An Interstate Comparison of Property and Casualty Prompt-Pay Laws

TEXANS FOR LAWSUIT REFORM FOUNDATION

December 20, 2016

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I. The Sudden Surge of Wind and Hail Lawsuits in Texas Courts

Beginning in 2012, Texas courts experienced a sudden and unprecedented increase in insurance policyholder lawsuits against their insurance carriers alleging non-payment, underpayment, and late payment of claims resulting from hail and wind storm damage. Texas has always had plenty of wind and hail storms, and a sudden shift in weather did not precipitate this surge of lawsuits. Rather, the surge appears to be a sequel to the litigation explosion that followed 2008's Hurricane Ike, when entrepreneurial law firms discovered how Texas insurance laws could be exploited to produce lucrative returns, often based on little or no evidence. But the offensive nature of this recent rash of lawsuits has not gone unnoticed. In December 2016, referring to one of the most active plaintiff law firms in the field, United States District Judge Micaela Alvarez observed that "[i]n a bout of cosmic irony, the [firm] has unleashed a hailstorm of its own upon the Court in the form of baseless claims."

The selection of causes of action available to insurance policyholders under Texas law includes actions for violation of the Insurance Code's Unfair Claims Settlement Practices Act and Prompt Payment of Claims Act; for violation of Texas's Deceptive Trade Practices-Consumer Protection Act (DTPA); for breach of the common-law duty of good faith and fair dealing; for breach of contract; and for breach of other common-law duties. These claims carry an overlapping plethora of remedies, including an 18 percent per year penalty for late payment; potential treble damages; punitive damages; and attorney's fees. When brought by aggressive lawyers using a mass-tort model—filing hundreds of cases generated by questionable means—this extensive and redundant arsenal of legal weaponry has proven to be a potent vehicle for abusive litigation. Similar litigation essentially bankrupted the Texas Windstorm Insurance Association following Hurricane Ike. Today's lawsuit explosion seems likely to—at the very least—affect the availability and affordability of property insurance in Texas.

The history behind the many causes of action available under Texas law to insurance policyholders is provided in Part II of this paper. As is described in Part II, causes of action under the DTPA and Insurance Code first became available to Texas consumers in 1973, although these statutes were not aimed at the failure of insurance companies to deal with their customers in good faith or to pay claims fully or timely. Addressing the failure of insurance companies to deal with their customers in good faith in the settlement of claims was left to the Texas Insurance Commission in 1973.

This changed in 1987 and 1988, when the Texas Supreme Court created a common-law duty requiring insurance companies to deal with their customers in good faith when settling a claim; and when the Court found that the Texas Insurance Commission's rules regarding unfair claim-settlement practices gave rise to a private cause of action under the DTPA, thus creating a right to recover enhanced damages and attorney's fees.

In 1991, the Texas Legislature passed the Prompt Payment of Claims Act, requiring insurance companies to acknowledge, investigate, and pay claims within prescribed deadlines. This Act provided insurance policyholders with a right to recover attorney's fees and an 18 percent per year penalty. Four years later, the Legislature specifically incorporated a private right of action for unfair claim-settlement practices into the Insurance Code, while, at the same time, taking away the court-created ability of policyholders to pursue a DTPA claim based on rules promulgated by the Department of Insurance.

Part III of this paper provides greater detail about the various policyholder causes of action currently in place under Texas law, and the remedies available to policyholders under each cause of action. As described in Part III, a policyholder may enforce the policy itself and recover attorney's fees under chapter 38 of the Texas Civil Practice and Remedies Code. If a claim is paid late, a policyholder may recover an 18 percent per year penalty plus attorney's fees under the Prompt Payment of Claims Act. The insured also may recover under the Unfair Claim Settlement Practices Act attorney's fees, actual damages, and up to three times the amount of those actual damages, if the insurance company failed to investigate the insured's claim, unreasonably delayed payment of the claim, or otherwise did not treat the insurer fairly. Additionally, the insured may recover actual and exemplary (punitive) damages under the common-law cause of action for breach of the duty of good faith and fair dealing.

Thus, as Part III shows, Texas provides policyholders with a number of causes of action, both statutory and common law, and these causes of action provide significant remedies to policyholders.

Part IV of this paper reviews ten other states' statutory and common laws relating to insurance-claim payments, and compares those laws to Texas's statutory and common law causes of action. As Part IV explains, Texas differs from other states in significant respects. For example, Texas is among a minority of states providing a private cause of action under its Prompt Payment of Claims Act. Other jurisdictions typically enforce their prompt-payment statutes through administrative action, and then only if the insurance company has repeatedly failed to pay claims on time.

Like Texas, the other states have unfair claim-settlement practices acts or generally applicable consumer protection statutes that provide remedies to policyholders. Those statutes typically require that the insurance company have acted unreasonably or in bad faith. Liability typically is not imposed for an inadvertent one-day-late payment of a claim as it is in Texas.

Texas also imposes an 18 percent per year penalty on an insurer that fails to pay a claim on time. This interest rate is among the highest in the nation. For the most part, the other states that impose a percentage penalty for late payment of claims use a lower interest rate, some of which are fixed and some of which float with market conditions.

In sum, Texas provides at least six overlapping causes of action to an insured who believes her insurer failed to timely or fully pay an insurance claim or otherwise acted badly in the claim-settlement process. No other state included in the survey has a similar cache of remedies for consumers. Texas law is unique, and uniquely harsh, among the states surveyed.

II. History of Insureds' Causes of Action Against Insurers

A. 1973: Adoption of the Deceptive Trade Practices Act, a Cause of Action in the Insurance Code, and the Unfair Claim Settlement Practices Act

The late 1960s through the 1980s was a period of increased interest in consumer protection, nationwide. The federal government and many state governments passed consumer protection statutes, while class action litigation was favored in many courts as a way to give protection to consumers whose claims were too small to pursue individually. Texas boarded the bandwagon in 1973 when it adopted the DTPA, parallel amendments to the Texas Insurance Code, and the Unfair Claim Settlement Practices Act.

The 1973 version of the DTPA allowed a consumer to bring an action for redress of any false, misleading, or deceptive act or practice in the conduct of trade or commerce.[1] It contained a general prohibition on deceptive acts and practices *and* a non-exclusive "laundry list" of specifically prohibited acts or practices that, generally speaking, related to pre-sale misrepresentations regarding goods or services.[2] A consumer who prevailed in a DTPA action was entitled to an injunction and to recover "three times the amount of actual damages plus court costs and attorneys' fees reasonable in relation to the amount of work expended."[3] The term "actual damages" was not defined.

The 1973 DTPA was tied to the Insurance Code, providing that a consumer could bring an action if she was adversely affected by "the use or employment by any person of an act or practice in violation of Article 21.21, Texas Insurance Code, as amended, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code, as amended."[4]

The legislation that created the Texas DTPA in 1973 also amended article 21.21 of the Texas Insurance Code to provide a private right of action. Before the 1973 amendments, section 4 of article 21.21 prohibited some unfair and deceptive acts or practices.[5] The unlawful acts described in section 4 mostly had to do with competition in the insurance industry, and some pre-sale deceptive conduct; however, they did not deal with claim-settlement practices.[6] Before 1973, a violation of section 4 could not be enforced through a private action, but, instead, was enforced by the Insurance Commissioner.[7]

In 1973, a new section (section 16) was added to article 21.21 to provide a private right of action for actions taken by an insurance company (not an individual) in violation of existing section 4 of the statute, as follows:

> ***Sec. 16. Relief Available to Injured Parties.*** Any person who has been injured by another's engaging in any of the practices declared in Section 4 of the Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition and unfair and deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business and Commerce Code, as amended, as an unlawful deceptive trade practice may maintain an action against the company or companies engaging in such acts or practices.[8]

The amendments to article 21.21 did not expand the existing list of unlawful acts or practices (which, as noted, mostly had to do with competition in the insurance industry and pre-sale deceptive conduct), but it did incorporate the DTPA's general prohibition of deceptive acts and practices in business activities *and* the DTPA's laundry list. A person who prevailed in an action under article 21.21 could obtain an injunction and recover "three times the amount of actual damages plus court costs and attorneys' fees reasonable in relation to the amount of work expended."[9] "Actual damages" was not defined.

In a separate bill passed in 1973, the Texas Legislature passed the Unfair Claim Settlement Practices Act, as Insurance Code article 21.21-2.[10] Newly enacted article 21.21-2 contained a list of seven unfair settlement practices that—if "committed without cause and performed with such frequency as determined by State Board of Insurance"—would constitute unfair settlement practices.[11] Thus, one instance of failing to resolve a claim in good faith was not an unfair claim-settlement practice. The 1973 list of unfair claim-settlement practices is largely the same as now appears in subchapter A of chapter 542 of the Texas Insurance Code.[12] The 1973 list included, among other things, "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear."[13]

There was no private right of action in article 21.21-2 for unfair claim-settlement practices, and no tie-in to any other statute providing a private right of action. Instead, the State Board of Insurance could investigate an insurer if it received a number of complaints about that insurer's activities; it could require regular reports from insurers found to be "substantially out of line"; and it could impose penalties.[14]

B. 1982: Adoption of Unfair Claim Settlement Practices Rules

In August 1982, Texas's State Board of Insurance adopted rules prohibiting unfair claim-settlement practices.[15] Under the Board's rules, an unfair claim-settlement practice was defined to mean "committing or performing with such frequency as to indicate a general business practice" any of 16 listed acts.[16] For reasons that were not explained by the Board when it adopted the rules, the new rules did not duplicate the statutory mandate that the insurer's acts be "committed without cause."

The rules provided that if the Board found, based on complaints of unfair claim-settlement practices, that an insurer "is substantially out of line and should be subjected to closer supervision with respect to such practices,"[17] then the insurer could be required by the Board to file periodic reports with the Board. For purposes of this rule, "substantially out of line" was defined to mean "a patently disproportionate number of complaints to indicate the existence of a pattern of unfair claims settlement practices."[18]

The rules were "adopted under the authority of Texas Insurance Code, Article 21.21-2, §8, pursuant to which the board may promulgate such rules and regulations as are necessary to carry out the purposes and provisions of the Unfair Claim Settlement Practices Act and in augmentation thereof, under authority of Texas Insurance Code, Article 21.21-2, §2(g), pursuant to which the State Board of Insurance may define unfair claims settlement practices. . . ."[19]

As discussed above, article 21.21 (not article 21.21-2) created a private right of action that was available to "[a]ny person who has been injured by another's engaging in any of the practices declared . . . in rules or regulations lawfully adopted by the Board *under this Article* to be unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. . . ."[20] Article 21.21 did not make rules adopted under a different statute, like article 21.21-2, actionable.[21] Similarly, the DTPA at that time allowed a private right of action based on rules adopted under article 21.21, not some other statute.[22] Consequently, because the Insurance Commission's rules about unfair claim-settlement practices were adopted under article 21.21-2, not article 21.21, the rules did not appear to trigger a private right of action under either the Texas Insurance Code or the DTPA.

C. 1985: Amendments to Article 21.21 of the Texas Insurance Code

In 1985, the Texas Legislature made several important changes to article 21.21.

First, section 16 of article 21.21 was amended to allow lawsuits for unfair *or* deceptive acts or practices ("and" was replaced by "or") against "persons" (rather than "companies") engaged in such acts or practices.[23] "Persons" was defined broadly to include individuals and all forms of business organizations.[24] Consequently, starting in 1985, both insurance companies and their agents and employees were subject to a lawsuit under article 21.21, which, again, was primarily aimed at unfair competition and marketing misconduct.

Second, before the 1985 amendments, a person who prevailed in an action under section 16 was entitled to recover three times the amount of actual damages plus court costs and attorney's fees. After the 1985 amendments, a person who prevailed in an action under section 16 was entitled to recover the amount of actual damages plus court costs and *reasonable and necessary* attorney's fees; but if the trier of fact determined that the insurer knowingly committed the acts complained of, the court was *required* to award an additional two times the amount of actual damages.[25] The requirement that the attorney's fees be "reasonable in relation to the amount of work expended" was deleted.

Third, article 21.21 was amended to provide that an action under section 16 had to be commenced within two years after the date on which the unfair act or practice occurred, or within two years after the person bringing the action discovered the occurrence.[26] The prior iteration of the statute provided that "damages [recoverable under Section 16] may not include any damages incurred beyond a point two years prior to the institution of the action."

Fourth, the statute was amended to require that the plaintiff give written notice to the prospective defendant at least 30 days before filing suit, stating the specific complaint, the amount of plaintiff's actual damages, and the attorney's fees incurred in asserting the claim against the defendant.[27] This notice triggered the right of the defendant to make a settlement offer, and if that offer turned out to be "the same or substantially the same as the actual damages found by the trier of fact," then the damages were capped at the amount offered.[28] Thus, the requirement for a pre-suit notice, and the provisions for a settlement offer made in response to that notice, both were added more than 30 years ago, in 1985.

D. 1987-88: Creation of the Duty of Good Faith and Fair Dealing

The Texas Supreme Court recognized a common-law duty of good faith and fair dealing in the insurance context in 1987, in *Arnold v. National County Mutual Fire Insurance Co*.[29] The Court recognized this duty because of the "special relationship" that arises in the insurance context stemming from "the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims."[30] According to the Court, "without such a cause of action insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed."[31] The Court concluded that a cause of action for breach of the duty of good faith and fair dealing is stated when it is alleged that there is no reasonable basis for denial or delay in payment of a claim, or when there is a failure on the part of the insurer to determine whether there is any reasonable basis for the denial or delay.[32]

The following year, the Texas Supreme Court handed down another important insurance decision, *Vail v. Texas Farm Bureau Mutual Insurance Co*.[33] In *Vail*, the Court held that an insured could bring an action for unfair claim-settlement practices under the DTPA.[34] The Court held that unfair claim-settlement practices were prohibited by the Insurance Board's rules, and that

both the DTPA and article 21.21 made violations of the Board's rules actionable.[35] The Court essentially ignored the fact that both the DTPA and Insurance Code provided that the Board's rules had to be derived from article 21.21 (not article 21.21-2) to be actionable; and the Board's rules about unfair claim-settlement practices were derived from article 21.21-2. The Court also found unpersuasive the argument that article 21.21-2 and the Board's rules made unfair claim-settlement practices unlawful only if "performed with frequency."[36] Thus, a single unfair act related to claims handling now was actionable under the DTPA.

E. 1991: Enactment of the Prompt Payment of Claims Act and an Amendment to the Unfair Claim Settlement Practices Act

In 1991, the Texas Legislature passed the Prompt Payment of Claims Act, as article 21.55 of the Texas Insurance Code.[37] The Act was made applicable to "any insurer authorized to engage in business as an insurance company or to provide insurance in this state" (with a few exceptions).[38] The requirements of the Act have remained largely static since its adoption in 1991 and are outlined in Part III.C, below. Broadly speaking, the 1991 Act provided that an insurer had to acknowledge receipt of a claim within 15 days; accept or reject the claim within 15 business days after receiving all items, statements, and forms required to evaluate the claim; and pay an accepted claim within five business days after notifying the insured that the claim has been accepted.[39] An insurer that was liable for a claim under the insurance policy and "not in compliance with the requirements of this article" was liable to the policyholder for "18 percent per annum of the amount of such claim as damages, together with reasonable attorney fees as may be determined by the trier of fact."[40]

In addition to passing the Prompt Payment of Claims Act in 1991, the Texas Legislature deleted the requirement in article 21.21-2 that unfair claim-settlement practices be committed without cause and performed with frequency in order to trigger administrative action.[41] The following year, the Texas Department of Insurance amended its rules to delete the requirement that unfair claim-settlement practices be committed or performed with "such frequency as to indicate a general business practice."[42] The consequence of these changes was to give the Texas Department of Insurance enforcement powers based on a single unfair claim-settlement act by an insurer.

F. 1995: Amendments to the DTPA and Insurance Code Article 21.21

In 1995, the Texas Legislature passed significant amendments to both the DTPA and Insurance Code article 21.21.[43]

Among many significant changes to the DTPA was an amendment to section 17.50 that deleted the provision creating a DTPA cause of action for acts or practices that violated the rules or regulations issued by the Texas Department of Insurance under article 21.21 of the Insurance Code.[44] An act or practice that violated article 21.21 itself continued to be actionable, but an act or practice that violated Texas Department of Insurance rules would no longer be actionable.[45] As noted in Part II.A, above, article 21.21 made certain anti-competitive acts and some forms of marketing misconduct unlawful, but it did not make unfair claim-settlement practices actionable. Unfair claim-settlement practices became actionable through the Texas Supreme Court's decision in *Vail*, which incorrectly made Insurance Department rules adopted under Insurance Code article 21.21-2 actionable under the DTPA.[46]

The DTPA was also amended to delete references to "actual damages" (which, as noted above, was not a defined term), and to substitute references to "economic damages" (which is a defined term).[47]

Apparently in exchange for eliminating the tie-in between the DTPA and the Insurance Department's rules, a multi-item list of unfair claim-settlement practices was added to article 21.21.[48] This change created a statutory cause of action for unfair claim-settlement practices that had not previously existed (except to the extent *Vail* recognized a statutory cause of action). This private right of action gave plaintiffs a right to recover "actual damages" for unfair claim-settlement practices, along with two-times actual damages for knowing misconduct, plus attorney's fees.

Section 16 of article 21.21 was amended to delete the provision providing a private cause of action under the Insurance Code for violation of rules adopted by the Texas Department of Insurance under article 21.21.[49] Additionally, section 16 was amended to provide that an insurance policyholder could bring a DTPA action for a violation of the DTPA laundry list, but not for an unspecified deceptive act or practice.[50] Thus, it was no longer possible to sue an insurance company for a non-specific deceptive act or practice under section 17.46(a) of the DTPA. And a sentence was added to section 16 providing that in order to maintain an action under the DTPA's laundry list, the person had to "show that he has relied on the act or practice to the person's detriment."[51]

The remedy provision in article 21.21 was changed to provide that the trier of fact could (discretionarily) award not more than three times the amount of actual damages for a person's knowing violation of article 21.21.[52] Previously article 21.21 said that for a knowing violation "the court shall award, in addition [to awarding actual damages], two times the amount of actual damages. . . ."[53]

2003: Non-substantive Codification of the Insurance Code

In 2003, as part of a process to incorporate all of Texas's statutes into subject-matter codes, the old Texas Insurance Code was re-codified as the new Texas Insurance Code.[54] The codification was non-substantive.[55]

- Article 21.21, originally passed in 1973 along with the DTPA, was codified as Chapter 541 of the Insurance Code.[56]
- Article 21.21-2, the Unfair Claim Settlement Practices Act from 1973, was codified as Subchapter A of Chapter 542 of the Insurance Code.[57] It still does not have a private cause of action, except that it has a small tie-in to the DTPA having to do with the examination of tax returns.[58]
- The unfair claim-settlement practices cause of action that resulted from the decision in *Vail* (derived by the Texas Supreme Court from the Department of Insurance's rules, as discussed in Part II.D, above), which was subsequently codified as section 10 to article 21.21, was codified at section 541.060 of the Insurance Code.[59] The private cause of action for all forms of deceptive acts or practices (including unfair claim-settlement practices) is codified at sections 541.151 and 541.152, including the right to recover "actual damages," reasonable and necessary attorney's fees, and up to three times the amount of actual damages for a knowing violation.[60]
- Article 21.55, the Prompt Payment of Claims Act from 1991, was codified as Subchapter B of Chapter 542 of the Texas Insurance Code, including the right to recover 18 percent penalty interest plus reasonable attorney's fees.[61]

III. Overview of Insured's Causes of Action and Remedies Against Insurer

With that history as background, below are the standards and remedies for each of an insured's potential causes of action against an insurer for failure to pay claims promptly.

A. Private Right of Action for Unfair Claim-Settlement Practices

Under Texas's unfair claim-settlement practices statute, an insurer has an obligation to conduct a proper investigation of a claim, deal with the insured fairly, and pay a claim when liability for the claim becomes "reasonably clear."[62] An insured may pursue a private right of action against an insurer for violation of the statutory laundry list of prohibited acts.[63] If a violation is found, the insurer is liable for "actual damages" plus "reasonable and necessary attorney's fees."[64] In addition to actual damages, if the trier of fact determines that the insurer acted knowingly, it may also award up to three times the amount of actual damages as a penalty.[65]

The unfair claim-settlement statute requires an insured seeking damages to provide written pre-suit notice not later than 61 days before an action is filed.[66] The notice must contain the specific complaint and "the amount of actual damages and expenses, including attorney's fees reasonably incurred in asserting the claim."[67] The recipient of a pre-suit notice then has 60 days to make an offer of settlement.[68] The settlement offer must include both an amount for damages and for reasonable and necessary attorney's fees incurred as of the date of the offer.[69] The settlement offer is rejected unless both parts of the offer are accepted by the insured within 30 days.[70] If the settlement offer is rejected, the insurer may file it with the court, along with an affidavit certifying its rejection.[71] If the court finds that the settlement offer for damages under section 541.157(1) is "the same, substantially the same as, or more than the amount of damages found by the trier of fact," the claimant may not recover any amount in excess of the lesser of the amount of damages stated in the offer or the amount of damages found by the trier of fact.[72] The court will also determine reasonable and necessary attorney's fees to compensate the claimant for attorney's fees incurred before the date and time the rejected settlement offer was made.[73] "If the court finds that the amount stated in the offer for attorney's fees under section 541.157(2) is the same as, substantially the same as, or more than the amount of reasonable and necessary attorney's fees incurred by the claimant as of the date of the offer, the claimant may not recover any amount of attorney's fees in excess of the amount of fees stated in the offer."[74]

B. Administrative Action for Unfair Claim-Settlement Practices

In addition to the private cause of action for unfair claim-settlement practices, Texas also has a separate, administratively-enforced unfair claim-settlement practices statute.[75] It prohibits insurers from engaging in unfair claim-settlement practices, including "not attempting in good faith to effect a prompt, fair, and equitable settlement of a claim submitted in which liability has become reasonably clear."[76] The Texas Department of Insurance (TDI) has the authority to investigate insurers.[77] If, after notice and a hearing, TDI determines that an insurer has engaged in an unfair claim-settlement practice in violation of the statute, it shall issue a cease and desist order directing the insurer to stop the unlawful practice.[78] If the insurer fails to comply with the cease and desist order, TDI may enforce it by revoking or suspending the insurer's certificate of authority or regulating, limiting, or controlling the insurer's business.[79] TDI is entitled to recover reasonable attorney's fees if judicial action is necessary to enforce a cease and desist order.[80]

C. Prompt Payment of Claims Act

In addition to the private right of action under the unfair claim-settlement practices statute, Texas has a separate private right of action for violation of the prompt-payment statute.[81] The prompt-payment statute is "liberally construed to promote the prompt payment of insurance claims."[82]

1. Deadlines for Accepting or Denying and Paying Claims

Under the prompt-payment statute, an insurer has 15 calendar days to acknowledge receipt of a claim, to begin to investigate the claim, and to request information from the insured that the insurer believes is necessary to investigate the claim.[83] The insurer then has 15 business days beyond the date it receives all requested information to accept or deny the claim, and another five business days beyond that to pay an accepted claim.[84] The deadline to accept or deny may be extended when an insurer requests additional information from an insured.[85]

2. Remedy/Penalty

If an insurer fails to comply with the deadlines above, it is liable for 18 percent penalty interest on the claim, plus any attorney's fees the insured incurs in pursuing an action to recover the penalty interest.[86] All "reasonable attorney's fees" incurred by the insured may be recovered in litigation if the insured proves that the insurer did not comply with the statutory deadlines.[87] These remedies are "in addition to any other remedy or procedure provided by law or at common law."[88] Thus, under Texas law, if a claim is paid a day late, penalty interest is due and attorney's fees will be awarded to the insured if litigation is pursued.

D. Deceptive Trade Practices Act

Texas law expressly allows an insured to pursue an action against her insurer under the DTPA by linking the DTPA and Insurance Code.[89] Under the DTPA, an insured may maintain a cause of action for any act or practice in violation of Chapter 541 of the Insurance Code.[90] An insured can also pursue a DTPA action against her insurer based on violation of the DTPA's laundry list of deceptive trade practices.[91]

Under the DTPA, a prevailing insured may obtain "economic damages."[92] If the trier of fact finds that the conduct was knowing, the insured may also recover mental anguish damages, as found by the trier of fact, and up to three times the amount of the economic damages.[93] If the trier of fact finds the conduct was intentional, the insured may recover mental anguish damages, as found by the trier of fact, and up to three times the amount of the mental anguish and economic damages.[94] Additionally, a prevailing insured "shall be awarded court costs and reasonable and necessary attorneys' fees."[95]

The DTPA requires an insured seeking damages to provide written pre-suit notice to the defendant at least 60 days before filing suit.[96] The notice must provide with "reasonable detail" the insured's specific complaint and the amount of economic damages, mental anguish damages, and expenses, including attorney's fees, if any, reasonably incurred by the insured in asserting the claim.[97] The recipient of the pre-suit notice has 60 days within which to make an offer of settlement.[98] The offer must include an offer to pay both damages and reasonable and necessary attorney's fees incurred as of the date of the offer.[99] Unless both parts of the offer are accepted within 30 days after the offer is made, the offer is rejected.[100] If the offer is rejected, the defendant may file with the court both the offer and an affidavit certifying its rejection.[101] If the court finds that the damages amount tendered in the settlement offer "is the same as, substantially the same as, or more than the damages found by the trier of fact," the insured may not recover any amount in excess of the lesser

of the amount of damages tendered in the settlement offer or the amount of damages found by the trier of fact.[102] If the court makes this finding, it shall also determine reasonable and necessary attorney's fees to compensate the insured for attorney's fees incurred before the date and time of the rejected settlement offer.[103] If the court finds that the amount tendered in the settlement offer for attorney's fees is the same as, substantially the same as, or more than the amount of reasonable and necessary attorney's fees incurred by the insured as of the date of the offer, the insured may not recover attorney's fees greater than the amount of fees tendered in the settlement offer.[104]

E. Common Law Bad Faith

In addition to the statutory causes of action that arise for failure to pay promptly, Texas recognizes a common-law tort action for breach of the duty of good faith and fair dealing.[105]

The Texas Supreme Court first recognized the duty of good faith and fair dealing in the insurance context in *Arnold*.[106] The Court recognized this duty because "without such a cause of action insurers could arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed."[107] The Texas Supreme Court articulated the standard of care for this duty a year later in *Aranda v. National County Mutual Fire Insurance Co.*[108] Under *Aranda*, an insured was required to establish: "(1) the absence of a reasonable basis for denying or delaying payment of the benefits of the policy and (2) that the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim."[109]

Appellate courts found it difficult to assess the legal sufficiency of evidence to support bad faith findings under the *Aranda* standard.[110] In *Universe Life Insurance Co. v. Giles*, the Texas Supreme Court described the problem as follows:

> A plaintiff in a bad-faith case must prove the *absence* of a reasonable basis to deny the claim, a negative proposition. Yet, under our no-evidence standard of review, an appellate court must resolve all conflicts in the evidence and draw all inferences in favor of a bad-faith finding. It has been argued, then, that if the reviewing court must give no weight to the insurer's evidence of a reasonable basis for the denial or delay in payment of a claim, no judgment can be reversed for want of evidence because there will never be any evidence of a reasonable basis.[111]

Thus, the Court replaced the "no reasonable basis" standard with a new standard that imposes liability upon an insurer for breach of the duty of good faith and fair dealing "if the insurer knew or should have known that it was reasonably clear that the claim was covered."[112] This standard unifies the common law and statutory standards for bad faith.[113]

In addition to recovering actual damages for the insurer's breach of the duty of good faith and fair dealing, an insured can recover punitive damages "when an insurer was actually aware that its actions involved an extreme risk—that is, a high probability of serious harm, such as death, grievous physical injury, or financial ruin—to its insured and was nevertheless consciously indifferent to its insured's rights, safety, or welfare."[114]

F. Breach of Contract

Texas courts analyze insurance contracts using the well-established principles of contract construction.[115] Like any other breach of contract claim, to establish a breach of contract, a plaintiff must prove: (1) the existence of a valid contract; (2) the plaintiff's performance or tender of performance; (3) the defendant's breach; and (4) the plaintiff's damages as a result

of the breach.[116] In the context of an insurance policy, this means a plaintiff must prove the existence of a valid insurance policy covering the denied claim and entitlement to money damages on that claim.[117]

If the insurance contract provides for the prevailing party to recover attorney's fees, the court will award attorney's fees to the prevailing party. If the insurance contract is silent, the insured can seek attorney's fees under Texas Civil Practice and Remedies Code section 38.001.[118] Chapter 38 specifically excludes insurance contracts subject to several provisions of the Insurance Code, including chapters 541 and 542.[119] Nevertheless, the Texas Supreme Court has held that despite the plain language of section 38.006, in an insured's successful breach of contract action against an insurer, the insurer is liable for reasonable attorney's fees under section 38.001 unless the insurer is liable for attorney's fees under some other statutory scheme.[120]

G. Other Common-Law Causes of Action

Other common-law causes of action, such as negligence and fraud, may be applicable in a claim-settlement lawsuit brought by an insured against her insurers depending on the specific case.

IV. Comparison of Texas's Prompt-Pay Laws to Other States' Laws

This section compares Texas's property and casualty prompt-pay laws to the prompt-pay laws of ten other states: California, Florida, New York, Illinois, Pennsylvania, Ohio, Georgia, North Carolina, Michigan, and New Jersey. These states, plus Texas, are the 11 most populous states. The Appendix to this paper provides a detailed discussion of the applicable statutes in other states.

A. Prompt-Pay Statutes

1. Deadlines for Accepting or Denying and Paying Claims

In contrast to Texas's separate prompt-pay statute, which sets out specific timeframes within which an insurer must accept or deny and pay claims, in most states, deadlines related to the prompt settlement of claims are set out in regulations promulgated by the states' insurance regulators pursuant to their unfair claim-settlement practices statutes. This section will compare deadlines for accepting or denying and paying claims regardless of the type of statutory or regulatory scheme they fall within.

The deadlines for various actions related to investigation and settlement of claims vary widely from state to state. Texas is tied with several states for the shortest time period within which an insurer must accept or deny a claim after receipt of a complete proof of loss.[121]

Other states surveyed allow longer time periods for claims to be accepted or denied.[122] Some states do not specify a time period within which claims must be accepted or denied, instead requiring only that it be within a "reasonable" time after proof of loss statements have been completed.[123]

Of the states that include a specific deadline to accept or deny a claim, in most the deadline may be extended if, within the statutory period for accepting or denying a claim, or shortly thereafter, the insurer notifies the insured that it needs additional time to investigate, and in some states, includes the reason additional time is needed.[124]

Texas allows an insurer to request additional time to affirm or deny a claim, but uniquely puts a firm cap on the additional time allowed.[125] In contrast, most other states surveyed allow the insurer to continue providing written notice that additional time is needed.[126] Texas is tied with New York for the shortest period of time after acceptance or denial of a claim to make payment.[127] Of the states with specific deadlines for payment, most allow longer time periods, some measured from acceptance of the claim and others measured from receipt of proof of loss.[128]

2. Remedies/Penalties

As discussed above, Texas has a separate prompt-pay statute that provides an insured with a private cause of action under which she can recover 18 percent penalty interest plus reasonable attorney's fees for a late-paid claim.[129] In most states surveyed, payment deadlines are set out in unfair claim-settlement practices statutes, which generally do not allow the insured to bring a private lawsuit.[130] It is unclear whether an insured may bring a claim for violation of the prompt-pay statute standing alone, or whether the insured must also prevail on another cause of action.[131]

In three of the states surveyed, there are statutory penalties payable to an insured for failure to pay promptly.

Florida allows an insured to recover penalty interest at the state judgment rate of interest (4.97 percent effective January 1, 2017) for any claim made more than 90 days after the insurer receives notice of the claim or 15 days after there are no longer factors beyond the insurer's control preventing payment.[132]

Michigan's unfair claim-settlement statute provides an insured a private right of action to recover penalty interest for a late-paid claim.[133] However, interest is set lower than Texas, at 12 percent, and the statute does not allow for the recovery of attorney's fees.[134] For first-party insureds, the penalty applies irrespective of whether the claim is reasonably in dispute.[135] However, there are also some limitations: if the loss exceeds the limits of available coverage, interest is payable on the limits rather than the amount of the loss; and if payment is offered but rejected by the claimant, and the claimant does not subsequently recover more than the amount offered, no interest is due.[136]

Finally, in Georgia, there is a statutory cause of action for failure to pay promptly; however, it requires a showing of bad faith by the insurer and does not apply when the insurer has any reasonable ground to contest the claim.[137] If the insurer refuses to pay a covered loss within 60 days of a demand by the insurer, "and a finding has been made that such refusal was in bad faith," the insurer must pay the insured "in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer."[138] The insured bears the burden of proving that the refusal to pay the claim was made in bad faith.[139] The penalty does not apply when the insurer has any reasonable ground to contest the claim and there is a disputed question of fact.[140] The penalty is "the exclusive remed[y] for an insurer's bad faith refusal to pay insurance proceeds."[141]

B. Unfair Claims Practices Statutes

In Texas, an insured has a private cause of action for violation of the unfair claim- settlement statute laundry list.[142] The laundry list includes as a violation, "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement" when an insurer's liability "has become reasonably clear."[143] If a violation is found, the insurer is liable for "actual damages" plus "reasonable and necessary attorney's fees."[144]

All of the states surveyed have an unfair claim-settlement practices act similar to the Texas unfair claim-settlement statute. However, other than Texas, Florida is the only state with a private right of action for its violation.[145] In all other states surveyed, the unfair claim-settlement statutes are administratively enforced.

The Florida Unfair Insurance Trade Practices Act makes it a violation to "fail[] to pay undisputed amounts of partial or full benefits owed . . . within 90 days after an insurer receives notice of . . . claim, determines the amount of partial or full benefits, and agrees to coverage" with exceptions for acts of God and fraud by the insured.[146] Like Texas, if a violation is found, an insurer is liable for unspecified "damages," as well as court costs and attorney's fees.[147] However, in Florida, an insured may also recover punitive damages if the acts giving rise to the violation "occur with such frequency as to indicate a general business practice," and are willful, wanton, and malicious or in reckless disregard for the rights of any insured.[148] Any person who pursues a claim for punitive damages must post in advance the costs of discovery, which "shall be" awarded to the authorized insurer if no punitive damages are awarded to the plaintiff.[149]

While it does not have a private right of action for violation of the unfair claim-settlement statute, Illinois has an extra-contractual remedy against insurers in the form of an award of a penalty, attorney's fees, and costs, but only when an insurer's delay or refusal to pay a claim is vexatious and unreasonable.[150] The penalty under this provision is, "an amount not to exceed any one of the following amounts: (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs; (b) $60,000; (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action."[151] For an insured to recover under the Illinois statute, he must also succeed in the action on the policy.[152] "If a bona fide coverage dispute exists, an insurer's delay in settling a claim will not be deemed vexatious or unreasonable for purposes of section 155 sanctions."[153] "[W]hen determining whether an insurer's conduct in a given case is vexatious and unreasonable under the totality of the circumstances, a court may properly consider actions identified as improper claims practices under [the unfair claim-settlement statute] as relevant to, but not dispositive of, a section 155 claim."[154]

C. Common Law Bad Faith

Texas recognizes a tort action for breach of the duty of good faith and fair dealing.[155] An insurer breaches the duty of good faith and fair dealing if it denies or delays payment of a claim when it "knew or should have known that it was reasonably clear that the claim was covered."[156] In addition to actual damages arising from the breach, an insured can recover punitive damages "when an insurer was actually aware that its actions involved an extreme risk—that is, a high probability of serious harm, such as death, grievous physical injury, or financial ruin—to its insured and was nevertheless consciously indifferent to its insured's rights, safety, or welfare."[157]

California, New Jersey, North Carolina, and Ohio also have common law bad-faith causes of action.[158] However, unlike Texas, these states do not also have private causes of action under their respective unfair claim-settlement statutes.[159]

While the standards for imposing bad-faith liability vary among the states, they all require some unreasonable conduct or something more than a mistake or disagreement. In California, an insured must show that the insurer's failure to pay promptly was "prompted not by an honest mistake, bad judgment, or negligence but rather by a conscious and deliberate act, which

unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party."[160] In New Jersey, an insured must show that "no valid reasons existed to delay processing the claim and the insurance company knew or recklessly disregarded the fact that no valid reasons supported the delay."[161] In North Carolina, an insured must show (1) recognition of a valid claim and a refusal to pay that claim; (2) bad faith in making that refusal; and (3) aggravating or outrageous conduct.[162] Finally, in Ohio, an insured must show that there is no reasonable justification for the insurer's refusal to pay.[163]

The damages available for common law bad-faith claims also vary from state to state. In California, an insured can recover all damages proximately caused by an insurer's bad faith.[164] In New Jersey, because the bad-faith cause of action is rooted in contract law, contract law principles apply in determining damages.[165] Accordingly, a breaching party is responsible for all foreseeable consequential damages resulting from the breach.[166] In North Carolina, aggravated or outrageous conduct is one of the elements of a bad-faith claim, and the only available damages for this cause of action appear to be punitive damages.[167] Finally, in Ohio, an insurer who acts in bad faith is liable for compensatory damages flowing from the bad-faith conduct of the insurer and caused by the insurer's breach of contract.[168]

In all four states with common law bad-faith claims, punitive damages are available if the insured can prove aggravating conduct.[169] In California and Ohio, attorney's fees are also available.[170]

The remaining states surveyed do not have common law bad-faith tort actions. Florida, Georgia, and Illinois do not have any common-law bad-faith causes of action.[171] Michigan, New York, and Pennsylvania do not have common law tort actions, but do recognize breach of contract actions for violation of the insurance contract's implied duty of good faith and fair dealing.[172] The remedies available for breach of contract will be discussed in Part IV.E, below.

D. Deceptive Trade Practices Statutes

The Texas DTPA expressly allows an insured to maintain a cause of action for any act or practice in violation of the insurance unfair claim-settlement statute.[173] An insured can also pursue a DTPA action against her insurer based on violation of the DTPA's laundry list of deceptive trade practices.[174] Under the DTPA, an insured can recover economic damages, plus if the conduct was committed knowingly, mental anguish damages and up to three times the amount of the economic damages.[175] If the conduct was committed intentionally, both economic and mental anguish damages may be trebled.[176] Finally, a prevailing insured "shall be awarded court costs and reasonable and necessary attorneys' fees."[177]

Several of the states surveyed have consumer-protection statutes applicable to insurers. The only state that appears to be as punitive as Texas is North Carolina, in which violation of the administratively-enforced unfair claim-settlement statute is *per se* an instance of an unfair or deceptive trade practice under the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA).[178] Violation of the subsection of the unfair claim-settlement statute requiring insurers to "attempt in good faith to settle claims promptly after liability has become reasonably clear," does not require a demonstration that the insurer engaged in the prohibited conduct "with such frequency as to indicate a general business practice" to rise to the level of a violation of the UDTPA.[179] This is because an insurance company that fails to comply with the unfair claim-settlement statute, "engages in conduct that embodies the broader standards of [the UDTPA] because such conduct is inherently unfair, unscrupulous, immoral, and injurious to consumers."[180] Because this conduct in itself qualifies as an unfair and deceptive trade practice, it is not necessary for the plaintiff to additionally demonstrate that the conduct occurred with

any frequency.[181] If an insured proves a violation of the UDTPA, she may recover damages of "treble the amount fixed by the verdict."[182] Upon a finding that the insurer "willfully engaged in the act or practice, and there was an unwarranted refusal . . . to fully resolve the matter," the insured is also entitled to reasonable attorney's fees."[183]

In California, an insured can sue an insurer for bad-faith claims handling under the California Unfair Competition Law (UCL).[184] The UCL identifies "any unlawful, unfair or fraudulent business act or practice" as "unfair competition."[185] Under the UCL, prevailing plaintiffs are generally limited to injunctive relief and restitution and may not receive damages or attorney's fees.[186] These equitable remedies are cumulative to the remedies and penalties available under other laws.[187]

Finally, in New York, an insured can assert a private cause of action under the consumer protection statute, but only if the insurer's conduct has a broad impact on consumers at large and is not unique to the parties to the contract.[188] An injured party may recover actual damages or $50, whichever is greater, and the court may, if it finds that the defendant acted willfully, or that it knowingly violated the section, triple the damages to a maximum of $1,000.[189] The court may also award reasonable attorney's fees to a prevailing plaintiff.[190]

E. Breach of Contract

In Texas, an insurance contract is like any other contract; thus, Texas courts analyze insurance contracts using well-established principles of contract construction.[191]

In three of the states surveyed, a duty of good faith is implied into the insurance contract. In Michigan, the contractual obligation to act in good faith extends to the investigation of claims.[192] An insured prevailing on a claim for breach of this duty is entitled to the consequential damages that would be available in any other breach of contract claim.[193] Similarly, in New York, an implied duty of good faith and fair dealing is part of the insurance contract, and thus bad faith is considered part of a breach of contract claim.[194] Accordingly, a claim that an insurer failed to make payments or provide benefits in accordance with a policy of insurance is generally considered a breach of contract cause of action, limited to contract damages, including consequential damages.[195] Finally, in Pennsylvania, an insured can bring a breach of contract action for violation of an insurance contract's implied duty of good faith.[196] An insured prevailing on a claim for breach of this duty is entitled to recover the known or foreseeable compensatory damages that reasonably flow from the bad-faith conduct.[197]

V. Conclusion

Texas's laws governing the settlement and payment of property insurance claims are unique in many respects. While the insurance laws in other states are not uniform, it is clear that no state surveyed in this paper allows policyholders as many avenues for recovery, or provides the potent combination of punitive remedies against insurers, as does Texas.

Unlike most other states, Texas has a private cause of action for violation of its prompt payment of claims statute. And Texas is unique among the states surveyed in that its prompt payment of claims statute has the following combination of elements: (1) imposes strict liability on the insurer (no fault, wrongdoing, or bad faith by the insurer need be shown); (2) is applicable if a single dollar of the claim is late paid; (3) imposes an 18 percent per year penalty on the insurer, which is among the highest penalty rates in the nation; and (4) allows the insured to recover attorney's fees from the insurer.

Importantly, the cause of action available to Texans under the prompt payment of claims statute is *in addition* to the private right of action under Texas's unfair claim-settlement statute, which allows for the recovery of attorney's fees, actual damages, and up to three times the amount of those actual damages, if an insurer fails to pay a claim reasonably promptly after its liability becomes clear. This is in contrast to most states surveyed, in which the unfair claim-settlement statute is administratively enforced and no private cause of action is provided the policyholder.

Additionally, Texas law provides that a violation of its unfair claim-settlement statute also is a violation of its Deceptive Trade Practices Act. And, furthermore, a deceptive act or practice in the business of insurance (including a deceptive act in settling an insurance claim) is independently actionable under the DTPA, even if that act or practice does not violate the specific terms of Texas's unfair claim-settlement statute. The DTPA allows the insured to recover economic damages and attorney's fees, mental anguish damages if the conduct was knowing, and treble damages if the conduct was intentional.

Further, Texas has a common-law cause of action for breach of the duty of good faith and fair dealing, which allows the recovery of actual and exemplary damages against an insurer. And a policyholder also has a cause of action for breach of contract, which allows for the recovery of policy benefits and attorney's fees.

In sum, Texas provides a unique and plentiful array of causes of action and remedies to an insured who believes her insurer failed to timely or fully pay an insurance claim, or otherwise acted unfairly in the claim-settlement process. The expansiveness of Texas's insurance laws invited excessive litigation in 2008, following Hurricane Ike, when a handful of lawyers manipulated these laws to produce lucrative returns. Then, beginning in 2012, Texas courts began seeing another precipitous increase in insurance policyholder lawsuits. This time the lawsuits allege that private insurers across the state are failing to pay or are under-paying claims following hail and wind storms. Again, the litigation explosion is being pursued by attorneys who are exploiting the unusually vast and consumer-friendly collection of actions and remedies available to insurance policyholders under Texas law. ■

ENDNOTES

1 *See* Tex. H.B. 417, 63rd Leg., R.S., Ch. 143, § 1, 1973 Tex. Gen. Laws 322, 326-27 (cause of action codified at Tex. Bus. & Com. Code § 17.50).

2 *See id.* at 323-24 (general prohibition on false, misleading, and deceptive acts codified at Tex. Bus. & Com. Code § 17.46(a) and "laundry list" codified at Tex. Bus. & Com. Code § 17.46(b)). The laundry list included, for example, "passing off goods or services as those of another"; "causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services"; "representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand." *See id.*

3 *See id.* at 327 (codified at Tex. Bus. & Com. Code § 17.50(b)).

4 *See id.* (codified at Tex. Bus. & Com. Code § 17.50(a)(4)).

5 *See* Tex. Ins. Code art. 21.21, § 5 (now codified at Tex. Ins. Code § 541.101).

6 *See id.* The list of prohibited practices included, for example, "mak[ing], issu[ing], or circulat[ing] . . . an estimate, illustration, circular, or statement misrepresenting" the terms or benefits of the policy and "mak[ing], publish[ing], disseminat[ing], circulat[ing], or plac[ing] before the public. . . an advertisement, announcement, or statement containing an untrue, deceptive, or misleading assertion, representation, or statement regarding the business of insurance or a person in the conduct of the person's insurance business." *See id.*

7 *See id.*, art. 21.21, § 4 (now codified at Tex. Ins. Code §§ 541.051, .052).

8 *See* Tex. H.B. 417, 63rd Leg., R.S., Ch. 143, § 2, 1973 Tex. Gen. Laws 322, 335, 338 (codified at Tex. Ins. Code art. 21.21, § 16(a)).

9 *See id.* at 338 (codified at Tex. Ins. Code art. 21.21, § 16(b)).

10 *See* Tex. S.B. 837, 63rd Leg., R.S., Ch. 319, § 1, 1973 Tex. Gen. Laws 735, 735-39 (codified at Tex. Ins. Code art. 21.21-2). Although the statutory designation was similar, articles 21.21 and 21.21-2 were entirely different statutes.

11 *See id.* at 736 (codified at Tex. Ins. Code art. 21.21-2, § 2).

12 *Compare id.* (codified at Tex. Ins. Code art. 21.21-2, § 2(a)-(g)) with Tex. Ins. Code § 542.003(b)(1)-(7).

13 *See id.* (codified as Tex. Ins. Code art. 21.21-2, § 2(d)).

14 *See id.* at 736-38 (codified at Tex. Ins. Code art. 21.21-2, §§ 3, 4, 6).

15 *See* 7 Tex. Reg. 3148, 3148-50 (August 27, 1982) (codified as Insurance Commission Rules 059.21.26.001-.005).

16 *See id.* (codified as Insurance Commission Rule 059.21.26.003).

17 *Id.* at 3150 (codified as Insurance Commission Rule 059.21.26.004).

18 *Id.*

19 *Id.* at 3148.

20 *See* Tex. H.B. 417, 63rd Leg., R.S., Ch. 143, § 2, 1973 Tex. Gen. Laws 322, 338 (emphasis added) (codified at Tex. Ins. Code art. 21.21, § 16(a)).

21 *See* Part II.A, *supra.*

22 *See id.*

23 *See* Tex. H.B. 316, 69th Leg., R.S., ch. 22, § 3, 1985 Tex. Gen. Laws 395, 395-96 (codified at Tex. Ins. Code art. 21.21, § 16(a)).

24 *Id.* at § 2 (codified at Tex. Ins. Code art. 21.21, § 2(a)).

25 *Id.* (codified at Tex. Ins. Code art. 21.21, § 16(b)(1)).

26 *Id.* (codified at Tex. Ins. Code art. 21.21, § 16(d)). A 180-day additional period was added if the plaintiff proved that the failure to timely commence the action was caused by the defendant's engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action. *Id.*

27 *Id.* (codified at Tex. Ins. Code art. 21.21, § 16(e)).

28 *Id.* (codified at Tex. Ins. Code art. 21.21, § 16(g), (h)).

29 725 S.W.2d 165 (Tex. 1987).

30 *Id.* at 167.

31 *Id.*

32 *Id.*

33 754 S.W.2d 129 (Tex. 1988).

34 *Id.* at 133-36.

35 *Id.* at 135-36.

36 *Id.* at 134. As noted below, the requirement that the unfair claim-settlement acts be "performed with frequency" was dropped in the 1992 amendments to the rules.

37 *See* Tex. H.B. 2, 72nd Leg., R.S., ch. 242, § 11.03, 1991 Tex. Gen. Laws 939, 1043-45 (codified at Tex. Ins. Code art. 21.55).

38 *Id.* (codified at Tex. Ins. Code art. 21.55, § 1(4)).

39 *Id.* (codified at Tex. Ins. Code art. 21.55, §§ 2, 3, 4).

40 *Id.* (codified at Tex. Ins. Code art. 21.55, § 6). The requirement that the amount of attorney's fees be determined by the trier of fact was removed in 1995. *See* Tex. S.B. 598, 74th Leg., R.S., ch. 333, § 1, 1995 Tex. Gen. Laws 2839, 2839 (amending Tex. Ins. Code art. 21.55, § 6).

41 *See* Tex. H.B. 2, 72nd Leg., R.S., ch. 242, § 11.12, 1991 Tex. Gen. Laws 939, 1060 (amending Tex. Ins. Code art. 21.21-2, § 2).

42 *See* 10 Tex. Reg. 82, 83 (amending 28 Tex. Admin. Code § 21.203).

43 *See* Tex. H.B. 668, 74th Leg., R.S., ch. 414, 1995 Tex. Gen Laws 2988.

44 *See id.* at 2992 (amending Tex. Bus. & Com. Code § 17.50(a)).

45 *See id.*

46 *See* Part II.D, *supra*.

47 *See id.* at 2989, 2992 (amending Tex. Bus. & Com. Code § 17.45 to add a definition of "economic damages" and amending § 17.50(a) to replace "actual damages" with "economic damages").

48 *See id.* at 2999 (amending Tex. Ins. Code art. 21.21. to add section 10). The Legislature also added section 11 to article 21.21, making certain marketing-related misconduct actionable. *See id.* at 2999-3000.

49 *See id.* at 3000.

50 *See id.*

51 *See id.*

52 *See id.*

53 *See id.*

54 *See* Tex. H.B. 2922, 78th Leg., R.S., ch. 1274, 2003 Tex. Gen. Laws 3611.

55 *See id.* at 3611 ("relating to the nonsubstantive revision of statutes relating to the Texas Department of Insurance...").

56 *See id.* at 3658-75 (parentheticals in each section provide derivation of statutory language).

57 *See id.* at 3676-79.

58 *See id.* at 3677 (codifying prior Tex. Ins. Code art. 21.21-2, § 2(c) as Tex. Ins. Code § 542.004(c)).

59 *See id.* at 3662.

60 *See id.* at 3664-65.

61 *See id.* at 3679-81.

62 Tex. Ins. Code § 541.060.

63 *Id.* § 541.151.

64 *Id.* § 541.152(a). The statute does not define "actual damages." Insureds have argued that "actual damages" for unfair claim-settlement practices means the policy benefits themselves, and at least one court of appeals has agreed. *See USAA Tex. Lloyds Co. v. Menchaca,* No. 13-13-00046, 2014 WL 3804602 (Tex. App.—Corpus Christi July 31, 2014, pet. pending) (holding that policy limits were the correct measure of damage for violation of section 541.060 despite jury finding that insurer did not breach policy). Insurers, on the other hand, argue that "actual damages" means something more than the amount owed under the insurance policy.

65 Tex. Ins. Code § 541.152(b).

66 *Id.* § 541.154(a).

67 *Id.* § 541.154(b).

68 *Id.* § 541.156(a).

69 *Id.* § 541.157.

70 *Id.* § 541.158(a).

71 *Id.* § 541.158(b).

72 *Id.* § 541.159(a).

73 *Id.* § 541.159(b).

74 *Id.*

75 *See* Tex. Ins. Code § 542.001, *et seq.*

76 *Id.* § 542.003(b)(4).

77 *Id.* §§ 542.007, .008.

78 *Id.* §§ 542.009, .010(a).

79 *Id.* § 542.010(b),(c).

80 *Id.* § 542.012.

81 *Id.* § 542.051, *et seq.*

82 *Id.* § 542.054.

83 *Id.* § 542.055(a).

84 *Id.* §§ 542.056(a), .057(a).

85 *Id.* § 542.055(b).

86 *Id.* § 542.060(a).

87 *Id.*

88 *Id.* § 542.061.

89 *See* Tex. Bus. & Com. Code § 17.50(a)(4); Tex. Ins. Code § 541.151(2).

90 Tex. Bus. & Com. Code § 17.50(a)(4).

91 *See* Tex. Bus. & Com. Code §§ 17.46(b), 17.50(a)(1)(A).

92 *Id.* § 17.50(b)(1).

93 *Id.*

94 *Id.*

95 *Id.* § 17.50(d).

96 *Id.* § 17.505(a).

97 *Id.*

98 *Id.* § 17.5052(a).

99 *Id.* § 17.5052(d).

100 *Id.* § 17.5052(e).

101 *Id.* § 17.5052(f).

102 *Id.* § 17.5052(g).

103 *Id.* § 17.5052(h).

104 *Id.* § 17.5052(h).

105 *See Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 50 (Tex. 1997).

106 725 S.W.2d at 167.

107 Justin L. Jeter, *Is Universe Life Insurance Co. v. Giles A Reasonable Alternative to the "No Reasonable Basis" Standard of Bad Faith Liability?*, 51 Baylor L. Rev. 175 (1999) (quoting *Arnold*, 725 S.W.2d at 167).

108 748 S.W.2d 210 (Tex. 1988).

109 *Id.* at 213.

110 *Giles*, 950 S.W.2d at 51.

111 *Id.* at 51 (internal citations omitted).

112 *Id.* at 55.

113 *Id.*

114 *Id.* at 57; *see also* Tex. Civ. Prac. & Rem. Code § 41.003(a) (allowing recovery of exemplary damages if the claimant proves fraud, malice, or gross negligence).

115 *See State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010).

116 *Davis v. Nat'l Lloyds Ins. Co.*, 484 S.W.3d 459, 468 (Tex. App.—Houston [1st Dist.] 2016, pet. filed).

117 *Id.*

118 Tex. Civ. Prac. & Rem. Code § 38.001(8).

119 *Id.* § 38.006.

120 *Grapevine Excavation, Inc. v. Maryland Lloyds,* 35 S.W.3d 1, 5 (Tex. 2000) (noting Court's prior interpretation of section 38.001 and recognizing the "established statutory construction rule that once appellate courts construe a statute and the Legislature re-enacts or codifies the statute without substantial change, we presume that the Legislature has adopted the judicial interpretation").

121 *See* Tex. Ins. Code § 542.056(a) (insurer must accept or deny a claim not later than 15 business days after receipt of all information required for final proof of loss); N.Y. Comp. Codes R. & Regs. tit. 11, § 216.6(c) (insurer must accept or deny a claim within 15 business days after receipt of properly executed proof of claim); Ga. Comp. R. & Regs. 120-2-52-.03(3) (insurer must affirm or deny liability within 15 days after receiving complete proof of loss); 31 Pa. Code § 146.7(a)(1), (2) (insurer must notify insured of acceptance or denial of claim within 15 working days after receipt of proper proof of loss).

122 *See, e.g.* Cal. Ins. Code § 2695.7(c)(1) (40 calendar days from receipt of proof of claim); Fla. Stat. § 626.9541(i)(3)(e) (30 calendar days after complete proof of loss and upon written requested from insured); Ohio Admin. Code rule no. 3901-1-54(G)(1) (21 days after receipt of properly executed proof of loss).

123 *See, e.g.*, 215 Ill. Comp. Stat. 5/154.6(i); Mich. Comp. Laws § 500.2026(e); N.C. Gen. Stat. § 58-63-15(11)(e).

124 *See, e.g.*, Cal. Code Regs. tit. 10 § 2695.7(c)(1); Fla. Stat. § 626.9641(1)(i)(3)(e); Ga. Comp. R. & Regs. 120-2-52-.03(3); N.J. Admin. Code § 11:2-17.7(e); N.Y. Comp. Codes R. & Regs. tit. 11, § 216.6(c); Ohio Admin. Code rule no. 3901-1-53(G)(1); 31 Pa. Code § 146.6(c)(1).

125 *See* Tex. Ins. Code § 542.056(d) (extending deadline if insurer notifies insured within deadline for accepting or rejecting a claim, but requiring insurer to accept or reject claim within 45 days of that notice).

126 *See, e.g.* Cal. Code Regs. tit. 10 § 2695.7(c)(1) (requiring written notice every 30 calendar days until determination is made); Fla. Stat. § 626.9641(1)(i)(3)(e) (allowing insurer to provide a written statement that the claim is being investigated within timeframe for accepting or denying claim); N.J. Admin. Code § 11:2-17.7(e) (allowing insurer to provide written notice within timeframe for accepting or denying claim, then send updated notices every 45 days); N.Y. Comp. Codes R. & Regs. tit. 11, § 216.6(c) (allowing insurer to provide written notice with reason additional time is needed within timeframe for accepting or denying claim, then send updated notice every 90 days until claim is accepted or denied); Ohio Admin. Code rule no. 3901-1-53(G)(1) (allowing insurer to provide written notice with reason additional time is needed within timeframe for accepting or denying claim, then send updated notice every 45 days until claim is accepted or denied); 31 Pa. Code § 146.6(c)(1) (allowing insurer to provide written notice with reason additional time is needed within timeframe for accepting or denying claim, then send updated notice 30 days from the date of the initial notification and every 45 days thereafter). *But see* Ga. Comp. R. & Regs. 120-2-52-.03(3) (setting total time for insurer to accept or deny liability at 60 days from insurer being notified of claim unless insurer has documented claim file where necessary information was requested from, but not submitted by, the insured).

127 See Tex. Ins. Code § 542.057(a) (insurer must pay a claim not later than the fifth business day after notifying a plaintiff of acceptance of claim or part of claim); N.Y. Comp. Codes R. & Regs. tit. 11, § 216.6(f) (insurer must pay any amount finally agreed upon in settlement no later than five business days from receipt of such agreement by the insurer).

128 See, e.g., Cal. Code Regs. tit. 10 § 2695.7(c)(1) (30 calendar days from acceptance of claim); Fla. Stat. § 627.70131(5)(a) (90 calendar days from receipt of notice of claim unless factors beyond insurer's control); Ga. Comp. R. & Regs. 120-2-52-.03(4) (ten days after the full amount of the claim is determined and not in dispute); 50 Ill. Admin. Code 919.50 (within 30 days after affirmation of liability if the amount is determined and not in dispute); Mich. Comp. Laws § 500.2006 (60 days after receipt of a satisfactory proof of loss); N.J. Admin. Code § 11:2-17.7(f) (10 working days from receipt by insurer of agreement to settle claim); Ohio Admin. Code rule no. 3901-1-54(G)(6) (10 days after acceptance of claim if amount is determined and not in dispute).

129 *See* Tex. Ins. Code §§ 542.058, 542.060(a).

130 *See* Part IV.B, *infra*.

131 *See* Tex. Ins. Code §§ 542.058 ("insurer shall pay damages and other items a provided by Section 542.060" if insurer does not pay claim within statutory timeframe); 542.060 (requiring penalty payment by "an insurer that is liable for a claim under an insurance policy"); *see also Cox Operating, L.L.C. v. St. Paul Surplus Lines Ins. Co.*, 795 F.3d 496, 508 (5th Cir. 2015) (holding that any violation of the prompt-pay statute begins accrual of statutory interest even though the carrier did not yet have final proof of loss from the insured).

132 *See* Fla. Stat. § 627.70131(5)(a); *see also* http://www.myfloridacfo.com/Divison/AA/Vendors/Default (setting judgment rate of interest). The Florida penalty-interest provision, standing alone, does not create a private cause of action. Fla. Stat. § 627.70131(5)(a).

133 Mich. Comp. Laws § 500.2006(4); *Young v. Michigan Mut. Ins. Co.*, 362 N.W.2d 844, 846 (Mich. Ct. App. 1984).

134 *See id.*

135 *Griswold Props., LLC v. Lexington Ins. Co.*, 741 N.W.2d 549, 557 (Mich. Ct. App. 2007).

136 *Id.*

137 *See* Ga. Code § 33-4-6(a); *Mock v. Cent. Mut. Ins. Co.*, No. CV 214-113, 2016 WL 310945, at *13-14 (S.D. Ga. Jan. 25, 2016).

138 *Id.*

139 *Mock,* 2016 WL 310945, at *13-14.

140 *Id.* (citing *Central Nat. Ins. Co. of Omaha v. Dixon,* 373 S.E.2d 849 (Ga. 1988)).

141 *Balboa Life & Cas., LLC v. Home Builders Fin., Inc.*, 697 S.E.2d 240, 245 (Ga. Ct. App. 2010) (holding that plaintiff could not claim expenses of litigation under both Georgia's general litigation statute (section 13-6-11) and section 33-4-6).

142 Tex. Ins. Code § 541.151.

143 *Id.* § 541.060(a)(2).

144 *Id.* § 541.152(a).

145 *See, e.g. Zhang v. Superior Court*, 304 P.3d 163, 177 (Cal. 2013) (California Unfair Insurance Practices Act does not create a private cause of action); Ga. Code § 33-6-37 (Georgia Unfair Claims Settlement Practices Act expressly provides that it does not create a private cause of action); *Area Erectors, Inc. v. Travelers Prop. Cas. Co. of Am.*, 981 N.E.2d 1120, 1127 (Ill. App. Ct. 2012) (Illinois Improper Claims Practices Act does not create a private cause of action); *Dubuc v. Auto Club Grp. Ins. Co.*, No. 320331, 2015 WL 4680744, at *3 (Mich. Ct. App. Aug. 6, 2015) (Michigan Uniform Trade Practices Act does not create a private cause of action); *Pickett v. Lloyd's*, 621 A.2d 445, 450 (N.J. 1993) (New Jersey Insurance Trade Practices Act does not create a private cause of action); *Rocanova v. Equitable Life Assur. Soc. of U.S.*, 634 N.E.2d 940, 944 (N.Y. 1994) (New York unfair claim-settlement statute does not create a private right of action); N.C. Gen. Stat. § 58-63-15(11) (Unfair Trade Practices Act expressly provides that it does not create a private cause of action); Ohio Admin. Code rule no. 3901-1-54(B) (expressly providing that unfair trade practices rules do not create a private cause of action); *Kramer v. State Farm Fire & Cas. Ins. Co.*, 603 A.2d 192, 193 (Pa. Super. Ct. 1992) (Pennsylvania Unfair Insurance Practices Act does not create a private cause of action). *But see* Fla. Stat. §§ 626.9541(1)(i)(4)(making it a violation to fail to pay undisputed amounts within 90 days after agreeing to coverage); 624.155 (creating private cause of action).

146 Fla. Stat. § 626.9541(1)(i)(4).

147 *See id.* at § 624.155(4).

148 *Id.* § 624.155(5).

149 *Id.* § 624.155(5).

150 *Cramer v. Ins. Exch. Agency*, 675 N.E.2d 897, 902 (Ill. 1996) (citing 215 Ill. Comp. Stat. 5/155(1)).

151 215 Ill. Comp. Stat. 5/155(1).

152 *Hoover v. Cty. Mut. Ins. Co.*, 975 N.E.2d 638, 647 (Ill. App. Ct. 2012) (citing *Cramer*, 675 N.E.2d at 902).

153 *Area Erectors*, 981 N.E.2d at 1127.

154 *Zagorski v. Allstate Ins. Co.*, 54 N.E.3d 296, 305 (Ill. App. Ct. 2016).

155 *Giles*, 950 S.W.2d at 50.

156 *Id.* at 55.

157 *Id.* at 57.

158 *See Chateau Chamberay Homeowners Ass'n v. Associated Int'l. Ins. Co.*, 90 Cal. App. 4th 335, 347 (Cal. App. 2001); *Pickett v. Lloyd's*, 621 A.2d 445, 450 (N.J. 1993); *Lovell v. Nationwide Mut. Ins. Co.*, 424 S.E.2d 181, 184 (N.C. Ct. App. 1993); *Furr v. State Farm Mut. Auto. Ins. Co.* 716 N.E.2d 250, 256 (Ohio Ct. App. 1998).

159 *See* Part IV.A.2, *supra*.

160 *Chateau Chamberay Homeowners Ass'n*, 90 Cal. App. 4th at 347.

161 *Pickett*, 621 A.2d at 457-58.

162 *Lovell*, 424 S.E.2d at 184.

163 *Furr*, 716 N.E.2d at 256 (internal quotation omitted); *see also Ohio Nat'l Life Assur. Corp. v. Satterfield*, 956 N.E.2d 866, 872 (Ohio App. Ct. 2011) (no reasonable justification where an insurer refuses to pay a claim in an arbitrary or capricious manner).

164 Cal. Civ. Code § 3333.

165 *Pickett*, 621 A.2d at 452.

166 *Id.*

167 *Lovell*, 424 S.E.2d at 184.

168 *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 400 (Ohio 1994).

169 *See* Cal. Civ. Code § 3294(a),(c) (requiring clear and convincing evidence of malice, oppression, or fraudulent intent); *Pickett*, 621 A.2d at 455 (requiring proof that insurer acted with wanton recklessness or maliciously); *Lovell*, 424 S.E.2d at 185 (requiring aggravating or outrageous conduct, which can be "fraud, malice, gross negligence, insult, rudeness, oppression, or wanton and reckless disregard of plaintiff's rights"); *Satterfield*, 956 N.E.2d at 874 (requiring proof of "actual malice, fraud, or insult").

170 *McGregor v. Paul Revere Life Ins. Co.*, 369 F.3d 1099, 1011 (9th Cir. 2004) (citing *Brandt v. Super. Ct.*, 693 P.2d 796 (Ca. 1985)) (damages can include attorney's fees as part of the economic loss proximately caused by the tort); *Zoppo*, 644 N.E.2d at 400 (attorney's fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted).

171 *See QBE Ins. Corp. v Chalfonte Condo Apartment Ass'n, Inc.*, 94 So.3d 541, 547 (Fla. 2012); *Great Sw. Exp. Co. v. Great Am. Ins. Co.*, 665 S.E.2d 878, 881 (Ga. Ct. App. 2008); *Cramer*, 675 N.E.2d at 903-04.

172 *See Soc'y of St. Vincent De Paul v. Mt. Hawley Ins. Co.*, 49 F. Supp. 2d 1011, 1019 (E.D. Mich. 1999); *Acquista v. New York Life Ins. Co.*, 285 A.2d 73, 81 (N.Y. App. Div. 2001); *Wolfe v. Allstate Prop. & Cas. Ins. Co.*, 790 F.3d 487, 496-97 (3d Cir. 2015) (applying Pennsylvania law).

173 Tex. Bus. & Com. Code § 17.50(a)(4).

174 *See id.* §§ 17.46(b), 17.50(a)(1)(A).

175 *Id.* § 17.50(b)(1).

176 *Id.*

177 *Id.* at § 17.50(d).

178 *See Murray v. Nationwide Ins. Co.*, 472 S.E.2d 358, 363 (N.C. Ct. App. 1996); *see also* N.C. Gen. Stat. § 75-1.1.

179 *Gray v N.C. Ins. Underwriting Ass'n*, 529 S.E.2d 676, 683 (N.C. 2000).

180 *Gray*, 529 S.E.2d at 683.

181 *Id.*

182 N.C. Gen. Stat. § 75-16.

183 *Id.* § 75-16.1.

184 *Zhang*, 304 P.3d at 177.

185 *Id.* at 167 (citing Cal. Bus. & Prof. Code § 17200).

186 *Zhang*, 304 P.3d at 179, n.4 (citing *Davis v. Ford Motor Credit Co.*, 101 Cal. Rptr. 3d 697 (Cal. Ct. App. 2009)).

187 *Id.* (citing Cal. Bus. & Prof. Code § 17205).

188 *N. Y. Univ. v. Cont'l Ins. Co*, 662 N.E.2d 763, 770 (N.Y. 1995) (citing New York Gen. Bus. Law § 349).

189 N.Y. Gen. Bus. Law § 349(h).

190 *Id.*

191 *See Page*, 315 S.W.3d at 527.

192 *Murphy v. Cincinnati Ins. Co.*, 772 F.2d 273, 276 (6th Cir. 1985).

193 *See No Limit Clothing, Inc. v. Allstate Ins. Co.*, No. 09-13574, 2011 WL 96869, at *5 (E.D. Mich. Jan. 12, 2011) (holding that "a breaching party's good or bad faith is immaterial with respect to the availability of consequential damages").

194 *Bi-Economy Market, Inc. v. Harleysville Ins. Co.*, 886 N.E.2d 127, 131 (N.Y. 2008).

195 *Acquista*, 285 A.2d at 81.

196 *Wolfe*, 790 F.3d at 496-97.

197 *Birth Ctr. v. St. Paul Cos.*, 787 A.2d 376, 379 (Pa. 2001).

APPENDIX

An Interstate Comparison of Property and Casualty Prompt-Pay Laws
Texans for Lawsuit Reform Foundation

December 20, 2016

CALIFORNIA

Time to accept or deny claim: Forty calendar days from receipt of proof of claim, with the possibility of extending the time period if additional information is required. CAL. CODE OF REGS. § 2695.7(b),(c)(1).

Time to pay claim: Thirty calendar days from acceptance of a claim in whole or in part. *Id.* § 2695.7(c)(1).

Penalty or interest for failure to pay promptly: None.

Private right of action for failure to pay promptly: No.

Enforcement of unfair claim-settlement statute: Administratively enforced. S*ee Zhang v. Superior Court,* 304 P.3d 163, 177 (Cal. 2013).

Damages available in private action under unfair claim-settlement statute: N/A.

Common law bad-faith cause of action: Common law cause of action for breach of the implied covenant of good faith and fair dealing. *Chateau Chamberay Homeowners Ass'n v. Associated Int'l. Ins. Co.,* 90 Cal. App. 4th 335, 347 (Cal. Ct. App. 2001). Requires showing that the insurer acted "unreasonably or without proper cause." *Id.*

Damages available for common law bad-faith claim: All damages proximately caused by the insurer's bad faith. CAL. CIV. CODE § 3333. Damages can include attorney's fees as part of the economic loss proximately caused by the tort. *McGregor v. Paul Revere Life Ins. Co.,* 369 F.3d 1099, 1011 (9th Cir. 2004) (citing *Brandt v. Superior Court,* 693 P.2d 796 (Ca. 1985)). Punitive damages only if clear and convincing evidence of malice, oppression, or fraudulent intent. CAL. CIV. CODE § 3294(a),(c).

Other causes of action: Insureds retain traditional common law theories of private recovery, including fraud, infliction of emotional distress, and either breach of contract, or breach of the implied covenant of good faith and fair dealing. *Zhang,* 304 P.3d at 169 (citing *Moradi–Shalal v. Fireman's Fund Ins. Co.,* 758 P.2d 58 (Cal. 1988)).

Insureds may sue for bad-faith claims handling under the California Unfair Competition Law (UCL), which defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Zhang,* 304 P.3d at 177 (citing CAL. BUS. & PROF. CODE § 17200). Remedy under UCL limited to injunctive relief and restitution. *Id.* at 167.

FLORIDA

Time to accept or deny claim: Upon written request of the insured, within 30 calendar days after a complete proof-of-loss completed with the possibility of extending the time period if additional information is required. FLA STAT. § 626.9541(1)(i)(3)(e).

Time to pay claim: Ninety calendar days from receipt of notice of claim, unless factors beyond control of insurer which reasonably prevent payment. *Id.* § 627.70131(5)(a).

Penalty or interest for failure to pay promptly: Late payments bear interest, payable to the insured, at the state judgment rate of interest (4.97 percent per annum effective January 1, 2017). *Id.* § 627.70131(5)(a).

Private right of action for failure to pay promptly: Yes. A provision of the unfair claims settlement statute, which allows a private right of action, makes it an unfair practice to fail to pay within 90 days "after an insurer receives notice of a residential property insurance claim, determines the amounts of partial or full benefits, and agrees to coverage," with exceptions for fraud and acts of God. *Id.* § 626.9541(1)(i)(3),(4); *see also* § 624.155(1)(a)(1) (creating civil action for violation of unfair claim-settlement statute).

Damages available in private action or failure to pay promptly: See section on unfair claim-settlement statute, *infra*.

Enforcement of unfair claim-settlement statute: Private cause of action and administratively enforced.

Damages available in private action under unfair claim-settlement statute: Damages, court costs, and reasonable attorney's fees. *Id.* § 624.155(4). Punitive damages if the acts giving rise to the violation "occur with such frequency as to indicate a general business practice," and are willful, wanton, and malicious, or in reckless disregard for the rights of any insured. *Id.* § 624.155(5).

Common law bad-faith cause of action: No. *See QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541, 547 (Fla. 2012) (holding that Florida does not recognize a common law first-party bad-faith action).

Damages available for common law bad-faith claim: N/A.

Other causes of action: Unfair claim-settlement statute does not bar other common law causes of action. Fla. Stat. § 624.155(8).

GEORGIA

Time to accept or deny claim: Within 15 days of receiving a completed proof of loss, with the possibility of extending the time period if additional information is required. Ga. Comp. R. & Regs. 120-2-52-.03(3),(5).

Time to pay claim: Within ten days after "coverage is confirmed and the full amount of the claim is determined and not in dispute." *Id.* 120-2-52-.03(4).

Penalty or interest for failure to pay promptly: If bad-faith refusal to pay within 60 days after a demand made by insured, insurer is liable for, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $5,000, whichever is greater, and reasonable attorney's fees. Ga. Code § 33-4-6. Penalty not authorized where insurer has "any reasonable ground to contest the claim." *Mock v. Cent. Mut. Ins. Co.*, No. CV 214-113, 2016 WL 310945, at *13-14 (S.D. Ga. Jan. 25, 2016).

Private right of action for failure to pay promptly: No.

Damages available in private action or failure to pay promptly: N/A.

Enforcement of unfair claim-settlement statute: Administratively enforced. *See* Ga. Code §§ 33-6-35; 33-6-7.

Damages available in private action under unfair claim-settlement statute: N/A.

Common law bad-faith cause of action: See section on penalty or interest for failure to pay promptly, *supra*.

Damages available for common law bad-faith claim: See section on penalty or interest for failure to pay promptly, *supra*.

Other causes of action: Penalties set out in section 33-4-6 are the exclusive remedies for an insurer's bad-faith refusal to pay insurance proceeds. *See Balboa Life & Cas., LLC v. Home Builders Fin., Inc.,* 697 S.E.2d 240, 245 (Ga. Ct. App. 2010); *see also Great Sw. Exp. Co. v. Great Am. Ins. Co. of New York,* 665 S.E.2d 878, 881 (2008) (damages for bad-faith denial of insurance proceeds cannot be recovered under general contract or tort law).

ILLINOIS

Time to accept or deny claim: Within a reasonable time after proof of loss statements have been completed. 215 Ill. Comp. Stat. 5/154.6(i).

Time to pay claim: Within 30 days after affirmation of liability, if the amount of the claim is determined and not in dispute. 50 Ill. Admin. Code 919.50.

Penalty or interest for failure to pay promptly: None.

Private right of action for failure to pay promptly: Only when delay in settling is "vexatious and unreasonable." 215 Ill. Comp. Stat. 5/155. Extra-contractual action that "presupposes an action on the policy, and therefore, in order for a plaintiff to recover under [it], he must also succeed in the action on the policy." *Hoover v. Cty. Mut. Ins. Co.,* 975 N.E.2d 638, 647 (Ill. App. Ct. 2012) (citing *Cramer v. Ins. Exch. Agency,* 675 N.E.2d 897, 902 (Ill. 1996)).

Damages available in private action or failure to pay promptly: Reasonable attorney's fees, or other costs, plus an amount not to exceed: (a) 60 percent of the amount which the court or jury finds such party is entitled to recover against the insurer, exclusive of all costs;(b) $60,000; or (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the insurer offered to pay in settlement of the claim prior to the action. 215 Ill. Comp. Stat. 5/155(1).

Enforcement of unfair claim-settlement statute: Administratively enforced. *See Area Erectors, Inc. v. Travelers Prop. Cas. Co. of Am.,* 981 N.E.2d 1120, 1127 (Ill. App. Ct. 2012).

Damages available in private action under unfair claim-settlement statute: N/A.

Common law bad-faith cause of action: No. *See Cramer,* 675 N.E.2d at 905.

Damages available for common law bad-faith claim: N/A.

Other causes of action: Section 155 does not preempt a claim of insurer misconduct based on a separate and independent tort. *Id.*

MICHIGAN

Time to accept or deny claim: An insurer must "attempt[] in good faith to effectuate prompt, fair, and equitable settlement of claims in which liability has become reasonably clear." Mich. Comp. Laws § 500.2026.

Time to pay claim: Within 60 days of receipt of a satisfactory proof of loss. *Id.* § 500.2006

Penalty or interest for failure to pay promptly: Interest payable to the insured at the rate of 12 percent per annum. *Id.* § 500.2006.

Private right of action for failure to pay promptly: Yes. A private party may directly recover the interest penalty in an action against the insurer. *Young v. Michigan Mut. Ins. Co.,* 362 N.W.2d 844, 846 (Mich. Ct. App. 1984).

Damages available in private action or failure to pay promptly: No. Just the interest penalty.

Enforcement of unfair claim-settlement statute: Administratively enforced. *See* MICH. COMP. LAWS § 500.2028, et. seq.; *see also Dubuc v. Auto Club Grp. Ins. Co.,* No. 320331, 2015 WL4680744, at *3 (Mich. Ct. App. Aug. 6, 2015).

Damages available in private action under unfair claim-settlement statute: N/A.

Common law bad-faith cause of action: No. *See Soc'y of St. Vincent De Paul in Archdiocese of Detroit v. Mt. Hawley Ins. Co.,* 49 F. Supp. 2d 1011, 1019 (E.D. Mich. 1999).

Damages available for common law bad-faith claim: N/A.

Other causes of action: Contractual obligation on the part of an insurer to act in good faith. *Murphy v. Cincinnati Ins. Co.,* 772 F.2d 273, 276 (6th Cir. 1985). Because insurance policies are subject to the same principles of construction that apply to any other contract, an insured that fails to perform its obligations under an insurance contract becomes liable for all foreseeable damages flowing from the breach. *Home Owners Ins. Co. v. Griffith,* No. 312707, 2014 WL 5462597, at *5 (Mich. Ct. App. Oct. 28, 2014) (citing *Burnside v. State Farm Fire and Cas. Co.,* 528 N.W.2d 749, 751 (Mich. Ct. App. 1995)). An insured is not entitled to recover attorney's fees on a claim for breach of the contractual obligation to act in good faith. *Burnside,* 528 N.W.2d at 751.

NEW JERSEY

Time to accept or deny claim: Within a reasonable time after proof of loss statements have been completed. N.J. STAT. § 17:29B-4(9)(e).

Time to pay claim: Within 30 calendar days of receipt of properly executed proofs of loss. N.J. ADMIN. CODE §§ 11:2-17.7(c)(1),(e). Also, any amount finally agreed upon in settlement of a claim must be paid not later than ten working days from either the receipt of such agreement by the insurer or the date of performance by the claimant of any conditions of such agreement, whichever is later. *Id.* § 11:2-17.7(f).

Penalty or interest for failure to pay promptly: No

Private right of action for failure to pay promptly: No

Damages available in private action or failure to pay promptly: N/A

Enforcement of unfair claim-settlement statute: Administratively enforced. *See* N.J. STAT. § 17:29B-5; *see also Pickett v. Lloyd's,* 621 A.2d 445, 450 (N.J. 1993).

Damages available in private action under unfair claim-settlement statute: N/A.

Common law bad-faith cause of action: Yes. *See Pickett,* 621 A.2d at 450. Insured must establish: (1) lack of a reasonable basis for denying coverage or delaying payment; and (2) knowledge of or reckless disregard for the lack of reasonable basis for the denial or delay. *Id.*

Damages available for common law bad-faith claim: All foreseeable consequential damages resulting from the breach of the duty of good faith. *Id.* No punitive damages unless insurer acted with wanton recklessness or maliciously. *Id.* at 455. Prevailing insured may recover costs and fees upon proof that insurer mounted a frivolous defense. N.J. STAT. § 2A:15-59.1.

Other causes of action: N/A.

NEW YORK

Time to accept or deny claim: Within 15 business days after receipt by the insurer of a

properly executed proof of loss and all requested items, with the possibility of extending the time period if additional information is required. N.Y. Comp. Codes R. & Regs. tit. 11 § 216.6(c).

Time to pay claim: Any amount finally agreed upon in settlement of all or part of a claim must be paid no later than five business days from receipt of such agreement by the insurer, or from the date of the performance by the claimant of any condition set by such agreement, whichever is later. *Id.* § 216.6(f).

Penalty or interest for failure to pay promptly: No.

Private right of action for failure to pay promptly: No.

Damages available in private action or failure to pay promptly: N/A.

Enforcement of unfair claim-settlement statute: Administratively enforced. *See Rocanova v. Equitable Life Assur. Soc. of U.S.,* 634 N.E.2d 940, 944 (N.Y. 1994).

Damages available in private action under unfair claim-settlement statute: N/A.

Common law bad-faith cause of action: No. Implied covenant of good faith and fair dealing is part of the insurance contract, and thus bad faith is part of a breach of contract claim. *Bi-Economy Market, Inc. v. Harleysville Ins. Co.,* 886 N.E.2d 127, 131 (N.Y. 2008).

Damages available for common law bad-faith claim: Breach of contract claim limited to contract damages, including consequential damages. *Acquista v. New York Life Ins. Co.,* 285 A.D.2d 73, 81 (N.Y. App. Div. 2001).

Other causes of action: Egregious conduct may support a claim in tort independent of the insurance contract, such as fraud or tortious breach of a duty of care separate and apart from the failure to fulfill contractual obligation. *New York Univ. v. Cont'l Ins. Co.,* 662 N.E.2d 763, 767 (N.Y. 1995).

If the insurer's conduct has a broad impact on consumers at large and is not unique to the parties to that contract, an insured, as a consumer, can assert a private cause of action under the consumer protection statute, New York General Business Law § 349, for unlawful deceptive acts or practices in conducting a business or furnishing a service. *Id.* at 770. Section 349 allows for actual damages as well as treble damage up to a maximum of $1,000 in the case of a willful or knowing violation. N.Y. Gen. Bus. Law § 349(h). A prevailing plaintiff may also recover attorney's fees. *Id.*

NORTH CAROLINA

Time to accept or deny claim: Insurer must "affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed." N.C. Gen. Stat. § 58-63-15(11)(b).

Time to pay claim: Within ten business days after the claim is settled. 11 N.C. Admin. Code 4.0421.

Penalty or interest for failure to pay promptly: No.

Private right of action for failure to pay promptly: No.

Damages available in private action or failure to pay promptly: N/A.

Enforcement of unfair claim-settlement statute: Administratively enforced. N.C. Gen. Stat. §§ 58-63-15(11), 58-63-20.

Damages available in private action under unfair claim-settlement statute: N/A.

Common law bad-faith cause of action: Yes. *See Lovell v. Nationwide Mut. Ins. Co.,* 424 S.E.2d

181, 184 (N.C. Ct. App. 1993). Insured must show recognition of a valid claim and a bad-faith refusal to pay that claim. *Id.*

Damages available for common law bad-faith claim: Punitive damages if aggravating or outrageous conduct on the part of the insurance company. *Id.* Aggravating conduct can be shown through examples of "fraud, malice, gross negligence, insult, rudeness, oppression, or wanton and reckless disregard of plaintiff's rights." *Id.*

Other causes of action: Violation of the Insurance Unfair Trade Practices Act (N.C. Gen. Stat. § 58-63-15(11)), is per se a violation of the Unfair and Deceptive Trade Practices Act (UDTPA). *Murray v. Nationwide Ins. Co.,* 472 S.E.2d 358, 363 (N.C. Ct. App. 1996). However, an insurer's act of failing to attempt in good faith to effectuate prompt and fair claims settlements is also a violation of the UDPTA separate and apart from any violation of section 58-63-15(11). *Gray v. N.C. Ins. Underwriting Ass'n,* 529 S.E.2d 676, 683 (N.C. 2000). Thus, a party need not demonstrate that an insurer failed to attempt in good faith to effectuate prompt and fair claims settlement with any frequency to succeed on a private cause of action against an insurer under the UDTPA. *Id.*

OHIO

Time to accept or deny claim: Within 21 days of receipt of a properly executed proof of loss, with the possibility of extending the time period if additional information is required. Ohio Admin. Code rule no. 3901-1-54(G)(1).

Time to pay claim: No later than ten days after acceptance of a claim "if the amount of the claim is determined and not in dispute." *Id.* at rule no. 3901-1-54(G)(6).

Penalty or interest for failure to pay promptly: No.

Private right of action for failure to pay promptly: No.

Damages available in private action or failure to pay promptly: N/A.

Enforcement of unfair claim-settlement statute: Administratively enforced. *See* Ohio Admin. Code rule no. 3901-1-54(B) ("provisions of this rule are intended to define procedures and practices which constitute unfair claims practices. Nothing in this rule shall be construed to create or imply a private cause of action for violation of this rule."); *Furr v. State Farm Mut. Auto. Ins. Co.* 716 N.E.2d 250, 257 (Ohio 1998).

Damages available in private action under unfair claim-settlement statute: N/A.

Common law bad-faith cause of action: Yes. Insurer has a duty to its insured to act in good faith in the handling and payment of an insured's claims. Furr, 716 N.E.2d at 256 (citing *Hoskins v. Aetna* 452 N.E.2d 1315 (Ohio 1983)). "An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Id.* (internal quotation omitted). A lack of reasonable justification exists where an insurer refuses to pay a claim in an arbitrary or capricious manner. *Ohio Nat'l Life Assur. Corp. v. Satterfield,* 956 N.E.2d 866, 872 (Ohio App. Ct. 2011).

Damages available for common law bad-faith claim: An insurer who acts in bad faith is liable for compensatory damages flowing from the bad-faith conduct of the insurer and caused by the insurer's breach of contract. *Zoppo v. Homestead Ins. Co.,* 644 N.E.2d 397, 400 (Ohio 1994). Punitive damages may also be recovered upon proof of "actual malice, fraud, or insult" on the part of the insurer. Satterfield, 956 N.E.2d at 874. Attorney's fees may be awarded in a bad-faith action as an element of compensatory damages where the jury finds that punitive

damages are warranted. Zoppo, 644 N.E.2d at 400.

Other causes of action: N/A.

PENNSYLVANIA

Time to accept or deny claim: Within 15 working days after receipt by the insurer of a proper proof of loss, with the possibility of extending the time period if additional information is required. 31 PA. CODE § 146.7(a)(1),(2).

Time to pay claim: Not specified. Must "attempt[] in good faith to effectuate prompt, fair and equitable settlements of claims in which the company's liability under the policy has become reasonably clear." 40 PA. CONS. STAT. § 1171.5(10).

Penalty or interest for failure to pay promptly: Yes, but requires bad faith.

Private right of action for failure to pay promptly: Yes. Plaintiff must show by clear and convincing evidence that the insurer had no reasonable basis for denying benefits under the policy and that the insurer "knew or recklessly disregarded its lack of reasonable basis in denying the claim." *Wolfe v. Allstate Prop. & Cas. Ins. Co.,* 790 F.3d 487, 498 (3d Cir. 2015).

Damages available in private action or failure to pay promptly: If insured proves bad faith, court may award: (1) interest on the amount of the claim from the date the claim was made by the insured (prime rate of interest plus 3 percent); (2) punitive damages; and (3) court costs and attorney's fees. 42 PA. CONS. STAT. § 8371.

Enforcement of unfair claim-settlement statute: Administratively enforced. *See Kramer v. State Farm Fire & Cas. Ins. Co.,* 603 A.2d 192, 193 (Pa. Super. Ct. 1992).

Damages available in private action under unfair claim-settlement statute: No.

Common law bad-faith cause of action: Yes. As part of the duty of good faith, the insurer must "consider in good faith the interest of the insured as a factor in deciding whether to settle a claim." *Wolfe,* 790 F.3d at 497 (internal quotation omitted). "Evidence showing only bad judgment is insufficient for liability." *Id.*

Damages available for common law bad-faith claim: The known or foreseeable compensatory damages that reasonably flow from the bad-faith conduct of the insurer. *Birth Ctr. v. St. Paul Cos.,* 787 A.2d 376, 379 (Pa. 2001).

Other causes of action: N/A.