

**EXTRA CONTRACTUAL CLAIMS
AGAINST INSURERS IN MICHIGAN**

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A. Introduction

Subject to the terms and conditions of the individual policy, insurers have a general contractual duty to defend and indemnify their insureds. Implicit in this relationship is a duty on the part of the insurer to fairly deal with the insured. An insurer is required to act in good faith in all of its dealings with its insured. Accordingly, when an insured believes he has been wronged in the handling of a claim, he will often bring suit alleging both breach of contract and a separate action alleging bad faith. This outline briefly addresses the various arguments used to raise such claims.

B. No Cause of Action Exists for Bad-Faith Breach of an Insurance Contract

In alleging the insurer acted in bad faith, the insured will argue that he has suffered damages beyond those covered by the insurance contract. Often, this consists of the insured claiming that he suffered some form of emotional or psychological distress from the insurer's failure to pay the insurance claim. Michigan courts have rejected such attempts to gain payments for damages beyond the damages arising out of the insurance contract. The insured must demonstrate that the insurer breached some duty owed to the insured *outside* of the contract.

In Michigan, a plaintiff cannot maintain a tort action for noncompliance with a contract. Instead, there must be a separate and distinct duty imposed by law in order to establish a cause of action. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 401; 729 NW2d 277 (2006). This rule applies to bad faith claims regarding insurance contracts. "An alleged bad-faith breach of an insurance contract does not state an independent tort claim." *Id.* at 401-402.

"[T]he damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Ins Co*, 409 Mich 401, 414; 295 NW2d 50 (1980). It is this rule that

prevents any claim for mental distress for breach of contract. *Id.* at 415. The Supreme Court concluded that recovery could be made only if the parties actually contemplated the mental distress at the time of forming the contract:

For the above reasons, we hold that a disability income protection insurance policy contract is a commercial contract, the mere breach of which does not give rise to a right to recover damages for mental distress. The damages recoverable are those damages that arise naturally from the breach, or which can reasonably be said to have been in contemplation of the parties at the time the contract was made. Absent proof of such contemplation, the damages recoverable do not include compensation for mental anguish. [*Id.* at 419.]

Damages for mental distress cannot be collected for a breach of an insurance contract.

The plaintiff must demonstrate a separate cause of action in tort:

Damages for mental distress are not recoverable in a breach of contract action absent allegation and proof of tortious conduct existing independently of the breach of contract. *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 419-421, 295 NW2d 50 (1980); *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 657, 517 NW2d 864 (1994); *Wendt v Auto-Owners Ins Co*, 156 Mich App 19, 24, 401 NW2d 375 (1986). In this case, as in *Kewin*, *Taylor*, and *Wendt*, plaintiff has pleaded no more than defendant's bad-faith failure to pay its contractual obligation. This is insufficient to establish an independent tort action. *Roberts v Auto-Owners Ins Co*, 422 Mich. 594, 607-608, 374 NW2d 905 (1985); *Taylor, supra*. [*Isagholian v Transamerica Ins Co*, 208 Mich App 9, 17; 527 NW2d 13 (1994).]

The attempt to plead a separate tort must show something beyond a mere failure to pay an insurance claim. This would amount to nothing more than the failure to perform an obligation under a contract, which cannot give rise to a negligence cause of action in tort. *Runions v Auto-Owners Ins Co*, 197 Mich App 105, 109; 495 NW2d 166 (1992):

In this case, the only conduct alleged by plaintiff as being tortious is defendants' failure to pay the claim. The facts alleged fall "far short of the conduct which is considered tortiously outrageous." At most, it attempts to plead the nonexistent tort of bad-faith handling of an insurance claim. The trial court properly held that plaintiff's complaint failed to state a claim. [*Id.* at 110, quoting *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 608; 374 NW2d 905 (1985).]

Both *Roberts* and *Runions* rejected attempts to bring the tort action of intentional infliction of emotional distress based on the failure to pay an insurance claim. There are four elements to establish such a cause of action: “(1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress.” *Roberts*, 422 Mich at 602 (internal quotations omitted). Extreme and outrageous conduct has to be exceedingly troublesome to meet the standard necessary to state this cause of action. “Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Id.* at 603, quoting Restatement Torts 2d § 46 comment d. The mere failure to pay a contractual obligation, without more, does not rise to that level of outrage. *Roberts*, 422 Mich at 605; *Runions*, 197 Mich App at 110.

There have been two published cases that have allowed a cause of action for intentional infliction of emotional distress to go forward in the insurance arena. In *Atkinson v Farley*, 171 Mich App 784; 431 NW2d 95 (1988),¹ the workers’ compensation insurer allegedly arbitrarily cut off and reduced benefits, claimed inappropriate set-offs, refused to communicate through the insured’s attorney, and demanded reimbursements it was not entitled too. *Id.* at 786-787. The Court of Appeals found the alleged conduct sufficient to bring the cause of action to the jury. Its focus was on the fact that the insured was economically dependent on the benefits:

Plaintiff’s complaint alleges facts indicating that defendants were in a position of control over plaintiff’s sole source of income, and knew that plaintiff was extremely dependent upon receipt of his disability benefits, yet abused their position by interfering with plaintiff’s benefits, by ignoring the requirement to deal with his attorney, by threatening to cut off plaintiff’s benefits, and by demanding that plaintiff repay them a large sum of money. The complaint alleges

¹ Although this is a published decision, a subsequent panel of the Court of Appeals would not necessarily be bound by the decision. “A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.” MCR 7.215(J)(1).

that defendants were abusing their control of plaintiff's income in order to harass and intimidate him to gain economic benefit for the insurance company. Instead of waiting for their appeal to go through or attempting to coordinate plaintiff's benefits in a permissible manner, defendants are said to have arbitrarily decided that plaintiff's benefits would be reduced to \$11.88 per week and that he owed them \$7,788.50, payable within thirty days. The perception of economic disaster is intimidating to most males (e.g., the Wall Street crash of October, 1929) and a trier of fact should assess the allegations of deliberate, malicious infliction of economic destitution. In this context, defendants' actions could be considered extreme and outrageous. [*Id* at 791.]

In *McCahill v Commercial Union Ins Co*, 179 Mich App 761; 446 NW2d 579 (1989),² the fire insurer's inspectors allegedly came to the scene of the fire without the insured's permission or even notice to him. The insurer also allegedly altered the fire scene, intentionally sent material to the wrong address, issued a report indicating that the cause of the fire was arson despite the fact that an internal document showed that the investigator reached the opposite conclusion, called the insured around midnight, and accused the insured of the crimes of arson, false swearing, and fraud. *Id.* at 770. The Court of Appeals upheld the jury's verdict finding an intentional infliction of emotional distress. It concluded that the case involved much more than hurt feelings and that there was no need for the insured to have sought medical treatment to substantiate his claim. *Id.* at 771-772.

Arguably, the Court of Appeals conclusion in *Atkinson* could apply equally to any insurer who completely controls the insured's source of income. And *McCahill's* conclusion could apply to any insurer that takes a similar course of conduct as the insurer in that case. But both involve extreme conduct by the insurer.

In *Murphy v Cincinnati Ins Co*, 772 F2d 273 (CA 6, 1985), the Sixth Circuit concluded that attorney fees *were recoverable* for an insurer's bad faith refusal to pay benefits:

² This case is also not binding pursuant to MCR 7.215(J)(1).

Thus, damages are recoverable in an action for breach of contract when they “arise naturally from the breach.” *See also International Harvester Credit Corp v Wilkie*, 695 F.2d 231, 234 (6th Cir 1982). The district court determined that defendant's breach of its implied contractual duty to investigate the claim fairly and reasonably caused the plaintiffs to incur the expense of the litigation to enforce their rights under the contract. Accordingly, the district court properly concluded that the expenditure of attorney fees arose naturally from the breach. In sum, the district court did not err by interpreting Michigan law to permit an award of attorney fees as a proper measure of damages arising out of an insurer's implied contractual duty to act fairly and reasonably in investigating and refusing to pay an insured's claim.

The Sixth Circuit did not find an independent cause of action. It merely stated that attorney fees could be a measure of damages for a breach of contract claim. But this conclusion was later specifically *rejected* by the Michigan Court of Appeals.

After applying these principles in the present case, we reject the Sixth Circuit's decision in *Murphy* and hold that the recovery of attorney fees incurred as a result of an insurer's bad-faith refusal to pay an insured's claim is governed by the American rule. . . . We find unavailing plaintiffs' argument that the American rule is inapplicable when an insurer acts in bad faith. In general, breach of contract damages are not awarded to punish a wrongdoer. We see no reason to carve out an exception in this instance when none exists. An insured's right to recover attorney fees as an element of damages is not triggered by the foreseeability of loss. Instead, attorney fees are recoverable only when expressly authorized by statute, court rule, or a recognized exception. [*Burnside v State Farm Fire & Cas Co*, 208 Mich App 422, 430-431; 528 NW2d 749 (1995), lv den 450 Mich 853 (1995).]

Therefore, *Murphy* is not a valid statement of Michigan law. *See also Isagholian*, 208 Mich App at 18.

C. A Cause of Action Does Exist for Bad-Faith Failure to Settle

Another often-raised claim of bad faith against insurers is that the insurer failed to fairly and quickly settle a claim made under the insurance policy. This may expose the insured to greater liability than he would have otherwise faced had the insurer settled the policy in good faith. Michigan has recognized a cause of action for such failures when an insurer's actions in failing to settle rise to the level of recklessness or indifference.

“As servants of the public, insurance companies are held to the universally high standard of ‘good faith.’” *Frankenmuth Mut Ins Co v Keeley*, 433 Mich 525, 539; 447 NW2d 691 (1989) vacated on rehearing on other grounds, 436 Mich 372 (1990). To effectuate this high standard, Michigan recognizes an insured’s claim against its insurer for bad faith in failing to settle. *J&J Farmers Leasing Inc v Citizens Ins Co*, 472 Mich 353, 356 n3; 696 NW2d 681 (2005); *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 393 NW2d 161 (1986); *Wakefield v Globe Indemnity Co*, 246 Mich 645, 225 NW 643 (1929).

Bad faith is not the same as negligence or fraud. Instead, it is defined as “arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.” *Commercial Union Ins Co*, 426 Mich at 136. The Supreme Court elaborated on this definition:

Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith. Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment. However, because bad faith is a state of mind, there can be bad faith without actual dishonesty or fraud. If the insurer is motivated by selfish purpose or by a desire to protect its own interests at the expense of its insured’s interest, bad faith exists, even though the insurer’s actions were not actually dishonest or fraudulent. [*Id.* at 136-137.]

The Court gave a 12-part, nonexclusive list of factors to determine if bad faith exists:

- 1) failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured,
- 2) failure to inform the insured of all settlement offers that do not fall within the policy limits,
- 3) failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances,
- 4) failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury,
- 5) rejection of a reasonable offer of settlement within the policy limits,
- 6) undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high,
- 7) an attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits,

8) failure to make a proper investigation of the claim prior to refusing an offer of settlement within the policy limits,

9) disregarding the advice or recommendations of an adjuster or attorney,

10) serious and recurrent negligence by the insurer,

11) refusal to settle a case within the policy limits following an excessive verdict when the chances of reversal on appeal are slight or doubtful, and

12) failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal, especially where trial counsel so recommended. [*Commercial Union Ins Co*, 426 Mich at 138-139.]

No one of these factors should be viewed as decisive. *Id.* at 138. And it is inappropriate to view them with 20-20 hindsight. Instead, the insurer's actions must be viewed in light of the circumstances as they appeared at that time. *Id.* at 139. "It must be remembered that if bad faith exists in a given situation, it arose upon the occurrence of the acts in question; bad faith does not arise at some later date as a result of an unsuccessful day in court." *Id.*

The dissenting opinion of Justice Levin in *Frankenmuth Mut Ins Co* was later adopted as the proper means of determining liability after a bad-faith failure to settle. 436 Mich 372 (1990). Justice Levin noted that "[c]ontract damages seek to place the aggrieved party in the same *economic* position he would have been in had the contract been performed." *Frankenmuth Mut Ins Co*, 433 Mich at 557 (Levin, J., dissenting) (emphasis original). Pursuant to this rule, while the insured does not have to actually make a payment in order to suffer a loss, the insured must demonstrate that he is capable of making the payment before the insurer will be required to pay. Otherwise, the insured will have suffered no economic loss. *Id.* at 560. The insurer may also be required to compensate the insured for damaged credit and "financial ruin." *Id.* at 559. Thus, the measure of damages under the Michigan rule is that the amount of recovery for a bad faith breach of the duty to defend is a question of fact which turns upon the amount of the excess judgment that could be collected from the insured.

D. The Michigan Consumer Protection Act No Longer Applies to Insurance Companies

The Michigan Consumer Protection Act does not apply to insurance companies. At one time such causes of actions were permissible against insurance companies, but the Legislature has eliminated them through subsequent amendments. As the Federal District Court for the Western District of Michigan explained:

The Michigan Supreme Court held in *Smith v Globe Life Ins Co*, 460 Mich 446, 597 NW2d 28 (1999), that

Although [MCL § 445.904(1)(a)] generally provides that transactions or conduct "specifically authorized" are exempt from the provisions of the MCPA, [MCL § 445.904(2)] provides an exception to that exemption by permitting private actions pursuant to [MCL § 445.911] arising out of misconduct made unlawful by chapter 20 of the Insurance Code. Therefore, the exemptions provided by [MCL 445.904(1)(a) and (2)(a)] are inapplicable to plaintiff's MCPA claims to the extent that they involve allegations of misconduct made unlawful under chapter 20 of the Insurance Code.

Globe Life, 460 Mich at 467, 597 NW2d 28. At the time the Court decided *Globe Life*, MCL § 445.904(2) contained an exception to the § 904(1)(a) exemption and permitted private actions pursuant to MCL § 445.911 that arose out of misconduct made unlawful by Chapter 20 of the Insurance Code. *Globe Life*, 460 Mich at 467, 597 NW2d 28. The exception to the exemption did not apply to conduct made unlawful by Chapter 21. Moreover, subsequent amendments to MCL § 445.904 enacted in 2000 eliminated the ability to bring a MCPA claim against an insurance company under MCL § 445.911. *Rodgers v North American Ins Co*, No. 251926, 2005 WL 1683548 at *2-3 (Mich App July 19, 2005) (unpublished); *Kitterman v Michigan Educational Employees Mut Ins Co*, No. 247428, 2004 WL 1459523, *6 (Mich App June 29, 2004). Because the amendments eliminated a plaintiff's ability to enforce the provisions of the MCPA against insurance companies through MCL § 445.911, "the MCPA no longer applies to insurance companies." *Milhouse v Michigan Basic Property Ins Ass'n*, No. 257701, 2005 WL 3501364 at *5 (Mich App Dec 22, 2005) (unpublished). [*McLiechey v Bristol West Ins Co*, 408 F Supp2d 516, 523-524 (WD MI, 2006).]

The Sixth Circuit affirmed this decision:

While most businesses are subject to the Michigan Consumer Protection Act, insurance companies are not to the extent that various provisions of the Michigan Insurance Code, obviously including both the Credit Insurance Act and

Chapter 21, regulate their conduct. For this reason, the Michigan Consumer Protection Act does not provide the McLiechys with a private cause of action. [*McLiechey v Bristol West Ins Co*, 474 F3d 897, 903 (CA 6, 2007).]

See also *Bolan v Auto-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 2007 (Docket No., 274927) (“Furthermore, even if the trial court found that defendant committed “unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce,” the MCPA is no longer applicable to insurance companies.”).

E. The Uniform Trade Practices Act

1. The purpose of the act.

The Uniform Trade Practices Act, MCL 500.2001, et seq. regulates the business of insurance.

The purpose of this uniform trade practices act is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March 9, 1945 (Public Law 15, 79th Congress as amended), by defining, or by providing for the determination of (under standards or procedures herein prescribed), all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices, and by prohibiting the trade practices so defined or determined. [MCL 500.2002.]

2. No private cause of action exists under the UTPA

Violation of the Uniform Trade Practices Act does not give rise to a private cause of action. “We note that, in general, a violation of the Uniform Trade Practices Act, MCL § 500.2001 et seq.; M.S.A. § 24.12001 et seq., does not give rise to a private cause of action.” *Isagholian*, 208 Mich App at 17. “Plaintiff’s allegation with regard to violation of the UTPA fails as a matter of law because the act provides a comprehensive, exclusive scheme of enforcement of the rights and duties it creates; no private cause of action exists in tort for a violation of the UTPA.” *Crossley v Allstate Ins Co*, 155 Mich App 694, 697; 400 NW2d 625 (1986). “While the Code defines unfair methods of competition, empowers the Commissioner of Insurance to investigate complaints of violations, establishes a comprehensive system for the

hearing procedure before the Commissioner, and provides for court review of administrative proceedings and criminal penalties for violations, it does not create a right to file a private civil action.” *Safie Enterprises Inc v Nationwide Mut Fire Ins Co*, 146 Mich App 483, 494; 381 NW2d 787 (1985) (citations omitted). “There is no private cause of action for violation of the UTPA.” *Society of St Vincent de Paul v Mt Hawley Ins Co*, 49 F Supp2d 1011 (1999). See also *Young v Michigan Mut Ins Co*, 139 Mich App 600, 605; 362 NW2d 844 (1984).

3. The power of the Commissioner regarding unfair practices

The Legislature has given the Commissioner of Insurance the power to regulate unfair practices. “We note that the Insurance Commissioner may rid the industry of unfair trade practices not specified in the Insurance Code by proceeding under MCL § 500.2043.” *Lawyers Title Ins Corp v Chicago Title Ins Co*, 161 Mich App 183, 204; 409 NW2d 774 (1987). MCL 500.2043(1) provides:

Whenever the commissioner has probable cause to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of such business which is not defined in sections 2005 through 2025, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be in the interest of the public, the commissioner may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than 15 days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in section 2029. The commissioner shall, after such hearing, state in writing his findings of fact, his decision, and his order if any; and he shall serve a copy thereof upon all parties of record to the proceeding.

If the alleged unfair act is not discontinued after the hearing, a petition can be filed in the Ingham County court to enjoin the action. MCL 500.2043(2)

The Commissioner is not required to hold a hearing. This is true even where there is probable cause to believe that there is a violation of the act. Instead, the decision of whether or

not to hold a hearing is left to the Commissioner's discretion. *Brandon School Dist v Michigan Ed Special Services Ass'n*, 191 Mich App 257, 264; 477 NW2d 138 (1991).

A party may petition the commissioner to commence a "contested case"³ pursuant to the administrative rules. AACS R 500.2103. After receiving such a petition, the Commissioner has the discretion to demand an answer to the petition, order a public hearing, or investigate the allegations. AACS R 500.2104. But the Commissioner is not required to do any of these things. All that the Commissioner is required to do is to notify the petitioner of his decision in a brief written explanation. AACS R 500.2104(2). *Brandon School Dist*, 101 Mich App at 265.

In *Kekel v Allstate Ins Co*, 144 Mich App 379; 375 NW2d 455 (1985), the Court of Appeals found that MCL 500.2043's regulation by the Insurance Commissioner³ meant that the Michigan Consumer Protection Act did not apply. It explained:

Section 2043 of the Uniform Trade Practices Act specifically authorizes the Commissioner of Insurance to stop any unfair method of competition or practice which may be otherwise undefined. The provision which is broad in scope allows the Commissioner of Insurance to prevent, in the interest of the public, any unfair or deceptive trade practice. The actions complained of by the plaintiffs could arguably fit factually into a number of the itemized acts or practices which are made unlawful. There can be no argument, however, that the acts complained of by the plaintiffs are covered by the provisions of § 2043. Thus, defendant's conduct as described by plaintiffs would be subject to the Insurance Code of 1956 meeting the criteria of the exemption set out in § 4(2)(a) of the Michigan Consumer Protection Act. [*Kekel*, 144 Mich App at 386-387.]

Kekel was subsequently overruled by *Smith v Globe Life*. *Smith* noted that *Kekel* failed to take note of a special exemption provided in the statute for 'unfair, unconscionable, or deceptive methods, acts, or practices made unlawful by chapter 20 of the Insurance Code.' *Smith*, 460 Mich at 466. As noted above, the language relied on by *Smith* has subsequently been stricken

³ "'Contested case' means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is

from the Michigan Consumer Protection Act, which nullifies *Smith's* ruling. Therefore, *Kekel* offers the fair explanation of why the insurance industry is no longer subject to the Michigan Consumer Protection Act.

4. Penalty interest under the UTPA

MCL 500.2006(1) assesses penalty interest against an insurer that fails to in a timely manner:

A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice ***unless the claim is reasonably in dispute***. [emphasis added.]

The intent behind this provision is to punish recalcitrant insurers who are dilatory in paying claims. *Commercial Union Ins Co*, 426 Mich at 136 n5.

MCL 500.2006(3) gives the insurer 30 days after notice of the loss to specify in writing the materials sufficient to be a satisfactory proof of loss. This is important because, if the insurer does not make a timely payment, the 12% interest runs from 60 days after the insured supplied satisfactory proof of loss. MCL 500.2006(4) provides:

If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum ***if the liability of the insurer for the claim is not reasonably in dispute***, the insurer has refused payment in bad faith and the bad faith was determined by a court of law. The interest shall be paid in addition to and at the time of payment of the loss. If the loss exceeds the limits of

taken to another agency, the hearing and the appeal are deemed to be a continuous proceeding as though before a single agency." MCL 24.203.

insurance coverage available, interest shall be payable based upon the limits of insurance coverage rather than the amount of the loss. If payment is offered by the insurer but is rejected by the claimant, and the claimant does not subsequently recover an amount in excess of the amount offered, interest is not due. Interest paid pursuant to this section shall be offset by any award of interest that is payable by the insurer pursuant to the award. [emphasis added.]

Both subsection (1) and subsection (4) contain language that potentially exempts an insurer from the interest penalty if the claim is “reasonably in dispute.” The Court of Appeals recently clarified that this language only applies to third-party claims. In *Griswold Prop LLC v Lexington Ins Co*, 276 Mich App 551; 741 NW2d 549 (2007), the Court noted that the first sentence of MCL 500.2006(4) deals with first-party insureds. That first sentence makes no mention of the claim being reasonably in dispute. *Griswold*, 276 Mich App at 565. This omission indicates that the Legislature did not intend to apply the “reasonably in dispute” language to first-party claims:

The first sentence of MCL 500.2006 (4) speaks specifically to claims filed by first-party insureds, and the Legislature's omission of the “reasonably in dispute” language from that sentence must be construed as intentional. Therefore, we decline to read the “reasonably in dispute” language into the first sentence of MCL 500.2006(4). [*Griswold*, 276 Mich App at 566 (citation omitted).]

Failure to pay third-party benefits can be excused if they are reasonably in dispute. *Griswold*, 276 Mich App at 557. “The determination whether a claim was “reasonably in dispute” is a matter for the Court.” *Jones v Jackson Nat'l Life Ins Co*, 819 F Supp 1372, 1379 (WD Mich, 1994). Part of the court’s determination in third-party cases, would be whether the insurer acted in bad faith:

If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment ***in bad faith and the bad faith was determined by a court*** of law. [MCL 500.2006(4) (emphasis added).]

The Supreme Court explained that the Legislature’s use of the phrase “bad faith” in the statute did not mean the same as a “bad faith” failure to settle an insurance claim. Rather, the statute imposes a higher standard of bad faith:

Although the right to recover on a bad-faith claim is generally conditioned upon proving “bad faith” as it is defined in this opinion, we agree with the Court of Appeals that the “bad faith” definition, “conscious doing of a wrong because of dishonest purpose or moral obliquity,” as used in *Medley v Canady*, 126 Mich App 739, 748, 337 NW2d 909 (1983) is correct when limited to bad-faith cases involving § 6 of the Uniform Trade Practices Act, MCL § 500.2006(4); MSA § 24.12006(4). The differentiation in definitions arises because § 6 of the Uniform Trade Practices Act is a statutory penalty, intended to penalize recalcitrant insurers who, in bad faith, are dilatory in paying claims. Since § 6 is a statutory provision having a punitive purpose, a higher standard of liability is warranted. Virtually all authority sanctioning penalties and other punitive-type damages require the higher standard of malice or fraud. [*Commercial Union Ins Co*, 426 Mich at 136 n5 (citations omitted).]

The language of MCL 500.2006(4) indicates that the interest would be above and beyond the policy limit. “The interest shall be paid *in addition to* and at the time of payment of the loss. If the loss exceeds the limits of insurance coverage available, *interest shall be payable based upon the limits of insurance coverage* rather than the amount of the loss.” MCL 500.2006(4) (emphasis added). While the insurer would not have to pay interest on the portion of the loss exceeding the policy limits, it would have to pay interest on the amount up to the policy limit, including if the loss and added interest exceed the policy limit. This amount is “in addition to” the loss. MCL 500.2006(4).

The insurer may offset any other award of interest that is paid to the insured. “Interest paid pursuant to this section shall be offset by any award of interest that is payable by the insurer pursuant to the award.” MCL 500.2006(4). Therefore, the insurer could offset any interest paid under this statute by any statutory judgment interest. “Based on this plain language, we are constrained to conclude that an award of penalty interest pursuant to the Uniform Trade Practices

Act must be offset by any award of interest that is payable by the insurer pursuant to the award.”

McCahill, 179 Mich App at 780.

F. The Michigan No-Fault Act

1. MCL 500.3142

The Michigan No-Fault Act has its own penalty interest provision. MCL 500.3142(2) provides:

Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

MCL 500.3142(3) sets the rate of interest at 12%.

“First, to be overdue, allowable expenses must actually have been incurred. MCL 500.3142(1); *Proudfoot, supra* at 485, 673 NW2d 739. Second, PIP ‘benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained.’ MCL 500.3142(2).” *Borgess Medical Center v Resto*, 273 Mich App 558, 577; 730 NW2d 738 (2007), appeal abeyed for *Ross v Auto Club Group* (Docket No 130917). 739 NW2d 83 (2007). If the benefits are overdue, a rebuttable presumption of unreasonable refusal or undue delay arises, which the insurer must rebut. *Id.* at 578; *McKelvie v Auto Club Ins Ass’n*, 208 Mich App 331, 335; 512 NW2d 74 (1994). “A refusal or delay in payment by an insurer will not be found unreasonable under this statute where it is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty.” *Id.*

Unlike the 12% interest imposed under MCL 500.2006, there is no indication in the statute that the penalty interest is to setoff against other paid interest. Therefore, the insurer must pay both forms of interest. “In a no-fault matter, a prevailing party is allowed to recover both statutory and penalty interest when an insurer unreasonably refuses to promptly pay personal protection benefits.” *McCahill*, 179 Mich App at 779. The interest allowed under the no-fault act is a cost on which the prevailing party can collect prejudgment interest on pursuant to MCL 600.6013(6). *Attard v Citizens Ins Co*, 237 Mich App 311, 319-320; 602 NW2d 633 (1999).

2. MCL 500.3148

Beyond the statutorily imposed penalty interest, the unreasonable delay in paying no fault benefits subjects the insurer to paying the insured’s attorney fees:

An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. [MCL 500.3148(1).]

See *Attard*, 237 Mich App at 317.

On the other hand, MCL 500.3148(2) allows for the *insurer* to collect attorney fees for defending against a fraudulent or excessive claim:

An insurer may be allowed by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation. To the extent that personal or property protection insurance benefits are then due or thereafter come due to the claimant because of loss resulting from the injury on which the claim is based, such a fee may be treated as an offset against such benefits; also, judgment may be entered against the claimant for any amount of a fee awarded against him and not offset in this way or otherwise paid.

There is not significant case law discussing MCL 500.3148(2). The Court of Appeals has concluded that it is unambiguous:

We do not find any ambiguity in the statutory language, and agree with defendant that a \$4000 verdict on an \$82,000 claim is evidence that the jury found that plaintiff's claim "was in some respect fraudulent or so excessive as to have no reasonable foundation," and remand for the "award of a reasonable sum." MCL 500.3148(2). [*Robinson v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2004 (Docket Nos. 244824, 245363.)]

But another unpublished opinion came to a different conclusion than *Robinson*. In *Johnson v Farms Ins Exchange*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 2006 (Docket No. 258731), the Court upheld the lower court's ruling that an insurer could not collect attorney fees pursuant to MCL 500.3148(2) unless it was fully the prevailing party, meaning that it had to pay no benefits at all. *Id.* at slip op pp 6-7. This is in obvious conflict with *Robinson* where the insurer was ordered to pay some benefits but collected attorney fees because the amount paid was substantially less than the amount sought. No subsequent court has addressed this apparent conflict between these two cases.

G. Punitive Damages

The question of whether punitive damages are insurable in Michigan has not been established by case law.

Case law has indicated that punitive damages have only limited applicability in Michigan. "Punitive damages, which are designed to punish a party for misconduct, are generally not recoverable in Michigan." *Casey*, 273 Mich App at 400. The exception to this rule is if they are expressly authorized by statute. *Id.* Michigan does allow for exemplary damages. "In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant." *Kewin*, 409 Mich at 419. The basic concept behind such damages is that the reprehensible conduct of the defendant intensifies the harm done to the plaintiff and justifies recovery for the damage done to the plaintiff's feelings. *Id.* This rule generally does not extend to cases involving only a breach of contract. "In cases involving only

a breach of contract, however, the general rule is that exemplary damages are not recoverable.” *Id.* at 419-420. Exemplary damages have been allowed in contract cases where the damages are not easily ascertainable or measurable, such as in a breach of a promise to marry case. “In the commercial contract situation, unlike the tort and marriage contract actions, the injury which arises upon a breach is a financial one, susceptible of accurate pecuniary estimation. The wrong suffered by the plaintiff is the same, whether the breaching party acts with a completely innocent motive or in bad faith.” *Id.* at 420.