THE SCOPE AND SIGNIFICANCE OF EXTRA-CONTRACTUAL DAMAGES IN MISSISSIPPI INSURANCE LITIGATION TODAY

by

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The topic of my talk today is the obligation of good faith and fair dealing that accompanies every contract of insurance, and the damages recoverable by policyholders in Mississippi and throughout the United States for breach of that obligation. This is a topic of increasing importance to insurance policyholders in today's world, where virtually every practice by an insurance company, or any national or global business, is standardized, computerized, and institutionalized. I want to address both the theory of the law in this area, and the practical application of the law on behalf of policyholders today.

There are three key points I wish to make that are important to attorneys who represent policyholders in Mississippi and throughout the nation:

1. Extra-contractual liability for breach of an insurance company's obligation of good faith and fair dealing is **not limited** to liability for " 'Bad Faith' failure to pay claims without arguable reason."
2. Extra-contractual damages in the insurance context in Mississippi, as in the majority of states, include extra-contractual *compensatory* as well as punitive damages, and
3. In Mississippi, as in the majority of states, extra-contractual compensatory damages, including attorneys' fees, are included in the actual damages to be

multiplied for purposes of applying the "constitutional ratio" test to determine the reasonableness of the amount of punitive damages.

These points are of importance to the real world, *practical* enforcement and protection of the contractual rights of insurance policyholders today.

INTRODUCTION
Insurance in the 21st Century

The insurance industry has undergone massive changes in practices over the past twenty-five years as the world burst from an Industrial Age into a new, global, digitally-driven Information Age. The industry is not alone in this regard. Banking, finance, manufacturing, communications, distribution, retail, medical, legal – every aspect of life, both personal and professional, of every member of society – has been impacted by tectonic changes in how business is conducted as the world enters the 21st Century. The very nature of the actuarial foundation of insurance, however, places the insurance industry at the forefront in opportunities for improvements in competitiveness, efficiency and profitability made available by these changes.[1]

Whether in sales practices, claims adjusting practices, policy provision interpretation, actuarial calculations, or the computation and payment of policy benefits, any action that impacts

[1]For a discussion of the impact of epochal changes in technology on civil litigation in general, *see* "The THIRD AGE, Civil Litigation at the Dawn of the 21st Century, Oct. 28, 2000, Keynote Address, by the author of this paper, to the 9th Annual Consumer Litigation Rights Conference in Denver, Colorado, available at http://www.smithphillips.com/publications.php.

an individual policyholder by *$ X* today, impacts the insurance company by *$ X* thousands (or hundreds of thousands) through systemic or institutional application. Enforcing the rights of a policyholder through the legal system in this environment has become an increasingly challenging and expensive task.

The old "Bad Faith" litigation for "tortious refusal to pay a claim without an arguable reason" which (particularly in California, Florida, and a few other states) occupied the attention of lawyers, judges, and legal scholars during the final decades of the 20th Century, is becoming a "relic" in today's world. Pushed by the competitive forces of consolidation and globalization of the industry and the quest for increasing efficiency and profitability, insurance companies and their officers are driven, in every aspect of the business, to "push the envelope" or, with increasing frequency in the post-*State Farm v. Campbell* legal system, **cross the line** of good faith and fair dealing.

It is in this environment that I want to discuss: (a) the **scope** of extra-contractual damages in insurance litigation, and (b) the **significance** of extra-contractual damages in insurance litigation today. In Mississippi – as in the majority of states throughout the nation – the scope of extra-contractual damages in insurance litigation is broader than frequently recognized. It includes extra-contractual compensatory, as well as punitive damages. The **significance** of extra-contractual compensatory damages, particularly in the post-*State Farm v. Campbell* and *Philip Morris v. Williams* legal system, is much **greater** than commonly recognized.

EXTRA-CONTRACTUAL DAMAGES
Mississippi in the Mainstream

Mississippi is frequently viewed as an "outlier" in many areas of civil law. Whether "ahead of the times" or "behind the times," the Mississippi legal system has often occupied positions considered "out of step" with current law in other states with regard to significant issues, both substantive and procedural.[2] With regard to the theory and scope of extra-contractual damages in insurance litigation, however, Mississippi is, and has always been, **squarely in the mainstream**. In almost four decades of well-articulated and recently *unanimous* opinions, the Mississippi Supreme Court has put Mississippi squarely in the center of the **majority** of states throughout the United States with regard to both (1) the *extent* of the obligation of good faith and fair dealing by insurance companies, and (2) the compensatory, as well as punitive, damages recoverable for breach of that obligation.[3]

The law in Mississippi as to extra-contractual damages is built on solid legal ground. The seminal Mississippi " 'bad faith' failure to pay a claim without an arguable reason" case, the *Veal*

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[2]In 1910, for instance, as early 20th Century tort law developed, Mississippi was the **first state** (by 21 years) to adopt the doctrine of **comparative negligence**. Act of April 16, 1910, ch. 135, 1910 MISS. LAWS 125 (codified as amended at MISS. CODE ANN. § 11-7-15 (Rev. 2004). The next state to do so was Wisconsin in 1931, followed by Alabama in 1955. *See* Victor E. Schwartz, Comparative Negligence § 1.04 (b) (4th ed. 2002); Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts § 220 (2d ed.). A century later, on the other hand, in 2014, Mississippi remains the **last state** with no state court procedure **for class actions**, a factor that puts state courts in Mississippi at a disadvantage in addressing institutional or systemic wrongful actions. *See* Linda S. Mullenix, *Should Mississippi Adopt A Class-Action Rule? Balancing the Equities: Ten Considerations That Mississippi Rulemakers Ought to Take into Account in Evaluating Whether to Adopt A State Class-Action Rule*, 24 Miss. C.L. Rev. 217 (2005).

[3]It is for this reason, that an examination of Mississippi law on the subject *today* is beneficial not only to Mississippi attorneys, but to attorneys representing policyholders, and the courts hearing their cases, throughout the United States.

case, was decided in 1977. *Standard Life Ins. Co. of Indiana v. Veal*, 354 So. 2d 239 (Miss. 1977). The *Veal* case expressly rested on the premise that an intentional wrong, or *actions that rise to the level of an independent tort*, gives rise to extra-contractual or punitive damages. ["We are of the opinion that the refusal to pay the legitimate claim in this cases was an intentional wrong and constituted an independent tort, as contemplated in *Progressive Casualty Insurance Company v. Keys.*"] *Id*. at 248, citing *Progressive Casualty Insurance Company v. Keys*, 317 So.2d 396 (Miss. 1975).

In reaching its decision in *Veal*, the Mississippi Supreme Court reviewed the history of punitive and extra-contractual damages in Mississippi, noting that "[p]unitive damages may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." *Seals v. St. Regis Paper Co*., 236 So.2d 388 (Miss. 1970); Such damages serve as "an example so that others may be deterred from the commission of similar offenses thereby in theory protecting the public." *Snowden v. Osborne*, 269 So.2d 858 (Miss. 1972); For such damages to lie "there must enter into the injury some element of aggression or some coloring of insult, malice or gross negligence, evincing ruthless disregard for the rights of others." *Fowler Butane Gas Co. v. Varner*, 244 Miss. 130, 150-51, 141 So.2d 226, 233 (1962); And that punitive damages are recoverable for breach of contract in Mississippi where "such breach is attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort." *Standard Life Ins. Co. of Indiana v. Veal*, 354 So.2d 239, (Miss. 1977), citing *Progressive Casualty Insurance Company v. Keys*, 317 So.2d 396, 398 (Miss. 1975).

On this solid foundation, there arose over the next three decades a body of substantive law in Mississippi regarding the duty of good faith and fair dealing implicit in contracts of insurance – and the extra-contractual liability of insurance companies for violation of that duty. *See, e.g., Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1186 (Miss. 1990); *Lewis v. Equity Nat'l Life Ins. Co.* 637 So. 2d 183, 185 (Miss 1994); *Stewart v. Gulf Guaranty Life Ins. Co.*, 846 So. 2d 192, 201 (Miss. 2003); *United American Insurance Company v. Merrill*, 978 So.2d 613, 630 (Miss. 2007), *cert denied*, 128 S.Ct. 1257, 170 L.Ed.2d 68, 76 USLW 3324, 76 USLW 3433, 76 USLW 3339 (Feb. 19, 2008).

In Mississippi, as in a majority of states throughout the nation, extra-contractual liability for breach of an insurance company's obligation of good faith and fair dealing is not limited to "'Bad Faith' failure to pay claims without arguable reason." The implied covenant of good faith and fair dealing exists with regard to every policy of insurance. Liability may exist for violation of that covenant whenever the breach reaches the level of an independent tort.

Extra-contractual damages in the insurance context in Mississippi, as in the majority of states, include extra-contractual *compensatory* as well as punitive damages. Where an insurance company's wrongdoing is accompanied by conduct that rises to the level of an intentional tort, damages for emotional distress, mental anguish and costs, including attorneys' fees, are recoverable.

> Applying the familiar tort law principle that one is liable for the fall measure of the reasonably foreseeable consequences of her actions, it is entirely foreseeable by an insurer that the failure to pay a valid claim through the negligence of its employees should cause some adverse result to the one entitled to payment. Some anxiety and emotional distress would ordinarily follow, especially in the area of life insurance where the loss of a loved one is exacerbated by the attendant financial effects of that loss. Additional inconvenience and expense, attorneys fees and the like should be expected in an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries.

United American Insurance Company v. Merrill, 978 So.2d 613, 630 (Miss. 2007).

As the law regarding the obligation of good faith and fair dealing and extra-contractual damages has developed throughout the United States, Mississippi has remained in the mainstream, also, with regard to "third party" Bad Faith actions, as opposed to "first party" actions for breach of obligation of good faith and fair dealing.

Ten (10) of the 50 states have Third Party, as well as First Party, actions for "Bad Faith" refusal to pay without an arguable reason.[4] Twelve (12) States have either no, or limited, actions for breach of the obligation of good faith and fair dealing. Mississippi is squarely in the middle of the growing majority, Twenty-Eight (28) States whose laws provide for First Party actions only. *See*, Appendix A: "50 STATE ANALYSIS, 'Bad Faith Law' (Obligation of Good Faith and Fair Dealing)", March 2014, page 1.

As illustrated by page 2 of Appendix A, Mississippi is in the solid majority of Thirty Eight (38) states whose laws provide insurance policyholders the protection afforded by First Party extra-contractual liability in insurance. Appendix A: "50 STATE ANALYSIS, (Protected Policyholder Status)," March 2014, page 2.

[4]Much of the "Bad Faith" litigation, as it is commonly thought of throughout the country, revolves around these Third Party states, particularly California and Florida.

The Scope of Extra-Contractual Liability

The scope of Extra Contractual Liability ["ECL"] for breach of the obligation of good faith and fair dealing in Mississippi, as elsewhere, is much broader than simple "failure to pay a claim without an arguable reason." The obligation of good faith and fair dealing in a contract of insurance relates to all dealings by the insurer with the insured regarding the policy. An insurance company's obligation of good faith and fair dealing to its insured is much broader than implied by the often mis-applied, short-hand term "Bad Faith."[5]

A few examples of actual Mississippi cases illustrate the extensive breadth and increasing importance of ECL for protection of insurance policyholders in situations other than simple "bad faith refusal to pay with out an arguable reason." All materials referenced here are available as a matter of public record.

1. Institutional and systemic claims practices

A classic example of institutional and systemic actions in the modern era of claims handling that give rise to liability for breach of the obligation of good faith and fair dealing is

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[5] *See*, "The Law of Insurance Claim Practices - Beyond Bad Faith," 47 TORT TRIAL & INSURANCE PRACTICE LAW JOURNAL 693, (publication of the American Bar Association, Tort Trial & Insurance Practice Section) Winter 2012, by Professor Jay Feinman of the Rutgers School of Law, Camden, New Jersey. A basic premise of Professor Feinman's article, which reexamines the law of first-party claims practices generally, is that **"bad faith" is an ill-advised term** for the area. For an even more recent, "philosophical" examination of the "obligation resting on the nature and contemporary importance of insurance," *see*, Kenneth S. Abraham, LIABILITY FOR BAD FAITH AND THE PRINCIPLE WITHOUT A NAME (YET), 19 Conn. Ins. L.J. 1 (2012). "Insurers owe, or ought to owe those with whom they deal," writes Professor Abraham, "a higher obligation of fair dealing than ordinary private enterprises typically owe those with whom they deal," *Id.* 11. Over the past two decades of evolution of "bad faith law" there has arisen, says Abraham, an "as yet unnamed principle" relating to institutional or systemic conduct by insurance companies. "The character of the principle I discern in insurance law is one of obligation resting on the nature and contemporary importance of insurance. . . . ." *Id.* 8-9.

Kuykendoll v. Progressive Gulf Insurance Co., et al., Cause Number CV2000-60(P2), Circuit Court of the Second Judicial District of Panola County, Mississippi.[6] The *Kuykendoll* case addressed systemic "claim withdrawals" procured in the company's Southeast Region, including Mississippi, via allegedly intimidatory tactics, employing standardized forms prepared at the home office for each state. Even in the absence of a claim "denial," actions by the insurance company and its employees that violate the obligation of good faith and fair dealing may give rise to extra-contractual and punitive damages.[7]

2. Post-Catastrophe modification of claims practices (The Post-Katrina "Wind-Water Protocol")

Post-catastrophe scenarios with increasing frequency give rise to situations where extra-contractual damages afford the only practical means of redress for a policyholder who is one of thousands impacted by the catastrophe. *See, for example, Guice v. State Farm*, Civil Action No. 1:06cv1 LTS-RHW, United States District Court, Southern District of Mississippi, **Doc. 195**, Second Amended Complaint, ¶¶ 54-59; 64-70, available at **2007 WL 607472**; *also*, **Doc. 386**, Plaintiff's Response to State Farm Defendants' Motion for Protective Order, available at **2007 WL 1623838**. [Post-catastrophe reinterpretation of anti-concurrent causation clause].

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[6] *Kuykendoll v. Progressive* was one of two (2) cases in Panola County, Mississippi, arising from identical "claims withdrawal" practices, allegedly systemic in the southeast region and motivated by an institutional "Gainsharing" program for compensation of employees including adjusters. The other case was *Davis v. Progressive Gulf Insurance Company, et al.*, Cause Number CV2001-92(P1), Circuit Court of the First Judicial District of Panola County, Mississippi.

[7] Details of facts in the case, and the legal basis for liability, can be found in the publically-available June 1, 2004 Memorandum in Opposition to Motion for Partial Summary Judgment in the *Kuykendoll* case. [Copies available]

3. Actuarial Illustration and Sales Practices

Breach of the obligation of good faith and fair dealing was at issue, also, in the intentional illustration of interest-sensitive "vanishing premium" life insurance based on dividends which were actuarially unsustainable at current earnings for purpose of illustrating earlier "vanish dates" for competitive sales purposes. *See, Phillips v. New England Mutual Life Ins. Co.*, 36 F. Supp.2d 345, 347 (S.D. Miss. 1998). [Sales illustrations based on inflated dividend assumptions and actuarial computations manipulated to portray more favorable 'vanish date'. Causes of action stated under Mississippi law for fraudulent misrepresentation, fraudulent concealment and fraudulent inducement.] *Also, Myers v. Guardian Life Insurance Co.*, 5 F. Supp.2d 423 (N.D. Miss. 1998); *Hignite v. American General Life & Accident Ins. Co.*, 142 F. Supp.2d 785. 789-90 (N.D. Miss., 2001); *and Haggan, et al v. Jackson National Life Ins. Co, et al*, Cause No. 96-0295, Circuit Court of Copiah County, Mississippi. [Jury verdict on behalf of policyholders for actual and punitive damages for life insurance deceptive sales practices]

4. Unilateral reduction of Policy benefits to "on-claim" Cancer Victims:

Perhaps the best example of the critical role of extra-contractual compensatory and punitive damages (and the interplay between the two) is found in the recent Life Investors supplemental cancer policy litigation. *See, Wright, et al v. Life Investors Insurance Company of America*, No. 2:08cv003-WAP-SAA, **Doc. 202**, Plaintiffs' Memorandum in Opposition to Life Investors Insurance Company of America's Motion for Partial Summary Judgment, pp.6-16, United States District Court, Northern District of Mississippi, **2010 WL 3252605**; also available on PACER. [Nationwide unilateral modification of benefits payable to "on claim" cancer victims

based on prior, express calculation by insurance company of potential aggregate post-*State Farm v. Campbell* punitive damage liability, including costs of defending policyholder cases; computation of potential net savings; and intentional implementation of new policy interpretation and method of calculating benefits under cancer policies.]

Publically-available materials from each of the above cases illustrate the breadth and scope of both compensatory, extra-contractual and punitive damages for the protection and enforcement of policyholders rights in Mississippi, as in a majority of states throughout the nation.

Significance of Extra-Contractual Compensatory Damages in Insurance Litigation Today (The *State Farm/Campbell* Punitive Damage Ratio)

Attorneys fees and costs of prosecuting the case for tortious breach of the obligation of good faith and fair dealing are not punitive damages in Mississippi. They are part of the *compensatory* damages to be multiplied in the *State Farm/Campbell* "ratio" analysis. The fees and costs of enforcing the contract are recoverable as compensatory damages in Mississippi for tortious breach of the obligation of good faith and fair dealing implicit in every contract of insurance. *Universal Life Ins. Co. v. Veasley,* 610 So. 2d 290, 295 (Miss. 1992); *United American Insurance Company v. Merrill*, 978 So.2d 613, 630 (Miss. 2007).[8]

The recovery of punitive damages is governed in Mississippi by statute. MISS. CODE § 11-1-65. The Mississippi punitive damage statute was enacted in 1993. The statute limits the

[8]Such damages, frequently referred to as "*Veasley* damages" in Mississippi, are commonly known in other states by the names of their cases to similar effect.

amount of punitive damages recoverable in certain situations. [§ 11-1-65(3)]. It also specifies the elements the fact finder shall consider in determining the amount of punitive damages. [Section 11-1-65(1)(e)]. Attorneys' fees and costs of litigation are not factors to be included by the fact finder in the determining the amount of punitive damages to be awarded. They are a part of the actual, compensatory damages to be multiplied by the Court in applying the single-digit "ratio" test pursuant to *State Farm v. Campbell*.

Mississippi is again in the majority. It is one of twenty-seven (27) states in which such extra-contractual damages are compensatory. In only nine (9) states – including Utah – are such damages a part of the *punitive* damages. In fourteen (14) states the issue appears undecided, but the trend is clearly toward the majority/Mississippi view. *See*, Appendix B, "50 STATE ANALYSIS, Attorneys' Fees as Compensatory (For Punitive Damage Multiplier)" [including citations].

In Mississippi, as in other states where attorneys' fees and litigation costs are part of the compensatory damages, a policyholder's attorneys' fees and costs are to be included in his actual damages for purposes of the applying the *State Farm v. Campbell* constitutional, single-digit "ratio" test. *Blount v. Stroud*, 915 N.E.2d 925, 943 (Ill.App.Ct. 2009), *cert. denied*, 131 S.Ct. 503 (2010) [noting that the majority of the courts across the country that have considered this issue have agreed that attorney fees should be taken into account as part of the compensatory damages factor in the "ratio" analysis.] *See, also, Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3rd Cir. 2005).

The inclusion of policyholders' attorneys' fees and litigation expenses as part of the compensatory damages for purposes of application of the *Campbe*ll punitive damage "multiplier" ratio enables individual policyholders, as a practical matter, to combat improper institutional practices. It helps "narrow the gap" between the amount the two parties have at issue in the dispute. It helps eliminate abusive practices which exploit that disparity on both an individual and mass basis. In cases of (sometimes calculated) tortious breach of an insurer's obligation of good faith and fair dealing, it helps prevent insurance companies from using their superior economic power, in a post-*State Farm/Campbell* legal system, to profit via systemic or institutional wrongful practices.[9]

CONCLUSION

Extra contractual liability for breach of the obligation of good faith and fair dealing plays an increasingly important role in protecting the ability of policyholders to enforce their contracts of insurance. It is hoped that the above paper may shed some light on the scope and proper application of extra-contractual liability in Mississippi and throughout the United States today.

[9]*See*, e.g., *Wright, et al v. Life Investors Insurance Company of America*, No. 2:08cv003-WAP-SAA, Doc. 202, 2010 WL 3252605.

50 STATE ANALYSIS

"BAD FAITH" LAW

(Obligation of Good Faith and Fair Dealing)

March 2014

First Party and <u>Third Party</u> "Bad Faith" Claims (10 States)	**First Party Actions Only (28 States)**	**Limited or NO Actions (12 States)**
1. Alabama	1. Alaska	1. Georgia
2. **California**	2. Arizona	2. Illinois
3. **Florida**	3. Arkansas	3. Kansas
4. Iowa	4. Colorado	4. Maine
5. Kentucky	5. Connecticut	5. Maryland
6. Louisiana	6. Delaware	6. Missouri
7. Michigan	7. Hawaii	7. New York
8. Montana	8. Illinois	8. Oregon
9. Washington	9. Idaho	9. Pennsylvania
10. West Virginia	10. Indiana	10. Tennessee
	11. Massachusetts	11. Utah
	12. Minnesota	12. Virginia
	13. **Mississippi**	
	14. Nebraska	
	15. Nevada	
	16. New Jersey	
	17. New Mexico	
	18. North Carolina	
	19. North Dakota	
	20. Ohio	
	21. Oklahoma	
	22. Rhode Island	
	23. South Carolina	
	24. South Dakota	
	25. Texas	
	26. Vermont	
	27. Wisconsin	
	28. Wyoming	

APPENDIX A

50 STATE ANALYSIS

PROTECTED POLICYHOLDER STATUS

(FIRST PARTY Extra-Contractual Damages)

March 2014

POLICYHOLDER Actions Available (38 States)

1. Alabama
2. Alaska
3. Arizona
4. Arkansas
5. California
6. Colorado
7. Connecticut
8. Delaware
9. Florida
10. Hawaii
11. Illinois
12. Idaho
13. Indiana
14. Iowa
15. Kentucky
16. Louisiana
17. Massachusetts
18. Michigan
19. Minnesota
20. **Mississippi**
21. Montana
22. Nebraska
23. Nevada
24. New Jersey
25. New Mexico
26. North Carolina
27. North Dakota
28. Ohio
29. Oklahoma
30. Rhode Island
31. South Carolina
32. South Dakota
33. Texas
34. Vermont
35. Washington
36. West Virginia
37. Wisconsin
38. Wyoming

Limited or NO Actions (12 States)

1. Georgia
2. Illinois
3. Kansas
4. Maine
5. Maryland
6. Missouri
7. New York
8. Oregon
9. Pennsylvania
10. Tennessee
11. Utah
12. Virginia

APPENDIX A

50 STATE LAW ANALYSIS

ATTORNEYS' FEES AS COMPENSATORY
(For Punitive Damages Multiplier)
March 2014

Compensatory: (27 States)	**Punitive: (9 States)**	**Undecided: (14 States)**
1. Arizona	1. Alabama	1. Alaska
2. Florida	2. California	2. Arkansas
3. Georgia	3. Colorado	3. Connecticut
4. Idaho	4. Delaware	4. Hawaii
5. Illinois	5. Kentucky	5. Indiana
6. Iowa	6. New York	6. Louisiana
7. Kansas	7. Tennessee	7. Maine
8. Massachusetts	8. Texas	8. North Carolina
9. Maryland	9. **Utah**	9. North Dakota
10. Michigan		10. New Hampshire
11. Minnesota		11. Rhode Island
12. Missouri		12. South Carolina
13. **Mississippi**		13. South Dakota
14. Montana		14. Virginia
15. Nebraska		
16. New Jersey		
17. New Mexico		
18. Nevada		
19. Ohio		
20. Oklahoma		
21. Oregon		
22. Pennsylvania		
23. Vermont		
24. Washington		
25. Wisconsin		
26. West Virginia		
27. Wyoming		

APPENDIX B
REFERENCES ATTACHED

50 STATE LAW ANALYSIS

ATTORNEYS' FEES AS COMPENSATORY
(For Punitive Damages Multiplier)

COMPENSATORY

STATE		LEGAL AUTHORITY
AZ	Compensatory	A.R.S. § 12-341.01; Schwartz v. Farmers Ins. Co. of Ariz., 800 P.2d 20, 23 (Ariz.Ct.App.1990) ("attorney's fees are compensable damages in the bad faith claim")
FL	Compensatory	Fla. Stat. § 624.155. See Progressive Express Ins. Co. v. Scoma, 975 So.2d 461, 465 (Fla. 2d DCA 2007); Talat Enters., Inc. v. Aetna Cas. & Sur. Co., 217 F.3d 1318, 1319 (11th Cir. 2000); McLeod v. Continental Ins. Co., 591 So. 2d 621, 623 (Fla. 1992)
GA	Compensatory	Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302, 1321 (11th Cir. 2007) ("In Georgia, awards of attorney fees in tort cases involving bad faith are compensatory in nature."); O.C.G.A. § 13-6-11 (2006 Supp.) City of Warner Robins v. Holt, 220 Ga.App. 794, 470 S.E.2d 238, 240 (1996)(purpose of award of attorney fees and litigation expenses is to compensate injured party, in order that such parties are not further injured by the cost as result of seeking legal redress); Ross v. Hagler, 209 Ga.App. 201, 433 S.E.2d 124, 127 (1993)(award of attorney fees under 13-6-11 not punitive in nature).
ID	Compensatory	I.C. § 41-1839; Halliday v. Farmers Ins. Exchange, 404 P.2d 634 (Idaho 1965) ("Not being a penalty, such attorney fee is an additional sum rendered as compensation")
IL	Compensatory	Blount v. Stroud, 915 N.E.2d 925 (Ill.App.Ct. 2009), *cert den'd* by United States Supreme Court 131 S.Ct. 503 (2010); Lawlor v. North American Corp. of Illinois, 949 N.E.2d 155, 176 (Ill. App. 2011); aff'd in part; rev'd in part on other issues, 983 N.E. 2d 414 (Ill. 2012); 215 ILCS 5/155 (1992)

IA	Unsure	Deters v. USF Ins. Co., 797 N.W.2d 621 (Iowa Ct. App. 2011); Smutz v. Central Iowa Mut. Ins. Ass'n, 742 N.W.2d 605 (Iowa App. 2007)
KS	Compensatory	K.S.A. 40-256; Wolf v. Mutual Ben. Health and Acc. Ass'n, 366 P.2d 219 (Kan. 1961) ("*compensatory and not penal*")
MA	Compensatory	G.L. c. 176D, § 3(9) (f); G.L. c. 93A, § 9(3) and (4) (reasonable attorneys' fees and costs); Hopkins v. Liberty Mut. Ins. Co., 750 N.E.2d 943 (Mass. 2001); Siegel v. Berkshire Life Ins. Co., 873 N.E.2d 1202 (Mass.App.Ct. 2007) (evidence supported award of fees as damages); Hanover Ins. Co. v. Golden, 436 Mass. 584, 766 N.E.2d 838 (Mass. 2002) (bad faith showing not required for fee award against insurer); Fascione v. CNA Ins. Companies, 435 Mass. 88, 754 N.E.2d 662 (Mass. 2001) ("compensated for their litigation expenses")
MD	Compensatory	Poku v. F.D.I.C., CIV.A. RDB-08-1198, 2011 WL 1599269 (D. Md. Apr. 27, 2011); Hoffman v. Stamper, 385 Md. 1, 48-49, 867 A.2d 276, 304-305 (Md.2005) (citing Golt v. Phillips, 308 Md. 1, 12, 517 A.2d 328, 333 (1986); Md.Code Ann., Com. Law § 13-408; Kilsheimer v. Dewberry & Davis, 665 A.2d 723 (Md.App. 1995)
MI	Compensatory	Murphy v. Cincinnati Ins. Co., 576 F Supp 542 (E.D. Mich. 1983)
MN	Compensatory	Morrison v. Swenson, 142 N.W.2d 640 (MINN 1966) (fees are recovered as compensation for loss caused by the insurers' breach)
MO	Compensatory	Mo.Rev.Stat. s 375.420; Columbia Union Nat. Bank v. Hartford Acc. and Indem. Co., 669 F.2d 1210 (8th Cir. 1982)
MS	Compensatory	Universal Life Ins. Co. v. Veasley, 610 So.2d 290, 636 (Miss. 1992); United American Insurance Company v. Merrill, 978 So.2d 613 (Miss. 2007); *cert denied*, United States Supreme Court, 128 S.Ct. 1257, 170 L.Ed.2d 68, 76 USLW 3324, 76 USLW 3433, 76 USLW 3339,(U.S. Miss. Feb. 19, 2008)

MT	Compensatory	Mountain West Farm Bureau Mut. Ins. Co. v. Brewer, 69 P.3d 652 (MT 2003); Goodover v. Lindey's Inc., 843 P.2d 765, 774 (Mont. 1992); Riordan v. State Farm Mut. Auto. Ins. Co., 2008 WL 2512023 (D.Mont. June 20, 2008).
NE	Compensatory	Neb.Rev.Stat. § 44-359; Guenther v. Time Ins., Company, 2008 WL 731593 (D.Neb. Mar. 17, 2008)
NJ	Likely Compensatory	Taddei v. State Farm Indem. Co., 401 N.J.Super. 449, 951 A.2d 1041 (N.J.Super.A.D. 2008) (measure of damages for breach of duty of good faith and fair dealing is "any foreseeable consequential damages," including attorneys' fees); *but see* Baker v. National State Bank, 801 A.2d 1158 (N.J. Super. 2002) (applying only to certain actions with fee awards by statute)
NM	Compensatory	State ex rel. New Mexico State Hwy. & Transp. Dep't. v. Baca, 120 N.M. 1, 5, 896 P.2d 1148, 1152 (1995)
NV	Compensatory	In re USA Commercial Mortg. Co., 802 F.Supp. 2d 1147 (D. Nev. 2011); N.R.S. 686A.310 (awarding "any damages sustained by the insured as a result of the commission of any act set forth"); Union Pacific R. Co. v. Zurich American Ins. Co., 2010 WL 4983466, *1 (D.Nev. Nov 30, 2010) (attorneys' fees may be used to establish jurisdictional amount for diversity jurisdiction); NRS 18.010 allows attorney fee recovery where prevailing party has not been awarded more than $20,000.
OH	Compensatory	Furr v. State Farm Mut. Auto. Ins. Co., 128 Ohio App.3d 607, 716 N.E.2d 250, 265 (Ohio Ct.App.1998); Estate of Millhon v. UNUM Life Ins. Co. of America, 2009 WL 2431252 (S.D.Ohio Aug. 5, 2009) ("Compensatory damages arising from a bad-faith insurance claim may include attorney's fees.")

OK	Likely Compensatory	36 Okl.St.Ann. § 3629; Christian v. American Home Assur. Co., 577 P.2d 899 (Okl. 1977) ("[W]here a litigant has acted in bad faith, wantonly or for an oppressive reason, the trial court, in exercise of its equitable power, may award attorney fees."); Badillo v. Mid Century Ins. Co., 121 P.3d 1080 (Okla. 2005); Barnes v. Okla. Farm Bureau Mut. Ins. Co., 11 P.3d 162, 180 (Okla. 2000); *Hebble v. Shell W. E & P, Inc.*, 238 P.3d 939 (OK CIV APP 2010)
OR	Compensatory	O.R.S. § 742.061; Hardware Mut. Cas. Co. v. Farmers Ins. Exchange, 256 Or. 599, 474 P.2d 316 (Or. 1970) ("The statute is compensatory, not penal.")
PA	Compensatory	Willow Inn, Inc. v. Public Service Mut. Ins. Co., 399 F.3d 224 (3rd Cir. 2005); Jurinko v. Medical Protective Co., 305 Fed.Appx. 13 (3rd Cir. 2008)
VT	Compensatory	Burlington Drug Co., Inc. v. Royal Globe Ins. Co., 616 F.Supp. 481, 483 (D.C.Vt. 1985); Monahan v. GMAC Mortg. Corp., 893 A.2d 298, 323-24 (Vt. 2005)
WA	Compensatory	Clausen v. Icicle Seafoods, Inc., 174 Wash.2d 70, 272 P.3d 827, 836 (2012); Olympic Steamship Co., Inc. v. Centennial Ins. Co., 811 P.2d 673 (1991) ; fees also available under Washington Consumer Protection Act
WI	Compensatory	Roehl Transport, Inc. v. Liberty Mut. Ins. Co., 784 N.W.2d 542 (Wis. 2010); Stewart v. Farmers Ins. Group, 2009 WI App 130, ¶ 14, 321 Wis.2d 391, 773 N.W.2d 513 ("[A]s damages resulting from the tort of bad faith, attorney fees do not remain attorney fees, but instead are transformed into damages.")
WV	Compensatory	Quicken Loans, Inc. v. Brown, 737 S.E.2d 640, 666 (W.Va. 2012); Jordan v. National Grange Mut. Ins. Co., 183 W. Va. 9, 393 S.E.2d 647 (W. Va. 1990) (attorneys' fees awarded for bad faith as element of compensatory damages)

WY	Compensatory	W.S.1977 § 26-15-124; State Farm Mut. Auto. Ins. Co. v. Shrader, 882 P.2d 813 (Wyo. 1994) (“recovery of attorney's fees and interest as a form of compensatory damages”); Smith v. Equitable Life Assur. Soc., 614 F.2d 720 (10th Cir. 1980) (“Statutory provisions allowing recovery of expenses incurred in pursuing a just and reasonable claim are not penal, but remedial or compensatory, in that actual loss is at issue, traceable directly to the insurer's improper conduct. Thus, statutes awarding attorney's fees to successful insurance claimants are properly considered compensatory, not penal . . . .”).

50 STATE LAW ANALYSIS
ATTORNEYS' FEES NOT COMPENSATORY
(For Punitive Damages Multiplier)

PUNITIVE

STATE		LEGAL AUTHORITY
AL	Punitive / Attorneys' Fees Generally Not Recoverable	Jackson v. National Sec. Fire and Cas. Co., Inc., 962 So.2d 855 (Ala.Civ.App. 2006); Clark v. Exchange Ins. Assn., 161 So.2d 817 (Ala.1964) (strict American Rule)
CA	Punitive	Amerigraphics, Inc. v. Mercury Cas. Co., 107 Cal.Rptr.3d 307 (Cal. App. 2010); Bardis v. Oates, 14 Cal. Rptr.3d 89 (Cal. App. 2004); *but see* Brandt v. Superior Court, 693 P2d 796 (Cal. 1985).
CO	Punitive / Attorneys' Fees Not Generally Recoverable	Bernhard v. Farmers Ins. Exchange, 915 P.2d 1285 (Colo. 1996). May be able to get fees under Colo. Rev. Stat. Ann. § 13-17-101 (2008) (allowing attorneys' fees to address the problem of excessive litigation)
DE	Punitive	E. I. Du Pont De Nemours and Co. v. Admiral Ins. Co., 1994 WL 465547 (Del.Super. Aug. 03, 1994) (not compensatory)
KY	Punitive	Aetna Casualty & Surety Co. v. Commonwealth, 179 S.W.3d 830, 842 (Ky.2005) (strict American Rule); Blue Cross and Blue Shield of Kentucky, Inc. v. Whitaker, 687 S.W.2d 557 (Ky.App. 1985)
NY	Punitive / Fees Generally Not Recoverable	White v. Blue Cross & Blue Shield, 549 NYS2d 598 (1989) (recoverable only with punitive damages). New York has the unusual rule that bad faith damages must have been "within the contemplation of the parties at the time of the execution of this insurance contract." Harriman v. Norfolk & Dedham Mut. Fire Ins. Co., 172 A.D.2d 585 (N.Y.A.D. 1991)

TN	Likely Punitive	T. C. A. § 56-7-105 ("refusal to pay the loss was not in good faith, and that the failure to pay inflicted additional expense, loss, or injury including attorney fees"); St. Paul Fire & Marine Ins. Co. v. Kilpatrick, 129 Tenn. 55, 164 S.W. 1186 (1913) (holding statute to be penal, with numerous future citing cases referring to attorneys' fee award as "penalty"); but see Williamson v. Aetna Life Ins. Co., 481 F.3d 369 (6th Cir. 2007) (amount considered in determining jurisdictional amount for diversity jurisdiction).
TX	Not Compensatory	In re Nalle Plastics Family Ltd. Partnership, 406 S.W.3d 168 (Tex. 2013); Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8) (Vernon 1986); Grapevine Excavation, Inc. v. Maryland Lloyds, 35 S.W.3d 1 (Tex. 2000); Standard Fire Insurance Co. vs. Stephenson, 963 S.W.2d 81, 90-91 (Tex. App.--Beaumont 1997); Nationwide Mutual Insurance Co. vs. Holmes, 842 S.W.2d 335 (Tex. App.--San Antonio 1992); Colonial County Mutual Insurance Co. vs. Valdez, 30 S.W.2d 514 (Tex. App.--Corpus Christi 2000); *but see* TXJUR DAMAGES § 400.
UT	Punitive	Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409 (Utah 2004) (holding attorney fees were not used in calculating punitive damages ratio)

50 STATE LAW ANALYSIS
ATTORNEYS' FEES AS COMPENSATORY
(For Punitive Damages Multiplier)

UNDECIDED

STATE		LEGAL AUTHORITY
AK	Unsure / Fee Schedule in Statute Based on Compensatory Award / Unique English Rule Statute	Civil Rule 82(a) directs that attorney's fees be awarded to the prevailing party and sets out a statutory fee schedule. Hillman v. Nationwide Mut. Fire Ins. Co., 855 P.2d 1321 (Alaska 1993) (attorneys' fees awarded to prevailing party even where no "compensatory and punitive damages (were awarded) against the insurance company on their claim of bad faith"). In Tobeluk v. Lind, 589 P.2d 873, 876 (Alaska 1979), the court commented that it "intend[s] fee awards [under Rule 82] to be compensatory rather than punitive." However, in Williams v. Eckert, 643 P.2d 991, 997 (Alaska 1982), the court permitted a Rule 82 award in an admiralty case because the purpose of Rule 82 was "remedial." At the same time, the court has emphasized that Rule 82 was not intended to penalize a losing party for litigating a good faith claim. Gilbert v. State, 526 P.2d 1131, 1136 (Alaska 1974); Malvo v. J.C. Penney Co., 512 P.2d 575, 588 (Alaska 1973).
AR	Unsure	A.C.A. § 23-79-208 (taxed as "costs," "for the prosecution and collection of the loss")
CT	Unsure. Attorney fees are separate from punitive damages under CUTPA	Odell v. Wallingford Mun. Fed. Credit Union, CV 106012228S, 2013 WL 4734783 (Conn. Super. Ct. Aug. 8, 2013); ACMAT Corp. v. Greater New York Mutual Ins. Co., 282 Conn. 576, 582-83, 923 A.2d 697 (2007); Lincoln General Ins. Co. v. Rodriguez , 2010 WL 5064463 (Conn.Super. Nov. 17, 2010) (attorneys' fees may be awarded if prevailing party can prove bad faith); Hartford Hosp. Medical Plan v. State Farm Mut. Auto. Ins. Co., 2010 WL 2365657 (Conn.Super. May 5, 2010)

HI	Unsure / Reasonable Fee Awarded by Statute When Insurer Ordered to Pay Under Policy	HRS § 431:10-242 (attorneys' fees automatically awarded when insurer is ordered to pay under policy); Liberty Mut. Ins. Co. v. Sentinel Ins. Co., Ltd., 205 P.3d 594 (Hawaii App. 2009); Commerce & Industry Ins. Co. v. Bank of Hawaii, 832 P.2d 733 (Haw. 1992)
IN	Compensatory in some situations.	Indiana Patient's Comp. Fund v. Brown, 949 N.E.2d 822, 824 (Ind. 2011). Ind.Code § 34-52-1-1; Sanyo Laser Products, Inc. v. Royal Ins. Co. of America, 2003 WL 23101793 (S.D.Ind. Nov. 7, 2003); Weidman v. Erie Ins. Group, 745 N.E.2d 292 (Ind.App. 2001)
LA	Unsure / Statute Allows for Attorney Fee Awards	La. R.S. 22:1892; Second Highway Baptist Church v. State Farm Ins. Co., 2009 WL 5245735 (E.D.La. Feb. 18, 2009)
ME	Unsure	24-A M.R.S.A. § 2436-A; Saucier v. Allstate Ins. Co., 742 A.2d 482 (Me. 1999) (awarding fees based on counsel's submission of work performed, but stating that statute's purpose is remedial)
NC	Unsure	N.C. Gen.Stat. § 75-16.1 ("taxed as a part of the court costs"); Country Club of Johnston County, Inc. v. United States Fidelity, 563 S.E.2d 269 (N.C.App. 2002); N.C.G.S.A. § 6-21.1 (said attorney's fee to be taxed as a part of the court costs in cases where damages are $10,000 or less)
ND	Unlikely Compensatory	State Bank & Trust of Kenmare v. Brekke, 1999 ND 212, 602 N.W.2d 681, 685; Nord v. Herman, 1998 ND 91, 577 N.W.2d 782. Hoge v. Burleigh County Water Management Dist., 311 N.W.2d 23, 31 (N.D. 1981).
NH	Unsure	N.H. Rev. Stat. § 417:20 (cost of suit, including reasonable attorneys' fees); Drop Anchor Realty Trust v. Hartford Fire Ins. Co., 496 A.2d 339 (N.H. 1985); Johnson v. Phoenix Mut. Fire Ins. Co., 445 A.2d 1097 (N.H. 1982).
RI	Unsure / Attorney Fee Award Allowed by Statute	R.I.Gen. Laws § 9-1-33; Mello v. DaLomba 798 A.2d 405 (R.I. 2002)
SC	Unsure / Likely Not Compensatory	S.C. Code Ann. § 38-59-40 (West 2002) ("The amount of reasonable attorneys' fees must be determined by the trial judge and the amount added to the judgment.")

SD	Unsure / Awarded as Costs by Statute	SDCL 58-12-3; SDCL 58-33-46.1
VA	Unsure	Va. Code Ann. § 38.2-209 (statutory award of attorneys' fees in bad faith cases)