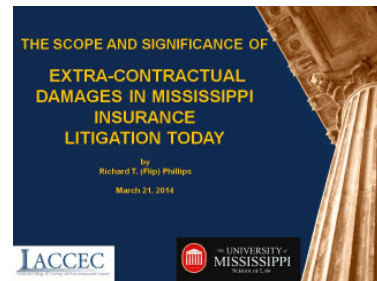


Slide 1 – Title



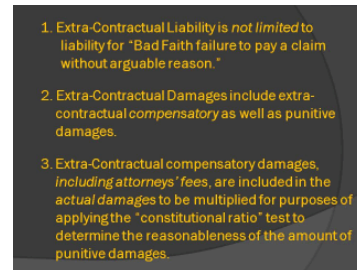
The TOPIC of my Address is of PRACTICAL Significance to those of you who represent **Individual Policyholders** in Insurance Litigation.

It is: **“The Scope and Significance of Extra-Contractual Damages in Mississippi Insurance Litigation Today.”**

THESIS of my address is twofold:

1. The **SCOPE** of Extra-Contractual Damages – in Miss. and throughout the United States today – is much **BROADER** than commonly recognized;
and
2. The **SIGNIFICANCE** of such Damages in today’s Legal System – is much **GREATER** than most people think.

Slide 2 – There are **Three Points** I want to make



1. Extra-Contractual Liability is *not limited* to liability for **“Bad Faith failure to pay a claim without arguable reason.”**
2. Extra-Contractual Damages include extra-contractual *compensatory* as well as punitive damages.
and
3. – **MOST IMPORTANTLY**
In Mississippi – as in a MAJORITY of States – extra contractual *compensatory* damages – including *attorneys fees* – are included in the **ACTUAL** damages to be *multiplied* for purposes of applying the **State Farm / Campbell “constitutional ratio” test** to determine the reasonableness of a Punitive Damages award.

Slide 3 – Insurance – and Contracts – in the 21st Century

This fact is **significant** as Society – and our Legal System – enters the **21st century**

Every aspect of society - undergone tremendous changes within the past 2 decades as the World has burst from an **Industrial Age** into a new, unprecedented, global **Information Age**

Not since the turn of the previous Century – when we emerged from **Agrarian Society** into the **Industrial Age** - have we seen such rapid change – socially. . . as well as in business practices.

Insurance Industry – by its very nature is – at the forefront of these changes.

Slide 4 – Contracts in the 21st Century

The **impact** on these changes on Business Practices – and on the practical ability to

enforce individual contracts in Today’s Legal System – is huge.

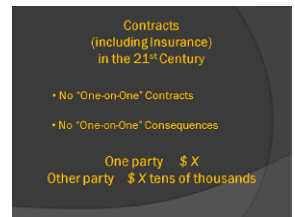
1. **The Reason:** There are no longer any “**one on one**” contracts –

One Bank – Standard Agreement with thousands of Customers
One Insurance Company – A policy held by Hundreds of Thousands of Policyholders

2. **The Result:** No longer any “one on one” consequences – to a breach of the contract by the Drafter

Makes Obligation of Good Faith and Fair Dealing – (which is implicit in every contract of insurance) critical to the ability of a Policyholder to enforce his Contract of Insurance **as a practical matter.**

3. **Reason:** Policyholder \$X
Insurance Co. Hundred of thousands of \$X



Slide 5 – Extra-Contractual Damages (Miss. in Mainstream)

Traditionally, Mississippi has been an Outlier in many areas of Civil Litigation
From **Comparative Negligence** – where in 1910 we were the *First State* - by
almost a quarter of Decade - to **adopt** the Doctrine
To **State Court Class actions** – where 2014 we remain the *Last State* **not** to have them.

But with regard to **Extra-Contractual Damages** for Breach of the Obligation of Good Faith and
Fair Dealing – Mississippi is **squarely** in Mainstream.

We are in the mainstream in regard to both:

1. The EXTENT of the Obligation of Good Faith and Fair Dealing – and
2. The COMPENSATORY NATURE of Extra-Contractual DAMAGES recoverable
for Breach of the Obligation.

Slide 6 – Obligation of Good Faith and Fair Dealing

The law in Mississippi as to Extra-Contractual Damages in Insurance Litigation
is built on solid legal ground.

Obligation of Good Faith and Fair Dealing

Standard Life Ins. Co. of Indiana v. Veal,
354 So. 2d 239 (Miss. 1977)

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), cert denied, 128
S.Ct. 1257, 170 L.Ed.2d 68, 76 USLW 3324, 76
USLW 3433, 76 USLW 3329 (Feb. 19, 2008)

It rests on more than 3 Decades of “Middle of the Road” Substantive Decisions

- In 1977, the seminal VEAL case held that in insurance litigation “an intentional wrong” by the Ins. Company . . . “or *actions that rise to the level of an independent tort*” give rise to extra-contractual or punitive damages.
- In 1992 in VEASLEY – and in numerous cases since then, including in 2007 – the **UNANIMOUS Opinion** written by Justice Randolph in the **Merrill Case** – as to which the United States Denied Cert –
- The Mississippi Supreme Court has repeatedly held (as do a Majority of States) That the Breach of obligation of good faith and fair dealing with respect to an Insurance Policy gives rise not only to punitive damages - but also to extra-contractual compensatory damages.

Merrill and its predecessors established unequivocally:

* 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 as part of those Compensatory Damages.

Slide 7 – Mississippi in the Mainstream

On this issue – Mississippi is in the Main Stream with States Throughout the U.S.

Mississippi in the Mainstream

Slide 8 – 50-State Analysis (2 pages)

Page 1

Miss. in majority with regard to “first party” and “third party” actions for Breach of Obligation of Good Faith and Fair Dealing

Ten states have both First Party and Third Party claims for “Bad Faith” or Breach of Obligation of Good Faith and Fair Dealing (Much of the Litigation surrounding “Bad Faith” comes from several of these States, including California and Florida.)

Twelve states have either Limited or NO actions

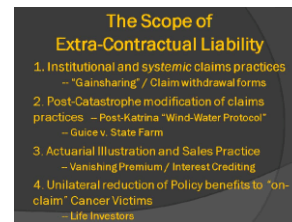
The Majority (of 28) states – including Mississippi -- have **First Party Actions Only**

Page 2

This puts Miss. in the Majority of **Thirty Eight (38)** “Protected Policyholder States” *i.e.*, those affording Policyholders **First Party Extra-Contractual Damages** for an Ins. Co’s breach of its obligation of good faith and fair dealing.

50 STATE ANALYSIS Breach of Obligation of Good Faith and Fair Dealing March 2014		
First Party and Third Party "Bad Faith" Claims (28 States)	First Party Actions Only (28 States)	Limited or NO Actions (22 States)
1. Arizona	1. Alaska	1. Colorado
2. California	2. Arkansas	2. Florida
3. Florida	3. Connecticut	3. Georgia
4. Illinois	4. Delaware	4. Idaho
5. Kansas	5. District of Columbia	5. Iowa
6. Michigan	6. Hawaii	6. Kentucky
7. New York	7. Louisiana	7. Maryland
8. North Carolina	8. Maine	8. Massachusetts
9. North Dakota	9. Minnesota	9. Missouri
10. South Dakota	10. Mississippi	10. Montana
	11. Nebraska	11. Nevada
	12. New Hampshire	12. New Jersey
	13. New Mexico	13. New Mexico
	14. Oklahoma	14. New York
	15. Oregon	15. North Carolina
	16. Rhode Island	16. North Dakota
	17. South Carolina	17. Ohio
	18. Tennessee	18. Oklahoma
	19. Texas	19. Pennsylvania
	20. Utah	20. South Carolina
	21. Vermont	21. South Dakota
	22. Virginia	22. Tennessee
	23. Washington	23. Texas
	24. West Virginia	24. Utah
	25. Wisconsin	25. Virginia
	26. Wyoming	26. Washington
		27. West Virginia
		28. Wyoming

Slide 9 – The Scope of Extra Contractual Liability



My NEXT POINT is:

The **Scope of Extra Contractual Liability** - in Miss. and throughout most of the United States – is much broader than commonly recognized.

(It is NOT simply “ ‘Bad Faith’ Failure to Pay a Claim without an Arguable Reason.”)

By way of Example, It INCLUDES:

1. **Institutional** and Systemic Practices

Example *Kuykendoll v. Progressive* (in Paper)

“Claim withdrawal” forms

Motivated by “Gainsharing Program”

for compensation of Adjusters based on savings
in handling first party claims

Institutional - “Top Down”

Systemic - “Bottom Up”

2. **Post-Catastrophe** modification of Policy Interpretation and Claims Adjusting Practices

Guice v. State Farm

Documents on WestLaw

3. **Actuarial Illustrations** and Sales Practice

Vanishing Premium and subsequent “Interest Crediting” litigation
- cases cited at Page 10 of Paper

4. AND, Perhaps the **best example of importance** of Extra-Contractual compensatory Damages – including Attorneys Fees –

The **Life Investors Litigation**:

Unilateral, **calculated** reduction of policy benefits to cancer victims under Supplement Cancer Policies.

[See citations to **Life Investors materials** available on WestLaw]

Slide 10 – Significance of Extra-Contractual Compensatory Damages in Insurance Litigation Today



My Next Point is the SIGNIFICANCE of Extra-Contractual Compensatory Damages in Post - *State Farm / Campbell* Insurance Litigation

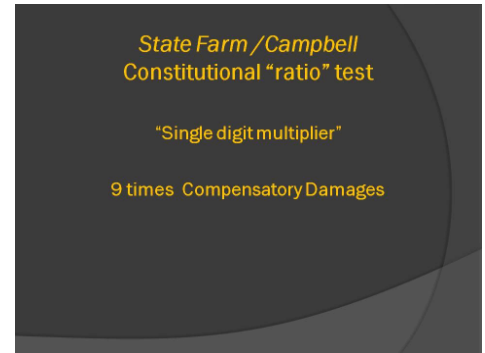
Please “See page 11 of Paper”

The Point is: “Attorneys fees and costs of prosecuting a case for tortious breach of the obligation of good faith and fair dealing - in Mississippi AND in a majority of States - are NOT part of the Punitive Damages.

They are part of the *compensatory* damages to be multiplied in applying the *State Farm/Campbell* Constitutional “Ratio” Analysis.

The fees and costs of enforcing the contract are recoverable as compensatory damages for tortious breach of the obligation of good faith and fair dealing implicit in every contract of insurance”. [Veasley/Merrill]

Side 11 – State Farm / Campbell Constitutional “ratio” test
refers to a
“Single digit Multiplier”
9 times Compensatory Damages

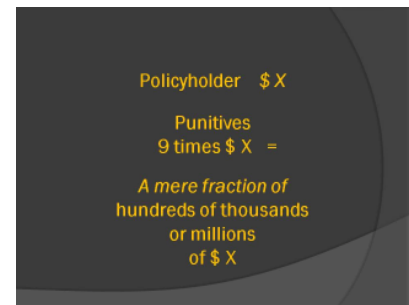


Under the *State Farm/Campbell* “Constitutional Ratio” analysis, the size of a Punitive Damage award is “suspect” when it exceeds

the Compensatory Award by more than a **9-Times Multiplier**

The *State Farm/Campbell* “Constitutional Ratio” test – as it is commonly thought of – enabled the issuers of mass contracts (such as Insurance Policies) for the first time to mathematically estimate their Potential Liability – including Punitive Damages – for Intentionally breaching a contract, and to make calculated decision of whether it is profitable to do so.

**Slide 12 – Policyholder \$ X
Punitives 9 times \$ X**



The problem is

the **disparity** of the amount of Money at issue from the Point of View of (A) the mass issuer of the Contract, and (B) a single policyholder

AND the Opportunity the situation affords the Issuer of the policy to make Litigation of the Matter by a policyholder not economically viable

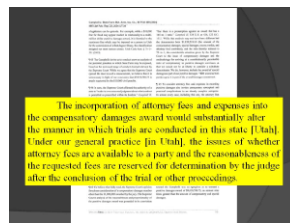
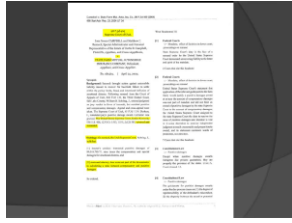
– even when the Duty of Good Faith and Fair Dealing is violated
AND even with Punitive Damages

The reason: READ SLIDE

HERE, TOO, HOWEVER, the **Law in Mississippi** – as in a MAJORITY of States throughout the Nation – provides a REMEDY for the Policyholder

That is BECAUSE: In Mississippi – and in a GROWING Majority of States, **Extra-Contractual Damages** for Breach of the Obligation of Good Faith and Fair Dealing – **including attorneys fees and litigation costs** – are part of the **compensatory** damages for purposes of the “9-times” Constitutional Ratio Calculation.

Slides 13 – and 14 – (Campbell v. State Farm Excerpts)



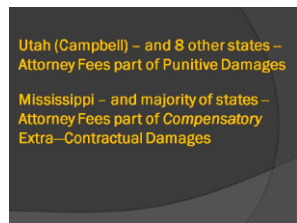
You discover this when you COMPARE – as I did when preparing for my first *Post-Campbell* Punitive Damage case – the Law in Utah (where *State Farm v. Campbell* arose) - with the Law in Mississippi – and in MOST states.

In Utah, Attorneys Fees are NOT part of the Compensatory Damages recoverable for Breach of Obligation of Good Faith and Fair Dealing.

In Mississippi, on the other hand – AND in a Majority of States throughout the Nation –

those fees ARE a part of the Compensatory Damages for purposes of the “9-Times, “Single Digit Ratio” Constitutional Analysis.

Slide 15 - Utah / Mississippi



Utah (Campbell) – and 8 other states –
Attorney Fees part of Punitive Damages

Mississippi – and majority of states –
Attorney Fees part of Compensatory
Extra-Contractual Damages

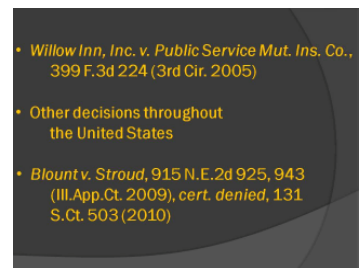
In **Utah** - and in **only 8 other States** - are attorneys fees **NOT** part of the Compensatory Damages for purposes of the *Campbell* Constitutional “Ratio Analysis”

In Mississippi – and in a GROWING Majority of States, they are part of the Extra-Contractual **Compensatory** damages for purposes of the Constitutional Ratio Calculation.

Slide 16 - Cites – Willow Inn, etc.

Cites that establish this fact include:

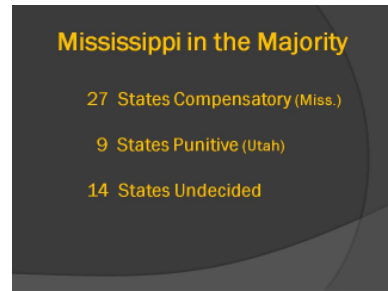
- Willow Inn v. Public Service Mut. Ins. Co., in 2005
- Subsequent cases throughout the Country, and
- And **Blount v. Stroud** – with **Cert. Denied** - on this precise issue - by United States Supreme Court in 2010.



- *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3rd Cir. 2005)
- Other decisions throughout the United States
- *Blount v. Stroud*, 915 N.E.2d 925, 943 (Ill.App.Ct. 2009), cert. denied, 131 S.Ct. 503 (2010)

Slide 17 - Miss. in the Majority

Once again, Mississippi is in the Majority.



In **27 - States** – (including Miss.) – Attys Fees part of **Compensatory** damages

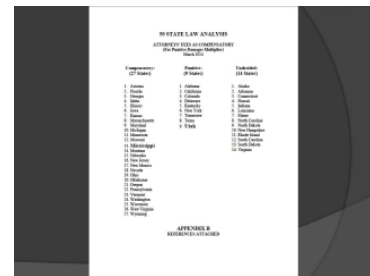
In Only **9 States** (Including Utah) are they **Punitive** damages

In **14 States** – We had say “Undecided”

Slide 18

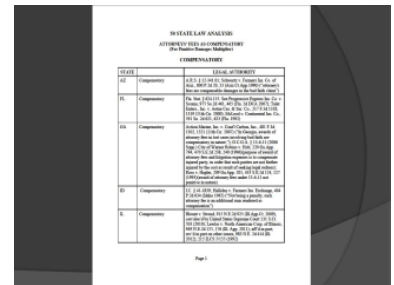
APPENDIX B. to my Paper has two Charts

The first has a list of the states where Compensatory/Punitive/or Undecided



Slide 19

Also attached is a 10-page, **50- State Analysis** of the issue (prepared by my office) with Citations you may find helpful



Slide 20 – CONCLUSION



The right – and practical ability – of an individual to enforce a contract is a foundation of the economic success of this nation.

Nowhere is that right more important – to more individuals today than in the area of Contracts of Insurance.

The Obligation of Good Faith and Fair Dealing – and Extra-Contractual Compensatory Damages for breach of that Obligation – are increasingly important to the ability of Insurance Policyholders to enforce that right in the Legal System of the 21st Century.