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COMMENT

THE OTHER INSURANCE CRISIS: BAD FAITH REFUSAL TO PAY FIRST-PARTY BENEFITS

MICHAEL KEITH GREEN

In recent years, a number of jurisdictions, including Florida, have adopted various types of "tort reform" in an effort to remedy the much ballyhooed "liability insurance crisis."2 Far less publicized is the "insurance crisis" faced by insureds when auto, health, life, property, or disability carriers deliberately refuse to pay legitimate first-party claims.3 When insurance companies refuse to pay, policyholders are forced to litigate to recover benefits due ab initio. The consequences can be disastrous since the insured is usually "in unfortunate circumstances—his house may have been burned down; he may be disabled and unable to work; he may be hospitalized."4 Moreover, insurers can often exploit such exigent situations to compel highly favorable settlements, thereby profiting from their own misconduct.5

In response, a majority of American jurisdictions now permit the recovery of extra-contractual damages when insurers are found to have handled first-party claims in bad faith.6 These courts recog-

3. First-party benefits are paid directly to the insured when a covered contingency occurs. W. SHERNOFF, INSURANCE BAD FAITH LITIGATION § 501, at 5-3 (1984).
5. See infra notes 41-49 and accompanying text.
nize that consumers buy first-party insurance for "protection" against catastrophic eventualities, not an unjustified "court battle." Indeed:

[T]he insured signs the insurance contract not for commercial advantage but for the peace of mind that if the anticipated injury should occur, his claim for any physical or property damage covered by the policy will be treated reasonably by the insurer. The insured certainly does not pay premiums in the expectation that if he suffers the anticipated injury, the insurer will act in bad faith . . . .

Insurance companies market their products by explicitly holding themselves out as fiduciaries, playing on mass expectations of prompt, good faith treatment. Yet many jurisdictions still charac-


7. "The . . . most significant characteristic of insurance contracts differentiating them from ordinary, negotiated commercial contracts, is the increasing tendency of the public to look upon the insurance policy not as a contract but as a special form of chattel. The typical applicant buys 'protection' much as he buys groceries." 7 WILLISTON ON CONTRACTS § 900, at 34 (2d ed. 1938).

8. See Gulf Atlantic Life Ins. Co. v. Barnes, 405 So. 2d 916, 925 ( Ala. 1981) ("an insured purchases insurance and not an unjustified court battle when he enters into the insurance contract").


10. "The insurer's promise to the insured to 'simplify his life,' to put him in 'good hands' . . . or to be 'on his side' hardly suggests that the insurer will abandon the insured in his time of need." Id. at 342-43, 396 A.2d at 786. "[I]nsurers hold themselves out as fiduciaries,
terize the relationship as adversarial, that of debtor-creditor, when an insured sues to compel performance. Increasingly, courts across the nation impose a fiduciary duty on first-party insurers. When this obligation is breached, a distinct tort cause of action arises: bad faith refusal to pay.

In this Comment the author traces the development of this relatively new right of action, surveys the reception it has received in various jurisdictions, and examines the present state of "excess liability law." He then focuses on Florida law, exploring the implications of the recently enacted "bad faith statute," which has been construed by the federal courts as legislative adoption of the new tort, although it has yet to be definitively interpreted by a Florida court. Finally, the author argues that the federal court's construction is correct and that Florida should align itself with the growing majority of jurisdictions which permit extra-contractual recovery when first-party insurers act in bad faith.

I. THE DEVELOPMENT OF INSURANCE EXCESS LIABILITY LAW

Decades ago, courts began to impose an independent duty on liability insurers to act in good faith when defending insureds against third-party claims. Because the insurer assumes complete control over the defense, it should act "with due regard for the interests of the insured." This fiduciary obligation requires insurers to adequately investigate claims, inform the insured about settlement offers, and settle within policy limits "where a reasonably prudent


12. YOUNG & HOLMES, supra note 4, at 375.


person . . . would do so.”18 When an insurer breaches this duty, thereby exposing its insured to a judgment in excess of policy limits, the insured may recover the “excess” and other potential compensatory and punitive damages.19

Many jurisdictions have extended this well-established doctrine to encompass first-party claims, thereby adopting a new tort cause of action for bad faith refusal to pay.20 The general rule was succinctly stated by the Nevada Supreme Court in United States Fidelity & Guarantee Co. v. Peterson:21

Where an insurer fails to deal fairly and in good faith with its insured by refusing without proper cause to compensate its insured for a loss covered by the policy such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. The duty violated arises not from the terms of the insurance contract but is a duty imposed by law, the violation of which is a tort.22

Thus, an insured's recovery is not limited by the contract. Consequential and punitive damages are available based solely on the effects of an insurer's bad faith handling of a valid first-party claim.23

Prior to the development of an independent tort action, extra-contractual recovery was authorized on a contract theory in a few particularly egregious cases. In Coffey v. Northwestern Hospital Association,24 the Oregon Supreme Court held an insurer liable for physical pain and emotional distress suffered by its insured, an

18. Gutierrez, 386 So. 2d at 785.
19. See, e.g., Butchikas v. Travelers Indem. Co., 343 So. 2d 816, 817-818 (Fla. 1976) (excess recoverable based on bad faith, however compensatory damages are only available where punitive damages are justified because the insurer engaged in active concealment, misrepresentation or other overt and dishonest dealing); cf. Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 697-98, 201 Cal. Rptr. 528, 537-38 (1984) (excess judgment and compensatory damages recoverable where the third-party insurer acts in bad faith, but punitive damages are available only if the insurer is guilty of oppression, fraud, or malice, including a conscious disregard for the rights of the insured); accord Gibson v. Western Fire Ins. Co., 682 P.2d 725, 739-40 (Mont. 1984).
22. Id. at 618, 540 P.2d at 1071.
23. See, e.g., Gruenberg, 9 Cal. 3d at 566, 510 P.2d at 1032, 108 Cal. Rptr. at 480.
24. 96 Or. 100, 187 P. 407 (1920).
elderly woman, because the insurer unreasonably refused to pay for her covered medical care. The court held that such coverage was within the contemplation of the parties when the contract was made, and that the plaintiff’s damages were a natural consequence of Northwestern’s wrongful denial of coverage. The court’s rationale aptly summarizes the justification for a tort action and deserves to be quoted at length:

It is a well-known fact that as a rule these [health insurance] contracts are not entered into by the wealthy or well-to-do class[es] . . . but by the poorer class[es] who seek thereby to provide themselves with medical or surgical assistance in case of sickness or accident, without resort to humiliating public or private charity. That a resort to such charity might result from a failure of defendant to keep its contract, was a contingency which would naturally be within the contemplation of both parties. That being compelled to resort to it for the meager assistance it usually affords would be a source of humiliation and mental anguish to a woman of average sensibilities, who for years had paid a monthly premium to avoid such a contingency, goes without saying.

The verdict and judgment were legally and morally right, and the . . . petition for rehearing is denied.

Although it was a gradual process, cases such as Coffey provided the impetus for the judicial imposition of an independent duty of good faith on first-party insurers, a move which eventually permitted the creation of a new common law tort.

A. California, Birthplace of a New Tort: Bad Faith Refusal to Pay

California was the first jurisdiction to recognize a new tort action based on bad faith handling of first-party claims. In Gruenberg v. Aetna Insurance Co., the Supreme Court of California held that the duty of an insurer to act in good faith when defending third-party claims, and the obligation to deal fairly with an insured by not unreasonably withholding first-party benefits, “are merely two different aspects of the same duty.” Moreover, the court reasoned that because the insurer’s duty arises from a covenant of good faith

25. Id. at 102, 187 P. at 409.
26. Id.
28. Id. at 573, 510 P.2d at 1037, 108 Cal. Rptr. at 485.
and fair dealing implied by law in every insurance contract, its breach constitutes a tort. The court rejected Aetna’s contention that proof of an independent tort was necessary to prompt recovery, and thereby created an independent cause of action. Thus, an insured like Gruenberg, “who as a result of [an insurer’s] . . . tortious conduct loses his property and suffers mental distress may recover not only for pecuniary loss but also for his mental distress.”

The next year, in Silberg v. California Life Insurance Co., the same court refined its first-party bad faith doctrine. Mr. Silberg was a self-employed operator of a small laundromat. He was seriously injured while trying to locate a fire on the premises. Silberg was immediately hospitalized, surgery was performed, and his medical insurer was notified. Initially, California Life denied coverage, without explaining why to either Silberg or the hospital. Later, the company cited his pending workers’ compensation claim. Meanwhile, complications developed, additional surgery proved necessary, and Silberg’s medical bills mounted. But even after the workers’ compensation issue was settled, leaving California Life liable under the policy, the company persisted in denying coverage.

The consequences for Silberg were disastrous: he was ejected from two hospitals, his original surgeon refused to provide further services, he was forced to exhaust his personal assets and borrow from relatives, his credit was ruined, he lost his business, his utilities were disconnected, he was unable to buy prescribed medication, and even his wheelchair was repossessed. In the process he experienced two nervous breakdowns, largely because California


31. Id. at 464, 521 P.2d at 1111, 113 Cal. Rptr. at 719.

32. It took this action aware Silberg had no alternative coverage. Moreover, it was contrary to a practice common in the industry: paying the benefits due and then recovering directly from the state workers’ compensation authority. Id. at 459-60, 521 P.2d at 1108, 113 Cal. Rptr. at 716.

33. Indeed, Silberg only gained admittance to a third hospital for essential surgery by resorting “to a ruse”; he checked in on Saturday so the hospital wouldn’t discover his lack of coverage and send him packing until the following Monday. Id. at 459, 521 P.2d at 1107, 113 Cal Rptr. at 715.
Life knowingly and unreasonably withheld payment for over a year.

After reciting the principles laid down in Gruenberg, the court focused on the startling incongruence between the insurer's representations and its actual behavior. Ironically, the policy application read in large letters, "Protect Yourself Against the Medical Bills That Can Ruin You." The court concluded that "[u]nder these circumstances defendant's failure to afford relief to its insured against the very eventuality insured against by the policy amounts to a violation as a matter of law of its duty of good faith and fair dealing implied in every [insurance] policy."

Accordingly, the court reinstated a jury verdict for $75,000 in compensatory damages, overruling the superior court's finding that the evidence was insufficient to support the award. In an oft-quoted passage, the court then addressed the issue of punitive damages:

It does not follow that because plaintiff is entitled to compensatory damages that he is also entitled to exemplary damages. In order to justify [such] an award . . . the defendant must be guilty of oppression, fraud or malice. He must act with the intent to vex, injure or annoy, or with a conscious disregard of the plaintiff's rights. While we have concluded that defendant violated its duty of good faith and fair dealing, this alone does not necessarily establish that defendant acted with the requisite intent to injure plaintiff.

Subsequently, in Neal v. Farmers Insurance Exchange, the California court upheld an award of $740,000 in punitive damages against an insurer who was held to have consciously sought to exploit the insured's desperate plight to coerce a favorable settlement. The facts in Neal were indeed compelling. Mrs. Neal suf-

34. Id. at 461, 521 P.2d at 1109, 113 Cal. Rptr. at 717.
35. Id. at 462, 521 P.2d at 1109, 113 Cal. Rptr. at 717.
36. Id. at 462, 521 P.2d at 1109-10, 113 Cal. Rptr. at 717-18.
37. Id. at 462-63, 521 P.2d at 1110, 113 Cal. Rptr. at 718 (citations omitted).
39. Specifically, the court stated:
[Farmers'] refusal to accept . . . [the] offer of settlement, and its subsequent submission of the matter to its attorney for opinion, were all part of a conscious course of conduct, firmly grounded in established company policy, designed to utilize the lamentable circumstances in which Mrs. Neal and her family found themselves, and the exigent financial situation resulting from it, as a lever to force a settlement more favorable to the company than the facts would otherwise have
ffered paralyzing spinal injuries when her automobile was struck by an uninsured motorist. She spent over two months in the hospital. The insurance company delayed payment, forcing arbitration over the issue of contributory negligence, though it was aware no such defense existed. The only real issue was a possible $5,000 offset under the medical payment provisions against the $15,000 uninsured motorists policy limit. Yet, the company rejected a $10,000 settlement, offering a maximum of $5,000. The court held that a reasonable jury could have concluded Farmers acted with the requisite malicious intent in conscious disregard for the Neals' rights, justifying a large punitive award.

The Gruenberg case marked the first opportunity for the California Supreme Court to apply its well-established third-party bad faith doctrine to a first-party case. In doing so, the court simply recognized that it is inequitable and logically inconsistent to require an insurer to give due regard to the interests of a tortfeasor insured but to permit a lesser degree of care when a seriously ill insured files a first-party claim. The court had ample justification to extend the remedy, in light of the quasi-public role of the insurance industry; the reasonable expectations of insureds; the ad-

warranted . . . . Clearly, the record supports an award of punitive damages against Farmers.

Id. at 923, 582 P.2d at 987, 148 Cal. Rptr. at 396 (footnotes omitted).

40. Farmers' attorney had already rendered an opinion that there was no defense to Mrs. Neal's claim, as the arbitrator eventually ruled. Id. at 921, 582 P.2d at 985, 148 Cal. Rptr. at 394.

41. Id. at 914, 582 P.2d at 984, 148 Cal. Rptr. at 393. In a footnote, the court examined a claims representative training manual used by Farmers to buttress its conclusion that the conscious bad faith handling of Mrs. Neal's claim was based on established company operating procedure. Essentially, the manual instructed adjustors to seek settlement when insureds were most vulnerable because of sickness, a large recent purchase, or a death in the family. Id. at 923 n.8, 582 P.2d at 987, 148 Cal. Rptr. at 396.

42. See supra notes 27-29 and accompanying text.


45. See Egan, 24 Cal. 3d at 818, 598 P.2d at 456, 157 Cal. Rptr. at 486.
hesive nature of insurance contracts; and the grossly unequal bargaining inherent in the relationship.46

B. Accelerating Recognition: The First-Party Bad Faith Bandwagon Rolls

In the wake of Gruenberg, other states began to hold insurers liable in tort for bad faith failure to pay valid first-party claims.47 Consider the influential decision of the Wisconsin Supreme Court in Anderson v. Continental Insurance Co.,48 in which the court extended the state’s longstanding bad faith doctrine to encompass first-party claims.49 It held that an insurer is guilty of bad faith when it knowingly denies a first-party claim or does so in reckless disregard for the rights of the insured.50 The central inquiry in each case is whether a reasonable insurer would have delayed or refused to pay the claim. If not, the insurer has breached a non-consensual duty of good faith imposed by law. The insured may then recover consequential damages and—where the facts warrant—punitive damages.

The recent case of Poling v. Wisconsin Physicians Service51 illustrates the Wisconsin rule. Mrs. Poling was a retired state worker, holding group health insurance administered by Wisconsin Physician Service (WPS). She entered the hospital suffering from Parkinson’s Disease and Alzheimer’s Syndrome. The key issue was whether the care she received was to be termed skilled, which was covered under the policy, or custodial, which was not. WPS denied

46. Egan involved a bad faith refusal to pay disability benefits. The court noted that “the relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position.” Id. at 820, 598 P.2d at 457, 157 Cal. Rptr. at 487 (citations omitted). Moreover, if the dispute is litigated, the insurance company’s resources are virtually always vastly superior to the insured’s, thus making punitive damages available is merely an “attempt to restore balance in the contractual relationship.” Id.


49. Wisconsin originally imposed a duty of good faith on insurers defending insureds against third-party claims in Hilker v. Western Auto. Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930), aff’d on rehearing, 235 N.W. 413 (1931).

50. Anderson, 85 Wis. 2d at 691, 271 N.W.2d at 376. Failure to properly investigate a claim before rejecting it can constitute reckless disregard for the rights of an insured. Id.

51. 120 Wis. 2d 603, 357 N.W.2d 293 (Wis. Ct. App. 1984).
coverage, initially claiming custodial care was administered. In response, Mrs. Poling's physician informed WPS that the care was clearly skilled in nature since she was being provided with occupational therapy under nursing supervision. WPS then shifted ground, denying coverage because there was no expectation of rehabilitation—when in fact no such requirement ever existed. The court held that WPS' conduct constituted bad faith, satisfying both prongs of the Anderson test. It upheld the jury's verdict awarding the Polings $35,000 in compensatory damages and $100,000 in punitive damages.

In Hoskins v. Aetna Life Insurance Co., the Ohio Supreme Court likewise recognized the new tort of bad faith failure to pay, on facts very similar to Poling. Mrs. Hoskins was covered under her husband's state employee group medical policy. She was hospitalized as the result of a stroke. Aetna paid initially, but later denied coverage when Mrs. Hoskins was transferred to a skilled nursing unit for physical therapy. It claimed such care was convalescent—but even after it became clear that the care was in fact skilled and therefore covered under the policy, Aetna still refused to pay.

The court applied the principles developed in various "refusal-to-settle" cases to a "refusal-to-pay" claim, stating that insurers have a "positive legal duty imposed by law" to act in good faith in both situations. A bad faith breach of this duty will expose the insurer to liability in tort. The court adopted this rule because of

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52. Id. The guidelines followed by WPS did not require an expectation of rehabilitation as a condition precedent to coverage. Moreover, the physician's report WPS claimed it relied on when it originally denied coverage was not prepared until two months later.

53. It was largely based on the mental distress suffered by the Polings as a proximate consequence of being forced to spend their life savings and eventually seek public assistance. The court held that these facts were sufficient to satisfy the requirement, under Wisconsin law, that mental distress must be accompanied by other substantial damages to be recoverable. Id. at 608-10, 357 N.W.2d at 297.

54. The court concluded that the evidence was sufficient to establish wanton disregard of duty. Id. at 611, 375 N.W.2d at 298.

55. 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983).

56. See supra notes 52-55 and accompanying text.


58. Hoskins, 6 Ohio St. 3d at 277, 452 N.E.2d at 1320 (punitive damages are available where an insurer acts with actual malice, which can be inferred from the circumstances).

59. The court explained that "[m]ere refusal to pay insurance is not, in itself, conclusive of bad faith." Bad faith "imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty. . . . [I]t also embraces actual intent to mislead or deceive another." Id. (citations omitted).
the fact that in the insurance field the insured usually has no voice in the preparation of the insurance policy and because of the great disparity between the economic positions of the parties. . . . and furthermore, at the time an insured party makes a claim he . . . may be especially vulnerable to oppressive tactics by an insurer seeking a settlement or a release.  

In *Vernon Fire & Casualty Insurance Co. v. Sharp*, the Indiana Supreme Court adopted the equivalent of the tort of bad faith refusal to pay when it carved out an exception to its general rule that punitive damages are not recoverable for breach of an insurance contract absent proof of an independent tort. The court recognized that the wrongful withholding of benefits due under a first-party insurance contract, standing alone, constituted a serious wrong, whether or not the insurer's bad faith conduct "conveniently fit the confines of a pre-determined tort." Punitive damages are available to serve the public interest by deterring similar misconduct in the future.

The Mississippi Supreme Court has also recognized an independent tort cause of action predicated solely on bad faith failure to pay. The court took the position that punitive damages must be available to protect insureds:

If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pres-
Thus, ever increasingly, insurance companies that deliberately reject valid first-party claims can no longer seek shelter in the "impregnable citadel of the policy limit," for it has been stormed by concerned jurists seeking equity and a consistent public policy.

C. Consequential Damages Under a Contract Theory: The New Hampshire Approach

The New Hampshire Supreme Court has taken a unique approach to first-party bad faith cases. While it refuses to recognize a new tort action per se, it does impose an implied contractual duty of good faith and fair dealing. An insurer who breaches this duty may be liable for reasonably foreseeable consequential damages in excess of policy limits. Because such a breach is not tortious, punitive damages are not available, nor are damages for mental or emotional distress absent an independent tort. Without expressly saying so, New Hampshire has applied the Hadley v. Baxendale rule of special damages to permit extra-contractual recovery. The court's rationale is strikingly similar to that used to justify an independent tort action:

66. Id. at 248.
67. YOUNG & HOLMES, supra note 4, at 375.
68. See Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 392 A.2d 576 (1978) (in a suit arising out of an insurer's unreasonable refusal to pay first-party benefits under a commercial fire insurance policy, the court declined to recognize a tort cause of action but permitted recovery of consequential damages beyond policy limits).
69. Id. at 612, 392 A.2d at 580. To date, no other jurisdiction has taken New Hampshire's approach to this class of cases.
70. Id. at 614, 392 A.2d at 581. The court distinguished first-party from third-party cases, in which it imposes full tort liability, by reciting the traditional rationale that in first-party cases, the "insurer is not in a position to expose the insured . . . by virtue of its exclusive control over the defense of the case." Id. See also Jarvis v. Prudential Ins. Co., 122 N.H. 648, 448 A.2d 407 (1982). Here, in a stinging dissent, Justice Douglas distinguished Lawton, which involved commercial fire insurance, and argued that New Hampshire should recognize a tort action for an unreasonable refusal to pay first-party medical benefits. Id. at 657, 448 A.2d at 413. He rejected the majority's attempt to distinguish third- and first-party relationships in such cases because, at least in the context of health insurance, a special relationship does exist, such policies are purchased for "peace of mind and security in the event of sickness." Id.
71. The recovery of consequential damages in an action on a first-party insurance contract could be upheld under both components of the Hadley rule of special damages: either as naturally arising from the breach, or from being within the contemplation of the parties when the contract was made. See Hadley v. Baxendale, 156 Eng. Rep. 145 (1854). This is so if one assumes it is reasonably foreseeable that an insured will face financial ruin when an
To limit the insurer's liability to the policy limits plus interest . . . would unnecessarily encourage insurers to delay settlement in an attempt to coerce a financially pressured claimant into accepting an unfair settlement, because its only liability would be to pay its original obligation and interest.\footnote{72}

Notwithstanding its doctrinal consistency, other jurisdictions have not yet followed New Hampshire's approach, in large part because punitive damages are considered essential to deter insurer misconduct.\footnote{73} Indeed, to achieve such deterrence, an enhanced contract remedy is a less efficient social policy. Without the spectre of punitive awards it is more tempting for insurers to act in bad faith and "gamble on the results" of the ensuing litigation.\footnote{74} A tort action can more effectively discourage unethical insurer conduct in its inception, rather than merely compensating injured insureds for actual economic loss they were unable to mitigate or avoid ex post facto.

D. The New Tort Rejected: Rationale and Rationalization

A large minority of jurisdictions still refuse to allow the recovery of extra-contractual damages when insurers wrongfully withhold first-party benefits unless their actions are accompanied by an independent tort.\footnote{75} This is so because these courts refuse to impose

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\footnote{72} Lawton, 118 N.H. at 612, 392 A.2d at 579.
an independent fiduciary duty on insurers.\textsuperscript{76} An insured damaged by "mere" bad faith in such a jurisdiction is limited to a contract remedy\textsuperscript{77} and, in some instances, limited statutory relief.\textsuperscript{78}

Ironically, many of the same jurisdictions require liability insurers to deal fairly and in good faith with tortfeasor insureds.\textsuperscript{79} These jurisdictions justify divergent treatment of logically analogous situations on the grounds that the potential injury to the insured is greater in the context of third-party claims:

When an insured purchases liability insurance, he relinquishes his right to control any litigation brought against him for conduct which is covered under the policy, and he loses his right to negotiate a settlement with the opposing party. Moreover, when the settlement value of a case approaches the policy limits, it becomes increasingly more tempting for the insurer to gamble on the results of litigation, for in refusing to settle under such circumstances, the insurer stands to lose little and gain much. The insured, however, has a strong interest in settlement so as to avoid a judgment in excess of his coverage. Because of this conflict, courts have held insurers to a high duty of good faith and fair dealing when conducting settlement negotiations on behalf of their insured.

Such considerations are not applicable outside the field of liability insurance. In cases involving the insurer's duty to pay under policies for theft, fire, health, disability or life insurance, the unique relationship which gives rise to the special duty of liability insurers to attempt to settle within their policy limits does not arise. The insured, or his beneficiary, is not subject to the

\textsuperscript{76} See, e.g., Haagenson, 277 N.W.2d at 652; Santilli, 278 Or. at 62, 562 P.2d at 969.
\textsuperscript{77} See Santilli, 278 Or. at 62, 562 P.2d at 969.
\textsuperscript{78} See, e.g., FLA. STAT. § 624.155(3) (Supp. 1986) (providing for damages, court costs, and reasonable attorney's fees); GA. CODE ANN. § 33(46) (1982) (providing for a bad faith penalty and for reasonable attorney's fees).
imposition of excess liability, and his rights and responsibilities are limited to those set forth in his contract.\textsuperscript{80}

Consequently, parties to first-party contracts are debtor and creditor; they are adversaries, and fiduciary obligations do not attach.\textsuperscript{81} Their relationship is unlike those under liability insurance, where the parties are "on the same side" in defending against claims of a third party.\textsuperscript{82}

In recent years, jurisdictions rejecting a first-party tort action\textsuperscript{83} have found additional justification for doing so in statutory schemes designed to regulate insurers and penalize grossly unethical conduct.\textsuperscript{84} In \textit{D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co.},\textsuperscript{85} the Pennsylvania Supreme Court relied heavily on the putative effectiveness of statutory sanctions in declining to recognize a new tort predicated on a bad faith refusal to pay. In a bitter dissent, Justice Larsen pointed out the facetiousness of the majority rationale.\textsuperscript{86} He concluded that the statutory scheme was clearly inadequate to deter insurer misconduct because the maximum possible penalty was only a $5,000 fine.\textsuperscript{87} Moreover, even if a fine were imposed, the proceeds would accrue to the state, thus providing no compensation for the injured insured.\textsuperscript{88} This

\textsuperscript{80} Santilli v. State Farm Ins. Co., 278 Or. 53, 61-62, 562 P.2d 965, 969 (1977). However, the court did recognize that unequal bargaining power of the parties encourages insurers to exploit the insureds' exigent circumstances—compelling them to settle for less. \textit{Id.} at n.5. Moreover, despite the dicta quoted herein, the court did leave open the possibility that it might recognize the new tort of bad faith in a proper case, but in \textit{Santilli}, the court stated "it is not necessary for us to decide" the issue because because "plaintiff would not . . . prevail on such a cause of action even if we were to adopt it." \textit{Id.} at 62, 562 P.2d at 969.

\textsuperscript{81} Baxter v. Royal Indem. Co., 317 So. 2d 725, 726 (Fla. 1975).

\textsuperscript{82} \textit{See Sherhoff, supra note 3, § 5.03, at 5-6.}

\textsuperscript{83} \textit{Id.}


\textsuperscript{86} \textit{Id.} at 509, 431 A.2d at 973 (Larsen, J., dissenting).

\textsuperscript{87} \textit{Id.} Pennsylvania's Unfair Insurance Practices Act provides that a violation has occurred when an insurer refuses "to pay claims without conducting a reasonable investigation" or "not attempting in good faith to effectuate a prompt, fair and equitable settlement of claims in which the company's liability under the policy has become reasonably clear." 40 \textit{Pa. Cons. Stat.} § 1171.5(a)(10)(iv) & (vi) (Supp. 1987). These provisions are enforceable only by the insurance commissioner who can seek judicial imposition of a civil penalty to a maximum of $5,000 for each "knowing violation." 40 \textit{Pa. Cons. Stat.} § 1171.11(1) (Supp. 1987).

\textsuperscript{88} Justice Larsen noted that no penalty had been imposed in this case. \textit{D'Ambrosio}, 49 Pa. at 509, 431 A.2d at 973. Further, state regulatory agencies have yet to demonstrate the ability, or more probably the willingness, to penalize insurers for engaging in statutorily proscribed conduct. \textit{See D. Caddy, Legislative Trends in Insurance Regulation} (1986).
would be so even if one were to assume that the penalties would be rigorously applied, itself a questionable assumption. Finally, Larsen persuasively argued that the majority misconstrued the statute which, he asserted, was not intended to limit any other remedies the insured might possess.

Whatever the rationale, the effect of judicial refusal to impose an independent fiduciary duty on first-party insurance is to limit an insured's potential recovery to the sum originally due under the contract plus interest and reasonable attorney's fees. Logically, insurers could be held liable for extra-contractual damages under well-established contract doctrine. Yet those courts which refuse to recognize a tort action have consistently refused to do so. A classic example is *Kewin v. Massachusetts Mutual Life Insurance Co.* *Kewin* involved an insurer's bad faith refusal to pay $6,500 in disability benefits. The jury awarded the insured the amount due under the contract in addition to $75,000 for mental distress and $50,000 in exemplary damages. The intermediate appellate court reversed the punitive award but upheld recovery for mental distress on the theory that, because the contract involved a matter of mental concern, such was a natural and foreseeable consequence of the breach. The Michigan Supreme Court, however, reversed the decision, expressly rejecting the lower court's theory by holding that disability policies are commercial contracts. Mental distress, the court held, did not arise naturally from the breach, nor was it reasonably within the contemplation of the parties when the contract was made. Thus, after years of protracted litigation, Kewin recovered only the $6,500 originally due under the contract—clearly a "bargain from the company's point of view." Decisions like *Kewin* can serve only to encourage insurers to deliberately deny legitimate first-party claims.

Indeed, state regulators are dominated by insurance interests; in 1986, 50 percent of all insurance commissioners were employed in the industry prior to taking office and more than 50 percent return to it after leaving public office. *Id.* at 34. This "revolving door" impedes effective regulation. *Id.* at 35. The United States Justice Department has reached similar conclusions. *Id.* (citing U.S. DEP’T JUSTICE, FEDERAL-STATE REGULATION OF THE PRICING AND MARKETING OF INSURANCE (P. MacAvoy ed. 1977)). Consequently, the argument that state enforcement of statutory mandates is sufficient to deter insurer misconduct, thus eliminating the need for a first-party tort action, is specious indeed.

90. *See supra* notes 68-74 and accompanying text.
92. *Id.* at 403, 295 N.W.2d at 52.
93. *Id.* at 405, 295 N.W.2d at 55.
In a separate dissenting opinion to *Kewin*, Justice Williams hotly disputed the majority's reasoning. He argued that disability insurance is indeed a personal contract obtained to "promote peace of mind" and to "avoid the insecurity and anguish of being disabled without a paycheck to meet the normal demands of life." Mental distress is thus a natural and foreseeable consequence of an insurer's bad faith failure to pay and hence should be recoverable under a contract theory. Challenges like Justice Williams' place jurisdictions that still reject extra-contractual recovery under increasing pressure to conform their doctrine to the realities of modern life.

II. **Florida Law: In the Process of Change?**

Until recently, Florida has upheld an often criticized distinction between the duty owed by insurers to their tortfeasor insureds, and that owed to first-party claimants. In 1982, the Florida Legislature modified this common law dichotomy with the enactment of section 624.155, which, when definitively construed by the Florida courts, should restore consistency while deterring insurer misconduct.

A. **The Case Law: A Bad Faith Dichotomy**

For decades, Florida has imposed a duty on liability insurers to act in good faith and to deal fairly with tortfeasor insureds. Because the insurer has control over the insured's defense, the insurer is required to act with "due regard" for the interests of the insured. This fiduciary obligation is not dependent on the contract, but arises by law from the relationship between the parties. Thus, where an insurer breaches its duty (typically by refusing a reasonable settlement within policy limits) it may be lia-

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96. *Id.*
98. *See Auto. Mut. Indemn. Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938); *see also American Fire & Casualty Co. v. Davis*, 146 So. 2d 615 (Fla. 1st DCA 1962) (insurer acted in bad faith when it refused to settle claim against its insured after it knew a verdict as to liability would be directed, most probably producing an excess judgement).
99. *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980), *cert. denied*, 450 U.S. 922 (1981). Although the standard for insurer liability is bad faith "in handling the defense of claims against its insured, [the insurer] has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business." *Id.* (citations omitted).
100. *Shaw*, 134 Fla. at 830-31, 184 So. at 859.
ble for the excess, and, in a proper case, compensatory\textsuperscript{102} and punitive damages.\textsuperscript{103}

However, Florida courts have not adopted a similar rule with regard to first-party insurance.\textsuperscript{104} Insurers owe no fiduciary duty in handling such claims.\textsuperscript{105} The parties are debtor and creditor. Thus, an insured who has been wrongfully denied first-party benefits is limited to an action on the contract.\textsuperscript{106} Extra-contractual damages are not available unless the insured can prove an independent tort such as fraud or the intentional infliction of emotional distress.\textsuperscript{107}

This unequal treatment and the distinction on which it rests has been roundly criticized. Dissenting in \textit{Baxter v. Royal Indemnity Co.}, Justice Dekle failed to “perceive a valid distinction between the . . . third party right of action and a cause of action [for an] insurer’s bad faith failure to settle” the claim of its own insured.\textsuperscript{108} Indeed, he found the dichotomy indefensible:

\begin{itemize}
\item \textsuperscript{101} In Campbell v. Government Employees Ins. Co., 306 So. 2d 525 (Fla. 1975), the court noted that bad faith rather than negligence was the standard for determining liability. \textit{Id.} at 530-31. Bad faith is a question of fact for the jury to decide whether the insurer has failed to act in good faith with due regard for the interests of the insured. \textit{Gutierrez}, 386 So. 2d at 785.

\item \textsuperscript{102} Compensatory damages cannot be recovered, however, absent physical injury unless punitive damages are also justified. \textit{Butchikas v. Travelers Indem. Co.}, 343 So. 2d 816, 819 (Fla. 1976).

\item \textsuperscript{103} “Punitives damages are recoverable . . . to serve the predominant function of deterrence and punishment . . . to vindicate wrongs arising from anti-social behavior . . . [as] the most satisfactory way to correct evil-doing in areas not covered by the criminal law.” \textit{Campbell}, 306 So. 2d at 531. In \textit{Butchikas}, the court raised the standard for punitive damages in such cases by holding that punitive damages are warranted in an “excess judgment” case where the insurer engaged in “concealment,” “misrepresentation,” or a “continued course of dishonest dealing.” \textit{Butchikas}, 343 So. 2d at 817 (quoting \textit{Campbell}, 306 So. 2d at 532). Prior to this decision the standard was malice, wantonness or outrageous conduct. See \textit{Campbell}, 306 So. 2d at 532.

\item \textsuperscript{104} \textit{See Baxter v. Royal Indem. Co.}, 317 So. 2d 725 (Fla. 1975); \textit{Industrial Fire & Casualty Ins. Co. v. Romer}, 432 So. 2d 66 (Fla. 4th DCA), \textit{review denied}, 441 So. 2d 633 (Fla. 1983).

\item \textsuperscript{105} \textit{Baxter}, 317 So. 2d at 726 (“there is no fiduciary relationship . . . the parties occupy a debtor-creditor type relationship for purposes of this class of insurance protection”).

\item \textsuperscript{106} \textit{See Industrial Fire & Casualty Ins. Co. v. Romer}, 432 So. 2d 66 (Fla. 4th DCA), \textit{review denied}, 441 So. 2d 633 (Fla. 1983).

\item \textsuperscript{107} \textit{Id.} The court interpreted \textit{World Insurance Co. v. Wright}, 308 So. 2d 612 (Fla. 1st DCA 1975), as limited to its facts and stated that “even deliberate refusal to pay a legitimate claim will not justify a punitive award.” \textit{Id.} at 68. In \textit{Wright}, the court held that a disability insurer’s actual and threatened bad faith, including attempts to “buy up” the policy, constituted intentional infliction of emotional distress and upheld a jury verdict awarding $40,000 in compensatory damages. \textit{Wright}, 308 So. 2d at 612-13.

\item \textsuperscript{108} 317 So. 2d 725, 729 (Fla. 1975) (Dekle, J., dissenting).}


It would be anachronistic to hold that an insurer owes a duty of good faith in handling the liability claim of a third person totally unrelated to the parties to the contract of insurance while at the same time holding that the insurer owed no such obligation of good faith to its own insured, who has paid premiums . . . for the specific purpose of protecting himself . . . .

Justice Dekle emphatically argued that Florida should treat third- and first-party claims in the same manner; "[j]ustice" and "public policy" demand it.\(^\text{109}\)

In *Escambia Treating Co. v. Aetna Casualty & Surety Co.*, a federal district court did interpret Florida law as recognizing a first-party bad faith action.\(^\text{111}\) The court reasoned that, since Florida recognizes the duty of an insurer to act in good faith and accept reasonable settlements of third-party claims, "[l]ogically, the Florida courts would also accept the [other] 'aspect of the same duty' requiring the insurer to act fairly and in good faith in handling the claims of its own insured."\(^\text{112}\) Subsequently, however, in *Industrial Fire and Casualty Insurance Co. v. Romer*,\(^\text{113}\) the Fourth District Court of Appeal expressly, though not enthusiastically, rejected this view;\(^\text{114}\) a decision the supreme court refused to review.\(^\text{115}\)

Romer was a minister injured while trying to help a member of his congregation change a flat tire. He filed a claim under the personal injury protection (PIP) provisions of his automobile insurance policy. Although its liability was clear, the insurance company refused to pay. Romer brought suit alleging breach of an affirmative duty of good faith, a breach which allegedly caused him to suffer mental anguish and emotional distress. The trial court allowed the issue of bad faith to go to the jury. It found for the preacher and awarded him $35,000 in compensatory and $250,000 in punitive damages.\(^\text{116}\)

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109. *Id.* at 729.
110. *Id.* at 731.
112. *Id.* at 1370.
113. 432 So. 2d 66 (Fla. 4th DCA), review denied, 441 So. 2d 633 (Fla. 1983).
114. *Id.* at 68. The court was "not without sympathy for an insured who is clearly covered by his or her policy, yet encounters stubborn refusal to admit coverage." It agreed with the *Escambia* court that "a policy holder buys insurance coverage, not a potential court battle." *Id.* at 69. Nevertheless, it was "left in little doubt that the conclusion we come to now is the law of this state in all of our courts." *Id.* at 68.
115. 441 So. 2d 633 (Fla. 1983).
The Fourth District Court reversed. It held that Florida does not recognize a tort cause of action for "mere bad faith refusal" to pay a first-party claim.\footnote{Id. Thus, the court was unable to redress the insurer's misconduct, which included: deliberate refusal to pay, delay in paying the judgment for a lesser sum, failure of its counsel to appear, and the interposition of "spurious" affirmative defenses. \textit{Id.} at 68-69.} Bad faith conduct constitutes only a breach of contract, the court held, and extra-contractual damages are not available absent an independent tort. This is the common rule in Florida today.\footnote{\textit{Id.} at 68. \textit{See also} Kent Ins. Co. v. Hassan, 447 So. 2d 323 (Fla. 4th DCA 1984); Smith v. Standard Guar. Ins. Co., 435 So. 2d 848 (Fla. 2d DCA), \textit{review denied}, 441 So. 2d 633 (Fla. 1983).}

\textbf{B. Legislative Change: Florida's New Bad Faith Statute}

In 1982, the Florida Legislature enacted section 624.155, the so-called bad faith statute.\footnote{FLA. STAT. § 624.155 (Supp. 1986) (amending FLA. STAT. § 624.155 (1985)). The statute states in pertinent part:}

\textit{(1)} Any person may bring a civil action against an insurer when such person is damaged:

\begin{itemize}
  \item \textit{(b)} By the commission of any of the following acts by the insurer:
  \begin{itemize}
    \item Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests;
  \end{itemize}
\end{itemize}

\begin{itemize}
  \item \textit{(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:
    \begin{itemize}
      \item Willful, wanton, and malicious;
      \item In reckless disregard for the rights of any insured; or
      \item In reckless disregard for the rights of a beneficiary under a life insurance contract.
    \end{itemize}
\end{itemize}

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.

\footnote{FLA. STAT. § 624.155(1) (1985 & Supp. 1986).}

\footnote{FLA. STAT. § 624.155(1)(b)1 (1985 & Supp. 1986).}

\footnote{FLA. STAT. § 624.155(3) (1985 & Supp. 1986).}
The legislature constructed section 624.155 to make actual consequential damages readily recoverable while imposing a higher standard for punitive damages, mitigating the possibility of "run-away awards." Punitive damages are available where "the acts giving rise to the violation occur with such frequency as to indicate a general business practice,"¹²³ and when these acts are "[w]illful, wanton and malicious,"¹²⁴ and "[i]n reckless disregard for the rights of any insured."¹²⁵

To date, no Florida court has applied or definitively construed section 624.155.¹²⁶ However, in a concurring opinion in Romer, Judge Hurley noted:

[A]lthough it need not be decided here, it is arguable that with the passage of this legislation [§ 624.155], Florida has joined the ranks of those states which impose an implied covenant of good faith and fair dealing in insurance contracts. If this is so, then proof of a breach of the covenant, would permit recovery in tort in first party, as well as third party, insurance claims.¹²⁷

Subsequently, a federal court in Rowland v. Safeco Insurance Co.¹²⁸ relied on section 624.155 to reject Safeco’s motion to dismiss a bad faith tort claim. The court held that section 624.155(1)(b)1 created a new cause of action for bad faith refusal to pay a legitimate first-party claim.¹²⁹ It did so based on the plain meaning of the statute and its legislative history which showed a clear intention to impose a fiduciary obligation on insurers with regard to all (not just third-party) claims.¹³⁰

¹²⁶. See Rowland v. Safeco Ins. Co., 634 F. Supp. 613, 615 (M.D. Fla. 1986) ("[t]here have been no cases interpreting FLA. STAT. § 624.155").
¹²⁷. Industrial Fire & Casualty Ins. Co. v. Romer, 432 So. 2d 66, 69 n.5 (Fla. 4th DCA) (Hurley, J., concurring specially) (citation omitted), review denied, 441 So. 2d 633 (Fla. 1983).
¹²⁸. 634 F. Supp at 613.
¹²⁹. Rowland, 634 F. Supp. at 614-15 ("The enactment of FLA. STAT. 624.155(1)(b)1 . . . created an independent cause of action for bad faith refusal to pay").
¹³⁰. Id. at 615. The court quoted from a 1982 Staff Report to the House Committee on Insurance which stated that section 524.155 requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage (first-party claims); the sanction is that a company is subject to a judgement in excess of policy limits. This section 624.155 would apply to all insurance policies. Id. (emphasis added).
Several months later, in *United Guaranty Residential Insurance Co. v. Alliance Mortgage Co.*, District Judge Black further developed the analysis originally set forth in *Rowland*. The court held that the plain meaning of section 624.155(1)(b)1 authorizes a new tort action where insurers are guilty of bad faith handling of a legitimate first-party claim. The court logically reasoned that the statute alters the common law by imposing a fiduciary duty, independent of the contract, to "all claims," which obviously includes benefits owed directly to insureds. It explicitly rejected the insurer's contention that section 624.155 was not intended to change the common law but to codify it. Further, under well-established Florida law, the court found no need to apply specific rules of statutory construction because the "words used by the legislature are clear and convey a definite meaning." A close reading of the statute and its legislative history leaves little doubt that the federal court's interpretation is correct even when applying appropriate rules of statutory construction.

A key issue addressed in neither *Rowland* nor *Alliance Mortgage* is punitive damages. Under subsection 624.155(1)(b)1, punitive awards are not available unless the insurer's actionable conduct constitutes "a general business practice." Similar statutory pro-

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132. Id. at 341. The court stated:

[This court notes] for purposes of clarification its disagreement with United's application of the rule for statutes in derogation of common law. United contends that the legislature's intention to alter the common law is not "plainly pronounced" because it did not expressly include first party actions. However, Florida courts presume that the legislature is fully cognizant of the case law governing subjects on which it is legislating. By opting not to exclude first-party actions from the broad coverage of subsection (1)(b)1 while fully aware of the majority rule permitting such actions, the legislature unequivocally stated that all bad-faith refusals to settle would be actionable.

Id. at 342 n.4 (citation omitted) (emphasis in original).

134. Other rules of statutory construction support the court's interpretation: "statutes governing insurance contracts [should] be liberally construed so as to protect the public." Praetorians v. Fisher, 89 So. 2d 329, 333 (Fla. 1956). More generally, "the rule requiring remedial statutes to be construed liberally in favor of the party for whose benefit the statute was enacted would require a finding of statutory coverage in this case." *Alliance Mortgage*, 644 F. Supp. at 342 n.4. (citing Canada Dry Bottling Co. v. Meekins, Inc., 219 So. 2d 439 (Fla. 3d DCA 1969)). Additionally, "the rule that requires presumption of substantive change whenever the legislature amends a statute would preclude a finding that the legislature merely sought to codify the common law rule relating to third party actions." Id. (citing Seddon v. Harpster, 403 So. 2d 409 (Fla. 1981)).
135. Industrial Fire & Casualty Ins. Co. v. Romer, 432 So. 2d 66, 69 n.5 (Fla. 4th DCA) (Hurley, J., concurring specially), review denied, 441 So. 2d 633 (Fla. 1983).
visions have been variously interpreted in other jurisdictions. In *Royal Globe Insurance Co. v. Superior Court*,136 the California Supreme Court held that "a single violation knowingly committed is . . . sufficient."137 However, in *Jenkins v. J.C. Penney Casualty Insurance Co.*, the West Virginia Supreme Court of Appeals rejected this interpretation.138 It held that only multiple statutory violations in the same case, or a showing of numerous separate violations by the same insurer would be sufficient to constitute proof of a general business practice.139 However, this general business practice requirement must be interpreted by Florida courts so as to make punitive damages a realistic possibility, otherwise the deterrent effect of the statute is significantly diluted and the will of the legislature thwarted.

III. CONCLUSION: AN ARGUMENT FOR CHANGE

Florida clearly needed to eliminate its common law dichotomy between the treatment of third- and first-party claims, and did so. Florida now recognizes a first-party tort action predicated on an insurer's bad faith refusal to pay—making injured insureds whole and preventing future harm by deterring insurer misconduct.140 A

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137. Id. at 891, 592 P.2d at 336, 153 Cal. Rptr. at 849 (construing Cal. Ins. Code § 790.03(h) (West 1972 & Supp. 1973)).
   *Unfair claim settlement practices.*—No person shall commit or perform with such frequency as to indicate a general business practice any of the following:
   
   (d) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
   
   (f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
   
   (g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when such insureds have made claims for amounts reasonably similar to the amounts ultimately recovered;

139. *Jenkins*, 167 W. Va. at 611, 280 S.E.2d at 260. The court went on to recognize an implied cause of action arising from violations of the statute where the insurer's misconduct indicated a general business practice. *Id.* at 258. The court did so even though, unlike section 624.155 of the Florida Statutes, the West Virginia statute did not provide for such a private cause of action.
contract remedy alone is simply inadequate to accomplish these objectives:

Absent the threat of a tort action, the insurance company can, with complete impunity, deny any claim they wish, whether valid or not. During the ensuing period of litigation following such a denial, the insurance company has the benefit of profiting on the use of the insured's money. [Without a tort] the only compensation a successful insured could expect through litigation was the belated payment of his claim and the possibility of recovering attorney fees . . . .

By enacting section 624.155, the Florida Legislature has extended the fiduciary obligation long imposed on liability insurers to bind all insurers; insurance companies now have a legal duty, independent of the contract, to handle the claims of all insureds in good faith. Therefore, once an insurer violates subsection 624.155(1)(b)1 by deliberately and unreasonably denying first-party coverage, the insured has a cause of action which contemplates the recovery of compensatory and punitive damages.142

The enactment of section 624.155 is a step forward because it eliminates the case law's formalistic dichotomy between third- and first-party claims. This unequal judicial treatment of first- and third-party insurance relationships is "anachronistic" and logically indefensible.143 First, it ignores the reasonable expectation of insureds that "a good-faith claim will receive good-faith treatment."144 Indeed, the common law rule allows first-party insurers to mass market themselves as fiduciaries, collect the premiums and then assume an adversarial posture when an insured rightfully sought return performance.145 Contract law generally does not per-

   [I]f an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. Actual damages are not limited by the contract. Further, if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages.

Id. Thus, South Carolina joined the evergrowing number of jurisdictions which recognize a first-party tort action when insurers act in bad faith.


143. See supra notes 109-13 and accompanying text.


145. See C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 178 (Iowa 1975) ("[w]e would be derelict in our duty to administer justice if we were not to judicially know that modern insurance companies have turned to mass advertising to sell 'protection'").
mit such conduct; promissory estoppel prevents a party from denying express representations on which others have detrimentally relied. 146

Second, the dichotomy assumes that an excess judgment is a greater potential evil than the consequences from withholding first-party benefits, justifying a fiduciary duty in the former situation but not in the latter. 147 When a liability insurer breaches its duty to an insured tortfeasor, a cause of action arises. The insured does not need to satisfy the full judgment as a condition precedent to a bad faith action 148 contemplating the recovery of the excess, and potentially compensatory and punitive damages. 149 In the interim, at worst, the insured must live with the possibility that he or she may not prevail and will remain liable for the excess judgment.

On the other hand, when an insurer wrongfully and deliberately withholds first-party benefits, the consequences are immediate. In such cases an insured may: (1) be denied essential surgery or therapy; 160 (2) be forced to exhaust a lifetime's hard-earned savings and seek humiliating public assistance; 161 (3) lose his business; 162 (4) have to watch a close relative needlessly suffer; 163 and (5) even be left financially unable to pay for the burial of a deceased loved one. 164 The foregoing parade of horribles is by no means exhaustive, and unlike instances where a liability insurer fails to accept a

Yet, under the debtor-creditor rationale, Florida's courts have allowed first-party insurers to be "good neighbors" and "good hands people" when selling their policies and collecting the premiums but stubborn, stingy debtors when an insured files a legitimate uninsured motorist claim. See Kent Ins. Co. v. Hassan, 447 So. 2d 323 (Fla. 4th DCA 1984); Smith v. Standard Guar. Ins. Co., 435 So. 2d 848 (Fla. 2d DCA), review denied, 441 So. 2d 633 (Fla. 1983); Saltmarsh v. Detroit Auto. Inter-Ins. Exch., 344 So. 2d 862 (Fla. 3d DCA 1977); MacDonald v. Penn Mut. Life Ins. Co., 276 So. 2d 232 (Fla. 2d DCA 1973).

146. See Restatement (Second) of Contracts § 90 (1979).
147. See Baxter, 317 So. 2d at 726 & n.3.
148. See American Fire & Casualty Co. v. Davis, 146 So. 2d 615, 619 (Fla. 1st DCA 1962) ("[W]e hold that prior satisfaction of the excess judgment is not a prerequisite to bringing an action against one's insurer for damages due to . . . bad faith in failing to settle a claim within the policy limits.").
152. See Silberg, 11 Cal. 3d at 452, 521 P.2d at 1103, 113 Cal. Rptr. at 711.
reasonable settlement of a third-party claim, these disastrous effects are actual, not hypothetical. Such exigent and egregious situations are further aggravated by time-consuming litigation, since insurers have an incentive to delay, aware their ultimate liability is assuredly limited.\textsuperscript{155}

Third, a fiduciary duty is imposed on liability insurers when defending tortfeasor insureds, because they are tempted to refuse reasonable settlements, "gamble" on the results of litigation, and thereby expose the insured to an excess judgment.\textsuperscript{156} With first-party claims, the incentive to act unethically is even greater; it is no "gamble" at all. Furthermore, by wrongfully denying coverage, the insurer may be able to exploit the insured's dire circumstances to coerce a highly-favorable settlement or avoid its contractual obligation entirely. At worst, the insured sues, prevails on the contract, and recovers the sum originally due, plus interest and reasonable attorney's fees. In any event, what is a "bargain from the company's point of view" is often a personal tragedy for the insured.\textsuperscript{157} Moreover, such tactics often force insureds onto the welfare rolls, wrongfully draining the public treasury. The common law rule permits insurers to maximize their profits by shunning their obligations, externalizing the cost, and profiting from their own misconduct.

Finally, section 624.155 encourages self-reliance; it rewards insureds who have provided for themselves in the event of a catastrophic occurrence. In Butchikas v. Travelers Indemnity Co.,\textsuperscript{158} Justice England defended the majority's refusal to permit the recovery of damages for mental distress unless punitive damages were justified by noting that "in 'excess' cases the fact and degree of financial exposure are brought about by the insured's decision to risk the financial and emotional consequences which naturally flow from . . . insufficiency of coverage."\textsuperscript{159} In first-party cases, however, the insured has procured sufficient coverage, but it is the insurer's bad faith refusal to pay from which the disastrous "consequences naturally flow."\textsuperscript{160}

\textsuperscript{158} 343 So. 2d 816 (Fla. 1976).
\textsuperscript{159} Id. at 819.
\textsuperscript{160} Id.
In the near future, a Florida court will address this issue and construe subsection 624.155(1)(b)1. It should do so consistent with the legislature's objective in enacting section 624.155. It is clear that the legislature intended to eliminate the antiquated common law dichotomy between third- and first-party claims, and to create a new tort cause of action in favor of Florida's insureds, injured when insurers deliberately refuse to pay legitimate first-party claims. Justice and a consistent public policy demand no less.¹⁶¹
