <i>See, e.g., Batas v. Prudential Ins. Co.</i>, 281 A.D.2d 260 (N.Y. App. Div. 2001). Likewise, an insured under a disability policy can bring such a suit. <i>See, e.g., Acquista, supra</i>.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>While a cause of action for bad faith generally cannot be based on a non-liability policy, an insured may assert a claim for punitive damages if she can state a cause of action in tort independent of the contract. However, the plaintiff must show (1) egregious conduct making punitive damages necessary to vindicate a public right and deter the insurer from engaging in conduct that is "gross" and "morally reprehensible" and of "such wanton dishonesty as to imply a criminal indifference to civil obligations;" (2) egregious conduct directed at the plaintiff; and (3) egregious conduct that is part of a pattern of conduct directed at the public generally. <i>N.Y. Univ., supra; Rocanova, supra</i>.</p> <p>To sustain a cause of action against an insurer for fraud, the plaintiff cannot simply allege a scheme to receive premium payments without giving any benefit in return, but rather must allege the elements of fraud, including material misrepresentation, fraudulent intent by the insurer, and reliance by the insured to his detriment. <i>N.Y. Univ., supra</i>.</p> <p>An insured asserting a claim for violation of N.Y. GEN. BUS. LAW § 349 must show that the insurer's conduct impacted consumers at large, and did not merely cause a private contract dispute unique to the parties.</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>What Damages Can Be Recovered?</p>	<p>The measure of damages for wrongfully denying policy benefits is the provision of those benefits and payment of other contract damages. However, in an insured's claim for disability benefits, the court noted that "the problem of dilatory tactics by insurance companies seeking to delay and avoid payment of proper claims warrants a remedy beyond that traditionally available for an insurer's failure to pay on a claim," and held that the insured could seek consequential damages that exceed the policy limits for the claimed breach of contract. <i>Acquista, supra</i>; see also <i>Bi-Economy Market, Inc. v. Harleysville</i>, 2008 WL 423451 (N.Y. Ct. App. Feb. 19, 2008) (holding that an insurer may be liable for damages in excess of the stated policy limits if those damages are a natural and probable consequence of the breach).</p> <p>Punitive damages are available only if the insured claimant can state a cause of action in tort independent of the contract, and show that (i) the insurer's conduct was so egregious that punitive damages are necessary to vindicate a public right and deter the insurer from engaging in conduct that is "gross" and "morally reprehensible" and of "such wanton dishonesty as to imply a criminal indifference to civil obligations;" (ii) this egregious conduct was directed at the plaintiff; and (iii) it was also part of a pattern of conduct directed at the public generally. <i>Accord N.Y. Univ., supra</i>.</p> <p>An insured who establishes a violation of N.Y. GEN. BUS. §349 for unlawful deceptive acts or practices is entitled to injunctive relief and to recover its actual damages or fifty dollars, whichever is greater if the court finds the insurer willfully or knowingly violated the statute. The statute also authorizes a court, in its discretion, to increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars.</p>
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NEW YORK (cont'd)

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. New York recognizes a common law cause of action by an insured against its insurer for bad faith refusal to settle a liability claim made by a third party against the insured within policy limits. <i>Smith v. Gen. Accident Ins. Co.</i>, 697 N.E.2d 168 (N.Y. 1998). The general principle of good faith and fair dealing is implied in insurance policies, as it is in all contracts. <i>Smith, supra</i>.</p> <p>However, there is no statutory basis for a bad faith award. N.Y. INS. LAW §2601 prohibits insurers from engaging in unfair claim settlement practices, but there is no statutory or common law private cause of action for unlawful claim settlement practices. <i>Rocanova</i>, 634 N.E.2d at 940.</p>
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Gen Re Note

The 2008 *Bi-Economy Market* decision noted above raises new exposures and concerns for first-party insurers for it announced the principle that an insurer can be liable for consequential damages that are the probable result of a breach of the insurance contract. So, for example, given the purpose of business interruption loss insurance coverage, the bankruptcy of the insured could be a reasonably foreseeable result of the breach of such a policy. While this exposure is still moderate in the scheme of state bad faith laws, it is an expansion for New York. Insurers may wonder if the high court is moving in the direction of recognizing tort actions for bad faith and the broader remedies this will provide.

First-Party Claims

(B) Liability Insurance Policies cont'd

NEW YORK (cont'd)

<p>If So, What Is the Insured's Burden of Proof?</p>	<p>New York applies a stringent gross disregard standard rather than a negligence test. <i>Pavia v. State Farm Mut. Auto. Ins. Co.</i>, 626 N.E.2d 24 (N.Y. 1993), <i>reargument denied</i>, 633 N.E.2d 480 (1994). In order to establish a <i>prima facie</i> claim of bad faith and hold an insurer liable for a verdict against its insured in excess of policy limits, the insured 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." <i>Smith, supra</i>. While bad faith can be established "where the liability is clear and the potential recovery far exceeds the insurance coverage ... it does not follow that whenever an injury is severe and the policy limits are significantly lower than a potential recovery the insurer is obliged to accept a settlement offer." <i>Pavia, supra</i>. Factors to be considered include whether the insurer diligently investigated the claim and any potential defenses so that it could make an informed evaluation of the risks of refusing settlement, what information was available to the insurer when the demand for settlement was made, a pattern or indicia of reckless or conscious disregard for the insured's rights and whether the insured had any fault in delaying or ceasing settlement negotiations. <i>Id.</i> Another factor is whether the insurer kept the insured informed of the settlement demand and negotiations. <i>Smith, supra</i>. Although an insurer may not coerce an insured to contribute to a settlement, a court may consider as a factor in a bad faith claim whether the insured was informed during settlement negotiations that it could contribute to a settlement. <i>Brockstein v. Nationwide Mut. Ins. Co.</i>, 417 F.2d 703 (2d Cir. 1969). Inattention or delay in responding to a settlement offer or other conduct that amounts to no more than ordinary negligence is not sufficient to establish bad faith. <i>Pavia, supra</i>.</p>
<p>What Damages Can Be Recovered?</p>	<p>An insured may recover damages in excess of policy limits if such damages are the result of the insurer's bad faith refusal to settle a liability claim within policy limits. <i>Gordon v. Nationwide Mut. Ins. Co.</i>, 285 N.E.2d 849 (N.Y. 1972), <i>cert. denied</i>, 410 U.S. 931 (1973). The measure of damages is the amount in excess of policy limits for which the insured becomes charged plus interest. <i>Soto v. State Farm Ins. Co.</i>, 635 N.E.2d 1222 (N.Y. 1994). Consequential damages for emotional distress cannot be recovered. <i>DiBlasi v. Aetna Life and Cas. Ins. Co.</i>, 147 A.D.2d 93 (N.Y. App. Div. 1989). Under New York Law, punitive damages cannot be recovered for ordinary breach of contract, as their purpose is not to remedy private wrongs, but to vindicate public rights. <i>Rocanova, supra</i>. However, punitive damages can be recovered if the insurer's conduct constitutes egregious fraud aimed at the public generally, and such damages are necessary to vindicate a public right. <i>See N.Y. Univ.</i>, 662 N.E.2d at 763. Punitive damages awarded against the insured in a lawsuit by a third-party claimant against the insured is not a proper element of the compensatory damages recoverable by the insured against its insurer for bad faith refusal to settle the third-party claim. <i>Soto, supra</i>.</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. There is no private statutory cause of action for a third-party claimant for unfair claims settlement practice or bad faith. However, a claimant potentially can state a bad faith claim if he alleges that (i) an insurer attempted to coerce him to accept a settlement offer and threatened that, if the offer was rejected, the insurer would conduct settlement negotiations with other claimants and “thereby reduce the amount of money which would have been otherwise available for the payment of any judgment which the said plaintiff might recover;” (ii) the insurer then in bad faith conducts settlement negotiations with other claimants, exhausting the policy limits, which was done intentionally and with full knowledge of the prejudice that would inure to the plaintiff, and (iii) such conduct was calculated to and did defeat, impair, impede and prejudice the rights and remedies of the claimant. <i>Obad v. Allstate Ins. Co.</i>, 27 A.D.2d 795 (N.Y. App. Div. 1967).</p> <p>Generally, New York does not recognize a direct action by a claimant against a tortfeasor’s insurer except in very limited circumstances. Under N.Y. INS. LAW § 3420(a)(2), a third-party judgment creditor who has a judgment against an insured that remains unsatisfied thirty days after the service of entry of the judgment upon the insured or its attorney and the insured’s insurer, may maintain an action against the insurer under the terms of the policy for the amount of the judgment not exceeding the applicable limit of coverage under the policy.</p> <p>An insured can assign its rights against its insurer to a third party and that third party can then assert the insured’s bad faith claim.</p>
<p>If So, What Is the Third Party’s Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>In the receiver of an insured’s action against an insurer, the Court of Appeals held that damages may exceed policy limits for an insurer’s failure to settle within a liability policy’s limits, in breach of the implied condition of its contract to act in good faith. <i>Gordon v. Nationwide Mut. Ins. Co.</i>, 285 N.E.2d 849 (N.Y. 1972).</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. An assignee stands in the shoes of the insured for purposes of a bad faith analysis. <i>Daus v. Lumbermen’s Mut. Cas. Co.</i>, 241 A.D.2d 665 (N.Y. App. Div. 1997). An assignee can recover the amount of any excess verdict, to which the insured is entitled, and is not limited to the amount it paid for the assignment. <i>Home Ins. Co. v. United Services Auto. Ass’n</i>, 262 A.D.2d 452 (N.Y. App. Div. 1999). However, no person or co-partnership engaged in the business of collection or adjustment of claims and no corporation or association can take an assignment of a claim with the primary purpose of bringing an action or proceeding thereon. New York Judiciary Law § 489; <i>Fairchild Hiller Corp. v. McDonnell Douglas Corp.</i>, 270 N.E.2d 691 (N.Y. 1971).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES. An insurer owes a duty to act in good faith to excess insurance carriers. <i>New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.</i>, 295 F.3d 232 (2d Cir. 2002); <i>Hartford Acc. and Indem. Co. v. Mich. Mut. Ins. Co.</i>, 463 N.E.2d 608 (N.Y. 1984) (holding that a primary liability insurer owed to its excess insurer the same duty to act in good faith that it owed to its own insureds).</p>

Third-Party Claims

Defenses

NEW YORK (cont'd)

What Defenses Can Be Asserted Against a Bad Faith Claim?

If the insurer has an arguable basis for denying coverage, bad faith cannot be established. *Redcross v. Aetna Cas. & Sur. Co.*, 688 N.Y.S.2d 817 (N.Y. App. Div. 1999). The insurer cannot be held liable if its decision not to settle was the result of an error of judgment on its part or even by a failure to exercise reasonable care. *DiBlasi v. Aetna Life and Cas. Ins. Co.*, 542 N.Y.S.2d 187 (N.Y. App. Div. 1989).

In determining whether an insurer was liable for bad faith for failing to settle within policy limits, the court must assess various factors depending on the facts of the case, such as the plaintiff's likelihood of success on the liability issue in the underlying action, the potential magnitude of damages, the financial burden each party may be exposed to as a result of a refusal to settle, the insurer's failure to properly investigate the claim and any potential defenses thereto, the information available to the insurer at the time the demand for settlement is made, any other evidence that tends to establish or negate the insurer's bad faith in refusing to settle, and the insured's fault in delaying or ceasing settlement negotiation by misrepresenting the facts. *Pavia v. State Farm Mut. Auto. Ins. Co.*, 626 N.E.2d 24 (N.Y. 1993).

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. North Carolina recognizes both a statutory and a common law claim for bad faith.</p> <p>N.C. GEN. STAT. § 75-1.1 prohibits unfair and deceptive acts or practices and provides a private cause of action for consumers. <i>Howerton v. Arai Helmet, Ltd.</i>, 470, 597 S.E.2d 674, 693 (N.C. 2004). An insurance company can violate Section 75-1.1 by not attempting in good faith to effectuate prompt, fair and equitable settlements of claims for which liability has become reasonably clear. <i>Topsail Reef Homeowners Ass'n v. Zurich Specialties London Ltd.</i>, 11 Fed. App'x 225, 2001 WL 565317 (4th Cir. 2001) (unpublished).</p> <p>N.C. GEN. STAT. § 58-63-15(11) defines unfair practices in the settlement of insurance claims. There is no private cause of action for violating this statute. <i>Gray v. N.C. Ins. Underwriting Assoc.</i>, 529 S.E.2d 676 (N.C.), <i>reh'g denied</i>, 544 S.E.2d 771 (2000). However, a violation is <i>per se</i> an unfair and deceptive trade practice under N.C. GEN. STAT. § 75-1.1. <i>Cash v. State Farm Mut. Auto. Ins. Co.</i>, 528 S.E.2d 372 (N.C. 2000), <i>aff'd</i>, 538 S.E.2d 569 (N.C. 2000). A plaintiff need not establish a violation of § 58-63-15(11) to succeed on a private cause of action against an insurer under Chapter 75. <i>Country Club v. U.S. Fid. & Guar. Co.</i>, 563 S.E.2d 269 (N.C. 2002).</p> <p>There is also a common law cause of action for bad faith refusal to settle under North Carolina law. <i>See Lovell v. Nationwide Mut. Ins. Co.</i>, 424 S.E.2d 181 (N.C. 1993).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>In order to establish a violation of N.C. GEN. STAT. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice; (2) in or affecting commerce; (3) which proximately caused injury to plaintiffs. <i>Gray v. N.C. Ins. Underwriting Assoc.</i>, <i>supra</i>. The plaintiff must also allege that the insurer engaged in the prohibited practices with such frequency as to indicate that the acts are its general practice. <i>Cash v. State Farm Mut. Auto. Ins. Co.</i>, <i>supra</i>.</p> <p>In order to establish a common law claim for bad faith refusal to settle, an insured must show: (1) a refusal to pay after recognition of a valid claim; (2) bad faith; and (3) aggravating or outrageous conduct. Bad faith means conduct not based on honest disagreement or innocent mistake. Aggravated conduct includes fraud, malice, gross negligence, insult, and actions willfully or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights. <i>Topsail Reef Homeowners Assoc. v. Zurich Specialties London Ltd.</i>, <i>supra</i>.</p>
<p>What Damages Can Be Recovered?</p>	<p>Damages proximately caused by an unfair or deceptive act or practice under N.C. GEN. STAT. § 75-1.1 are trebled. <i>Gray v. N. C. Ins. Underwriting Assoc.</i>, <i>supra</i>.</p> <p>Under N.C. GEN. STAT. § 75-16.1, in actions based upon a violation of N.C. GEN. STAT. § 75-1.1, a trial court has discretion to award attorneys' fees if the trial court determines that "[t]he party charged with the violations 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." <i>Country Club v. U.S. Fid. & Guar. Co.</i>, <i>supra</i>.</p> <p>In order to recover punitive damages for the tort of an insurance company's bad faith refusal to settle, the plaintiff must prove: (1) a refusal to pay after recognition of a valid claim; (2) bad faith; and (3) aggravating or outrageous conduct. <i>Lovell v. Nationwide Mut. Ins. Co.</i>, <i>supra</i>.</p>

First-Party Claims

(B) Liability Insurance Policies

NORTH CAROLINA (cont'd)	Can the Insured Assert a Bad Faith Claim?	YES. North Carolina law does not appear to differentiate between liability and non-liability policies. See analysis above.
	If So, What Is the Insured's Burden of Proof?	See analysis above.
	What Damages Can Be Recovered?	See analysis above.

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. Generally, North Carolina does not recognize a cause of action by third-party claimants against the insurer of an adverse party. <i>Koch v. Bell, Lewis & Assoc., Inc.</i>, 627 S.E.2d 636, 639 (N.C. 2006). However, if the third party is an intended third party beneficiary of the contractual relationship between the adverse party and the adverse party's insurer, then the third party may bring a claim against the insurer. <i>Prince v. Wright</i>, 541 S.E.2d 191 (N.C. 2000). North Carolina courts have held that the injured party in an automobile accident is the intended third party beneficiary to the insurance contract between insurer and the tortfeasor/insured party. <i>Murray v. Nationwide Mut. Ins. Co.</i>, 472 S.E.2d 358 (N.C. 1996).</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>NO. Claims for unfair and deceptive trade practices under Section 75-1.1 are not assignable. Likewise, claims for bad faith refusal to settle, breach of fiduciary duty and tortious breach of contract are not assignable. <i>Horton v. New S. Ins. Co.</i>, 468 S.E.2d 856 (N.C. 1996).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. North Carolina allows an excess insurer to bring suit against a primary insurer under the theory of equitable subrogation, when a primary carrier denies coverage and refuses to provide a defense to the insured, and the excess insurer steps in and then sues the primary insurer to recover its expenses. <i>Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.</i>, 176 S.E.2d 751 (N.C. 1970); see also <i>Progressive Am. Ins. Co., Inc. v. Geico Gen. Ins. Co.</i>, 637 S.E.2d 282 (N.C. Ct. App. 2006).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>A reasonable, non-negligent misunderstanding regarding a policy term is insufficient grounds for liability under Section 75-1.1 claim. See <i>Topsail Reef Homeowners Assoc. v. Zurich Specialties London Ltd.</i>, <i>supra</i>.</p>

First-Party Claims

(A) Non-Liability Insurance Policies

NORTH DAKOTA	Can the Insured Assert a Bad Faith Claim?	YES , under common law. In North Dakota, breach of the implied covenant of good faith and fair dealing is the common law tort claim of bad faith. <i>Hart Const. Co. v. Am. Family Mut. Ins. Co.</i> , 514 N.W.2d 384 (N.D. 1994); <i>Seifert v. Farmers Union Mut. Ins. Co.</i> , 497 N.W.2d 694 (N.D. 1993). The insurer's duty to act in good faith emanates from the obligation, imposed by law on the insurer, to act fairly and in good faith discharge its contractual responsibilities, not from the terms of the policy. <i>Hartman v. Estate of Miller</i> , 656 N.W.2d 676 (N.D. 2003); <i>Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co.</i> , 279 N.W.2d 638 (N.D. 1979). Unfair methods of competition and unfair or deceptive practices involving claim settlement are defined in N.D. CENT. CODE § 26.1-04-03(9) (2003), but North Dakota does not allow a private cause of action for violating the statute. <i>Farmer's Union Cent. Exch., Inc. v. Reliance Ins. Co.</i> , 675 F. Supp. 1534 (D.N.D. 1987).
	If So, What Is the Insured's Burden of Proof?	A bad faith claim requires the breach of a duty. <i>Martin v. Allianz Life Ins. Co.</i> , 573 N.W.2d 823 (N.D. 1998); <i>Isaac v. State Farm Mut. Auto. Ins. Co.</i> , 547 N.W.2d 548 (N.D. 1996). Whether the insurer refused to pay its insured's claim based upon an interpretation of the policy that is not reasonable and knowing that the insured incurred a payable loss is a significant factor in determining whether there is bad faith. <i>Seifert</i> , 497 N.W.2d at 698.
	What Damages Can Be Recovered?	An insurer's breach of the duty of good faith gives the insured a cause of action in tort to recover proximately caused damages. <i>Bender v. Time Ins. Co.</i> , 286 N.W.2d 489 (N.D. 1979). Emotional distress resulting from an insurer's bad faith is compensable. <i>Ingalls v. Paul Revere Life Ins. Group</i> , 561 N.W.2d 273 (N.D. 1997). Punitive damages may be awarded if there is "oppression, fraud, or malice, actual or implied." <i>Corwin Chrysler-Plymouth, supra</i> .

(B) Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?	YES , under common law. North Dakota's Supreme Court has held that the duty of good faith originates in the contractual relationship between the insurer and insured and is implied by law to "include a duty of fair dealing in paying claims, providing defense to claims, negotiating settlements, and fulfilling all other contractual obligations." <i>Fetch v. Quam</i> , 623 N.W.2d 357 (N.D. 2001). Unfair methods of competition and unfair or deceptive practices involving claim settlement are defined in N.D. CENT. CODE § 26-1.04-03(9) (2003), but North Dakota does not allow a private cause of action for violating the statute. <i>Farmer's Union Cent. Exch., Inc. v. Reliance Ins. Co.</i> , <i>supra</i> .
If So, What Is the Insured's Burden of Proof?	An insured must demonstrate that the insurer acted unreasonably by failing to compensate its insured for a loss covered by the policy. <i>Fetch</i> , 623 N.W.2d at 361-62.
What Damages Can Be Recovered?	An insured can recover the amount of the policy plus attorneys' fees and costs, as well as damages for mental suffering and emotional distress. <i>Smith v. Am. Family Mut. Ins. Co.</i> , 294 N.W.2d 751 (N.D. 1980).

Third-Party Claims

Can a Third Party Assert a Bad Faith Claim?	NO. North Dakota does not permit a third-party to assert a claim against an insurer for failure to negotiate the settlement of a claim, as the insurer's duty of good faith and fair dealing is owed to the insured, not to third-party claimants. <i>Dvorak v. Am. Family Mut. Ins. Co.</i> , 508 N.W.2d 329 (N.D. 1993).
If So, What is the Third Party's Burden of Proof?	See above.
What Damages Can Be Recovered?	See above.
Can the Insured Assign Rights to a Third Party?	North Dakota courts appear not to have addressed this issue.
Excess Insurers	
Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	North Dakota courts appear not to have addressed this issue.
Defenses	
What Defenses Can Be Asserted Against a Bad Faith Claim?	A bad faith tort claim will fail if the insurer can show that it had a reasonable basis for failing to pay the claim or delaying settlement. <i>Bilden v. United Equitable Ins. Co.</i> , 921 F.2d 822 (8th Cir. 1990); <i>Martin v. Allianz Life Ins. Co.</i> , 573 N.W.2d 823 (N.D. 1998). An insurer does not act in bad faith when it reasonably refuses to settle a claim "which is fairly debatable as to liability, for amounts demanded by an insured which are not supported by facts regarding damages." <i>Fetch</i> , 623 N.W.2d at 366. Further, an insurer has no duty to provide a defense in an action in which the insured cannot possibly be liable. <i>Id.</i> at 362. Also, lack of knowledge of an adverse effect from the claims adjustment process absolves an insurer of bad faith. <i>Seifert</i> , 497 N.W.2d at 698 (N.D. 1993).

First-Party Claims

(A) Non-Liability Insurance Policies

OHIO	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under common law. Ohio courts recognizes bad faith actions against insurers for breaching the duty to act in good faith in the handling and payment of the claims of insureds. <i>Hoskins v. Aetna Life Ins. Co.</i>, 452 N.E.2d 1315, 1319 (Ohio 1983). A cause of action exists for the insurer's breach of its duty to act in good faith in accepting reasonable settlements and handling the claims of its own insured. <i>Id.</i></p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The mere fact that an insurer refuses to settle within policy limits is not conclusive of the insurer's bad faith. <i>Helmick v. Republic-Franklin Ins. Co.</i>, 529 N.E.2d 464, 465 (Ohio 1988); <i>Hoskins, supra</i>. An insurer fails to exercise good faith when processing of a claim of its insured if its refusal to pay the claim is not based on a reasonable justification. <i>Zoppo v. Homestead Ins. Co.</i>, 644 N.E.2d 397, 400 (Ohio 1994), <i>cert. denied</i>, 516 U.S. 809 (1995). See also <i>Penton Media, Inc. v. Affiliated FM Ins. Co.</i>, 2007 WL 2332323 at *5 (6th Cir. 2007). The insurer's intent in processing the claim is not an element of the reasonable justification standard. <i>Zoppo, supra</i>. A lack of reasonable justification exists where an insurer refuses to pay a claim in an arbitrary or capricious manner. <i>Schrock v. Feazel Roofing Co.</i>, 2003 WL 21652162 at *6 (Ohio Ct. App. July 9, 2003). An insurer is not reasonably justified in denying a claim if it failed to conduct an adequate investigation. <i>Zoppo</i>, 644 N.E.2d at 400.</p>
	<p>What Damages Can Be Recovered?</p>	<p>The insurer will be liable for compensatory damages that flow from the bad faith breach. <i>Zoppo</i>, 644 N.E.2d at 402. In a claim for bad faith refusal to settle, the insurer is liable for the entire judgment against the insured, even though the judgment exceeds the policy limits. <i>Hoskins, supra</i>. Attorneys' fees may be an element of compensatory damages if a jury finds that punitive damages are warranted. <i>Zoppo, supra</i>. Punitive damages are recoverable if the insured can prove the insurer acted with actual malice, fraud, or insult. <i>Zoppo, supra; Hoskins, supra</i>. The jury must determine the amount of punitive damages. <i>Zoppo, supra</i>.</p>

(B) Liability Insurance Policies

<p>Can The Insured Assert a Bad Faith Claim?</p>	<p>YES, under common law. An insured can bring a cause of action for the tort of bad faith based on an insurer's failure to act in good faith in not settling a claim against its insured within policy limits. <i>Hart v. Republic Mut. Ins. Co.</i>, 87 N.E. 2d 347, 349 (Ohio 1949). See also <i>Essad v. Cincinnati Cas. Co.</i>, 2002 WL 924439 at *6 (Ohio Ct. App. Apr. 16, 2002) (considering an insured's claim to recover uninsured motorist benefits).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The insured must establish that the insurer had no reasonable justification for its handling of the claim or refusal to settle a claim, and that it was arbitrary and capricious. <i>Hart</i>, 87 N.E. 2d at 349.</p>
<p>What Damages Can Be Recovered?</p>	<p>Compensatory damages, punitive damages, and attorneys' fees are all available to the same extent as in claims asserted against a non-liability insurer. <i>Digital & Analog Design Corp. v. N. Supply Co.</i>, 590 N.E.2d 737, 742 (Ohio 1992) <i>rejected on other grounds, Zoppo</i>, 644 N.E.2d at 397. Compensable loss must be shown before attorneys' fees or punitive damages can be awarded. <i>Id.</i> The plaintiff must establish that the defendant acted with sufficient malice to justify punitive damages in order to obtain an award of attorneys' fees. <i>Id.</i></p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. A third party has no cause of action for bad faith against another party's insurer. <i>Siemientkowski v. State Farm Ins. Co.</i>, 2005 WL 1994486 at *5 (Ohio Ct. App. 2005) (considering action brought by insured homeowners against insurer and third-party insurer for loss of use of property); <i>See v. Nationwide Mut. Ins. Co.</i>, 2001 WL 458673 at *1 (Ohio Ct. App. 2001). An insurance company's duty to act in good faith in handling claims runs only from the insurer to the insured, not to third parties. <i>Siemientkowski, supra</i>. However, an injured third party who obtains a judgment against a tortfeasor and becomes a judgment creditor may sue an insurer on the judgment. <i>International EPDM Rubber Roofing Sys., Inc. v. Admiral Ins. Co.</i>, 114 F.3d 1187 (6th Cir. 1997)(table reference). By statute, a third-party judgment creditor may sue an insurer directly to collect a judgment obtained in a declaratory action. OHIO REV. CODE ANN. § 2721.02.</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES, but an insurer may contractually prohibit assignment of benefits under an insurance policy. <i>International EPDM Rubber Roofing Sys., Inc. v. Admiral Insurance Co.</i>, <i>supra</i>. A third party can sue an insurer in its own right only if the third party has first obtained an adjudicated excess judgment against the insured first. <i>Id.</i>; <i>Calich v. Allstate Ins. Co.</i>, 2004 WL 626143 at *2 (Ohio Ct. App. 2004); <i>Romstadt v. Allstate Ins. Co.</i>, 59 F.3d 608, 615 (6th Cir. 1995). An injured party must obtain a judgment against the alleged tortfeasor before commencing suit against the insurer. <i>International EPDM Rubber Roofing Sys. Inc., supra</i>. A judgment creditor may sue an insurer under Ohio law, but a settlement agreement alone does not entitle an allegedly injured party to recover from a tortfeasor's insurer. <i>Id.</i></p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. An excess insurer is subrogated to the rights of the insured against a primary insurer and may maintain an action for breach of the primary carrier's good faith duty to settle and defend. <i>Centennial Ins. Co. v. Liberty Mut. Ins. Co.</i>, 404 N.E.2d 759, 762 (Ohio 1980). However, an insurer will not be liable for bad faith for a refusal to negotiate if an insurer does a thorough investigation of the claim and engages in intensive negotiations. <i>Id.</i></p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can defend a bad faith claim on the basis that the statute of limitations bars the action. <i>Beever v. Cincinnati Life Ins. Co.</i>, 2003 WL 21321428 at *10 (Ohio Ct. App. 2003) (citing <i>United Dept. Stores Co. No. 1 v. Cont'l Cas. Co.</i>, 534 N.E.2d 878, 880 (Ohio 1987)). An action alleging that an insurer acted in bad faith in handling an insurance claim is governed by the four year statute of limitations for torts rather than any limitation that might be in the policy. <i>Id.</i></p> <p>Bad faith claims involving medical insurance plans are pre-empted by ERISA if the plans are considered to be employee benefit plans. <i>Community Hosp. v. Pierce</i>, 1994 WL 579842 at *6 (Ohio Ct. App. 1994). <i>See also Fugarino v. Hartford Life and Acc. Ins. Co.</i>, 969 F.2d 178, 186 (6th Cir. 1992), <i>cert. denied</i>, 507 U.S. 966 (1993). Insurers may also deny liability on the basis that conditions precedent to coverage did not occur, or coverage was voided based on material misrepresentations or omissions by the insured during the application process. <i>Pigg v. Commonwealth Life Ins. Co.</i>, 1996 WL 11239 at *2 (Ohio Ct. App. 1996).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">OKLAHOMA</p> <p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. In Oklahoma an insurer has an implied duty to deal fairly and act in good faith with its insured, and the violation of this duty gives rise to a tort action. <i>Christian v. Am. Home Assurance Co.</i>, 1977 OK 141, 577 P.2d 899, 904 (Okla. 1977). Oklahoma adopted an Unfair Claims Settlement Practices Act, 36 OKLA. STAT. ANN. § 1250.5 (2007), but the Oklahoma Supreme Court held that there is not a private cause of action against an insurer that violates this act. <i>Walker v. Chouteau Lime Co.</i>, 849 P.2d 1085, 1086 (Okla. 1993).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Tort liability may be imposed only when the insured makes a clear showing that the insurer withheld payment unreasonably and in bad faith. <i>Christian v. American Home Assurance Co.</i>, 577 P.2d at 905. Oklahoma's Unfair Claims Settlement Practices Act lists a number of acts by an insurer which may constitute a violation. See 36 OKLA. STAT. ANN. § 1250.5 (2007).</p>
<p>What Damages Can Be Recovered?</p>	<p>Consequential and punitive damages, as well as attorneys' fees, may be recovered for breach of the insured's duty to act in good faith with the insured. <i>Christian v. Am. Home Assurance Co.</i>, 577 P.2d at 904. Oklahoma's punitive damage statute allows recovery of punitive damages limited to the greater of the amount of actual damages awarded or the statutory cap, if the insurer has engaged in conduct evincing a wanton or reckless disregard for the rights of others, oppression, fraud or malice. <i>Continental Trend Res., Inc. v. OXY USA Inc.</i>, 101 F.3d 634, 644 (10th Cir. 1996), cert. denied, 520 U.S. 1241 (1997) (citing <i>Capstick v. Allstate Ins. Co.</i>, 998 F.2d 810, 819 (10th Cir. 1993)); 23 OKLA. STAT. ANN. § 9.1 (2007). The Statute sets forth three separate caps depending on the degree of scienter involved in the bad faith claim. See 23 OKLA. STAT. ANN. § 9.1 (2007).</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Insurer can be held liable for breach of the duty of good faith and fair dealing implied in every insurance contract. <i>Badillo v. Mid Century Ins. Co.</i>, 121 P.3d. 1080, 1093 (Okla. 2005). The Supreme Court of Oklahoma has ruled that, when dealing with liability policies the insured's interests must be given faithful consideration and the insurer must treat a claim being made by a third party against its insured "as if the insurer alone were liable for the entire amount" of the claim. <i>Am. Fid. & Cas. Co. v. Jones Trucking Co.</i>, 321 P.2d 685, 687 (Okla. 1957), overruled on other grounds, <i>Badillo</i>, 121 P.3d at 1080. In determining whether an offer should be accepted or rejected, the insurer may consider to its own interests, but its failure to give equal consideration to the interests of the insured constitutes bad faith. <i>Id.</i></p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The minimum level of culpability necessary for an insurer to be liable is more than simple negligence, but less than the reckless conduct necessary to sanction a punitive damage award against an insurer. <i>Badillo</i>, 121 P.3d at 1094. The essential elements an insured must show to make out a <i>prima facie</i> case are: (1) insured was covered under the insurance policy; (2) the actions of insurer were unreasonable under the circumstances; (3) insurer failed to deal fairly and act in good faith with insured in the handling of insured's case; and (4) the breach or violation of the duty of good faith and fair dealing was the direct cause of any damages sustained by insured. <i>Badillo</i>, 121 P.3d at 1093.</p>
<p>What Damages Can Be Recovered?</p>	<p>An insurer's bad faith renders it liable to the insured for any resulting damage if the judgment against the insured exceeds the policy limits. <i>Carney v. State Farm Mut. Auto. Ins. Co.</i>, 877 P.2d 1113, 1115 (Okla. 1994) (citing <i>American Fid. & Cas. Co. v. Jones Trucking Co.</i>, 321 P.2d 685, 688 (Okla. 1957)). 23 OKLA. STAT. ANN. § 9.1 (2007) provides that a jury may award punitive damages if it finds, by clear and convincing evidence, that an insurer has recklessly disregarded its duty to deal fairly and act in good faith with its insured or an insurer has intentionally and with malice breached said duty. See also <i>Badillo</i>, 121 P.3d at 1105-06. The Statute provides that a jury may award damages up to the greater of the amount of actual damages awarded or the statutory cap, setting forth three separate caps depending on the degree of scienter involved in the bad faith claim. See 23 OKLA. STAT. ANN. § 9.1 (2007).</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. The Supreme Court of Oklahoma has ruled that the duty of dealing fairly and acting in good faith with the insured arises from the contractual relationship, and in the absence of a contractual relationship an insurer has no duty to a third party that can be breached. <i>Allstate Ins. Co. v. Amick</i>, 680 P.2d 362, 364 (Okla. 1984); <i>accord Badillo</i>, 121 P.3d at 1080, 1093 (Okla. 2005) (noting that no duty of good faith and fair dealing are owed to third-party claimants).</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>UNDECIDED. The Oklahoma Court of Appeals noted that other jurisdictions allow assignment of a bad faith claim to a third party, but did not rule on whether such assignments are permissible in Oklahoma. <i>Tyson v. Casualty Corp. of Am., Inc.</i>, 560 P.2d 238, 239 (Okla. Civ. App. 1976).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. Oklahoma courts have ruled that an excess carrier may recover on an equitable subrogation theory from a primary carrier for a bad faith failure to settle a claim within the primary policy limits, but the excess insurer's rights cannot be greater than the insured's. <i>Republic Underwriters Ins. Co. v. Fire Ins. Exch.</i>, 655 P.2d 544, 545 (Okla. 1982).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>Oklahoma courts have ruled that insurers have a right to dispute questionable claims, and an insurer may assert as a defense that a legitimate dispute existed and that the insurer acted reasonably in regard to the insured's claim. <i>Christian v. American Home Assurance Co.</i>, 577 P.2d 899, 905 (Okla. 1977). Oklahoma has rejected the notions of comparative bad faith and reverse bad faith as defenses. <i>First Bank of Turley v. Fidelity & Deposit Ins. Co.</i>, 928 P.2d 298, 308 (Okla. 1996).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

OREGON	Can the Insured Assert a Bad Faith Claim?	YES. An insurer's bad faith refusal to pay policy benefits to its insured sounds in contract and is not actionable in tort. There is no private right of action under the Oregon Unfair Claim Settlement Practices Act, OR. REV. STAT. § 746.230. <i>See, Richardson v. Guardian Life Ins.</i> , 984 P.2d 917, 923 (Or. 1999).
	If So, What Is the Insured's Burden of Proof?	Insured must establish that the insurer knowingly acted in "bad faith" with respect to one or more of its obligations under the insurance contract. <i>Employees' Fire Ins. Co. v. Love It Ice Cream Co.</i> , 670 P.2d 160, 164 (Or. 1988).
	What Damages Can Be Recovered?	In bad faith actions deriving from contract, an insurer is liable for the "benefit of the bargain." <i>N.W. Pump & Equip. Co. v. Am. States Ins. Co.</i> , 925 P.2d 1241, 1243-44 (1996) (citing <i>Corder v. A & J Lumber Co., Inc.</i> , 354 P.2d 807, 810 (Or. 1960)). An insured can recover coverage under the terms of the policy as well as any consequential damages. <i>See id.</i> at 810. Breach of contract damages for bad faith conduct by the insurer may include policy limits plus any amount expended by the insured to gain recovery (typically attorneys' fees). <i>See OR. REV. STAT. §742.061.</i>

(B) Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?	YES , in contract and in tort at common law. <i>Radcliffe v. Franklin Nat'l Ins. Co. of New York</i> , 298 P.2d 1002, 1019 (Or. 1956) (language suggesting tort liability but declining to so hold); <i>Farris v. U.S. Fid. & Guar. Co.</i> , 587 P.2d 1015, 1018-19 (Or. 1978) (recognizing in dicta that an insurer in violation of its fiduciary responsibility to its insured may be liable in tort for bad faith but declining to so hold); <i>Georgetown Realty, Inc. v. Home Ins. Co.</i> , 831 P.2d 7, 12 (Or. 1992) <i>Georgetown I</i> (holding that negligence standard for bad faith applies to failure to settle cases). On remand, court found that the insurer's conduct merited the award of punitive damages and attorneys' fees. <i>Georgetown Realty, Inc. v. Home Ins. Co.</i> , 833 P.2d 1333, 1335 (Or. 1992) <i>Georgetown II</i> .
If So, What Is the Insured's Burden of Proof?	The insured must prove by a preponderance of the evidence that the insurer failed to exercise due care in claim handling or negotiating a settlement under all the circumstances. <i>Georgetown. Id.</i> at 13.
What Damages Can Be Recovered?	Breach of contract damages for bad faith conduct by the insurer may include policy limits plus any amount the insured expended to gain recovery (typically attorneys' fees). <i>See OR. REV. STAT. § 742.061; Hardware Mut. Cas. Co. v. Farmers Ins. Exch.</i> , 474 P.2d 316, 321-22 (Or. 1970). Tort damages for bad faith can be awarded where the insurer fails to exercise due care in its handling of insured's claim or settlement negotiations. <i>Georgetown I</i> , 831 P.2d at 12. In order to recover punitive damages, the insured must prove, by a clear and convincing standard, that the insurer acted with malice or showed reckless and outrageous indifference to a highly unreasonable risk of harm and acted with a conscious indifference to the health, safety and welfare of others. OR. REV. STAT. §31.730. Punitive damage awards are subject to judicial review. OR. REV. STAT. § 31.730. <i>See also Georgetown II</i> , 833 P.2d at 1335.

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>YES. Rights of the parties in an action on an insurance policy are contractual and hence assignable. <i>Georgetown Realty, Inc. v. Home Ins. Co.</i>, 831 P.2d 7, 12 (Or. 1992) (citing <i>Groce v. Fid. Gen. Ins. Co.</i>, 448 P.2d 554, 557 (Or. 1968)); <i>Fick v. Dairyland Ins. Co.</i>, 601 P.2d 868, 870 (Or. 1979). The Oregon Unfair Claim Settlement Practices Act (OR. REV. STAT. § 746.230) does not permit a private right of action by a third party.</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>The assignee must prove by a preponderance of the evidence that the insurer breached the contract of insurance in claim handling or negotiating a settlement. <i>Groce v. Fid. Gen. Ins. Co.</i>, <i>supra</i>.</p>
<p>What Damages Can Be Recovered?</p>	<p>If the insurer is found to have acted in bad faith, an assignee may recover contractual damages and any judgment in excess of policy limits. <i>Fick v. Dairyland Ins. Co.</i>, 601 P.2d 868, 871 (Or. 1979). No showing of bad faith by the assignee is required to recover attorneys' fees. <i>Id.</i>; OR. REV. STAT. § 742.061.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. If an insurer fails to settle within the policy limits, an insured can assign its rights against the insurer to a judgment creditor of the insured. <i>Groce v. Fid. Gen. Ins. Co.</i>, 448 P.2d at 557.</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES. A primary insurer owes an excess insurer essentially the same duty of due diligence in claims handling and settlement negotiating as it owes to an insured—due care under all the circumstances. <i>Maine Bonding & Cas. Co. v. Centennial Ins. Co.</i>, 693 P.2d 1296, 1299 (Or. 1985) (citing <i>Kuzmanich v. United Fire and Cas.</i>, 410 P.2d 812, 813 (Or. 1966)). See also <i>Portland Gen. Elec. Co. v. Pac. Indem. Co.</i>, 574 F.2d 469 (9th Cir. 1978) (applying Oregon law).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>Material misrepresentation in the application by the insured (OR. REV. STAT. § 742.013); the claimant's lack of insurance coverage; negligence defenses (i.e., exercise of due care consistent with that of a prudent insurer) in third party cases, and reasonableness of insurer conduct and investigation in first party cases.</p>

First-Party Claims

(A) Non-Liability Insurance Policies

PENNSYLVANIA	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. 42 PA CONS. STAT. § 8371 authorizes a private cause of action, while motorists have a separate bad faith cause of action under the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 PA. C.S. §§ 1701 <i>et seq.</i></p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>In order to prevail on a bad faith claim under section 8371, an insured must present clear and convincing evidence that the insurer did not have a reasonable basis for denying benefits under the policy and the insurer knew of or recklessly disregarded its lack of a reasonable basis in denying the claim. <i>See Anderson v. Nationwide Ins. Enter.</i>, 187 F. Supp. 2d 447, 458 (W.D. Pa. 2002) (involving first party claim and uninsured motorist coverage). Bad faith is not defined in Section 8371. However, courts have defined "bad faith" by an insurer as any frivolous or unfounded refusal to pay proceeds of a policy. <i>Id.</i> (citing <i>Terletsky v. Prudential Property and Cas. Ins. Co.</i>, 649 A.2d 680 (Pa. Super. 1994), <i>app. denied</i>, 659 A.2d 560 (Pa. 1995)). The refusal need not be fraudulent. <i>Id.</i> An action for bad faith may extend to an insurer's investigative practices. <i>See generally O'Donnell v. Allstate Ins. Co.</i>, 734 A.2d 901 (Pa. 1999).</p>
	<p>What Damages Can Be Recovered?</p>	<p>42 PA CONS. STAT. § 8371 permits courts to award interest, punitive damages and attorneys' fees against insurers who have acted in "bad faith." Section 8371, which allowed an ERISA plan participant to recover punitive damages for bad faith conduct by an insurer, is preempted by ERISA. <i>See Barber v. Unum Life Ins. Co.</i>, 383 F.3d 134, 140-41 (3d Cir. 2004). Emotional distress damages cannot be recovered. <i>See Duffy v. Nationwide Mut. Ins. Co.</i>, 1993 WL 475501 at *4 (E.D. Pa. 1993). Punitive damages are circumscribed by the factors set forth in the Restatement (Second) of Torts. <i>Anderson v. Nationwide Ins. Enter.</i>, 187 F. Supp. 2d 447, 460 (W.D. Pa. 2002). Under this standard, punitive damages can be awarded for conduct that is outrageous because of the defendant's evil motive or his reckless indifference to the rights of others. <i>Id.</i> Conduct must be malicious, wanton, reckless willful or oppressive; the purpose of awarding punitive damages is to punish a defendant for outrageous conduct in reckless disregard of another's rights. <i>Id.</i></p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. 42 PA CONS. STAT. § 8371 authorizes a private cause of action. Additionally, Pennsylvania recognizes a common law excess verdict bad faith cause of action. <i>Schubert v. American Independent Ins. Co.</i>, 2003 WL 21466915 at *2 (E.D. Pa. 2003); <i>Cowden v. Aetna Cas. and Sur. Co.</i>, 134 A.2d 223, 227 (Pa. 1957) (involving action by insured against automobile public liability insurer). An insurer has an implied duty to act in good faith during the defense of an insured. <i>Cowden v. Aetna Cas. and Sur. Co.</i>, <i>supra</i>.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Pennsylvania statutory law does not differentiate between liability and non-liability insurance policies. <i>See above.</i></p>
<p>What Damages Can Be Recovered?</p>	<p>Pennsylvania statutory law does not differentiate between liability and non-liability insurance policies. <i>See analysis above.</i></p> <p>While not permitted under § 8371, compensatory damages can be recovered in common law claims. <i>Birth Ctr. v. St. Paul Co., Inc.</i>, 787 A.2d 376, 385 (Pa. 2001). In common law cases, an insurer may be liable for the entire amount of a judgment secured by a third party against the insured, regardless of any limitation in the policy, 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. <i>Cowden v. Aetna Cas. and Sur. Co.</i>, <i>supra</i>.</p>

Third-Party Claims

Can a Third Party Assert a Bad Faith Claim?	NO. A third party may not bring a direct action against an insurer absent an assignment. <i>Brown v. Candelora</i> , 708 A.2d 104, 108 (Pa. Super. 1998).
If So, What Is the Third Party's Burden of Proof?	See above.
What Damages Can Be Recovered?	See above.
Can the Insured Assign Rights to a Third Party?	YES. An insured's claims against his insurer for breach of contract and breach of fiduciary duty and his claims under § 8371 for punitive damages, attorneys' fees and interest are assignable. <i>Haugh v. AllState Ins. Co.</i> , 322 F.3d 227, 239 (3d Cir. 2003) (citing <i>Brown v. Candelora</i> , supra).
Excess Insurers	
Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	NO. The Supreme Court of Pennsylvania would decide that an excess insurer owes no direct duty of good faith to a primary insurer, as no duty runs in the opposite direction. <i>Greater N.Y. Mut. Ins. Co. v. N. River Ins. Co.</i> , 872 F. Supp. 1403, 1409 (E.D. Pa. 1995), <i>aff'd</i> , 85 F.3d 1088 (3d Cir. 1996).
Defenses	
What Defenses Can Be Asserted Against a Bad Faith Claim?	A bad faith claim cannot survive a determination that there was no duty to defend, as that is good cause to refuse to defend. <i>Frog, Switch & Mfg. Co., Inc., v. Travelers Ins. Co.</i> , 193 F.3d 742, 751 (3d Cir. 1999). Good faith is not a defense in the absence of good cause to refuse coverage. <i>Id.</i> (citing <i>Gedeon v. State Farm Mut. Auto. Ins. Co.</i> , 188 A.2d 320, 322 (Pa. 1963)). Insurers have prevailed when the factual circumstances of a claim for benefits made a dispute regarding its merits reasonable. A bad faith claim based upon an alleged delay in payment will not succeed if the delay was due to a continuing investigation of the claim or to simple negligence. See <i>Anderson v. Nationwide Ins. Enter.</i> , 187 F. Supp. 2d 447, 458 (W.D. Pa. 2002).

First-Party Claims

(A) Non-Liability Insurance Policies

PUERTO RICO	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. In Puerto Rico, insurance is governed by the Insurance Code, which prohibits unfair practices in claim adjustments and requires that claims be investigated, adjusted and resolved within forty-five (45) days after all the documents needed to resolve the claim have been submitted to the insurer. 26 P.R. LAWS ANN. § 2716a-b. The Insurance Code does not provide a direct remedy for violations of its provisions, leaving enforcement to the Insurance Commissioner. Puerto Rico courts have not decided whether a cause of action in tort for an insurer's wrongful refusal to pay an insurance claim, but the United States District Court has predicted that Puerto Rico courts would recognize bad faith actions against insurers. <i>Event Producers, Inc. v. Tyser & Co.</i>, 854 F. Supp. 35, 39 (D. Puerto Rico 1993), <i>aff'd</i>, 37 F.3d 1484 (1st Cir. 1994) (table reference).</p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>In finding that Puerto Rico's Supreme Court would recognize a bad faith action against an insurer, the United States District Court held that the standard would be conscious wrongdoing, reckless indifference or the lack of a reasonable basis for denying the claim. <i>Event Producers, Inc.</i>, 854 F. Supp. at 39. Under Civil Law, the equivalent of the English language concept of "bad faith" is "dolo," which entails a malicious intent to do wrong and a willful act, rather than mere negligence. <i>Id.</i></p>
	<p>What Damages Can Be Recovered?</p>	<p>Puerto Rican courts have not yet decided whether compensatory damages can be recovered for a tort claim. <i>Event Producers</i>, 854 F. Supp. at 35 (D. Puerto Rico 1993). The Insurance Code provides for administrative penalties and the possibility of the Insurance Commissioner refusing to renew, suspending or revoking the authority of any insurer that violates the term for resolution of claims. 26 P.R. LAWS ANN. § 2716a-b.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>MAYBE. Puerto Rican courts have not yet decided whether an insurer's wrongful refusal to pay an insurance claim states a cause of action in tort. However, the United States District Court has predicted that Puerto Rican Courts would recognize bad faith actions against insurers. <i>Event Producers</i>, 854 F. Supp. at 35.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>In finding that Puerto Rico's Supreme Court would recognize a bad faith action against an insurer, the United States District Court held that the standard would be conscious wrongdoing, reckless indifference or the lack of a reasonable basis for denying the claim. <i>Id.</i> Under Civil Law, the equivalent of the English language concept of "bad faith" is "dolo," which entails a malicious intent to do wrong and a willful act rather than mere negligence. <i>Event Producers, Id.</i> at 38.</p>
<p>What Damages Can Be Recovered?</p>	<p>Puerto Rico courts have not yet decided whether compensatory damages can be recovered in a cause of action for tort. <i>Id.</i> at 35.</p>

Third-Party Claims

Can a Third Party Assert a Bad Faith Claim?	YES. The provisions of the Insurance Code forbidding unfair practices in claim adjustments protect policyholders or third-party claimants. 26 P.R. LAWS ANN. § 2716a-b. The Insurance Code does not provide a direct remedy for violating of its provisions, leaving enforcement to the Insurance Commissioner.
If So, What Is the Third Party's Burden of Proof?	The burden of proof for a statutory action may be found in 26 P.R. LAWS ANN. § 2716a.
What Damages Can Be Recovered?	The Insurance Code does not provide a direct remedy for violations of its provisions, leaving enforcement to the Insurance Commissioner. The statute allows for administrative penalties.
Can the Insured Assign Rights to a Third Party?	Puerto Rican courts appear not to have addressed this issue.
Excess Insurers	
Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	Puerto Rico courts appear not to have addressed this issue.
Defenses	
What Defenses Can Be Asserted Against a Bad Faith Claim?	An insurer may assert that it has a statutory right to duly investigate claims. 26 P.R. LAWS ANN. § 2716a-b. It may also assert that it was not reckless, immoral or negligent in its investigation. <i>Event Producers</i> , 854 F. Supp. at 41.

First-Party Claims

(A) Non-Liability Insurance Policies

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">RHODE ISLAND</p> <p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Rhode Island recognizes a common law bad-faith claim. <i>Zarella v. Minn. Mut. Life Ins. Co.</i>, 824 A.2d 1249, 1261 (R.I. 2003). <i>See also Pace v. Ins. Co. of N. Am.</i>, 838 F.2d 572, 580 (1st Cir. 1988).</p> <p>Further, § 9-1-33 of the General Laws of Rhode Island provides an insured with private cause of action for a wrongful and bad faith refusal to pay or settle a claim. R.I. STAT. ANN. § 9-1-33 (2007); <i>see also Lewis v. Nationwide Mut. Ins. Co.</i>, 742 A.2d 1207 (R.I. 2000) (discussing § 9-1-33). First party benefits under many work-related health, life and disability insurance policies are not proper subjects for bad faith claims because they are preempted by ERISA. <i>See Morris v. Highmark Life Ins. Co.</i>, 255 F. Supp. 2d 16, 25-27 (D.R.I. 2003). <i>See also Desrosiers v. Hartford Life and Ac Ins. Co.</i>, 354 F. Supp. 2d 119, 127-29 (D.R.I. 2005).</p> <p>The Rhode Island Supreme Court has stated that the Unfair Claims Settlement Practices Act, of which § 9-1-33 is part, "set[s] forth the statutory obligations imposed upon an insurer with respect to the handling of claims and that evidence of any breach thereof may be admissible in a civil action alleging bad faith." <i>Skaling v. Aetna Ins. Co.</i>, 799 A.2d 997, 1012 n.8 (R.I. 2002) (underinsured motorist insurance).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>In order to succeed on a common law bad faith claim in Rhode Island, an insured must demonstrate the absence of a reasonable basis for denying the policy benefits and that its insurer had knowledge of or recklessly disregarded the lack of a reasonable basis for denying the claim. <i>Zarella</i>, 824 A.2d at 1261.</p>
<p>What Damages Can Be Recovered?</p>	<p>An insured may recover consequential damages for economic loss and emotional distress. <i>Pace</i>, 838 F.2d at 579, quoting <i>Bibeault v. Hanover Ins. Co.</i>, 417 A.2d 313 (R.I. 1980) (uninsured motorist coverage). Punitive damages may be awarded when an insurer acts with malice, wantonness, or willfulness. <i>Pace</i>, 838 F.2d at 579. Although not in the context of a first party non-liability policy, the Rhode Island Supreme Court has stated that attorneys' fees can generally not be awarded for a common-law bad faith claim. <i>Insurance Co. of N. Am. v. Kayser-Roth Corp.</i>, 770 A.2d 403, 419 (R.I. 2001), quoting <i>Bibeault</i>, 417 A.2d at 319. Courts may award of compensatory damages, punitive damages and reasonable attorneys' fees. R.I. STAT. ANN. § 9-1-33 (2007).</p>

First-Party Claims

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Each insurer owes its insured a fiduciary obligation to protect him “from excess liability in the context of third-party claims.” <i>Skaling v. Aetna Ins. Co.</i>, 799 A.2d 997, 1005 (R.I. 2002) (involving underinsured motorist benefits). The duty of an insurer to deal fairly and in good faith with its insured is implied by law and any violation of this duty sounds in contract as well as in tort. <i>Bibeault</i>, 417 A.2d at 319. Further, an insured may bring a private cause of action for a wrongful and bad faith refusal to pay or settle a claim. R.I. STAT. ANN. § 9-1-33 (2007). Section 9-1-33 “set[s] forth the statutory obligations imposed upon an insurer with respect to the handling of claims and that evidence of any breach thereof may be admissible in a civil action alleging bad faith.” <i>Skaling</i>, 799 A.2d at 1012 n.8.</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>Bad faith involves more than simple negligence. <i>Voccio v. Reliance Ins. Companies</i>, 703 F.2d 1, 2 (1st Cir. 1983). In order to recover on a bad faith claim, “[a] plaintiff must demonstrate an absence of a reasonable basis in law or fact for denying the claim or an intentional or reckless failure to properly investigate the claim and subject the result to cognitive evaluation.” <i>Zarella</i>, 824 A.2d at 1261 (citing <i>Skaling</i>, 799 A.2d at 1012). An insurer is liable for a judgment exceeding the insurance “policy limits unless the insurer can demonstrate that it made a definite pretrial offer to settle the claim within the policy limits and that the claimant declined the offer.” <i>Skaling</i>, 799 A.2d at 1005-06. Bad faith exists when the insurer denied coverage or refused payment without having “a reasonable basis in fact or law for the denial.” <i>Id.</i> at 1010.</p>
<p>What Damages Can Be Recovered?</p>	<p>An insurer’s violation of its duty to act in good faith may result in an award of “consequential damages for economic loss and emotional distress and, when appropriate, punitive damages” <i>Bibeault</i>, 417 A.2d at 319. Punitive damages may be awarded when an insurer acts with malice, wantonness, or willfulness. <i>Id.</i> Attorneys’ fees may not be awarded for a common-law bad faith claim. Courts may award compensatory damages, punitive damages and reasonable attorneys’ fees. R.I. STAT. ANN. § 9-1-33 (2007)</p>

Third-Party Claims

RHODE ISLAND (cont'd)	<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. In order to recover on a bad faith claim, a plaintiff must be the insured. R.I. STAT. ANN. § 9-1-33 (2007); <i>Cianci v. Nationwide Ins. Co.</i>, 659 A.2d 662, 668 (R.I. 1995). A third party tort claimant has no right to assert a bad faith claim against the tortfeasor's liability carrier, since an insurer's "obligation to deal with settlement offers in good faith runs only to the insured." <i>Auclair v. Nationwide Mut. Ins. Co.</i>, 505 A.2d 431, 431 (R.I. 1986). However, an injured party, who has obtained a judgment against the insured, may sue the insurer in a separate action to collect on that judgment. R.I. STAT. ANN. 27-7-2 (2003); <i>Clauson v. New England. Ins. Co.</i>, 254 F.3d 331, 336 (1st Cir. 2001).</p>
	<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>See above.</p>
	<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
	<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. <i>Mello v. Gen. Ins. Co. of Am.</i>, 525 A.2d 1304, 1305-06 (R.I. 1987). The Rhode Island Supreme Court held that an insurer's fiduciary obligation to act in the insured's best interests and to protect the insured from excess liability "extends not only to the insurance company's own insured, but also . . . to a party to whom the insureds have assigned their rights." <i>Asermely v. Allstate Ins. Co.</i>, 728 A.2d 461, 464 (R.I. 1999).</p>
Excess Insurers		
	<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>Rhode Island courts appear not to have addressed this issue.</p>
Defenses		
	<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can defend a bad faith claim by demonstrating that it had a reasonable basis for denying the claim. <i>Asermely v. Allstate Ins. Co.</i>, 728 A.2d 461, 464 (R.I. 1999). A claim for bad faith cannot be stated when the insurer can demonstrate a reasonable basis for denying benefits. <i>Bibeault</i>, 417 A.2d at 319 (R.I. 1980). The insurer is entitled to dispute a claim if it is "fairly debatable." <i>Pace</i>, 838 F.2d at 581. A flawed investigation, without more, is insufficient to support a claim for bad faith. <i>Id.</i> at 584. Further, an insured must show intention or recklessness by the insurer. <i>Id.</i> An insurer is not liable for a judgment exceeding the policy limits if it can demonstrate that that it made a definite pretrial offer of settlement within the policy limits, which the claimant declined. <i>Skaling</i>, 799 A.2d at 1005-06.</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. South Carolina recognizes causes of action for breach of contract and tort for bad-faith refusal to pay first-party insurance benefits. <i>Nichols v. State Farm Mut. Auto. Ins. Co.</i>, 306 S.E.2d 616, 619 (S.C. 1983), preempted by <i>Duncan v. Provident Mut. Life Ins. Co.</i>, 427 S.E.2d 657, 659 (S.C. 1993) (holding that “tort created by <i>Nichols</i> is expressly preempted [by ERISA] when the bad faith claim arises under an employee benefit plan”); <i>Robertson v. State Farm Mut. Auto. Ins. Co.</i>, 464 F. Supp. 876, 880-83 (D. S.C. 1979) (applying South Carolina law). South Carolina’s Insurance Trade Practices Act and Claim Practices Act do not create private causes of action for first- or third-party claimants, but only entitle plaintiffs to administrative review before the Chief Insurance Commissioner. <i>Masterclean v. Star Ins. Co.</i>, 556 S.E.2d 371, 377 (S.C. 2001). See also <i>Bovis Lend Lease, Inc. v. Nat’l. Union Fire Ins. Co.</i>, 2007 WL 2022198 at *2 (D. S.C. 2007) (noting South Carolina’s Insurance Trade Practices Act and Claims Practices Act do not allow private causes of action based on defendant’s failure to settle policy claims, but rather provide an administrative remedy). South Carolina’s Insurance Trade Practices Act, S.C. CODE ANN. §§ 38-57-10, et. seq. (2003), prohibits an insurer from misrepresenting the provisions of an insurance policy with the intent of settling the claim on less beneficial terms than the actual policy provisions. The Claim Practices Act, S.C. CODE ANN. §§ 38-59-20 et. seq., provides administrative review and statutory penalties for the following types of improper claim practices: (1) misrepresenting or providing deceptive or misleading information about policy provisions relating to coverage; (2) failing to promptly acknowledge communications with respect to claims; (3) failing to implement reasonable standards for the prompt investigation and settlement of claims; (4) not attempting to settle claims in which liability has become reasonably clear; (5) compelling policyholders or claimants to file suit to recover amounts reasonably due with respect to claims arising under its policies by offering substantially less than the amounts ultimately recovered through suits; (6) basing offers to settle claims for amounts less than otherwise reasonably would be due on the probability that the policyholders would be required to incur attorneys’ fees to recover the amount reasonably due; (7) invoking policy defenses or threatening to rescind the policy, without a reasonable expectation of prevailing, for the purpose of reducing or discouraging a claim; and (8) any other practice constituting an unreasonable delay or failure to pay a claim arising under the policy.</p>
<p>If So, What Is the Insured’s Burden of Proof?</p>	<p>In a tort action, the insured must demonstrate that the insurer engaged in bad faith or took unreasonable action in processing a claim under a mutually binding insurance contract. <i>Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.</i>, 586 S.E.2d 586, 588 (S.C. 2003) (citing <i>Nichols v. State Farm Mut. Auto. Ins. Co.</i>, 306 S.E.2d 616, 619 (S.C. 1983)).</p>
<p>What Damages Can Be Recovered?</p>	<p>If an insured demonstrates that an insurer acted unreasonably or in bad faith in processing a claim under an insurance contract, the insured can recover consequential damages in a tort action. <i>Howard v. State Farm Mut. Auto. Ins. Co.</i>, 450 S.E.2d 582, 586 (S.C. 1994). The insured can recover punitive damages if it can demonstrate that the insurer’s actions were willful or in reckless disregard of the insured’s rights. <i>Howard, supra</i>.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. An insurer’s unreasonable refusal to accept an offer of settlement will render it liable to the insured in tort for any excess judgment against the insured above the policy limits. <i>Miles v. State Farm Mut. Ins. Co.</i>, 120 S.E.2d 217, 220 (S.C. 1961). To collect the excess judgment resulting from the insurer’s failure to settle a claim against its insured within the policy limits, two elements must be present: (1) the insurer must have had an opportunity to settle the case against its insured within the policy limits; and (2) the insurer must have acted unreasonably or in bad faith in failing to settle. <i>Tyger River Pine Co. v. Md. Cas. Co.</i>, 170 S.E. 346, 348-49 (S.C. 1933).</p>
<p>What Damages Can Be Recovered?</p>	<p>The insurer is liable in tort for all consequential damages, and actual damages are not limited by the contract. <i>Howard, supra</i>. Additionally, if the insured can demonstrate the insurer’s actions were willful or in reckless disregard of the insured’s rights, punitive damages can be recovered. <i>Id.</i></p>

Third-Party Claims

SOUTH CAROLINA (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. South Carolina does not recognize a bad faith cause of action against an insurer by a third-party claimant. <i>Kleckley v. N.W. Nat'l Cas. Co.</i> , 498 S.E.2d 669, 670 (S.C. Ct. App. 1998), <i>aff'd</i> , 526 S.E.2d 218 (S.C. 2000). However, the South Carolina Supreme Court held that a spouse had standing to assert a bad faith claim based on the insurer's failure to pay the expenses of her husband, who was the insured. <i>Ateyeh v. Volkswagen of Florence, Inc.</i> , 341 S.E.2d 378, 379 (S.C. 1986). The Claim Practices Act, S.C. CODE ANN. §§ 38-59-20 et. seq., entitles third party plaintiffs to administrative remedies, but does not create a private cause of action.
	If So, What Is the Third Party's Burden of Proof?	See above.
	What Damages Can Be Recovered?	See above.
	Can the Insured Assign Rights to a Third Party?	YES. Voluntary assignments of bad faith property damage and tort claims are permitted in South Carolina. <i>Whittington v. Nationwide Mut. Ins. Co.</i> , 208 S.E.2d 529, 530 (S.C. 1974).
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	South Carolina courts appear not to have addressed this issue. South Carolina recognizes a bad faith cause of action by insureds or their assignees, but it has not extended this cause of action against a primary insurer to third-party claimants or excess insurers. South Carolina recognizes equitable subrogation as a principle of natural justice, although it has not decided whether equitable subrogation applies to cases between excess and primary insurance carriers. The U.S. District Court for the District of South Carolina has predicted the South Carolina Supreme Court would apply the principles of equitable subrogation to cases between excess and primary carriers. <i>Royal Ins. Co. of Am. v. Reliance Ins. Co.</i> , 140 F. Supp. 2d 609, 618 (D. S.C. 2001).
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	The South Carolina Supreme Court has held that first party benefits under many work-related health, life and disability insurance policies are not proper subjects of bad faith claims because they are preempted by ERISA. <i>Duncan v. Provident Mut. Life Ins. Co.</i> , 427 S.E.2d 657, 659 (S.C. 1993).

First-Party Claims

(A) Non-Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?	YES. In South Dakota, an insured can bring a cause of action against an insurance company for bad faith failure to pay a claim. An insurer's violation of its duty of good faith and fair dealing is considered both a tort and a breach of contract. <i>Stene v. State Farm Mut. Auto. Ins. Co.</i> , 583 N.W.2d 399, 403 (S.D. 1998).
If So, What Is the Insured's Burden of Proof?	Bad faith is an intentional tort. The test for establishing a bad faith cause of action against an insurer is: (1) absence of a reasonable basis for denying policy benefits, or failing to comply with a duty under the insurance contract; and (2) the knowledge or reckless disregard of the lack of a reasonable basis for denial. <i>Stene v. State Farm Mut.</i> , <i>supra</i> . Knowledge of the lack of a reasonable basis may be imputed to an insurance company where there is a reckless disregard of or lack of a reasonable basis for denial, or a reckless indifference to facts or to proofs submitted by the insured. <i>Id.</i>
What Damages Can Be Recovered?	Under South Dakota law, an award of punitive damages for bad faith in handling an insurance claim must be supported by evidence of actual or presumed malice. <i>Kirchoff v. Am. Cas. Co.</i> , 997 F.2d 401, 406 (8th Cir. 1993); <i>see also Athey v. Farmers Ins. Exch.</i> , 234 F.3d 357, 362 (8th Cir. 2000). Malice sufficient to justify an award of punitive damages may be inferred from the challenged behavior if the liable party's actions were willful or wanton. <i>Id.</i> at 362. Attorneys' fees are not awarded in tort actions challenging the insurers' handling of insurance claims. <i>Kirchoff v. Am. Cas. Co.</i> , <i>supra</i> . To recover damages for emotional distress in South Dakota, a plaintiff must establish that he sustained a pecuniary loss because of the bad faith of an insurer, and show manifestation of physical symptoms. <i>Stene v. State Farm Mut.</i> , <i>supra</i> ; <i>Athey v. Farmers Ins. Exch.</i> , <i>supra</i> .

(B) Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?	YES. South Dakota recognizes an insured's right to bring an action for bad faith against its liability insurer. <i>Kunkel v. United Sec. Ins. Co.</i> , 168 N.W.2d 723 (S.D. 1969); <i>Kirchoff v. Am. Cas.</i> , <i>supra</i> .
If So, What Is the Insured's Burden of Proof?	The insured has the burden of establishing bad faith by a preponderance of the evidence. <i>Kunkel v. United Sec. Ins. Co. of N.J.</i> , 168 N.W.2d 723 (S.D. 1969).
What Damages Can Be Recovered?	See above.

Third-Party Claims

SOUTH DAKOTA (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. A third party cannot maintain a direct action against an insurer without first obtaining a judgment against the tortfeasor. <i>Railsback v. Mid-Century Ins. Co.</i> , 680 N.W.2d 652, 656 (S.D. 2004); <i>Trouten v. Heritage Mut. Ins. Co.</i> , 632 N.W.2d 856, 861 (S.D. 2001).
	If So, What Is the Third Party's Burden of Proof?	See above.
	What Damages Can Be Recovered?	See above.
	Can the Insured Assign Rights to a Third Party?	YES. An insured can assign rights to a third party. <i>Am. States Ins. Co. v. State Farm Mut. Auto. Ins. Co.</i> , 6 F.3d 549, 551-52 (8th Cir. 1993).
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES. An excess insurer can assert a bad faith claim against a primary carrier. However, an insurer is not liable for bad faith where the failure to settle is due to a mere error judgment, lack of foresight or negligence. In determining whether the insurer was guilty of bad faith, however, its negligence, if any, is a factor to be considered. <i>N. River Ins. Co. v. St. Paul Fire and Marine Ins. Co.</i> , 600 F.2d 721, 724 (8th Cir. 1979).
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	An insurance company may challenge claims that are fairly debatable and will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis, or has recklessly disregarded the lack of a reasonable basis for a denial, or shown a reckless indifference to facts or proofs submitted by the insured. <i>Stene.</i> , 583 N.W.2d at 403. Merely being dilatory or slow does not amount to bad faith. <i>Arp v. Aon/Combined Ins. Co.</i> , 300 F.3d 913, 916 (8th Cir. 2002). An insurer is not liable for bad faith where the failure to settle is due to a mere error judgment, lack of foresight or negligence. <i>N. River, supra.</i> However, in determining whether the insurer was guilty of bad faith its negligence, if any, is a factor to be considered. <i>Id.</i> Moreover, the insured has the burden of establishing that the insurer's bad faith was a proximate cause of damages to the insured. <i>Id.</i>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Tennessee's bad faith statute provides that, when an insurance company refuses to pay a loss under an insurance policy within sixty days after a demand has been made by the policy/fidelity bond holder, that insurance company "shall be liable to pay" the holder of the policy/fidelity bond, "in addition to the loss and interest thereon, a sum not exceeding 25% on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss (a) was not in good faith, and (b) that such failure to pay inflicted additional expense, loss, or injury including attorney fees upon" the holder of the policy/fidelity bond; and "provided further, that (c) such additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury including attorneys' fees thus entailed." TENN. CODE ANN. § 56-7-105</p> <p>Section 56-7-105 is the exclusive remedy for an insurer's bad faith refusal to pay an insurance policy. <i>Mathis v. Allstate Ins. Co.</i>, 959 F.2d 235 at *4 (6th Cir. 1992) (unpublished); <i>but see Sparks v. Allstate Ins. Co.</i>, 98 F. Supp. 2d 933, 938 (W.D. Tenn. 2000) (holding that Tennessee Consumer Protection Act also may apply to insurance company's bad faith denial of an insurance claim); <i>Myint v. Allstate Ins. Co.</i>, 970 S.W.2d 920, 925 (Tenn. 1998) (Tennessee Consumer Protection Act applies to acts and practices of insurance companies).</p>
<p>If So, What is the Insured's Burden of Proof?</p>	<p>"[B]efore there can be a recovery of penalty under TENN. CODE ANN § 56-7-105: (1) the policy of insurance must, by its terms, have become due and payable; (2) a formal demand for payment must have been made; (3) the insured must have waited 60 days after making his demand before filing suit (unless there was a refusal to pay prior to the expiration of the 60 days); and (4) the refusal to pay must not have been in good faith." <i>Farmers Mut. of Tenn. v. Athens Ins. Agency</i>, 145 S.W.3d 566, 569-70 (Tenn. Ct. App. 2004). Further, the "burden of proving bad faith of an insurance company is on the plaintiff. . . ." <i>Id.</i> at 570 (citation omitted).</p>
<p>What Damages Can Be Recovered?</p>	<p>Under Tennessee's bad faith statute, TENN. CODE ANN. § 56-7-105, the insured can recover a sum not exceeding 25% on the liability for the loss in addition to the amount of the loss and interest thereon.</p>

TENNESSEE

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>NO. The Tennessee Supreme Court has held that Tennessee's bad faith statute is not applicable to liability insurance. <i>Tennessee Farmers Mut. Ins. Co. v. Cherry</i>, 374 S.W.2d 371, 372 (Tenn. 1964); <i>Hurst Co. v. Bituminous Ins. Cos.</i>, 1998 WL 283069 at *8 n.3 (Tenn. Ct. App. May 28, 1998) ("[I]t appears that this statutory penalty is not applicable to contracts of liability insurance . . ."); <i>Genesco, Inc. v. Liberty Mut. Ins. Co.</i>, 235 F. Supp. 363, 365 (M.D. Tenn. 1964) (bad faith statute inapplicable to liability insurance policy); <i>Burnette v. Grande Mut. Cas. Co.</i>, 311 F. Supp. 873, 875 (E.D. Tenn. 1970) (bad faith statute "does not apply to an insurance company which fails to settle a claim of a third party within the policy limits so as to protect the insured from a judgment in excess of the policy limits").</p>
<p>If So, What is the Insured's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>

Third-Party Claims

TENNESSEE (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. Under Tennessee common law, a judgment creditor of an insured cannot assert a bad faith claim against the insurer. <i>Dillingham v. Tri-State Ins. Co.</i> , 381 S.W.2d 914, 915 (Tenn. 1964); <i>Clark v. Hartford Accident & Indem. Co.</i> , 61 Tenn. App. 596, 602, 457 S.W.2d 35, 38 (Tenn. Ct. App. 1970).
	If So, What Is the Third Party's Burden of Proof?	See above.
	What Damages Can Be Recovered?	See above.
	Can the Insured Assign Rights to a Third Party?	NO. A judgment debtor/insured cannot assign a bad faith claim to judgment creditor third party. <i>Dillingham v. Tri-State Ins. Co.</i> , 381 S.W.2d 914, 918 (Tenn. 1964).
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	Tennessee courts appear not to have addressed this issue.
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	Specific defenses are not mentioned in published case law. However, a court recently held that "[A]n insurance company is entitled to rely upon available defenses and refuse payment if there is substantial legal grounds that the policy does not afford coverage for the alleged loss. If an insurance company unsuccessfully asserts a defense and the defense was made in good faith, the [bad faith] statute does not permit the imposing of the bad faith penalty." <i>Farmers Mut. of Tenn. v. Athens Ins. Agency</i> , 145 S.W.3d 566, 570 (Tenn. Ct. App. 2004) (citation omitted).

First-Party Claims

(A) Non-Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?

YES, under common law and statute. An insured can assert a tort claim against its insurer for breach of the common law duty of good faith and fair dealing. *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 212-13 (Tex. 1988). An insurer breaches its common law duty of good faith and fair dealing by denying or delaying payment of a claim when the insurer's liability has become reasonably clear, or by refusing to pay a claim without conducting a reasonable investigation. *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998).

An insured may sue an insurer for violating the Texas Insurance Code by "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." TEX. INS. CODE ANN. § 541.060 (2007) (formerly ART. 21.21 § 4(10), preempted for claims against health insurers by *Erwin v. Texas Health Choice*, 187 F. Supp. 2d 661, 664 (N.D. Tex. 2002); *Mid-Century Ins. Co. of Texas v. Boyte*, 80 S.W.3d 546, 549 (Tex. 2002)). An insured may also sue an insurer for failing to affirm or deny coverage within a reasonable time. TEX. INS. CODE ANN. § 541.060 et. seq.; *Johnson v. Essex Ins. Co.*, 2002 WL 112561 at *9 (Tex. App. 2002) (not designated for publication). Title 5 of the Texas Insurance Code defines unfair settlement practices in the insurance business as misrepresenting a fact or policy provision relating to coverage; failing to attempt to promptly settle a claim for which the insurer's liability has become reasonably clear; failing to promptly provide a reasonable explanation for the insurer's denial of a claim or offer to settle a claim; failing within a reasonable time to affirm or deny coverage of a claim to a policyholder; refusing to pay a claim without conducting a reasonable investigation with respect to the claim; as well as additional practices listed in the statute. TEX. INS. CODE ANN. § 541.060 et. seq.

An insured (and its customer in certain circumstances) may bring suit under the Texas Deceptive Trade Practices Act ("DTPA"), TEX. BUS. & COM. CODE ANN. § 17.46(b) (2007). TEX. INS. CODE ANN. § 541.151 et. seq; TEX. BUS. & COM. CODE ANN. § 17.46(b); *Omni Metals, Inc. v. Poe & Brown of Texas, Inc.*, 2002 WL 1331720 at *7-9 (Tex. Ct. App. 2002) (not designated for publication), on remand, 2005 WL 5163511 (Tex. Ct. App. 2005).

Section 542 of the Texas Insurance Code establishes procedures for the prompt payment of insurance claims and provides penalties and attorneys' fees where an insurer does not comply with the requirements of the article. TEX. INS. CODE ANN. § 542.051 et. seq (2005).

However, when judgment is entered and when the parties' only legal relationship is that of judgment creditor and judgment debtor, and the insurance code no longer applies, the insurer's good faith duties end. *Mid-Century*, 80 S.W.3d at 549.

If So, What Is the Insured's Burden of Proof?

An insured suing for the tort of bad faith has the burden of proving: (1) the absence of a reasonable basis for denying or delaying payment of the benefits of the policy; and (2) the insurer knew or reasonably should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim. *Aranda*, 748 S.W.2d at 213. An insurer does not breach its duty by delaying payment when there is a bona fide controversy as to liability. *Johnson*, 2002 WL 112561 at *5. Reasonableness is determined using an objective standard of whether a reasonable insurer under similar circumstances would have delayed or denied the claimant's benefits. *Id.*; *Aranda*, 748 S.W.2d at 213. A reasonable investigation of a claim requires that the insurer conduct further testing or investigation in response to a conflicting report before denying a claim. *Johnson*, 2002 WL 112561 at *9.

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 claim must have been covered by the policy in order to sustain a bad faith claim for the breach of the duty of good faith and fair dealing. *See id.*

First-Party Claims

(A) Non-Liability Insurance Policies

TEXAS (cont'd)

If So, What Is The Insured's Burden of Proof? (cont'd)

The statutory standard is identical to the common law bad faith standard, and requires proof that the insurer failed to make a good faith effort to effect a prompt, fair, and equitable settlement of an insured's claim with respect to which the insurer's liability has become reasonably clear. *MidCentury*, 80 S.W.3d at 549. Both the Texas Insurance Code and the Texas Deceptive Trade Practices Act require proof that the defendant's conduct was the cause in fact of the plaintiff's actual damages. *East Texas Med. Ctr. Reg'l Healthcare Sys. v. Lexington Ins. Co.*, 2007 WL 2048660 at *11 (E.D. Tex. 2007) (quoting *Blanchard v. State Farm Lloyds*, 206 F. Supp. 2d 840, 847 (S.D. Tex. 2001)).

To maintain a claim under Title 5 of the Texas Insurance Code, a party must establish: (1) a claim under an insurance policy; (2) the insurer's liability for the claim; (3) the insurer's failure to follow one or more sections of Section 542 with respect to the claim. TEX. INS. CODE ANN. § 542.051 *et. seq.* (2005).

What Damages Can Be Recovered?

For a breach of the duty of good faith and fair dealing, a party can recover exemplary damages and mental anguish damages upon a showing of the same elements that permit recovery of those damages in other tort actions. *Aranda*, 748 S.W.2d at 215; *Arnold v. Nat'l County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 168 (Tex. 1987). To recover punitive damages, the plaintiff must establish that the insurer was aware that its actions involved an extreme risk of harm to its insured and was nevertheless consciously indifferent to its insured's rights, safety or welfare. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 57 (Tex. 1997). Punitive damages are imposed only when the breach of the duty of good faith and fair dealing is accompanied by malicious, intentional, fraudulent or grossly negligent conduct. *State Farm Fire & Cas. Co.*, 963 S.W.2d 42, 47 (Tex. 1998). Punitive damages cannot be recovered without evidence of actual damages. *Saenz v. Fid. & Guar. Ins Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996).

Section 542 of the Texas Insurance Code provides penalties and the recovery of attorneys' fees from an insurer which has not complied with the requirements of the article. TEX. INS. CODE ANN. § 542.060 (2005).

First-Party Claims

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. An insured may assert a tort claim for breach of the insurer's duty of good faith and fair dealing with regard to a liability policy. <i>Butler & Binion v. Hartford Lloyd's Ins. Co.</i>, 957 S.W.2d 566, 570 (Tex. App. 1997). This duty results from an obligation imposed in law as a result of a special relationship between the parties that is governed or created by a contract. <i>Vaughan v. Hartford Cas. Ins. Co.</i>, 277 F. Supp. 2d 682, 689 (N.D. Tex. 2003); <i>State Farm Mut. Ins. Co. v. Zubiata</i>, 808 S.W.2d 590 (Tex. App. 1991), <i>rev'd on other grounds by Saenz v. Fid. & Guar. Ins. Underwriters</i>, 925 S.W.2d at 607. An insured may also bring a claim under section 541 of the Texas Insurance Code. TEX. INS. CODE ANN. § 541.060 <i>et. seq.</i>; <i>Vaughan</i>, 277 F. Supp. 2d at 689. See also section (A) above.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To establish an insurer's bad faith in handling a claim, an insured must prove that the insurer had no reasonable basis for denying the insurance claim, or that the insurer failed to determine whether there was any reasonable basis for denying the claim. <i>Butler & Binion</i>, 957 S.W.2d at 570 (Tex. App. 1997). An insurer must act within a reasonable time to affirm or deny coverage of a claim or submit a reservation of rights to the policyholder. <i>Comsys Info. Tech. Service v. Twin City Fire Ins. Co.</i>, 130 S.W.3d 181, 190 (Tex. App. 2003); TEX. INS. CODE ANN. § 541.060; see also <i>State Farm Mut. Auto. Ins. Co. v. Zubiata</i>, 808 S.W.2d 590, 597 (Tex. Ct. App. 1991), <i>rev'd on other grounds by Saenz v. Fid. & Guar. Ins. Underwriters</i>, 925 S.W.2d at 607. Proof of actual damages is required for claims under Section 541 of the Texas Insurance Code and Section 17 of the Deceptive Trade Practices Act. <i>Vaughan</i>, 277 F. Supp. 2d at 690. An insured may not prevail on a common law tort claim without first showing that the insurer breached the policy contract. <i>Id.</i> at 689.</p>
<p>What Damages Can Be Recovered?</p>	<p>Ordinary tort damages, including exemplary damages, can be recovered for a breach of the duty of good faith and fair dealing. <i>State Farm Mut. Auto. Ins. Co. v. Zubiata</i>, 808 S.W.2d at 597 (Tex. App. 1991), <i>rev'd on other grounds by Saenz v. Fid. & Guar. Ins. Underwriters</i>, 925 S.W.2d at 607 (Tex. 1996).</p>

Third-Party Claims

TEXAS (cont'd)

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO, for common law claims. Texas courts have held that a third party tort claimant does not generally have a direct cause of action for extra-contractual liability against a liability insurer at common law. <i>Jones v. CGU Ins. Co.</i>, 78 S.W.3d 626, 629 (Tex. App. 2002). The court reasoned that a tort claimant has no direct cause of action against the tortfeasor's insurer until the tortfeasor has been adjudged liable to the tort claimant. <i>Id.</i> (citing <i>Grasso v. Cannon Ball Motor Freight Lines</i>, 81 S.W.2d 482, 486 (Tex. 1935)). The court emphasized that Texas is not a direct action state and an insurer owes no duty to tort claimants with which it has no contract. <i>Id.</i> at 486.</p> <p>YES, for statutory claims. Section 541.151 of the Texas Insurance Code provides a cause of action for unlawful deceptive trade practices as defined under the Deceptive Trade Practices Act ("DTPA"), § 17.46(b). <i>Omni Metals, Inc. v. Poe & Brown of Texas, Inc.</i>, 2002 WL 1331720 at *9 (Tex. App. 2002), <i>on remand</i>, 2005 WL 5163511 (Trial Order) (Tex. D. Ct. 2005). Section 541.151 does not limit the right to bring a cause of action under DTPA to consumers. However, if the right to recover under a particular subsection of DTPA section 17.46(b) is limited to consumers then only a consumer can bring an action under section 541 for violating that statute. <i>Omni Metals, Inc.</i>, 2002 WL 1331720 at *9 Privity of contract with the defendant is not required for the plaintiff to be deemed a consumer. <i>Id.</i></p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>The statutory standard is identical to the common law bad faith standard, and requires proof that the insurer failed to make a good faith effort to effect a prompt, fair, and equitable settlement of an insured's claim with respect to which the insurer's liability has become reasonably clear. <i>See Boyte</i>, 80 S.W.3d at 549.</p>
<p>What Damages Can Be Recovered?</p>	<p>A third party may recover attorneys' fees under Texas Insurance Code section 541 and Deceptive Trade Practices Act section 17.46(b), upon a showing that defendant committed a "wrongful act". <i>Omni Metals, Inc.</i>, 2002 WL 1331720 at *10.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. A Texas court will honor an insured's assignment of its cause of action against its insurer for the negligent failure to settle a claim to a third-party claimant. The duty to use ordinary care in settlement negotiations also constitutes an implied contractual warranty in the insurance policy to exercise due care when investigating and defending claims against the insured, and because an action based on breach of this duty also sounds in contract, the action may be assigned. <i>Smith v. Transit Cas. Co.</i>, 281 F. Supp. 661, 668 (E.D. Tex. 1968), <i>aff'd</i>, <i>Transit Cas. Co. v. Smith</i>, 410 F.2d 210 (5th Cir. 1969).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. An excess insurer can bring an equitable subrogation claim against a primary insurer for mishandling the claim of an insured. <i>Am. Centennial Ins. Co. v. Canal Ins. Co.</i>, 843 S.W.2d 480, 482 (Tex. 1992).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can defend a bad faith claim by arguing it had a reasonable basis for denying the claim or delaying payment. <i>Parsaie v. United Olympic Life Ins. Co.</i>, 29 F.3d 219, 221 (5th Cir. 1994); <i>Crocker v. American Nat'l. Gen. Ins. Co.</i>, 211 S.W.3d 928, 936 (Tex. App. 2007). Even if it is later found to be erroneous, if it had a reasonable basis for denying or delaying payment of a claim, the insurer is not liable for the tort of bad faith. <i>Johnson v. Essex Ins. Co.</i>, 2002 WL 112561 at *5 (Tex. App. 2002). An insurer can defend a bad faith claim on the grounds that the insured made a material misrepresentation on the application for coverage, if the application is attached to the policy. <i>Riner v. Allstate Life Ins. Co.</i>, 131 F.3d 530, 537 (5th Cir. 1998).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Utah recognizes that an insurer has a duty to fairly bargain or reasonably settle under an insurance contract as part of its duty of good faith and fair dealing. <i>Black v. Allstate Ins. Co.</i>, 100 P.3d 1163, 1168 (Utah 2004) (insured sued homeowner and homeowner's insurer), <i>reh'g denied</i>, (Nov. 10, 2004). However, in the first-party context, breach of that duty gives rise only to a cause of action in contract and not in tort. <i>Beck v. Farmers Ins. Exch.</i>, 701 P.2d 795, 800 (Utah 1985) (uninsured automobile insurance, first-party dispute). <i>See also Billings v. Union Bankers Ins. Co.</i>, 918 P.2d 461, 468 (Utah 1996) (health insurance). Although the Utah Insurance Code proscribes unfair claim settlement practices, the statute does not create a private cause of action. UTAH CODE ANN. § 31A-26-303 (2003).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The refusal to bargain or settle, standing alone, may be sufficient to prove a breach. <i>Beck</i>, 701 P.2d at 798. Although bad faith claims arise from the duty of good faith and fair dealing in all contracts, Utah courts will look to "the tort cases that have described the incidents of the duty of good faith in the context of the first part insurance contract." <i>Id.</i> These duties include the duty to diligently investigate the facts to determine the validity of the claim and the duty to fairly evaluate an insured's claim. <i>Id.</i></p>
<p>What Damages Can Be Recovered?</p>	<p>Damages can include general damages, which flow naturally from the breach, and consequential damages, which were reasonably within the contemplation of or reasonably foreseeable by the parties at the time the contract was made. <i>Billings</i>, 918 P.2d at 466; <i>Beck</i>, 701 P.2d at 801. Consequential damages in excess of the policy limits can be recovered. <i>Id.</i> at 801-02. Damages for mental anguish may be recovered. <i>Id.</i> at 802. Attorney fees may be recovered as a result of an insurer's breach of an express or implied term of an insurance contract. <i>Billings</i>, 918 P.2d at 468; <i>see also Prince v. Bear River Mut. Ins. Co.</i>, 56 P.3d 524, 532 (Utah 2002), <i>reh'g denied</i>, (Aug. 30, 2002) (insurer ordered to pay for insured's losses plus statutory interest and attorney fees).</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Utah recognizes a cause of action in tort for breach of an insurer's obligation to bargain in a liability insurance context. <i>Ammerman v. Farmers Ins. Exch.</i>, 430 P.2d 576, 578 (Utah 1967). <i>See also Campbell v. State Farm Mut. Auto. Ins. Co.</i>, 65 P.3d 1134 (Utah 2001), <i>rev'd on other grounds</i>, 538 U.S. 408 (2003).</p>
<p>If so, What Is the Insured's Burden of Proof?</p>	<p>An insured must demonstrate that there is a "substantial likelihood of a judgment being rendered against the insured in excess" of the limits of the policy in order for an insurer to owe "its insured a duty to accept an offer of settlement within the policy limits." <i>Campbell v. State Farm Mut. Auto. Ins. Co.</i>, 840 P.2d 130, 138 (Utah Ct. App.), <i>cert. denied</i>, 853 P.2d 897 (Utah 1992). The standard for the insurer's conduct is "reasonableness." <i>Id.</i> at 138-39. An insurer must "be as zealous in protecting the interests of its insured as it would in looking after its own." <i>Ammerman</i>, 430 P.2d at 579. Various factors, including "the certainty or uncertainty as to the issues of liability, injuries, and damages, determine whether the insurer's conduct was reasonable." <i>Id.</i></p>
<p>What Damages Can Be Recovered?</p>	<p>Punitive damages can be awarded for claims involving third party coverage. <i>State Farm Mut. Auto. Ins. Co. v. Campbell</i>, 538 U.S. 408, 432 (2003); <i>see also Campbell</i>, 840 P.2d at 139. Punitive damages cannot be awarded in first party suits. <i>Gagon v. State Farm Mut. Auto. Ins. Co.</i>, 771 P.2d 325, 325 (Utah 1988). Attorneys' fees can be also awarded, since the insurance company promised to pay all sums which the insured became legally obligated to pay and the insured incurred legal expenses as a result of the accident. <i>Am. States Ins. Co., v. Walker</i>, 486 P.2d 1042, 1044 (Utah 1971).</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. Utah law limits the insurer's duty of good faith to insureds. <i>Sperry v. Sperry</i>, 990 P.2d 381 (Utah 1999); <i>Ammerman</i>, 430 P.2d at 578; <i>Pixton v. State Farm Mut. Auto. Ins. Co. of Bloomington Illinois.</i>, 809 P.2d 746, 749 (Utah App. 1991).</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>NO. Under Utah law, an insurer owes no duties to third parties. <i>Losser v. Atlanta Intern. Ins. Co.</i>, 615 F. Supp. 58 (D.C. Utah 1985). Moreover, as a general rule, a judgment creditor of an insured has no right to appropriate the tort claim of another, including a bad faith tort claim. <i>Ammerman</i>, 430 P.2d at 578.</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>Utah courts appear not to have addressed this issue.</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>If coverage was fairly debatable when it was denied, an insurer may not be held liable for breaching the implied covenant of good faith for wrongfully denying coverage of its insured's claim. <i>Saleh v. Farmers Ins. Exch.</i>, 2006 UT 20, ¶124, 133 P.3d 428, 435 (Utah 2006), <i>reh'g denied</i>, (Mar. 24, 2006); <i>Billing</i>, 918 P.2d at 465. Moreover, an insured cannot recover for bad faith for an insurer's failure to defend or indemnify if there was a bona fide dispute about the scope of the insurer's liability and bad faith was not asserted concerning the insurer's investigation or handling the claim. <i>Am. Ins. Co. v. Freeport Cold Storage, Inc.</i>, 703 F. Supp. 1475, 1478 (D. Utah 1987).</p>

UTAH (cont'd)

First-Party Claims

(A) Non-Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?	YES. Vermont recognizes a common law cause of action for the bad faith failure of an insurer to pay a claim filed by its insured. <i>Bushey v. Allstate Ins. Co.</i> , 670 A.2d 807, 809 (Vt.), reargument denied (Dec. 5, 1995). Although the Insurance Trade Practices Act, 8 VT. STAT. ANN. §§ 4721-4726, provides administrative sanctions for unfair and deceptive acts within the insurance industry, including unfair claim settlement practices, the Act does not create a private right of action. <i>Larocque v. State Farm Ins. Co.</i> , 660 A.2d 286, 288 (1995). On March 1, 2007, legislation was proposed to amend Section 4724(9) by creating a private right of action for unfair settlement practices for first party claims, including awarding compensatory damages. The proposed amendment is under review by the House of Representatives' Committee on Commerce.
If So, What Is the Insured's Burden of Proof?	To establish a claim for bad faith, a plaintiff must show that: (1) the insurance company had no reasonable basis for denying benefits of the policy; and (2) the company knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim. <i>Bushey</i> , 670 A.2d at 809.
What Damages Can Be Recovered?	To win consequential damages, a plaintiff need only satisfy the two elements of a claim for bad faith, but he must prove malice in order to be awarded punitive damages. <i>Philips v. Aetna Life Ins. Co.</i> , 473 F. Supp. 984, 990 (D. Vt. 1979). Where there is a duty to provide benefits and no reasonable basis for denying them, a claim for emotional distress can be presented to the jury. <i>Buote v. Verizon New England</i> , 249 F. Supp. 2d 422, 433 (D. Vt. 2003). Attorneys' fees can be recovered from the insurer if there is a finding of bad faith or outrageous conduct creating the "dominating reasons of justice" that Vermont courts deem necessary to justify a departure from the American Rule against awarding attorneys' fees. <i>Concord Gen. Mut. Ins. Co. v. Woods</i> , 824 A.2d 572, 579 (Vt. 2003).

(B) Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?	YES. Vermont does not recognize a distinction between non-liability policies and liability policies in first party claims. See above.
If So, What Is the Insured's Burden of Proof?	See above.
What Damages Can Be Recovered?	See above.

Third-Party Claims

VERMONT (cont'd)

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. Vermont does not impose on an insurer a duty to a third-party claimant. <i>Hamill v. Pawtucket Mut. Ins. Co.</i>, 892 A.2d 226, 232 (Vt. 2005). Although the Insurance Trade Practices Act, 8 Vt. STAT. ANN. §§ 4721- 4726, provides administrative sanctions for unfair and deceptive acts, including unfair claim settlement practices, the Act does not create a private right of action. <i>Id.</i> The proposed amendment to Section 4724(9) would provide a private right of action to a third-party claimant but only after the underlying claim has been settled or a judgment is entered in favor of the claimant on the underlying claim. The proposed legislation is under review.</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>Vermont courts appear not to have addressed this issue.</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>Vermont courts appear not to have addressed this issue.</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>Insurers may challenge claims that are fairly debatable. If a realistic question of liability exists, an insurer may withhold payment while it determines whether there is a reasonable basis for the claim or the amount demanded. <i>Bushey</i>, 670 A.2d at 810. If a court decides that an insurer's actions were reasonable because the claim was fairly debatable as a matter of law, it must grant the insurer's summary judgment motion. <i>Id.</i> The proposed amendment to Section 4724(9) would afford a reasonable basis defense to insurers.</p>

First-Party Claims

(A) Non-Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?	YES. The Virgin Islands recognizes the tort of bad faith for an insurer's refusal to pay a direct claim. <i>Justin v. Guardian Ins. Co.</i> , 670 F. Supp. 614, 616 (D.V.I. 1987).
If So, What is the Insured's Burden of Proof?	In the Virgin Islands, to establish a cause of action for the tort of bad faith the plaintiff is required to show: (1) the existence of an insurance contract between the parties and a breach by the insurer; (2) intentional refusal to pay the claim; (3) the nonexistence of any reasonably legitimate or arguable reason for the refusal; (4) the insurer's knowledge of the absence of such a debatable reason; or (5) the insurer's intentional failure to determine the existence of a debatable reason for the refusal of the claim. <i>Justin</i> , 670 F. Supp. at 617. The Virgin Islands has adopted an Unfair Practices and Fraud Act, but the Act does not provide a private cause of action. 22 V.I. CODE ANN. § 22/1201 (2006).
What Damages Can Be Recovered?	In addition to compensatory damages, punitive damages can be recovered if the plaintiff shows, by clear and convincing evidence, that the acts complained of were outrageous or committed with evil motive or reckless indifference to his rights. <i>Justin</i> , 670 F. Supp. at 617. Attorneys' fees can be recovered by the prevailing party. 5 V.I. CODE ANN. § 5/541(b) (2006).

(B) Liability Insurance Policies

Can the Insured Assert a Bad Faith Claim?	YES. The Virgin Islands recognizes as a tort an insurer's breach of its duty to give good faith consideration to a settlement offer. <i>Buntin v. Cont'l Ins. Co.</i> , 525 F. Supp. 1077, 1082 (D.V.I. 1981).
If So, What is the Insured's Burden of Proof?	An insurer breaches its duty of good faith when it does not treat the claim as though the insurer was solely liable for the entire amount. The measure of the insurer's compliance with its settlement obligations is whether a reasonable insurer without policy limits would have accepted the settlement. <i>Buntin</i> , 525 F. Supp. at 1082.
What Damages Can Be Recovered?	If the insurer breaches its settlement duties and an excess judgment is entered against the insured, the insurer is liable for that excess. <i>Id.</i>

Third-Party Claims

VIRGIN ISLANDS (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. A third party may, however, assert its rights against the insurer pursuant to an assignment and a covenant not to execute against the insured. <i>In re Tutu Water Wells Contamination Litig.</i> , 78 F. Supp. 2d 423, 431 (D.V.I. 1999).
	If So, What Is the Third Party's Burden of Proof?	See above.
	What Damages Can Be Recovered?	See above.
	Can the Insured Assign Rights to a Third Party?	YES. Within policy limits, Virgin Islands' courts allow third parties to enforce against insurers consent judgments that are conditioned upon the third party's covenant not to execute against the insured. <i>In re Tutu Water Wells Contamination Litig.</i> , 78 F. Supp. 2d at 431.
Excess Insurers		
Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES, under equitable subrogation. The doctrine of equitable subrogation had been adopted as the law of the Virgin Islands and can apply to the relationship between prime and excess insurers, allowing the excess insurer to assume the rights of the insured. <i>Prime Hospitality Corp. v. Gen. Star Indem. Co.</i> , 1999 WL 293865 at *4 n. 10 (D.V.I. 1999).	
Defenses		
What Defenses Can Be Asserted Against a Bad Faith Claim?	As a defense to bad faith, the insurer may assert that it had a debatable reason in law or fact to refuse a claim. <i>Justin</i> , 670 F. Supp. at 616. In a bad faith failure to settle action, the insurer may assert that a reasonable insurer without policy limits would not have accepted the settlement. <i>Buntin</i> , 525 F. Supp. at 1081-82.	

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Although a private cause of action is not recognized under the Virginia Unfair Insurance Practices Act, VA. CODE ANN. § 38.2-100 <i>et seq.</i> (1986), there is an implied duty of good faith. <i>A & E Supply Co., Inc. v. Nationwide Mut. Fire Ins. Co.</i>, 798 F.2d 669, 676 (4th Cir. 1986), <i>cert. denied</i>, 479 U.S. 1091 (1987); <i>Estate of Mohamed v. Monumental Life Ins. Co.</i>, 138 F. Supp. 2d 709, 713 (E.D. Va. 2001). However, Virginia considers a breach of the duty of good faith to be a claim for breach of contract and not a tort claim. <i>A&E Supply Co., supra</i>; <i>Harris v. USAA Cas. Ins. Co.</i>, 37 Va. Cir. 553 (Va. Cir. Ct. 1994).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The Virginia Supreme Court has set forth five factors to consider in assessing whether an insurer acted in bad faith: (1) whether reasonable minds could differ in the interpretation of the policy provisions; (2) whether the insurer conducted a reasonable investigation of the facts; (3) whether the information disclosed by this investigation supported the insurer's denial; (4) whether the insurer denied coverage as a negotiating tactic; and (5) whether the insurer's defense raised issues of first impression or a reasonably debatable question of law or fact. <i>Nationwide Mut. Ins. Co. v. St. John</i>, 524 S.E.2d 649, 651 (Va. 2000).</p>
<p>What Damages Can Be Recovered?</p>	<p>An insured can recover direct damages, which flow naturally or ordinarily from the breach, and consequential damages, which result from special circumstances that were within the contemplation of the contracting parties. <i>Harris, supra</i>. Punitive damages will not be awarded against an insurer that acted in bad faith, since Virginia does not recognize a tort claim for bad faith and punitive damages cannot be recovered for breach of contract. <i>A & E Supply Co.</i>, 798 F.2d at 678.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. <i>Erie Ins. Group v. Hughes</i>, 393 S.E.2d 210, 211 (Va. 1990) (denial of insurance coverage claim) (citing <i>Aetna Cas. & Sur. Co. v. Price</i>, 206 Va. 749, 761, 146 S.E.2d 220, 228 (Va. 1966)). An independent claim for bad faith can be brought in connection with the defense of a third-party claim. <i>Swiatlowski v. State Farm Mut. Auto. Ins. Co.</i>, 585 F. Supp. 965, 967-68 (W.D. Va. 1984).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The Virginia Supreme Court has set forth five factors to consider in assessing whether an insurer acted in bad faith: (1) whether reasonable minds could differ in the interpretation of the policy provisions; (2) whether the insurer conducted a reasonable investigation of the facts; (3) whether the information disclosed by this investigation supported the insurer's denial; (4) whether the insurer denied coverage as a negotiating tactic; and (5) whether the insurer's defense raised issues of first impression or a reasonably debatable question of law or fact. <i>Cuna Mut'l Ins. Co. v. Norman</i>, 375 S.E.2d 724, 727 (Va. 1989)). See <i>Field v. Transcontinental Ins. Co.</i>, 219 B.R. 115, 123 (E.D. Va. 1998) (applying <i>Cuna</i> to a liability insurance context), <i>aff'd</i>, 173 F.3d 424 (4th Cir. 1999).</p>
<p>What Damages Can Be Recovered?</p>	<p>An insured may recover in excess of the policy limits. <i>Field, supra</i>. Virginia law does not permit recovery of punitive damages from an insurer that "in bad faith, delays or fails to satisfy a claim against its insured." <i>Bettius & Sanderson, P.C. v. National Union Fire Ins. Co. of Pittsburgh, Pa.</i>, 839 F.2d 1009, 1015 (4th Cir. 1988); <i>Levinson v. Mass. Mut. Life Ins. Co.</i>, 2006 WL 3337419 at *14 (E.D. Va. 2006). An insured can recover attorneys' fees under Va. Code Ann. §§ 38.2-209 and 8.01-66.1 from an insurer that acted in bad faith by refusing or failing to pay or settle a claim.</p>

Third-Party Claims

VIRGINIA (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. Third-party direct actions are not allowed. <i>Rowe v. U.S. Fid. and Guar. Co.</i> , 421 F.2d 937, 939 (4th Cir. 1970). See also <i>Atl. Permanent Fed. Sav. & Loan Ass'n v. Am. Cas. Co. of Reading, Pa.</i> , 670 F. Supp. 168, 170 (E.D. Va. 1986).
	If So, What Is the Third Party's Burden of Proof?	See above.
	What Damages Can Be Recovered?	See above.
	Can the Insured Assign Rights to a Third Party?	YES. <i>Rowe</i> , 421 F.2d at 940; <i>Spence-Parker v. Md. Ins. Group</i> , 937 F. Supp. 551, 557-58 (E.D. Va. 1996).
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	Virginia courts appear not to have addressed this issue. In <i>Horace Mann Ins. Co. v. Gov't Employees Ins. Co.</i> , 344 S.E.2d 906 (Va. 1986), the Virginia Supreme Court reversed the decision of a lower court, based solely on the facts of the case, which held that a primary carrier acted in bad faith in its dealings with the excess carrier. However, no Virginia court has held that an excess insurer <i>cannot</i> recover against a primary carrier on a bad faith claim.
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	If coverage is "reasonably debatable," there cannot be a finding of bad faith. <i>Nationwide Mut. Ins. Co.</i> , 524 S.E.2d at 651. Insurers may raise all five of the factors enumerated in <i>Nationwide</i> as defenses.

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under common law and statute. Insurers have a statutory and common law duty to act in good faith toward an insured. <i>Griffin v. Allstate Ins. Co.</i>, 29 P.3d 777, 783 (Wash. App. 2001), review denied, <i>Griffin v. Allstate Ins. Co.</i>, 45 P.3d 551 (Wash. 2002) (table reference) (citing WASH. REV. CODE § 48.01.030; <i>Tank v. State Farm Fire & Cas. Co.</i>, 715 P.2d 1133, 1136 (Wash. 1986)). Breach of this duty gives rise to a remedy in tort, which is separate from the insurance contract. <i>Griffin</i>, 29 P.3d at 783 (citing <i>Safeco Ins. Co. of Am. v. Butler</i>, 823 P.2d 499 (Wash. 1992)). In 2007, the Insurance Fair Conduct Act (IFCA) was adopted. IFCA creates a new cause of action against insurance companies for unreasonably denying insureds' claims for coverage or benefits. The statute also permits punitive damages and attorneys' fees to be awarded. WASH. REV. CODE §48.30.015; <i>HSS Enter., LLC v. Amco Ins. Co.</i>, 2008 WL 312695 at *2 (W.D. Wash.2008) (holding that IFCA not only creates a new cause of action but also imposes a penalty).</p> <p>An insured may also bring a private action against an insurer for breach of the duty of good faith under the Consumer Protection Act ("CPA"). <i>Coventry Assoc. v. Am. States Ins. Co.</i>, 961 P.2d 933, 937 (Wash. 1998); WASH. REV. CODE §19.86.010 <i>et seq.</i> Claims under the CPA compensate claimants for injuries to their business or property. <i>Overton v. Consol. Ins. Co.</i>, 38 P.3d 322, 330 (Wash. 2002).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To establish the tort of bad faith breach of contract, an insured must show the insurer's action was unreasonable, frivolous or unfounded. <i>Griffin</i>, 29 P.3d at 783 (citing <i>Kirk v. Mt. Airy Ins. Co.</i>, 951 P.2d 1124 (Wash. 1998)). The determinative question is the reasonableness of the insurer's action in light of all the facts and circumstances of the case. <i>Griffin</i>, 29 P.3d at 783 (citing <i>Indus. Indem. Co. v. Kallevig</i>, 792 P.2d 520, 528 (Wash. 1990)).</p> <p>A party asserting a claim under the CPA must show that the insurer engaged in an unfair or deceptive act or practice occurring in trade or commerce that impacted the public interest and caused her injury in her business or property. <i>Overton</i>, 38 P.3d at 330 (citing WASH. REV. CODE §19.86.020). As long as it is based on reasonable conduct of the insurer, a denial of coverage does not constitute an unfair or deceptive act or practice. <i>Overton</i>, 38 P.3d at 330 (citing <i>Villella v. Pub. Employees Mut. Ins. Co.</i>, 725 P.2d 957 (1986)). This is true even if the denial is ultimately proven to be incorrect. <i>Id.</i></p> <p>To establish a claim under the Insurance Fair Conduct Act (IFCA), a party must show that the insurer unreasonably denied a claim for coverage or payment of benefits. WASH. REV. CODE §48.30.015.</p>
<p>What Damages Can Be Recovered?</p>	<p>Damages for bad faith and CPA claims may include general tort damages as well as the loss the insured has incurred as a result of the insurer's bad faith. <i>Coventry Assoc.</i>, 961 P.2d at 940 (Wash. 1998). The CPA outlines damages recoverable under the act, including actual damages, reasonable attorneys' fees and costs. WASH. REV. CODE §19.86.090. Damages under IFCA include actual damages and the costs of the action, including reasonable attorneys' fees and litigation costs. Courts are also authorized to award treble damages as a punitive measure. WASH. REV. CODE §48.30.015; <i>HSS Enter., LLC v. Amco Ins. Co.</i>, 2008 WL 312695 at *2 (W.D. Wash. 2008).</p>

First-Party Claims

(B) Liability Insurance Policies

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">WASHINGTON (cont'd)</p> <p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. An insurer owes a duty of good faith to its policyholder and violation of that duty may give rise to a tort action for bad faith. <i>Smith v. Safeco Ins. Co.</i>, 78 P.3d 1274, 1276-77 (Wash. 2003). An insured may also bring a claim under the Consumer Protection Act for an insurer's unfair or deceptive practices. <i>Hayden v. Mut. of Enumclaw Ins. Co.</i>, 1 P.3d 1167, 1171 (Wash. 2000); WASH. REV. CODE §19.86.090. An insured may also bring a private action against his insurer for breach of the duty of good faith under the Consumer Protection Act (CPA). <i>Tank v. State Farm Fire & Cas. Co. v. Pub. Employees Mut. Ins. Co.</i>, 715 P.2d 1133, 1140 (Wash. 1986); WASH. REV. CODE §19.86.010 <i>et seq.</i></p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded. <i>Smith v. Safeco Ins. Co.</i>, 78 P.3d at 1276-77. The policyholder has the burden of proof, and may present evidence that the insurer's alleged reasonable basis was not the actual basis for its action or that other factors outweighed the alleged reasonable basis. <i>Id.</i> at 1277. If the insured claims that the insurer denied coverage unreasonably in bad faith, then the insured must come forward with evidence that the insurer acted unreasonably. <i>Id.</i> Washington imposes a rebuttable presumption of harm when the insured meets the burden of establishing bad faith in the third-party liability context. <i>Kirk</i>, 951 P.2d at 1127.</p> <p>Insureds suing under the CPA must show: (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) which causes injury to the party in his business or property, (5) which is causally linked to the unfair or deceptive act. <i>Hayden</i>, 1 P.3d at 1171. Breach of an insurer's duty of good faith constitutes a <i>per se</i> CPA violation. <i>Tank</i>, 715 P.2d at 1140.</p>
<p>What Damages Can Be Recovered?</p>	<p>Where an insurer acts in bad faith by failing to defend an insured against a claim, Washington courts will recognize coverage by estoppel and impose a rebuttable presumption of harm. <i>Kirk</i>, 951 P.2d at 1127-28. If the court finds that an insurer breached its duty by failing to defend a claim, the insurer will be liable for at least the policy limits. <i>Id.</i> at 1128. For a bad faith failure to defend, damages that can be covered include reasonable attorneys' fees the insured incurred defending the underlying action and the amount of the judgment entered against the insured. <i>Id.</i> at 1126. The insured must be put in as good a position as he or she would have been had the insurance contract not been breached. <i>Id.</i> The CPA outlines damages recoverable under the Act, including actual damages, fines, and attorneys' fees. WASH. REV. CODE §19.86.090.</p>

Gen Re Note

The 2007 law will undoubtedly open the doors to more first-party bad faith claims. Although the standards are not that different, we think that the remedies—treble damages—will drive awards and settlements upward.

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. Third-party claimants may not sue an insurance company directly for the alleged breach of the duty of good faith under a liability policy. <i>Tank</i>, 715 P.2d at 1139. Third parties may not bring claims under the Consumer Protection Act. <i>Id.</i> at 1140.</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. An insured can assign its bad faith cause of action against its insurer to a third-party claimant after judgment or settlement of the main case. <i>First State Ins. Co. v. Kemper Nat'l. Ins. Co.</i>, 971 P.2d 953, 958 n.9 (Wash. Ct. App. 1999), review denied, 989 P.2d 1136 (Wash. 1999) (table reference) (citing <i>Safeco Ins. Co. v. Butler</i>, 823 P.2d 499, 507 (Wash. 1992)).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. An excess insurer is subrogated to the rights of the insured on the insured's claims against the primary insurer. <i>First State Ins. Co.</i>, 971 P.2d at 960; <i>Truck Ins. Exch. of the Farmers Ins. Group v. Century Indem. Co.</i>, 887 P.2d 455, 458 (Wash. Ct. App. 1995). An excess insurer is therefore entitled to require the primary carrier to act in good faith. <i>Truck Ins. Exch.</i>, 887 P.2d at 460.</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer can deny coverage and defend against claims of bad faith based on the insured's material misrepresentations. <i>Michalski v. Farmers Ins. Co.</i>, 104 Wash. App. 1023, 2001 WL 63181 at *10 (Wash. App. 2001). An insurer can also defend against a bad faith allegation on the grounds that it had a reasonable basis to dispute the claim. See <i>Smith</i>, 78 P.3d at 1277-78.</p> <p>Bad faith will not be found where a denial of coverage or a failure to provide a defense is based upon a reasonable interpretation of the insurance policy. <i>Kirk</i>, 951 P.2d at 1126 (citing <i>Transcon. Ins. Co. v. Wash. Pub. Utils. Dists' Util. Sys.</i>, 760 P.2d 337, 347 (1988)).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

WEST VIRGINIA	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under statute, and for breach of contractual duty of good faith and fair dealing. An insured can assert a cause of action under the Unfair Trade Practices Act and a cause of action for breach of the contractual duty of good faith and fair dealing. W. VA. CODE § 33-11-4(9). However there is not a cause of action for tortious bad faith. <i>Weese v. Nationwide Ins. Co.</i>, 879 F.2d 115, 117 (4th Cir. 1989). The Unfair Claims Settlement Practices section of the Unfair Trade Practices Act sets forth a list of acts by the insurer, which may serve as the basis for a private cause of action, including misrepresenting facts or provisions relating to coverage; failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; failing to adopt reasonable standards for the prompt investigation of claims; attempting to settle claims for too little; compelling insureds to institute litigation by offering substantially less than amounts ultimately recovered; failing to promptly settle claims where liability is reasonably clear. W. VA. CODE § 33-11-4(9); <i>Thompson v. W. Va. Essential Prop. Ins. Co.</i>, 411 S.E.2d 27, 32 (W. Va. 1991), <i>overruled on other grounds by State ex rel State Farm Fire & Cas., Co. v. Madden</i>, 451 S.E.2d 721 (W. Va. 1994). The Supreme Court of Appeals has allowed private causes of action for misrepresentation and false advertising of insurance policies under W. VA. CODE § 33-11-4(1). <i>Morton v. Amos-Lee Sec.</i>, 466 S.E.2d 542, 546-47 (W. Va. 1995); <i>Halkias v. AXA Equitable Life Ins. Co.</i>, 2006 WL 890620 at *3 (S.D. W. Va. 2006) (considering insureds' claims against insurance companies for fraudulent misrepresentations in violation of Unfair Trade Practices Act). A private cause of action also exists under the "defamation" and the "false statements and entries" sections of W. VA. CODE § 33-11-4(3). <i>Mutafis v. Eric Ins. Exch.</i>, 328 S.E.2d 675, 681, 688 (W. Va. 1985).</p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>When a policyholder "substantially prevails" in a bad faith action against an insurer, the insurer is liable for the policyholder's damages, regardless of whether there is proof of wrongful conduct or bad faith. <i>Jones v. Sanger</i>, 618 S.E.2d 573, 578 (W. Va. 2005) (involving first party claim and uninsured motorist coverage). In order to recover damages in excess of the policy limits in a bad faith action, a plaintiff must prove that the insurer's conduct was unreasonable. <i>Marshall v. Saseen</i>, 450 S.E.2d 791, 798 (W. Va. 1994) (quoting <i>Shamblin v. Nationwide Ins. Co.</i>, 396 S.E.2d 766, 776-77 (W. Va. 1990)); <i>see also Arndt v. Burdette II</i>, 434 S.E.2d 394, 400 n.10 (W. Va. 1993). To determine if an insurer's efforts to settle were reasonable, a court will examine the appropriateness of the insurer's investigation and evaluation of the claim based upon objective and cogent evidence; whether the insurer had a reasonable basis to conclude that there was a genuine and substantial issue as to the liability of its insured; and whether there was potential for substantial recovery of an excess verdict against its insured. <i>Marshall</i>, 450 S.E.2d at 798; <i>Shamblin</i>, 396 S.E.2d at 768. To establish entitlement to punitive damages, the insured must show actual malice by the insurer; this burden can be met by demonstrating a company wide policy of delaying payment of just claims. <i>McCormick v. Allstate Ins. Co.</i>, 505 S.E.2d 454, 458 (W. Va. 1998).</p>
	<p>What Damages Can Be Recovered?</p>	<p>The insured may recover reasonable attorneys' fees, which are presumptively equal to one-third the face amount of the policy; net economic loss; and damages for aggravation and inconvenience. <i>Hayseeds, Inc. v. State Farm First & Cas.</i>, 352 S.E.2d 73, 80 (W. Va. 1986); <i>Marshall</i>, 450 S.E.2d at 796-97. Punitive damages can be recovered upon a showing of the insurer's malicious intent to injure or defraud. <i>McCormick</i>, 505 S.E.2d at 458.</p>

First-Party Claims

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under statute and common law. Although West Virginia's highest court has not decided this issue, federal courts applying West Virginia law have held that an insurer owes the insured a duty to act reasonably, in good faith, and without negligence with respect to settlement of claims against its insured. <i>Daniels v. Horace Mann Mut. Ins. Co.</i>, 422 F.2d 87, 89 (4th Cir. 1970); <i>Vencill v. Cont'l Cas. Co.</i>, 433 F. Supp. 1371, 1376 (S.D. W. Va. 1977). An implied private cause of action exists for an insurance company's violation of the unfair settlement practice provisions of W. VA. CODE § 33-11-4(9). <i>Taylor v. Nationwide Mut. Ins. Co.</i>, 214 W. Va. 324, 328-29, 589 S.E.2d 55, 59-60 (W. Va. 2003). Causes of action also exist for misrepresenting and false advertising of insurance policies under W. VA. CODE § 33-11-4(1), and for "defamation" and "false statements and entries" under W. VA. CODE § 33-11-4(3). See <i>Morton v. Amos-Lee Securities</i>, 466 S.E.2d 542, 547 (W. Va. 1995); <i>Mutafis v. Eric Ins. Exch.</i>, 174 W. Va. 660, 666, 328 S.E.2d 675, 688 (W. Va. 1985).</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>An insured must "substantially prevail" in an action against an insurer in order to hold the insurer liable for the judgment, attorneys' fees, and incidental damages. <i>Marshall</i>, 450 S.E.2d at 796-97. In an action to recover damages in excess of the policy limits for an insurer's bad faith refusal to settle, a court will evaluate whether the reasonably prudent insurer would have refused to settle; the insurer appropriately investigated the claim; the insurer had a reasonable basis to conclude there was a genuine issue as to the insured's liability; there was a good faith attempt to negotiate a settlement; and the insurer failed to settle based on reasonable and substantial grounds. <i>Id.</i> at 798; <i>Miller v. Fluharty</i>, 500 S.E.2d 310 (W. Va. App. 1997). See also <i>Burkett v. AIG Claim Services, Inc.</i>, 2007 WL 2059238 at *3 (N.D. W. Va. 2007), reconsideration denied (Jul. 13, 2007).</p>
<p>What Damages Can Be Recovered?</p>	<p>An insurer may be liable for an insured's reasonable attorneys' fees, damages for net economic loss, and damages for aggravation and inconvenience if the insured "substantially prevails." <i>Marshall</i>, 450 S.E.2d at 796-97; <i>Hayseeds</i>, 352 S.E.2d at 80. Punitive damages may be recovered upon a showing of actual malice. <i>Id.</i> at 80-81.</p>

Third-Party Claims

WEST VIRGINIA (cont'd)	Can a Third Party Assert a Bad Faith Claim?	NO. Under the Unfair Trade Practices Act, a third-party claimant may not bring a private cause of action or any other action against any person for unfair claims settlement practices. W. VA. CODE § 33-11-4a. A third-party's sole remedy for an unfair claims settlement practice or bad faith settlement of a claim is the filing of an administrative complaint.
	If So, What Is The Third Party's Burden of Proof?	See above.
	What Damages Can Be Recovered?	See above.
	Can the Insured Assign Rights to a Third Party?	YES. West Virginia courts allow insureds to assign their rights to third parties. <i>Johnson v. Acceptance Ins.</i> , 292 F. Supp. 2d 857, 864 (N.D. W. Va. 2003). In <i>Johnson</i> , the estate of a decedent, who had lived in a group home brought suit against the home and its insurer. Its settlement agreement with the home included an assignment of all of the home's rights against its insurer. The court allowed the estate's action against the insurer, alleging that the insurer breached its duty of good faith and fair dealing and violated the Unfair Claims Settlement Practices Act. <i>Id.</i> at 863-64.
Excess Insurers		
	Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?	YES. In <i>Vencill</i> , 433 F. Supp. at 1376 (S.D. W. Va. 1977), the court allowed an excess insurer's bad faith claim against the primary insurer for wrongfully refusing to settle a claim within its policy limits. The court emphasized that "the duty owed an excess insurer by a primary insurer to act in good faith and without negligence in the settlement of claims within the policy limits is identical to that owed an insured." <i>Id.</i> at 1376.
Defenses		
	What Defenses Can Be Asserted Against a Bad Faith Claim?	The insured's failure to cooperate may be grounds to defend a bad faith claim. <i>Bowyer by Bowyer v. Thomas</i> , 188 W. Va. 297, 302 423 S.E.2d 906, 910 (1992). The insurer must show the failure to cooperate was willful and intentional and that the insurer's rights were prejudiced. <i>Kronjaeger v. Buckeye Union Ins. Co.</i> , 200 W.Va. 570, 572, 490 S.E.2d 657, 659 (W. Va. 1997) (citing <i>Bowyer</i> , 188 W. Va. 297, 423 S.E.2d at 911). In addition, there is a one-year statute of limitation for a statutory bad faith cause of action. <i>Klettner, v. State Farm Mut. Auto. Ins. Co.</i> , 519 S.E.2d 870, 871 (W. Va. 1999); W. VA. CODE § 33-11-4(9). However, the statute of limitations is tolled by the appeal period applicable to the underlying action. <i>Klettner</i> , 519 S.E.2d at 871.

First-Party Claims

(A) Non-Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Wisconsin allows common law bad faith actions against insurers for breach of the duty of good faith and fair dealing. <i>Jones v. Secura Ins. Co.</i>, 638 N.W.2d 575, 579 (Wis. 2002). An insurer will be subject to liability in tort for withholding payment of the claim of its insured unreasonably or in bad faith. <i>Id.</i> at 579.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The insured must show the absence of a reasonable basis for denying benefits of the policy and the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. <i>Jones</i>, 638 N.W.2d at 580. The insured must demonstrate that, under the circumstances, a reasonable insurer would not have denied or delayed payment of the claim. Relevant factors include whether a claim was properly investigated and the results of the investigation were reasonably evaluated and reviewed. <i>Anderson v. Cont'l Ins. Co.</i>, 271 N.W.2d 368, 376 (Wis. 1978).</p>
<p>What Damages Can Be Recovered?</p>	<p>The insured may recover any damages, which are the proximate result of the defendant's alleged bad faith, including damages that are otherwise recoverable in a breach of an insurance contract claim. <i>Jones</i>, 638 N.W.2d 575, 576-77 (Wis. 2002). A bad faith action may result in compensatory damages, punitive damages, and damages for emotional distress. <i>Secura</i>, 638 N.W.2d at 580; <i>Anderson</i>, 271 N.W.2d at 378. Recovery for emotional distress caused by an insurer's bad faith is allowed only for severe distress and when substantial damage beyond the loss of contract benefits is proven. <i>Secura</i>, 638 N.W.2d at 580. Punitive damages will be awarded upon a showing of evil intent or of wanton disregard of duty. <i>Id.</i></p>

First-Party Claims

(B) Liability Insurance Policies

WISCONSIN (cont'd)

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Wisconsin allows insureds to bring common law bad faith actions against their liability insurers for bad faith failure to settle claims. <i>Mowry v. Badger State Mut. Cas. Co.</i>, 385 N.W.2d 171, 178 (Wis. 1986); <i>Alt v. Am. Family Mut. Ins. Co.</i>, 237 N.W.2d 706, 712 (Wis. 1976); <i>Allied Processors, Inc. v. W. Nat'l Mut. Ins. Co.</i>, 629 N.W.2d 329, 333 (Wis. App. 2001), review denied, 635 N.W.2d 782 (Wis. 2001) (table reference). A decision not to settle must be based on a thorough evaluation of the underlying circumstances of the claim and on informed interaction with the insured, which duty gives rise to the insurer's obligation to exercise reasonable diligence in ascertaining facts upon which a good faith decision as to settlement must be based. Moreover, the insurer must inform the insured when there is a likelihood of liability in excess of policy limits, so the insured can protect itself. Furthermore, the insurer is obligated to keep the insured abreast of settlement offers and the progress of settlement negotiations. <i>Id.</i></p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>To establish a claim for bad faith, the insured must show by the greater weight of the evidence that the insurer breached a duty it owed to the insured, and demonstrate to a reasonable certainty by evidence clear, satisfactory and convincing that the breach evinced a significant disregard for the insured's interests. <i>Allied Processors, Inc. v. W. Nat'l Mut. Ins. Co.</i>, 629 N.W.2d 329, 333 (Wis. App. 2001). The burden of proof is higher than required in most negligence cases. <i>Alt</i>, 237 N.W.2d at 714.</p>
<p>What Damages Can Be Recovered?</p>	<p>Actual damages, attorneys' fees, and punitive damages, may be awarded when the insured proves its bad faith claim against its insurer. <i>Allied Processors, Inc. v. W. Nat'l Mut. Ins. Co.</i>, 629 N.W.2d 329, 340-41 (Wis. App. 2001); <i>Danner v. Auto-Owners Ins.</i>, 629 N.W.2d 159, 170, 177 (Wis. 2001). To obtain punitive damages, the insured must establish to a reasonable certainty by clear, satisfactory and convincing evidence that the insurer acted maliciously toward the insured or in intentional disregard of its rights. <i>Allied</i>, 629 N.W.2d at 340-41. Punitive damages may also be awarded for outrageous conduct that falls short of malicious conduct. <i>Lorenz v. Rural Mutual. Ins. Co.</i>, 562 N.W.2d 926 (Wis. App. 1997).</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. A third-party claimant cannot state a claim for relief against an insurer for a bad faith refusal to settle under common law principles. <i>Kranzush v. Badger State Mut. Cas. Co.</i>, 307 N.W.2d 256, 265 (Wis. 1981). Because the insurer's duty of good faith and fair dealing arises from the privity of contract between the insurer and the insured, the duty does not exist as to a third-party claimant who is a stranger to the contract. <i>Id.</i> But see <i>Estate of Plautz v. Time Ins. Co.</i>, 525 N.W.2d 342, 346-47 (Wis. App. 1994) (concluding that a life insurance beneficiary may bring a bad faith action against a life insurance company, because an exception exists where a contract is specifically made for the benefit of a third party), <i>review denied</i>, 562 N.W.2d 602 (Wis. 1997).</p>
<p>If So, What Is the Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. When an insurer is liable for exercising bad faith toward its insured, as a matter of law the insured's assignee is entitled to the damages to which the insured would be entitled, including damages equal to an excess judgment. <i>Moutsopoulos v. Am. Mut. Ins. Co. of Boston</i>, 607 F.2d 1185, 1187 (7th Cir. 1979). See also <i>Newhouse v. Citizens Sec. Mut. Ins. Co.</i>, 501 N.W.2d 1, 3 (Wis. 1993).</p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>Wisconsin courts appear not to have addressed this issue. Specifically, the Wisconsin Supreme Court has not directly addressed the issue of whether an excess insurer can assert a bad faith claim against a primary insurer. However, the court has approved the use of agreements in which a primary insurer settles for less than its policy limits and then is released from liability, while the excess insurer remains liable. <i>Teigen v. Jelco of Wisconsin, Inc.</i>, 367 N.W.2d 806, 811 (Wis. 1985); <i>Loy v. Bunderson</i>, 320 N.W.2d 175, 186 (Wis. 1982). The court explained that the excess insurer has no claim against the primary insurer in this instance because there is no contract between the excess insurer and the primary insurer, and the primary insurer's duty of good faith arising from the insurance contract runs only to the insured. <i>Teigen</i>, 367 N.W.2d at 811.</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurance company may challenge claims which are fairly debatable and will be found liable only when it has intentionally denied or failed to process a claim without a reasonable basis. <i>Danner v. Auto-Owners Ins.</i>, 629 N.W.2d 159, 173 (Wis.), <i>reconsideration denied</i>, <i>Danner v. Auto-Owners Ins.</i>, 635 N.W.2d 786 (Wis. 2001); <i>Radlein v. Indus. Fire & Cas. Ins. Co.</i>, 345 N.W.2d 874, 883 (Wis. 1984); <i>Anderson v. Cont'l Ins. Co.</i>, 271 N.W.2d 368, 377 (Wis. 1978). An insurer may also argue for the dismissal of a bad faith claim that exceeds the two year statute of limitations for intentional torts. <i>Jones v. Secura Ins. Co.</i>, 638 N.W.2d 575, 577, 580-81 (Wis. 2002).</p>

First-Party Claims

(A) Non-Liability Insurance Policies

WYOMING	<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES, under common law. Wyoming recognizes a cause of action in tort for first party bad faith claims when an insurer unreasonably refuses to pay its insured's claim for policy benefits. <i>McCullough v. Golden Rule Ins. Co.</i>, 789 P.2d 855, 859-60 (Wyo. 1990). Under the Wyoming Unfair and Deceptive Claims Practices Act, an insurer is liable if it commits one or more of a number of unfair claims settlement practices with such frequency as to indicate a general business practice. WYO. STAT. ANN. § 26-13-124 (2004). However, the Wyoming Supreme Court has held that the legislature did not intend to create a private right of action under this statute. <i>Gainsco Ins. Co. v. Amoco Production Co.</i>, 53 P.3d 1051, 1058 (Wyo.), <i>rehearing denied</i>, (2002).</p>
	<p>If So, What Is the Insured's Burden of Proof?</p>	<p>The insurer will be found to have acted in bad faith if it knowingly or recklessly denied a first party claim for insurance benefits without a reasonable basis. <i>Hulse v. First Am. Title Co.</i>, 33 P.3d 122, 137 (Wyo.) (denying first party bad faith claim against title insurance company), <i>rehearing denied</i> (2001). Courts apply an objective standard i.e., whether the validity of the claim was fairly debatable, to determine bad faith. <i>Id.</i></p>
	<p>What Damages Can Be Recovered?</p>	<p>In addition to compensatory damages, punitive damages may be awarded for the tort of bad faith if there is a showing of an evil intent deserving of punishment or wanton disregard for duty or gross and outrageous conduct. Wyoming law does not differentiate between first person or third person insurance cases when awarding punitive damages. <i>McCullough.</i>, 789 P.2d at 860.</p>

(B) Liability Insurance Policies

<p>Can the Insured Assert a Bad Faith Claim?</p>	<p>YES. Wyoming recognizes a cause of action for third-party bad faith for a liability insurer's failure to settle a third-party claim against its insured within policy limits. <i>Gainsco Ins. Co.</i>, 53 P.3d at 1058.</p>
<p>If So, What Is the Insured's Burden of Proof?</p>	<p>Bad faith in the liability insurance context occurs if an excess judgment is obtained under circumstances which demonstrate the insurer failed to exercise intelligence, good faith, and honest and conscientious fidelity to the insured and insurer's common interest and to give at least equal consideration to the insured's interest. <i>West Cas. and Sur. Co. v. Fowler</i>, 390 P.2d 602, 606 (Wyo. 1964).</p>
<p>What Damages Can Be Recovered?</p>	<p>Compensatory damages may be awarded if the insurer has acted in bad faith. For punitive damages to be awarded in addition for the tort of bad faith, there must be a showing of an evil intent deserving of punishment or wanton disregard for duty or gross and outrageous conduct. Wyoming law does not differentiate between first-person or third-person insurance cases in the standard for awarding punitive damages. <i>McCullough</i>, 789 P.2d at 861 (Wyo. 1990).</p>

Third-Party Claims

<p>Can a Third Party Assert a Bad Faith Claim?</p>	<p>NO. Wyoming does not recognize a cause of action for bad faith against an insurer by a third-party claimant. The duty of good faith and fair dealing runs only from the insurer to the insured. <i>Herrig v. Herrig</i>, 844 P.2d 487, 492 (Wyo. 1992). Although Wyoming's Unfair Trade Practices Act, prohibiting unfair claims settlement practices, specifically refers to both "insureds" and "claimants," the statute does not create a private right of action for a third party. <i>Id.</i> at 492.</p>
<p>If So, What is The Third Party's Burden of Proof?</p>	<p>See above.</p>
<p>What Damages Can Be Recovered?</p>	<p>See above.</p>
<p>Can the Insured Assign Rights to a Third Party?</p>	<p>YES. Wyoming recognizes the assignability of the insured's claim for bad faith. <i>Id.</i></p>
<p>Excess Insurers</p>	
<p>Can an Excess Insurer Assert a Bad Faith Claim Against a Primary Carrier?</p>	<p>YES, under equitable subrogation. Wyoming has not adopted a direct cause of action for an excess insurer against a primary insurer, but an excess insurer harmed by a primary insurer's bad faith actions may recover through the equitable remedy of subrogation. The party asserting the right to subrogation must be without fault. <i>Hocker v. N.H. Ins. Co.</i>, 922 F.2d 1476, 1486 (10th Cir. 1991).</p>
<p>Defenses</p>	
<p>What Defenses Can Be Asserted Against a Bad Faith Claim?</p>	<p>An insurer may defeat a first-party bad faith claim by demonstrating that the validity of the claim was fairly debatable and the facts necessary to evaluate the claim were properly investigated. <i>McCullough</i>, 789 P.2d at 860 (Wyo. 1990). In a cause of action for bad faith failure of the insurer to initially settle a claim that is followed by judgment in excess of the policy limits, the insurer may demonstrate its good faith by showing that, when the offer was made and rejected, the insurer had a bona fide belief either that it had a good possibility of winning the lawsuit or that the claimant's recovery would not exceed the limits of the policy. <i>West Cas. and Sur. Co.</i>, 390 P.2d at 606.</p>



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