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Achilles' Heel: First-Party Property 'Bad-Faith' Damages

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Commentary

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Insurance "bad-faith" is recognized throughout the United States. In the setting of first-party property insurance, the relationship between the insured and insurer commences contractually. However, that contractual relationship can also provide exposure for tort damages in a first-party "bad-faith" action. Indeed, the threat of facing a first-party property "bad-faith" tort action commonly influences insurers to resolve litigation out of fear, rather than for substantive purposes based on the merits. One of the "Achilles' Heels" of such causes of action is the inability of the insured to prove any measurable "bad-faith" damages. The identification and measurement of "damages" in first-party property "bad-faith" actions varies greatly depending on the jurisdiction. This commentary will discuss certain jurisdictional differences relating to damages in first-party "bad-faith" actions, exclusive of punitive damages.[1]

Jurisdictions throughout the United States typically hold that an insurer will be liable in a first-party "bad-faith" action for those amounts that are the natural, proximate, probable, or direct consequence of the insurer's "bad-faith" actions.[2] The following have been addressed by courts as "damages" in the first-party "bad-faith" context: (1) Attorney's fees and costs; (2) foreclosure costs; (3) mental anguish and emotional distress; (4) excess judgments; (5) miscellaneous costs; (6) personal injury damages; and, (7) contractual damages barred by the statute of limitations.

I. Attorney's Fees And Costs

In surveying the array of damages available in a first-party "bad-faith" action, the Florida Supreme Court, in *McLeod v. Continental Insurance Company*,[3] stated:

> [T]here are two types of damages, *compensatory* and punitive. . . . [Florida Statutes §]624.155(4)[4] specifically sets forth the requirements for an award of punitive damages[5] under the statute. . . . [C]ompensatory damages a[re] "the loss, injury or deterioration caused by negligence, design or accident of one person to another."[6] . . . [T]his Court [has] stated that the "fundamental principle of the law of damages is that the person injured by breach of contract or by wrongful or negligent act or omission shall have fair and just *compensation commensurate with the loss sustained in consequence of the defendant's act which [gave] rise to the action.*"[7] [Accordingly,] we hold that the *damages* recoverable in a first-party suit under [§]624.155 *are those amounts which are the natural, proximate, probable, or direct consequence of the insurer's bad-faith*

> *actions*, and we reject the contention that first-party bad-faith damages should be fixed at the amount of the excess judgment. The insurer in a first-party bad-faith action is subject to a judgment in excess of policy limits if the actual damages resulting from the insurer's bad-faith are found to exceed the policy limits. *Such damages may include, but are not limited to, interest, court costs, and reasonable attorney's fees incurred by the plaintiffs. The attorney's fees shall also include any fees incurred in the original underlying action as a result of the insurer's bad-faith actions.*[8]

[*Emphasis* supplied].

Thus, in Florida, according to *McLeod*, if "bad-faith" is found, the insurer may be held responsible for interest, court costs and reasonable attorney's fees.[9]

Wisconsin also allows damages in first-party "bad-faith" litigation, including any damages that are the proximate result of "bad-faith" conduct.[10] Wisconsin courts have held that damages resulting from an insurer's "bad-faith" conduct may include attorney's fees and costs[11] as well as expert witness fees and attorney travel expenses[12] that are normally not recoverable in litigation.

In contrast, New York courts have held that "bad-faith" damages must have been within the contemplation of the parties at the time of entering into the insurance contract.[13] If the "bad-faith" damages are speculative, remote, and not within the contemplation of the parties at the time of execution of the insurance contract, they are not recoverable as first-party property "bad-faith" damages. In *Harriman v. Norfolk & Dedham Mut. Fire Ins. Co.*, the plaintiff contended that she suffered a plethora of consequential damages as a result of the "bad-faith" conduct of the insurer when it refused to settle her claim for loss of use to her home.[14] Included in the "bad-faith" damages being claimed were legal fees not incurred in the "bad-faith" action and miscellaneous costs for such things as postage and photocopying. The *Harriman* court held that these damages were not recoverable as consequential damages in a first-party property "bad-faith" case as they were not within the contemplation of the parties at the time of the execution of the insurance contract.

The penalties and damages available in a first-party "bad-faith" action are set forth by two Louisiana statutes. Previously, Louisiana courts indicated that reasonable attorney's fees were recoverable pursuant to La.Rev.Stat. Ann. § 22:658.[15] The relevant portion of this statute provided:

> Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor, as provided in R.S. 22:658(A)(1), or within thirty days after written agreement or settlement as provided in R.S. 22:658(A)(2) when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of ten percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or any of said employees, *together with all reasonable attorneys fees for the prosecution and collection of such a loss*, or in the event a partial payment or tender has been made, ten percent of the difference between the amount paid or tendered *and the amount found to be due and all reasonable attorney fees for the prosecution and collection of such amount.*

La.Rev.Stat. Ann. § 22:658(B)(1) (1995) [*emphasis* supplied].

However, in 2003, the Louisiana legislature revised § 22:658(B)(1) to provide as follows:

> Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor or failure to make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(1) and (4), respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2), when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of twenty-five percent damages on

> the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, twenty-five percent of the difference between the amount paid or tendered and the amount found to be due.

La.Rev.Stat. Ann. § 22:658(B)(1) (2004).

Consequently, in the event that an insurer fails to make payment and the failure to make this payment is found to be arbitrary, capricious, or without probable cause, the ability to recover attorney's fees no longer exists in Louisiana.[16]

II. Foreclosure Costs

Among the damages frequently sought by insureds are costs related to the foreclosure of the insured property. Specifically, the insured alleges that the "bad-faith" conduct of the insurer resulted in the foreclosure of the insured property. However, Wisconsin courts have held that an insured could not recover "bad-faith" damages arising from additional losses of over $3,000,000 from post-denial foreclosures on the insured's other cross-collateralized investment properties where the policy only covered the nightclub and there was no evidence that the insurer knew about the insured's other properties at time of contracting, especially where the policy premium was nominal (i.e., $10,000).[17] The Wisconsin court specifically held that the "bad-faith" damages in a first-party property "bad-faith" action must flow directly and necessarily from the breach of contract and must be reasonably foreseeable as a probable result of the breach at the time of execution of the contract. The court ruled that foreclosure costs were not reasonably foreseeable.

Similarly, New York courts have refused to allow recovery for foreclosure costs. As previously indicated, courts in New York have held that "bad-faith" damages must have been within the contemplation of the parties at the time of entering into the insurance contract.[18] The costs of home refinancing and defending against foreclosure actions were held to not have been within the contemplation of the parties at the time of entering into the contract, and, therefore, not recoverable as consequential damages in a first-party property "bad-faith" case.[19] New York courts have also held that recovery of damages resulting from foreclosure (allegedly caused by non-payment of premiums) were not permissible because the foreclosure was not foreseeable at the time of contracting.[20]

III. Mental Anguish And Emotional Distress

Another of the frequently cited "damages" in a first-party "bad-faith" action is emotional distress. There is a split of authority regarding the ability to recover emotional distress damages.

The Florida Supreme Court touched on emotional distress damages and advised that an award for mental anguish in "bad-faith" insurer cases is restricted to instances in which the insured acted with sufficient malice to support an award of punitive damages.[21]

In *Time Insurance Company v. Burger*,[22] the Florida Supreme Court explored the issue of emotional distress in the context of a first-party "bad-faith" action against a health insurer. Although compensatory damages for emotional distress were allowed, the Court qualified and narrowed its holding:

> In view of the possibility that an unjustified refusal to pay an insured's medical or hospital bills could result in the inability to obtain health care, we hold that [§]624.155(1)(b)(1) authorizes the recovery of damages for emotional distress in a first-party bad-faith claim against a health insurance company.[23]

Consequently, this holding limited emotional distress damages to first-party "bad-faith" conduct by health care insurers in the State of Florida.

New York has held that consequential damage claims resulting from mental and emotional distress, loss of reputation, public embarrassment, humiliation and mental anguish must arise from the creation of a relationship or duty between the insured and insurer separate from the contractual obligations of each party.[24] Accordingly, in the first-party property "bad-faith" context, these types of damages are typically unavailable because no separate relationship is created or exists other than the contractual relationship.

Louisiana courts may allow recovery for nonpecuniary loss in a first-party breach of contract case when the

contract is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.[25] However, because first-party property "bad-faith" cases involve contracts that do not address nonpecuniary interests, damages for emotional distress and mental anguish are typically not available in first party property "bad-faith" actions.[26]

Several jurisdictions allow a first-party "bad-faith" plaintiff to seek and recover emotional distress damages. California commonly allows a cause of action for intentional infliction of emotional distress resulting from an insurer's actions. Thus, emotional distress damages are recoverable in California in the first-party property context.[27] However, the court, in *Waters v. United Services Auto. Assn.*,[28] stated that emotional distress damages are only available if the insured has suffered a financial loss in addition to emotional distress.

Colorado also allows non-economic losses as compensatory damages in a first-party "bad-faith" action to include: emotional distress; pain and suffering; inconvenience; fear and anxiety; and, impairment of the quality of life.[29] However, an insured suing under the tort of "bad-faith" breach of an insurance contract is only entitled to recover damages based upon traditional tort principles of compensation for injuries actually suffered, including emotional distress.[30]

Alabama courts have indicated that recoverable damages for the tort of first-party property "bad-faith" may include mental distress and economic loss.[31] In expanding this form of recovery, the Alabama Supreme Court indicated that damages for mental anguish may be available if the contractual duties imposed in the policy are so coupled with matters of mental solicitude as to form a duty that is subsequently breached and results in mental anguish.[32]

Mississippi, like Alabama, similarly indicates that recoverable compensatory damages for the tort of first-party property "bad-faith" may include emotional distress and economic loss.[33] However, Mississippi courts impose the additional requirement that an insured set forth sufficient evidence to support an award of emotional distress damages.[34]

IV. Excess Judgments

In first-party "bad-faith" actions, plaintiffs typically argue that they are entitled to contractual damages that are in excess of the policy limits. However, these "damages" typically bear no relation to the "bad-faith" conduct of the insurer and should not be recoverable. Florida courts have addressed the award of excess judgments as "bad-faith" damages. In *McLeod*, the Florida Supreme Court held that recovering an excess judgment is analogous to imposing a penalty or asserting punitive damages upon the insurer.[35] Consequently, the *McLeod* Court refused to allow excess judgments as damages in a first-party "bad-faith" action. However, the Court, in *State Farm Mutual Automobile Insurance Company v. Laforet*,[36] carved out a narrow exception to this prohibition when the first-party action relates to an uninsured motorist claim under Florida Statute §627.727(10).[37]

Accordingly, the damages recoverable in a first-party "bad-faith" action under Florida Statute §624.155 are those amounts that are the natural, proximate, probable, or direct consequence of the insurer's "bad-faith" actions. The Florida Supreme Court rejected the contention that first-party "bad-faith" damages should include amounts of the breach of contract judgment in excess of the policy limits.[38] Consequently, in typical first-party property cases, it is not the insurer's conduct that results in the excess judgment, it is the damage that is caused by the peril that is not attributable to the insurer.

V. Miscellaneous Costs

Costs that are not covered under the insurance policy, but are a direct consequence of delay in claim handling, may be recoverable as first-party property "bad-faith" damages.[39] Specifically, Louisiana courts indicated that demolition costs that were necessary due to the failure of the insured to make a timely payment may be recoverable as "bad-faith" damages.[40]

However, New York courts have held that costs that may be related to the insurer's "bad-faith" may not be recovered in a "bad-faith" action because these costs were not within the contemplation of the parties at the time of entering into the insurance contract.[41] Specifically, New York has determined that loss of business and lost income were not recoverable as consequential damages in a first-party property "bad-faith" case.

VI. Personal Injury Damages

Interestingly, California appears to allow an insured to recover personal injury damages in first-party property "bad-faith" litigation. In *Patrick v. Maryland Casualty Co.*,[42] an insured's roof was damaged by a series of storms. The insured temporarily repaired the roof and submitted a claim. The insured contended the insurance company forced him to obtain needless documentation and multiple estimates that caused endless delay. The insured also claimed the insurer told him that his check was lost in the mail, and then delayed even more when reissuing a new one. Months later, the house continued to be damaged by water. After not receiving the money that had been promised, the insured commenced the repairs himself to avoid the continuing water damage.

Allegedly, the insurer's employee told the insured to do the work himself. However, the record indicates the idea may have originated with the insured. Nevertheless, the insured began replacing the entire roof and not just the damaged portions. While on the roof and attempting repair, the insured lost his balance, jumped to the ground, and was severely injured. As a result, the insured underwent hospitalization, received treatment and was disabled from his job. Thereafter, the insured claimed his injuries were caused by the insurer's conduct and filed suit for negligence, breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty.

On appeal, the court reversed the award of punitive damages[43] and remanded the action for failure to consider comparative fault. Specifically, the *Patrick* court held:

> Although no case has yet ruled precisely on the issue of whether negligent conduct by the plaintiff should be compared, in a system of comparative fault, with the bad-faith conduct of an insurer which raises the defense of comparative fault, we conclude that such a defense is available in an appropriate case such as this one. . . .Here, it is reasonably probable that [the insurer] would have received a more favorable result, absent the error. In this case, the jury was in essence instructed that the insurer would be liable for all [the insured's] damages, regardless of [the insured's] negligence in walking backward on his roof while pulling a heavy and unwieldy panel without taking any particular safety precautions. While we express no considered judgment, it even appears reasonably probable a comparison of the respective faults of the parties would lead to the conclusion [the insured] bore a substantial portion of the responsibility for his injuries caused when he fell off his roof. Certainly we cannot say as a matter of law that he was blameless. We, therefore, must reverse the judgment and remand for a new trial.[44]

The *Patrick* court did not indicate that personal injury damages were unavailable in this situation. Instead, the court remanded the action due to the jury's failure to consider comparative negligence when awarding damages. As such, it appears possible to bring an action for traditional personal injury damages in a first-party property "bad-faith" action in California.

VII. Contractual Damages Barred By The Statute Of Limitations

The Wisconsin Supreme Court, in *Jones v. Secura Insurance Company*,[45] held that contractual damages that would not have been available in a breach of contract action as a result of an expired statute of limitations could still be recovered through the tort of first-party "bad-faith".[46]

In *Jones*, the insureds presented a notice of loss to the insurer for damages to their residence and motel. Thereafter, the insurer conducted an inspection and denied coverage. Almost two years after the denial the insureds filed suit against the insurer claiming, among other things, breach of the insurance contract and "bad-faith". The trial court granted summary judgment in favor of the insurer based on the expiration of the statutory period for breach of contract (i.e., one year).[47] At the same time, the trial court denied the insurer's motion for summary judgment on the "bad-faith" claim.

In response, the insurer filed a motion for declaratory judgment and requested that the circuit court declare the insureds' damages legally unenforceable since the underlying contract action was barred statutorily. The insurer alleged the insureds lost use of their property, lost property, and lost business were unrecover-

able in the absence of a viable action for breach of contract. In other words, the insurer argued that the alleged damages are not recoverable in "bad-faith" since the underlying contract action was properly dismissed. In opposition, the insureds argued the insurer remained liable for any damages that are the proximate result of the insurer's "bad-faith". After considering each argument, the lower court issued an order prohibiting the insureds from attempting to collect any damages that would have been precluded under their previously dismissed contract claim. The insureds appealed.

On appeal, the appellate court found that the insureds' policy is a fire insurance policy governed by the one-year statute of limitations. Despite this, the court reversed the trial court's order regarding "bad-faith" damages and held as follows:

> [W]e have concluded that in a first-party bad-faith action, an insurer is liable to the insured for any damages which are the proximate result of the insurer's bad-faith, including damages otherwise recoverable in a breach of an insurance contract action. We have concluded that even though the one-year statute of limitations on the [insureds'] contract claim passed before this action was commenced, the [insureds] are not barred from pursuing and recovering damages on their bad-faith claim, including damages otherwise recoverable in a breach of an insurance contract action. The [insureds] are allowed to recover any damages that are the proximate result of [the insurer's] alleged bad-faith, if bad-faith is established at trial.[48]

Instructively, the Wisconsin Supreme Court noted:

> As two separate claims, they appropriately lead to recovery of separate, but not necessarily exclusive, damages. It would be inconsistent, therefore, to prohibit pursuit of some bad-faith damages because of application of the statute of limitations for a breach of insurance contract claim.[49]

Consequently, the Wisconsin Supreme Court ruled that the breach of contract damages were prohibited from recovery by the statute of limitations, however, the first-party "bad-faith" action breathed life into the potential recovery of these damages despite this fact.

VIII. Conclusion

The measure of these damages still remains difficult for both the insured to prove and the insurer to value. There is no universal formula as to what damages are applicable in each case. Most jurisdictions seem to agree that first-party "bad-faith" damages will include damages that are contemplated, or foreseeable, by the parties at the time of contractual execution. Exactly what these "damages" may be, however, is not precise. More importantly, it is usually difficult, if not impossible, for insureds to identify any quantifiable "bad-faith" damages. Thus, insurers and their attorneys should insist that insureds be responsive and detailed in their discovery responses on this issue of "bad-faith" damages — the "Achilles' Heel" of most first-party "bad-faith" claims.

Endnotes

1. It is important to note that even punitive damages are limited to a single digit multiple of actual compensatory "bad-faith" damages. *See State Farm Mutual v. Campbell*, 538 U.S. 408 (2003); *Crossing The Line: Punitive Damages And The Supreme Court*, John J. Pappas, Mealey's Litigation Report: Insurance Bad Faith, May 15, 2002 (Vol. 16, # 2); *The Campbell Cap*, John J. Pappas and William R. Lewis, Mealey's Litigation Report: Insurance Bad Faith, May 21, 2003 (Vol. 17, # 2); *but see Punitive Damages And Hip-Hop*, John J. Pappas and Eric W. Dickey, Mealey's Litigation Report: Insurance Bad Faith, September 7, 2004 (Vol. 18, # 9); *Detours: Campbell Stops At The Willow Inn*, John J. Pappas and Eric W. Dickey, Mealey's Litigation Report: Insurance Bad Faith, April 20, 2005 (Vol. 18, # 24); and *Piece of Mind: The Utah Supreme Court's Response to Campbell*, John J. Pappas and John V. Garaffa, Mealey's Litigation Report: Insurance Bad Faith, January 18, 2005 (Vol. 18, # 18).

2. *See McLeod v. Continental Ins. Co.*, 591 So.2d 621, 623 (Fla. 1992); *See also Jones v. Secura Insurance Company*, 249 Wis.2d 623, 638 N.W.2d 575 (Wis. 2002).

3. *See McLeod v. Continental Ins. Co.* at 623 (Fla. 1992)(stating "[a] first-party action is one in which the insured is also the injured party who is to receive benefits under the policy...[and] a third-party action is one in which a third-party injured, not the insured, is entitled to the benefits under the policy as a result of the insured's tortious conduct."); *See also Florida's First Party Bad-Faith Law*, John J. Pappas, Mealey's Litigation Report: Insurance Bad Faith, October 19, 2004 (Vol. 18, # 12)(in depth discussion of first party "bad-faith" in Florida).

4. Florida Statutes §624.155(4) provides: "(4) No punitive damages shall be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are: (a) Willful, wanton, and malicious; (b) In reckless disregard for the rights of any insured; or (c) In reckless disregard for the rights of a beneficiary under a life insurance contract. Any person who pursues a claim under this subsection shall post in advance the costs of discovery. Such costs shall be awarded to the insurer if no punitive damages are awarded to the plaintiff."; *Compare The Continuing Need for De Novo Review of Punitive Damage Awards - Liggett Group, Inc. v. Engle*, John V. Garaffa, Mealey's Litigation Report: Insurance Bad Faith, July 7, 2004 (Vol. 18, # 5)(in depth discussion of the *de novo* standard of review for punitive damages).

5. *See State Farm Mutual v. Campbell*, 538 U.S. 408 (2003)(reversing a $145 million dollar punitive damages award on constitutional grounds, the United States Supreme Court held: "Compensatory damages are intended to redress a plaintiff's concrete loss, while punitive damages are aimed at the different purposes of deterrence and retribution. The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor... Punitive damages awards serve the same purpose as criminal penalties...Thus, this Court has instructed courts reviewing punitive damages to consider (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."); *See also Piece of Mind: The Utah Supreme Court's Response to Campbell*, John J. Pappas and John V. Garaffa, Mealey's Litigation Report: Insurance Bad Faith, January 18, 2005 (Vol. 18, # 18 p. 25)(examines the constitutionality of punitive damages); and, *Punitive Damages And Hip-Hop*, John J. Pappas and Eric W. Dickey, Mealey's Litigation Report: Insurance Bad Faith, September 7, 2004 (Vol. 18, # 9 p. 27).

6. *Citing Hanna v. Martin*, 49 So.2d 585, 587 (Fla. 1950).

7. *Id.*

8. *See McLeod v. Continental Ins. Co.* at 623-624 & 626; *Accord Imhof v. Nationwide Mutual Insurance Co.*, 643 So.2d 617, 619 (Fla. 1994)("The damages recoverable by the insured in a first-party bad-faith action are those amounts that are the consequence of the insurer's bad-faith.").

9. Providing for an award of attorney's fees as a compensatory "damages" in a bad faith action seems irrelevant based on the fact that the insured would already be entitled to, and most likely has already received, attorney's fees in the underlying breach of contract action due to the operation of Fla. Stat. §627.428.

10. *See Jones v. Secura Insurance Company*, 249 Wis.2d 623, 638 N.W.2d 575 (Wis. 2002).

11. *See Danner v. Auto-Owners Insurance*, 245 Wis.2d 49, 629 N.W.2d 159 (Wis. 2001) and *DeChant v. Monarch Life Ins. Co.*, 200 Wis.2d 559, 547 N.W.2d 592 (Wis. 1996).

12. *See Allied Processors, Inc. v. W. Nat'l Mut. Ins. Co.*, 246 Wis.2d 579, 629 N.W.2d 329 (Wis. App. 2001).

13. *See Harriman v. Norfolk & Dedham Mut. Fire Ins. Co.*, 172 A.D.2d 585, 568 N.Y.S.2d 820 (N.Y.A.D. 2 Dept. 1991).

14. *Id.*

15. *See Real asset Management, Inc. v. Lloyd's of London*, 61 F.3d 1223 (5th Cir. 1995).

16. When the Louisiana legislature amended § 22:658(B)(1) to remove attorney's fees, they

also increased the penalty from 10% to 25%. Arguably, this increase was the legislature's determination that a reasonable attorney fee should be no more than 25% of the recovery.

17. *See General Star Indem. Co. v. Bankruptcy Estate of Lake Geneva Sugar Shack*, 215 Wis.2d 104, 572 N.W.2d 881 (Wis.App. 1997).

18. *See* FN13 (citing *Harriman v. Norfolk & Dedham Mut. Fire Ins. Co.*, 172 A.D.2d 585, 568 N.Y.S.2d 820 (N.Y.A.D. 2 Dept. 1991)).

19. *Id.*

20. *See Martin v. Metropolitan Prop. & Casualty Ins. Co.*, 238 A.D.2d 389, 390, 656 N.Y.S.2d 318, 319 (2d Dept.1997).

21. *See Butchikas v. Travelers* Indemnity Co., 343 So.2d 816, 819 (Fla. 1976)("The rule in Florida has been that, absent a physical injury, a plaintiff can recover damages for mental anguish only where it is shown the defendant acted with such malice that punitive damages would be justified."); *Compare Recovery of Damages for Emotional Distress in Tort, Contract and Statutory Bad Faith Actions*, Lee Craig and J. Pablo Caceras, Mealey's Litigation Report: Insurance Bad Faith, July 21, 1998 (Vol. 12, # 6)(analyzing the recovery of emotional distress damages in "bad-faith" actions). The Florida Supreme Court's holding in *Butchikas* was reinforced in *McLeod v. Continental Ins. Co.*, 591 So.2d 621 (Fla. 1992).

22. *See Time Insurance Company v. Burger*, 712 So.2d 389 (Fla. 1998)(awarding compensatory damages for emotional distress as well as punitive damages in a statutory "bad-faith" action).

23. *See Time Insurance Company v. Burger* at 392-393 (noting *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985) and stating: "[T]his Court established the impact rule, which holds that in the absence of discernible physical injury a person cannot recover compensatory damages for mental distress or psychiatric injury. While we have concluded that [§]624.155 creates a statutory exception to this rule, at least in health insurance cases, we note that the statute does not specify the standard of recovery for damages for emotional distress.").

24. *See White v. Blue Cross and Blue Shield of Greater New York*, 146 Misc.2d 125, 549 N.Y.S.2d 598, (N.Y.Supp. 1989); *Sweazey v. Merchants Mut. Ins. Co.*, 169 A.D.2d 43, 571 N.Y.S.2d 131 (N.Y.A.D. 3 Dept. 1991); *Fleming v. Allstate Ins. Co.*, 106 A.D.2d 426, 482 N.Y.S.2d 519 (N.Y.A.D. 2 Dept. 1984), *aff'd* 66 N.Y.2d 838, 498 N.Y.S.2d 365, 489 N.E.2d 252, *cert. denied* 475 U.S. 1096, 106 S.Ct. 1493, 89 L.Ed.2d 894; and, *Fiore v. State Farm Fire & Cas. Co.*, 135 A.D.2d 602, 603, 522 N.Y.S.2d 180 (N.Y.A.D. 1987).

25. *See Dixon v. First Premium Ins. Group*, 2006 WL 786781 (La.App. 1 Cir. 2006).

26. *Id.*

27. *See Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480 (Cal. 1973).

28. *See Waters v. United Services Auto. Assn.*, 41 Cal. App.4th 1063 (Cal.App.2.Dist. 1996).

29. *See Goodson v. American Standard Ins. Co. of Wisconsin*, 89 P.3d 409 (Colo. 2004) and *Ballow v. PHICO Ins. Co.*, 878 P.2d 672, 677 (Colo.1994).

30. *Goodson* at 415.

31. *See Chavers v. National Security Fire & Casualty Co.*, 405 So. 2d 1 (Ala. 1981) and *Baker v. State Farm General Ins. Co.*, 585 So.2d 804 (Ala. 1991).

32. *Compare Independent Fire Insurance Company v. Lunsford*, 621 So. 2d 977 (Ala. 1993)(stating damages for mental anguish can be awarded for a breach of contract and not the "bad-faith" action).

33. *See Langston v. Bigelow*, 820 So. 2d 752 (Miss. Ct. App. 2002).

34. *Id.*

35. *See* Florida Statutes §624.155(4) (sets forth specific requirements to award punitive damages for "bad-faith" conduct).

36. *See State Farm Mutual Insurance v. LaForet*, 658 So.2d 55, 58 (Fla. 1995)(noting the evolution of statutory "bad-faith").

37. Florida Statutes §627.727(10) provides: "The damages recoverable from an uninsured motorist carrier in an action brought under [§]624.155 shall include the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state. The total amount of the claimant's damages are recoverable whether caused by an insurer or by a third-party tortfeasor."

38. *See McLeod* at 623, 624 & 626.

39. *See Real asset Management, Inc. v. Lloyd's of London*, 61 F.3d 1223 (5th Cir. 1995).

40. *Id.*

41. *See* FN13 (citing *Harriman v. Norfolk & Dedham Mut. Fire Ins. Co.*, 172 A.D.2d 585, 568 N.Y.S.2d 820 (N.Y.A.D. 2 Dept. 1991)).

42. *See Patrick v. Maryland Casualty Co.*, 217 Cal. App.3d 1566 (Cal.App.1.Dist.,1990).

43. *Id.* at 1576 ("There was substantial evidence in this case...that [the insurer's] claims handling practices were shoddy, and that its handling of the claim sought by the [insured] was at times witless and inflicted with symptoms of bureaucratic inertia and inefficiency. However, after a review of the full record, we find no substantial evidence that its actions were malicious, fraudulent, or oppressive. While in other circumstances a consistent and unremedied pattern of egregious insurer practices might rise to the level of a malicious disregard of the insured's rights, we cannot find liability here for punitive damages based merely upon the insurer's inept and negligent handling of a claim.").

44. *Id.* at 1572 & 1575.

45. *See Jones v. Secura Insurance Company*, 249 Wis.2d 623, 638 N.W.2d 575 (Wis. 2002).

46. *Id.*

47. Wis. Stat. § 631.83(1)(a)(allows for a one year statute of limitation period in the context of breach of contract).

48. *Id.* at 649.

49. *Id.* at 646. ■

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