

Insurance Bad Faith

The Insurer's Bill Of Rights (A Balance Of Power)

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**A commentary article
reprinted from the
July 28, 2011 issue of
Mealey's Litigation Report:
Insurance Bad Faith**

Commentary

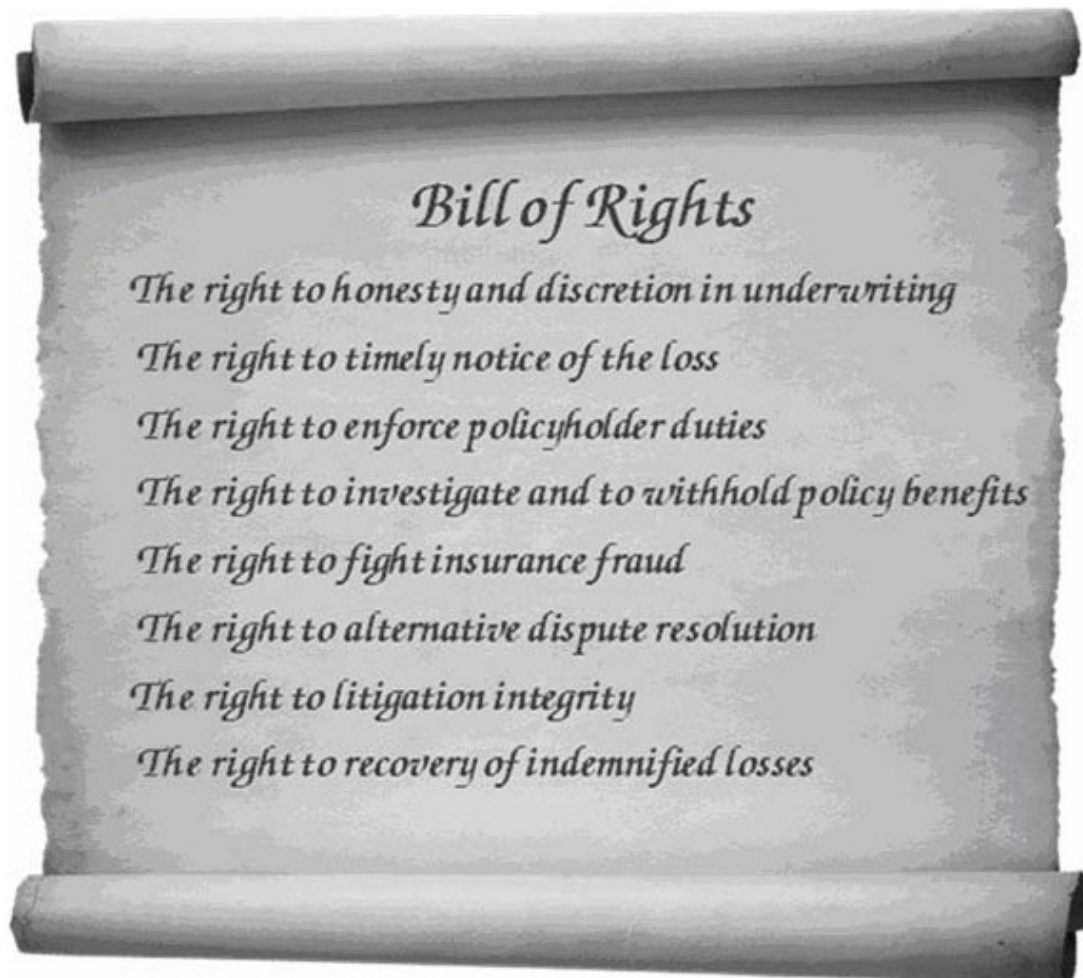
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Introducing the Insurance Company's Bill of Rights



An Historical Perspective

A quick lesson in the socio-economic history of the United States exhibits a centennial progression in the fortification of individual rights. U.S. citizens continue to be granted progressively more protection against perceived imbalances of power as this country has transitioned from a new nation to a world super-power.

Independence And The U.S. Constitution

On July 4, 1776, the United States of America declared its independence and formed a new nation based on certain unalienable rights, including: Life, Liberty, and the pursuit of Happiness.¹ Even as the designers of our new government established centralized authority to provide rule and order, they intentionally established a method of protecting citizens from transgressions by the sovereign upon individual rights.²

In 1787, delegates drafted and debated the U.S. Constitution.³ The document provides expansive powers of government.⁴ Before its adoption, several delegates expressed concern that the U.S. Constitution, as drafted, provided inadequate protection of individual civil rights.⁵ Some states demanded a "bill of rights" that would spell out the immunities of individual citizens, and only ratified the Constitution with the understanding that amendments would be offered.⁶ In 1791, the first ten amendments known as the American "Bill of Rights," were adopted to prevent government power from impeding individual rights.⁷

The Civil War Amendments

Gallop ahead 100 years. Civil rights were at the forefront of this nation's concerns in the mid-1800s. In 1861, a coalition of eleven southern states withdrew from the union and formed the "Confederate States of America."⁸ The American Civil War erupted between the southern confederacy and the 24 most northern states over the issue of slavery and the balance of power between state and federal governance.⁹ In 1863, President Abraham Lincoln issued his famous "Emancipation Proclamation."¹⁰ The northern states prevailed. By 1865, the American Civil War ended with the consolidation of the union,¹¹ but Constitutional amendments were needed to reform the bonds of a splintered nation.

In the years immediately to follow, "Civil War Amendments" were enacted to the United States Constitution, proclaiming the importance of individual civil rights.

The Thirteenth Amendment abolished slavery.¹² The Fourteenth Amendment protected natural rights by prohibiting the states from abridging "the privileges or immunities of citizens of the United States," forbidding the states to deny to any person life, liberty, or property without due process of law, and imposing a duty on the states not to deny "equal protection of the laws" to any person within their respective jurisdictions.¹³ The Fifteenth Amendment protected the right to vote, regardless of race.¹⁴

The Civil Rights Movement

Fast forward 100 more years. Modern history continues the story of this great nation's accomplishments in the protection of the rights of its citizens. Certain citizens continued to experience a power imbalance despite their constitutional guarantees. Laws were enacted to ensure equality. The Civil Rights Act of 1964 prohibited employment discrimination based on "race, color, religion, sex, or national origin."¹⁵ The Equal Pay Act of 1963 required equal wages for men and women doing equal work.¹⁶

The Consumer Rights Movement

The success of our nation resulted in great prosperity, but industrialization brought with it the byproduct of a power imbalance between businesses and consumers. In 1962, U.S. President John F. Kennedy, in a "special message" to the Congress expressed his concerns over product safety, affordability, and consumer choice. He addressed his vision for protection of consumer interests, setting forth four basic consumer rights: (1) The right to safety, (2) The right to be informed, (3) The right to choose, and (4) The right to be heard.¹⁷ President Kennedy's historic address is widely credited as the beginning of the modern-day consumer rights movement.

In the decades to follow, the consumer movement worked diligently to expand these consumer rights to protect individuals who were not effectively organized and whose views often were not heard. Consumers International, a not-for-profit global federation organized to protect consumer rights, proposed the following additional consumer rights to form what is now internationally recognized as the Consumer Bill of Rights: (5) The right to redress, (6) The right to a healthy environment, (7) The right to basic services, and (8) The right to consumer education.¹⁸ In 1985, the Consumer Bill of Rights achieved international

acceptance with the adoption of the foregoing "eight" consumer rights by the United Nations' Assembly.¹⁹

The United States, at both the federal and state level, have since adopted enumerable laws protecting consumers. Myriad consumer bills of rights have been published on topics varying from health care,²⁰ to professional services,²¹ to telephone services,²² to Hawaiian travel.²³ Of course, the insurance industry has not been left off this list. Protection of the rights of insurance consumer is delineated by statutes, administrative regulations, and common law doctrines of good faith and fair dealing.²⁴ Some states have even adopted a policyholder bill of rights.²⁵

The Policyholder's Bill Of Rights

Policyholders, as protected consumers, have been plentifully shielded with rights. The specific rights differ from one jurisdiction to another. Some states have attempted to simplify the vast protections of an insured consumer into a concise "bill of rights." Perhaps because there are so many important consumer rights for the insureds, no single policyholder bill of rights has achieved universal acceptance. Indeed, the bill of rights for insureds in each jurisdiction differs significantly from one to the next.

Florida, for example, enacted a wide-ranging policyholder bill of rights addressing (1) the cost of insurance, (2) the scope of coverage, (3) deceptive advertising, (4) financial security, (5) broker/agent responsibility, (6) policy transparency, (7) efficiency of claim handling, and (8) balanced regulation.²⁶ Florida's insurance bill of rights provides that policyholders shall have the right:

- (1) To competitive pricing practices and marketing methods that enable them to determine the best value among comparable policies;
- (2) To obtain comprehensive coverage;
- (3) To insurance advertising and other selling approaches that provide accurate and balanced information on the benefits and limitations of a policy;
- (4) To an insurance company that is financially stable;
- (5) To be serviced by a competent, honest insurance agent or broker;

- (6) To a readable policy;
- (7) To an insurance company that provides an economic delivery of coverage and that tries to prevent losses; and
- (8) To balanced and positive regulation by the Department of Financial Services, Insurance Commission, and Office of Insurance Regulation.

New Jersey's "Automobile Consumer Bill of Rights" is almost entirely different. Its focus is more limited. While also listing eight essential rights of insurance consumers, the topics are not as varied as Florida's bill of rights for insureds. Instead, the bill addresses only three essential issues: (1) discrimination, (2) obtaining and keeping insurance coverage in force, and (3) prompt and fair claim handling.²⁷ New Jersey's Automobile Consumer Bill of Rights provides the following rights:

- (1) To purchase insurance irrespective of race, gender or ethnicity;
- (2) To cancel or change insurance and obtain a refund of any unused premium;
- (3) To a choice of coverage options explained by the agent or broker;
- (4) To timely handling by the agent or broker of appointments and insurance applications;
- (5) To prompt and fair claim handling, and a written explanation of a denial;
- (6) To notice of policy cancellation (specifying the limited circumstances where cancellation is permitted);
- (7) To appeal coverage cancellation to the department of insurance;
- (8) To notice of non-renewal (specifying the limited circumstances where non-renewal is permitted).

By necessity, the insurance bill of rights for consumers reads as a brief summary of *some* rights about which the insured may want to be informed. With no agreement on a standardized policyholder bill of rights, one may

surmise that the rights identified in each state are a reflection of the current concerns of regulators and legislators in that state. Since the insurance bill of rights is a condensed version of broader consumer entitlements of insureds, it is best utilized as a quick reference to the guiding principles set forth more fully in legislation, administrative rules and judicial doctrine.

The Insurer's Bill Of Rights

Insurance companies are widely viewed as inherently the more powerful party to an insurance contract based on its particularized knowledge and experience, the ability to organize a sizeable work force at its direction, and its financial superiority. The truth is, however, the insurer's greatest power comes from its legal rights. Of course, insurer rights differ from one jurisdiction to the next, but the insurer's rights can be outlined generally in a bill of rights comparable to the policyholder bill of rights designed by legislators and regulators.

Viewed as a self-imposed challenge by this author, I endeavored to reduce the vast legal rights of an insurer into a "quick reference guide" for insurers. In recognition of the established trend of "eight" consumer rights adopted by the United Nations, this writer sets forth the insurance company's bill of rights in equal enumeration. Thus, I give you the eight basic rights of an insurance company:

- (1) The right to honesty and discretion in underwriting;
- (2) The right to timely notice of the loss;
- (3) The right to enforce policyholder duties;
- (4) The right to investigate and to withhold policy benefits;
- (5) The right to fight insurance fraud;
- (6) The right to alternative dispute resolution;
- (7) The right to litigation integrity; and
- (8) The right to recovery of indemnified losses.

The Insurer's Bill of Rights would be nothing more than a quick reference guide without a description of each of these rights. Therefore, I discuss each of the rights below.

The Right To Honesty And Discretion In Underwriting

The insurer has a right to the honest disclosure of information from a prospective insured, so that it can meaningfully assess the risk before policy issuance. The insurer has the right to deny an application for insurance if its underwriting criteria are not met, to assess an appropriate premium for the risk presented, and to set policy limitations in amount or scope of coverage.²⁸ The right to application honesty and underwriting discretion is protected both by insurance contract exclusions and by state statutes.²⁹

The Right To Timely Notice Of The Loss

Late notice of a loss impedes the insurance company's ability to investigate and timely settle claims. A failure to provide timely notice of a loss is a legal basis for the denial of recovery under the policy.³⁰ Indeed, in some jurisdictions the failure to give timely notice creates a rebuttable presumption of prejudice to the insurer.³¹ Moreover, the time within which an insured may pursue a legal action is generally limited by statute,³² and/or by a policy suit limitations clause.³³

The Right To Enforce Policyholder Duties

Every insurer has the right to insist on policyholder compliance with their contractual duties in the event of a loss. The insurer generally has the right to a sworn statement in proof of loss,³⁴ the right to an examination under oath,³⁵ ³⁶ the right to obtain documents supporting the claim,³⁷ the right to an independent medical examination for injury claims,³⁸ and the right to cooperation of the insured.³⁹

For property damage claims, the insurer generally has a right to have the insured exhibit the damaged property and undamaged property,⁴⁰ to inspect the property,⁴¹ and to have the insured provide an inventory of the items claimed to be damaged.⁴² The insurer is not responsible to pay for a loss intentionally caused by the insured,⁴³ and has the right to protection of the insured property forcing the insured to mitigate damages after a loss.⁴⁴ Most insurance contracts provide that the insured may not initiate litigation against the insurer unless and until the insured's duties are met.⁴⁵

The Right To Investigate And To Withhold Policy Benefits

Insurers are entitled to conduct investigations regarding liability and the extent of damages before offering policy

benefits.⁴⁶ This includes, but is not limited to, the right to verify information presented by a policyholder,⁴⁷ and to enforce the policyholder duties specified above. In a third-party liability claim, the insurer also has the right to control the defense and settlement decisions, and to be free from any interference from the insured in exercising these rights.⁴⁸ The insurer has the right to use its discretion in exhausting policy limits where there are multiple claimants.⁴⁹ If the indemnity obligation is not clear, the insurer may reserve its right to deny a claim for indemnification while offering a legal defense.⁵⁰ If the duty to defend is not apparent from the pleadings, then the insurer is free to decline both defense and indemnification of the loss alleged.⁵¹

Where there is a genuine dispute over entitlement to policy proceeds or the amount reasonably owed, an insurance company is within its rights to withhold benefits,⁵² and to deny claims.⁵³ An insurer who *correctly* determines that coverage under the policy does not exist, may have the right to be entirely free of a bad-faith action.⁵⁴ In some jurisdictions, an insurer even has a right to a judicial determination of liability and damages in the coverage action *before* a bad faith action may proceed against it.⁵⁵ Conversely, an insurer need not prevail on a coverage action to defeat a claim of bad faith. An insurer has the “right to be wrong” in its claim decision. A determination by a court that the insurer mistakenly denied a claim does not give rise to extra-contractual recovery if the denial was in good faith.⁵⁶ Where an insurer can defend a well-reasoned explanation for withholding benefits that is not arbitrary, capricious, or malicious, an insurance company has the right to withhold benefits without having committed bad faith.⁵⁷

Of course, an insurer may be forced to convince a *jury* that it acted properly. Whether an insurer will be able to enforce its “right to be wrong” by summary judgment is largely dependent on the bad-faith standard applicable in that particular jurisdiction.⁵⁸ Generally speaking, however, insurers have the right to deny questionable claims without being subject to liability for an erroneous denial.⁵⁹ In some jurisdictions, a bona fide controversy is sufficient reason for an insurer’s failure to promptly pay a claim, so long as the insurer had a reasonable basis to deny or delay payment.⁶⁰ In those states, the insurer is generally not liable for the tort of bad faith, even if the insurer’s claim decision is

eventually determined to be erroneous.⁶¹ In other jurisdictions, where the totality of the circumstances is evaluated, erroneous decisions could be the basis of a jury finding of bad faith even if the insurer had a reasonable basis for its determination.⁶²

Ultimately, however, an insurer may properly delay a payment of policy benefits or deny a claim entirely, so long as the delay or denial is in *good faith* based on a diligent investigation.⁶³

The Right To Fight Insurance Fraud

Insurance fraud is reportedly responsible for billions of dollars in property, casualty and healthcare losses every year.⁶⁴ Inevitably, this plays a part in increased premium to all policyholders. As a result, insurers have an arsenal of tools to take on fraudulent claims. The right to fight insurance fraud includes an insurer’s right to investigate suspicious claims,⁶⁵ to share information with other insurers,⁶⁶ to report insurance fraud to law enforcement for prosecution,⁶⁷ to deny claims,⁶⁸ and to void the policy.⁶⁹ To elicit cooperation in the fight against insurance fraud, states have protected the insurance company’s right to work together with others in the insurance industry and with law enforcement by shielding insurers with immunity.⁷⁰ Where a suspicious claim is denied in good faith, the insurer has no extra-contractual liability for resisting payment.⁷¹

The Right To Alternative Dispute Resolution

Insurance companies have the right to alternative means of dispute resolution outside of litigation. The most common forms of alternative dispute resolution are mediation, appraisal, and arbitration.

Mediation allows the parties to resolve their own dispute with the assistance of an intermediary. Mediation has been recognized as “the most effective method — short of a privately negotiated settlement — of reducing a party’s legal expenses and expediting the conclusion of litigation.”⁷² An insurer’s entitlement to mediation may be set forth by statute or by the insurance contract.⁷³ If one party fails to acquiesce to mediation, the other party may request that the court compel attendance.⁷⁴

Appraisal is a process that is designed to allow the judgment of an independent panel of appraisers to quantify a loss, without determining whether the loss is covered under the insurance policy.⁷⁵ Most property policies contain a contractual right to appraisal. While intended

to be an efficient means of resolving a dispute, it may be a lengthy and expensive venture. Notably, an insurer may invoke the appraisal provision without waiving other policy defenses, such as fraud, lack of notice, and failure to cooperate.⁷⁶ In fact, if the insured has not complied with post-loss conditions to suit, then the appraisal process may not be permitted to proceed before contractual compliance is first resolved.⁷⁷ Keep in mind, however, that where there is no formal process for appraisal, the insurer is not guaranteed due process.⁷⁸ In some jurisdictions the appraisal clause is viewed as subject to the rules associated with arbitration.⁷⁹ In other jurisdictions, insurance policy appraisal clauses do not provide a formal process for appraisal through arbitration or otherwise.⁸⁰ With no checks and balances to ensure the fairness of their award, an appraisal panel may be tasked with determining the extent of property damages and the *cause* of those damages.⁸¹

Arbitration is available in various forms, including: inter-company arbitration for participating insurers,⁸² court-ordered nonbinding arbitration,⁸³ and binding arbitration by agreement of the parties within the insurance policy. The Federal Arbitration Act typically governs arbitration.⁸⁴ However, state laws regulating or prohibiting insurance policy arbitration may take precedence. For *domestic* insurance arbitration agreements, state laws pertaining to arbitration of insurance disputes trump the Federal Arbitration Act.⁸⁵ For *international* insurance arbitration clauses, however, the Federal Arbitration Act governs.⁸⁶ Whether governed by federal arbitration procedures or not, participants to arbitration may enjoy a more efficient adjudication of their dispute than litigation. On the other hand, the entitlement to a streamlined adjudication comes with limited due process rights.

The Right To Litigation Integrity

Litigation may or may not be the most judicious plan for conflict resolution. Profitable insurers engage in pre-litigation planning. Internal audits and early involvement by legal counsel ultimately saves conscientious insurers significant indemnity dollars, extra-contractual exposure, and litigation fees and expenses. The savviest insurers encourage their adjusters to seek legal assistance early on to analyze coverage issues before disputes arise, assess policy and extra-contractual exposure, respond to demands and consumer complaints, and negotiate

settlements. Inevitably, however, some percentage of disputes will require a litigated outcome.

If forced to litigate, find comfort knowing that insurance companies are guaranteed due process rights.⁸⁷ This includes the right to proper notice and an opportunity to be heard,⁸⁸ trial by jury,⁸⁹ a fair trial,⁹⁰ and an appeal.⁹¹ The insurer also has a right to representation by legal counsel.⁹² Confidential communications with legal counsel are protected by attorney-client privilege,⁹³ and other litigation work product is afforded a qualified immunity from disclosure.⁹⁴ Confidential business information (including trade secrets) is also afforded protection.⁹⁵ Of the available methods of dispute resolution, litigation offers the greatest protection of an insurance company's rights.

The Right To Recovery Of Indemnified Losses

An insurer has the right to recoupment of its indemnification payment (beyond reinsurance) in two principal ways: salvage and subrogation.⁹⁶

Salvage is the right to recover the remaining value of property that has suffered a total loss once the insurer makes payment for the loss.⁹⁷ This right is usually contractual, and therefore relies on the language of the salvage provision of the policy.⁹⁸ However, an equitable claim for unjust enrichment to obtain the salvage value may also be available under specific circumstances.⁹⁹

The purpose of subrogation is to prevent the insured from obtaining a double recovery (and thus being unjustly enriched) through compensation by both the wrongdoer and the insurance company for a loss.¹⁰⁰ Subrogation places the ultimate responsibility for the loss on the party who caused the loss, while allowing the insurance company to seek reimbursement of its indemnity dollars.¹⁰¹ By paying a claim to its insured, the insurance company obtains the insured's right to subrogate (collect) against the person responsible for the loss to the extent the insurer has indemnified its insured.¹⁰²

Insurance subrogation rights are generally available both by contract and in equity. Contractual subrogation arises from an insurance policy language itself, while equitable subrogation may be invoked wherever justice demands its application.¹⁰³ Insurers are generally entitled to subrogation even if the insurance contract does not provide for it.¹⁰⁴ Additionally, an insurer

has the right to be free of interference with its subrogation rights from its insureds. If an insured tramples the insurer's subrogation rights, then the insurer may have the right to deny the insured's claim for policy benefits.¹⁰⁵

Conclusion

Insurance companies, not unlike insurance consumers, have many contractual, statutory, and even constitutional rights protecting their interests. In a world of insurance regulation and litigation where an insurer's duty of good faith and fair dealing has been reshaped into the "law of insurer bad faith," the insurer is not without protection. Nonetheless, broad recognition of an insurer's rights is not widespread. Education is the key. Insurer's rights should be given greater recognition by judges, legislators and regulators. Insurance professionals should tout The Insurer's Bill of Rights to preserve the balance of power between insurers and insureds – especially in the wake of today's explosion of consumer rights protection.

Endnotes

1. Authored by Thomas Jefferson, the "Declaration of Independence" provides: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The U.S. National Archives and Records Administration, Retrieved May 27, 2011, from http://www.archives.gov/exhibits/charters/declaration_transcript.html.
2. *Id.* ("[T]o secure these rights, Governments are instituted among Men. . . .")
3. The U.S. National Archives and Records Administration, Retrieved June 9, 2011, from <http://www.archives.gov/exhibits/charters/constitution.html>.
4. The U.S. National Archives and Records Administration, Retrieved June 9, 2011, from http://www.archives.gov/exhibits/charters/constitution_transcript.html.
5. The U.S. National Archives and Records Administration, Retrieved June 9, 2011, from <http://www.archives.gov/exhibits/charters/constitution.html>.
6. *Id.*
7. The original Bill of Rights is on permanent display at the Rotunda of the National Archives Building, Washington, D.C. The Preamble to the Bill of Rights states: "[A] number of the States, having . . . expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added. . . ." The U.S. National Archives and Records Administration, Retrieved May 27, 2011, from http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html.
8. "American Civil War." *New World Encyclopedia*. Feb. 21, 2009, 18:11 UTC. Retrieved June 1, 2011, from http://www.newworldencyclopedia.org/entry/American_Civil_War.
9. *Id.*
10. *Id.*
11. *Id.*
12. Michael Zuckert, University of Notre Dame, "*Natural Rights and the Post-Civil War Amendments*," for Natural Law, Natural Right, and American Constitutionalism (A *We the People* project for the National Endowment of the Humanities, The Witherspoon Institute © 2011). Retrieved June 1, 2011, from <http://www.nlnrac.org/american/civil-war-amendments>.
13. *Id.*
14. *Id.*
15. See Public Law 82-352 (78 Stat. 241). The U.S. National Archives and Records Administration, Retrieved June 1, 2011, from <http://www.archives.gov/education/lessons/civil-rights-act>.
16. Women's International Center, "*Women's History in America*," Retrieved June 1, 2011, from <http://www.wic.org/misc/history.htm>, *Excerpted from Compton's Interactive Encyclopedia. Copyright (c) 1994, 1995 Compton's New Media, Inc.*
17. John F. Kennedy, "*Special Message to the Congress on Protecting the Consumer Interest*," (March 15,

- 1962). Retrieved May 27, 2011, from <http://www.presidency.ucsb.edu/ws/?pid=9108>.
18. Retrieved May 27, 2011, from <http://www.consumersinternational.org/who-we-are/consumer-rights>.
 19. Bernice B. Wilson, "Get to Know Your Basic Consumer Rights: How Do They Work For You?" Published by the Alabama Cooperative Extension System (Alabama A&M and Auburn Universities) in cooperation with the U.S. Department of Agriculture. Retrieved May 27, 2011, from <http://www.aces.edu/pubs/docs/U/UNP-0040/UNP-0040.pdf>.
 20. On March 26, 1997, President William Jefferson Clinton appointed the U.S. Advisory Commission On Consumer Protection and Quality In the Health Care Industry to develop a "Consumer Bill of Rights and Responsibilities" for the health care system. Retrieved on May 27, 2011, from http://www.hcqualitycommission.gov/final/append_a.html. This bill of rights (also known as the "Patient Bill of Rights") was adopted in 1998. Retrieved May 27, 2011, from <http://www.cancer.org/treatment/findingandpayingfortreatment/understandingfinancialandlegalmatters/patients-bill-of-rights>.
 21. New York State Education Department, Office of the Professions. Retrieved May 27, 2011, from <http://www.op.nysed.gov/rights.htm>.
 22. Missouri Public Service Commission. Retrieved May 27, 2011, from <http://www.psc.mo.gov/telecommunications/consumer-information/missouri-psc-consumer-services-department/consumer-bill-of-rights>.
 23. Consumer rights, Hawaii Statutes Section 0468L-7.
 24. *See, e.g.*, Florida Statutes §§ 624.155 and 626.9541; Fla. Admin. Code Rule 4-220.201; Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980).
 25. *See, e.g.*, California Department of Insurance, "Bill of Rights for Seniors." Retrieved May 27, 2011, from <http://www.insurance.ca.gov/0150-seniors/0600informationguides/seniorbillofrights.cfm>.
- Oregon Department of Consumer & Business Services, "Insurance Bill of Rights." Retrieved May 27, 2011, from <http://insurance.oregon.gov/publications/consumer/0930.pdf>.
- State of New Jersey Department of Banking and Insurance, "New Jersey Automobile Consumer Bill of Rights." Retrieved May 27, 2011, from http://www.state.nj.us/dobi/division_consumers/insurance/autorights09.html.
- Policyholders, Bill of Rights, Florida Statutes Section 626.9641. Retrieved May 27, 2011, from http://www.myfloridacfo.com/consumers/InsuranceLibrary/Insurance/General/General_Insurance_Policyholders_Bill_of_Rights.htm.
26. Florida's policyholder bill of rights expressly provides that it does not create a civil cause of action by a policyholder against an insurer.
 27. State of New Jersey Department of Banking and Insurance, "New Jersey Automobile Consumer Bill of Rights." Retrieved May 27, 2011, from http://www.state.nj.us/dobi/division_consumers/insurance/autorights09.html.
 28. *See, e.g.*, Florida Statutes § 627.409 ("A misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy [if] . . . the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.")
 29. Insurers are entitled to rescind the insurance contract for fraud or misrepresentation in the insurance application. *See, e.g.*, Huda v. Integon Nat'l Ins. Co., 341 F. App'x 149, (6th Cir. 2009)(applying Michigan law); West Coast Life Ins. Co. v. Hoar, 558 F.3d 1151 (10th Cir. 2009)(applying Colorado law); State Farm Fire & Cas. Co. v. Oliver, 854 F.2d 416 (11th Cir. 1988)(applying Alabama law); GRG Transport, Inc. v. Certain Underwriters at Lloyd's, 896 So. 2d 922 (Fla. 3d DCA 2005).
 30. *See, e.g.*, Ideal Mut. Ins. Co. v. Waldrep, 400 So. 2d 782, 785 (Fla. 3d DCA 1981)(failure to comply with prompt notice provision is a breach of the insurance contract).

31. Bankers Ins. Co. v. Macias, 475 So. 2d 1216, 1218 (Fla.1985); National Gypsum Co. v. Travelers Indem. Co., 417 So. 2d 254, 256 (Fla. 1982); Miller v. Dilts, 463 N.E.2d 257 (Ind. 1984); Allstate Ins. Co. v. Occidental Int'l, Inc., 140 F.3d 1, 5 (1st Cir.1998).
32. See, e.g., Section 95.11(2)(b), Fla. Stat. (2010).
33. See, e.g., Harrington v. American Economy Ins. Co., 131 F. App'x 573 (9th Cir. 2005)(applying Oregon law); Taylor v. Western and Southern Life Ins. Co., 966 F.2d 1188 (7th Cir. 1992)(applying Illinois law); Joe E. Freund, Inc. v. Insurance Co. of North America, 370 F.2d 924 (5th Cir. 1967)(applying Louisiana law); Coney v. Homesite Ins. Co., No. 08-6151, 2010 WL 2925941 (D. N.J. July 15, 2010) (applying New Jersey law). CAVEAT: The time bar of an action under the contract may not preclude an independent action alleging bad faith in some jurisdictions. See, e.g., Waldman v. Pediatric Svcs. of America, Inc., No. CIV. A. 97-7257, 1998 WL 770629 (E.D. Pa. Nov. 5, 1998).
34. See, e.g., Starling v. Allstate Floridian Ins. Co., 956 So. 2d 511 (Fla. 5th DCA 2007)(failure to provide a sworn statement in proof of loss within the 60 days required by the insurance policy barred recovery).
35. An insured's failure to appear for an Examination Under Oath may be deemed a willful and material breach of an insurance contract, which precludes the insured from recovery under the policy. Goldman v. State Farm Fire Gen. Ins. Co., 660 So. 2d 300, 304 (Fla. 4th DCA 1995), *rev. denied*, 670 So. 2d 938 (Fla. 1996). However, failure to appear may be excusable under certain circumstances. See, e.g., Custer Medical Center v. United Auto. Ins. Co., — So. 3d —, 2010 WL 4340809, 35 Fla. L. Weekly S640, *pet. for rehearing denied*, — So. 3d — (May 18, 2011).
36. An insurer does not commit bad faith by insisting on the insured's compliance with the Examination Under Oath obligation. See, e.g., Hungerman v. Nationwide Mut. Fire Ins. Co., 11 So. 3d 1012 (Fla. 2d DCA 2009).
37. See, e.g., Hill v. Safeco. Ins. Co. of America, 93 F. Supp. 2d 1375 (M.D. Ga. 1999)(finding failure to comply with policy conditions precluded a bad faith action against the insurer). Notably, if the insured cooperates to some degree or provides an explanation for its noncompliance, then a fact question may need to be decided by a jury. See, e.g., Haiman v. Fed. Ins. Co., 798 So. 2d 811, 812 (Fla. 4th DCA 2001)(partial compliance with insured's obligation to produce records)(quoting Diamonds & Denims, Inc. v. First of Georgia Ins. Co., 417 S.E.2d 440, 441-42 (Ga.App.1992).
38. An Independent Medical Examination may be expressly permitted by statute. See, e.g., Section 627.736(7), Fla. Stat. (2001)(personal injury protection); Section 440.13(5)(a), Fla. Stat. (2008)(workers' compensation). This right may also be limited by statute. See, e.g., Custer Medical Center v. United Auto. Ins. Co., — So. 3d —, 2010 WL 4340809, 35 Fla. L. Weekly S640, *pet. for rehearing denied*, — So. 3d — (May 18, 2011). Moreover, an Independent Medical Examination may be requested under the applicable rules of civil procedure during a legal action. Leinhart v. Jurkovich, 882 So. 2d 456 (Fla. 4th DCA 2004).
39. Accord Continental Cas. Co. v. City of Jacksonville, 550 F. Supp. 2d 1312 (M.D. Fla. 2007)("Most insurance policies include what is often referred to as a 'cooperation clause.' In instances where a policy does not include such a clause, one is usually implied at law. See Mimbs v. Commercial Life Ins. Co., 832 F. Supp. 354, 358 (S.D. Ga. 1993) (finding an implied duty of cooperation and non-hindrance existed under health insurance policy); First Bank of Turley v. Fid. & Deposit Ins. Co. of Md., 928 P.2d 298, 304 (Okla.1996) (finding that an insured has a duty to cooperate which is both contractual and implied at law). The purpose of a cooperation clause is to protect the insurer from collusion between the insured and injured third parties, while making it possible for the insurer to conduct a proper investigation of the claim, and determine its own obligations. Hudson Tire Mart, Inc. v. Aetna Cas. & Sur. Co., 518 F.2d 671, 674 (2d Cir.1975); Martin v. Travelers Indem. Co., 450 F.2d 542, 553 (5th Cir.1971); Farmers Cas. Co. v. Green, 390 F.2d 188, 191 (10th Cir. 1968). Accordingly, an insured breaches the cooperation clause when it fails to communicate honestly and openly with its insurer. Wildrick v. N. River Ins. Co., 75 F.3d 432, 436 (8th Cir.1996). An insured's breach of the cooperation clause precludes coverage and releases the insurer from any responsibilities that

- it may otherwise have under the terms of the contract. *Sargent v. Johnson*, 551 F.2d 221, 232 (8th Cir. 1977); *Ramos*, 336 So. 2d at 71; 16 *Williston on Contracts* § 49:106 (Richard A. Lord ed., 4th ed.1990).”).
40. *See, e.g., Hill v. Safeco Ins. Co. of America*, 93 F. Supp. 2d 1375 (M.D. Ga. 1999).
 41. The right to inspect, however, may be waived. *See, e.g., State Auto. Prop. & Cas. Ins. Co. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (Ark. 1999); *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Federated Mut. Ins. Co.*, 596 N.W.2d 546 (Iowa 1999).
 42. *See, e.g., Keten v. State Farm Fire and Cas. Co.*, No. 2: 06-CV-341 JVB, 2008 WL 4449545 (N.D. Ind. Sept. 29, 2008). As with other duties of the insured, an insurer's right to insist upon compliance may be waived. *Cotton States Mut. Ins. Co. v. Walker*, 232 Ga. App. 41, 500 S.E.2d 587 (Ga. Ct. App. 1998).
 43. *See, e.g., Langer v. Liberty Mut. Fire. Ins. Co.*, No. CV0950330965, 2010 WL 4886404 (Conn. Super. Nov. 8, 2010)(granting summary judgment in coverage action based on intentional loss exclusion); *Riddle v. Auto-Owners Ins. Co.*, No. 2:08-CV-1-F, 2009 WL 2151386 (E.D. N.C. July 17, 2009)(granting summary judgment in unfair and deceptive trade practice case where insurer had legitimate basis to deny claim for intentional loss). Note, however, that there are exceptions to this right. *See, e.g., Century-National Ins. Co. v. Garcia*, 51 Cal. 4th 564, 246 P.3d 621 (Cal. 2001)(finding “intentional loss” exclusion in policy void as to innocent co-insureds per California statutes); *Kattoum v. New Hampshire Indemn. Co.*, 968 So. 2d 602 (Fla. 2d DCA 2007)(highlighting the importance of the specific policy language to whether an innocent co-insured is entitled to benefits when another insured intentionally causes a loss).
 44. *See, e.g., Lumpkin v. Alabama Farm Bureau Mut. Cas. Ins. Co., Inc.*, 343 So. 2d 1238 (Ala. Civ. App. 1977).
 45. *See, e.g., Starling*, 956 So. 2d at 513; *Lumpkin*, 343 So. 2d at 1239-40; *Hill*, 93 F. Supp. 2d at 1379.
 46. First-party loss: *Dyno-Bite, Inc., et al. v. The Travelers Cos.*, 80 A.D.2d 471 (1981), citing *Claffin v. Commonwealth Ins. Co.*, 110 U.S. 81, 94-95, 3 S.Ct. 507, 514-515, 28 L.Ed. 76 (explaining that the insurance company is entitled to obtain, promptly and while the information is still fresh, “all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights to enable them to decide upon their obligations, and to protect them against false claims”); *see also, Laine v. Allstate Ins. Co.*, 355 F. Supp. 2d 1303 (N.D. Fla. 2005), citing 5A John A. Appleman & Jean Appleman, *Insurance Law & Practice* § 3549 at 549-50 (1970)(“A provision in a policy requiring the insured to submit to examination under oath regarding the loss is reasonable and valid, and if breached, the insurer would be deprived of a valuable right for which it had contracted.”); *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300 (Fla. 4th DCA 1995)(same). Third-party loss: *See, e.g., Aboy v. State Farm Mut. Auto. Ins. Co.*, 394 F. App'x 655 (11th Cir. 2010)(affirming summary judgment holding insurer entitled to verify liability and damages before initiating settlement negotiations); *Johnson v. GEICO Gen. Ins. Co.*, 318 F. App'x 847, 851 (11th Cir. 2009)(recognizing that an insurer has the “right first to make inquiry and evaluate merit of claim before obligation to settle is triggered”); *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601 (Fla. 4th DCA 1975)(recognizing right first to make inquiry and evaluate merits of claim before obligation to settle is triggered).
 47. *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 669 (10th Cir. 2007) (explaining that courts should exercise caution in cases where the insurer is accused of *delaying* settlement, rather than *refusing* to settle, “to avoid creating the incentive to manufacture bad faith claims by . . . starving the insurer of the information needed to make a fair appraisal of the case.”). However, keep in mind that this right is balanced against the insurer's fiduciary duty to timely and properly investigate. *See, e.g., Gutierrez v. Yochim*, 23 So. 3d 1221 (Fla. 2d DCA 2009)(holding that whether there is an actual need for verification of information may be a question of fact for the jury).
 48. *See Continental Cas. Co. v. City of Jacksonville*, 550 F. Supp. 2d 1312 (M.D. Fla. 2007).
 49. *See, e.g., Biondino v. Southern Farm Bureau Cas. Ins. Co.*, 319 So. 2d 152 (Fla. 2d DCA 1975)(exhaustion

- of uninsured motorist benefits to primary policyholder to the detriment of additional insured's claim for loss of consortium); *Carter v. State Farm Mut. Auto. Ins. Co.*, 33 S.W.3d 369 (Tex. App. 2000)(exhaustion of uninsured motorist benefits on some injured insureds to the exclusion of others injured in the accident). The insurer's exercise of its discretion in the payment of benefits to only some insureds may someday be viewed by a jury. *See, e.g., Farinas v. Florida Farm Bureau Gen. Ins. Co.*, 850 So. 2d 555 (Fla. 4th DCA 2003), *rev. den.*, *Florida Farm Bureau Gen. Ins. Co. v. Farinas*, 871 So. 2d 872 (Fla. 2004). For a discussion of how to properly exercise discretion in paying multiple claims with inadequate limits, see Alan J. Nisberg, "Juggling Multiple Claims With Inadequate Limits," *Mealey's Litigation Report: Insurance Bad Faith*, Vol. 17, #12, p. 15 (October 15, 2003).
50. *Accord Centennial Ins. Co. v. Tom Gustafson Indus., Inc.*, 401 So. 2d 1143 (Fla. 4th DCA 1981), citing *Midland Ins. Co. v. Watson*, 188 So. 2d 403 (Fla. 3d DCA 1966).
 51. *See, e.g., Nationwide Mut. Ins. Co. v. Lang Mgt., Inc.*, 2010 WL 3958654 (S.D. Fla. 2010)(holding that where the insurer has no duty to defend, it necessarily has no duty to indemnify); *Essex Ins. Co. v. Clark*, No. 3:09-CV-1196-B, 2010 WL 3911424 (N.D. Tex. Oct. 5, 2010) (same).
 52. *See, e.g., Moore v. State Farm Mut. Ins. Co., et. al.*, No. 10-cv-01534, 2011 WL 1642298 (N.D. Cal. 2011)(entering summary judgment for insurer in a bad faith case where insurer had reasonable basis to withhold benefits).
 53. *See, e.g., Vest v. Travelers Ins. Co.*, 753 So. 2d 1270 (Fla. 2000)("The insurer has a right to deny claims that it in good faith believes are not owed on a policy").
 54. *See, e.g., Twin City Fire Ins. Co. v. Colonial Life & Acc. Ins. Co.*, 375 F.3d 1097 (11th Cir. 2004)(applying Alabama law); *OneBeacon Ins. Co. v. Delta Fire Sprinklers, Inc.*, 898 So. 2d 113 (Fla. 5th DCA 2005); *Medical Care America, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 341 F.3d 415 (5th Cir. 2003)(applying Texas law); *Love v. Fire Ins. Exchange*, 221 Cal. App. 3d 1136, 271 Cal. Rptr. 246 (Cal. Ct. App. 4th 1990); but cf. *Mid-Continent Cas. Co. v. Eland Energy, Inc.*, Not Reported in F. Supp. 2d, 2009 WL 3074618 (N.D. Tex. 2009).
 55. *See, e.g., Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991); *State Farm Mut. Auto. Ins. Co. v. Tranchese*, 49 So. 3d 803 (Fla. 4th DCA 2010); *Michigan Millers Mut. Ins. Co. v. Bourke*, 581 So. 2d 1368 (Fla. 2d DCA 1991).
 56. *See, e.g., Vest*, 753 So. 2d at 1275; *Hardesty Builders, Inc. v. Mid-Continent Cas. Co.*, 2010 WL 5146597 (S.D. Tex. 2010).
 57. Douglas G. Houser, "Good Faith As a Matter of Law: The Insurance Company's Right to be Wrong," *Tort Insurance Law Journal* (Spring 1992); John J. Pappas, "Bad-Faith Should be Difficult to Prove," *Mealey's Litigation Report: Insurance Bad Faith*, Vol. 19, #22 (March 21, 2006).
 58. Summary disposition favorable to the insurer in a "fairly debatable" jurisdiction is significantly more frequent than in a "totality of the circumstances" jurisdiction. *See generally*, Alan J. Nisberg, "Florida's Bad Faith Quagmire: Is Summary Judgment Ever Available?" *Mealey's Litigation Report: Insurance Bad Faith*, Vol. 22, #22 (March 26, 2009).
 59. *See, e.g., St. Paul Lloyd's Ins. Co. v. Fong Chun Huang*, 808 S.W.2d 524, 526 (Tex. App. 1991), citing *Aranda v. Ins. Co. of N. Am.*, 748 S.W. 2d 210, 213 (Tex.1988).
 60. *Id.*
 61. *See, e.g., Lyons v. Millers Cas. Ins. Co. of Tex.*, 866 S.W.2d 597, 600 (Tex. 1993).
 62. *See, e.g., Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004).
 63. The boundaries for a prompt decision based on a diligent investigation are constantly being tested. *See, generally*, James Hofert and Ali Ryan Amin, "Time-Sensitive Settlement Demands," *The Brief* (Spring 2011), a publication of the American Bar Association, Tort Trial & Insurance Practice Section. Gwynne A. Young and Johanna W. Clark, "The Good Faith, Bad Faith and Ugly Set-up of Insurance Claims Settlement," *The Florida Bar Journal* (Feb. 2011).

64. *Accord* Coalition Against Insurance Fraud, Retrieved June 7, 2011 from http://insurancefraud.org/auto_insurance.htm and http://insurancefraud.org/health_insurance.htm.
65. *Accord* MetLife Ins. Co. of Connecticut v. Petracek, No. 08-6095 (DSD/FLN), 2010 WL 2130966 (D. Minn. May 24, 2010) citing Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 603-04 (1925); *see also* Walker v. Progressive Direct Ins. Co., 720 F. Supp. 2d 1269 (N.D. Okla. 2010)(granting summary judgment for insurer finding no bad faith where insurer properly conducted a fraud investigation).
- Indeed, in light of the insurance fraud epidemic, state legislation has been enacted to assist insurers in fighting fraud. *See, e.g.*, Florida Statutes §§ 626.8797(false proof of loss is a crime), 626.9521(3)(b)(false insurance application is a crime), 626.9541(k)(misrepresentation in insurance application is deceptive and unfair trade practice), 626.9541(ee)(false signature on insurance application is a deceptive and unfair trade practice), 626.989 (facilitating insurer participation in investigation by the Department of Insurance Fraud), 626.9891 (requiring insurers to establish a special investigations unit and an anti-fraud plan), 626.9892 (establishing an anti-fraud reward program), 817.234 (false and fraudulent insurance claim is a crime), and 627.736(4)(h)(voiding personal injury protection benefits for fraud); *see also* Life Partners, Inc. v. Morrison, 484 F.3d 284 (4th Cir. 2007)(applying Virginia law); AAA Mid-Atlantic Ins. Co. of New Jersey v. Benson, Not Reported in A.2d, 2002 WL 32829048 (N.J. Super. 2002); Muci v. State Farm Mut. Auto. Ins. Co., 478 Mich. 178, 732 N.W.2d 88 (Mich. 2007).
66. *See, e.g.*, Florida Statutes § 626.989.
67. *Id.*
68. *See* Nova Hills Villas Condo. Ass'n, Inc. v. Aspen Specialty Ins. Co., No. 07-60939-CIV, 2008 WL 179878 (S.D. Fla. Jan. 21, 2008) and cases cited therein.
69. *Id.*
70. *See, e.g.*, Florida Statutes § 626.989.
71. *See, e.g.*, Curatolo v. Allstate Ins. Co., No. 5:10 cv 607, 2011 WL 2116459 (N.D. Ohio May 27, 2011)(granting summary judgment on bad faith allegations because concealment or fraud defense to coverage was fairly debatable).
72. West Coast Life Ins. Co. v. Longboat, No. 8:09-cv-2159-T-23TBM, 2010 WL 4942146 (M.D. Fla. Nov. 29, 2010).
73. *See, e.g.*, Florida Statutes § 627.7015 (statutory entitlement to mediation of Florida property claims); Lewis v. Universal Property and Cas. Ins. Co., 13 So. 3d 1079 (Fla. 4th DCA 2009)(referencing right to mediation under the insurance contract).
74. *See, e.g.*, Florida Statutes § 44.102; Perez-Wilson v. McPhee, 23 Misc. 3d 1053, 874 N.Y.S.2d 779 (N.Y. Sup. Ct. 2009)(recognizing court's ability to mandate mediation).
75. *See* Quade v. Secura Ins., 792 N.W.2d 478 (Minn. Ct. App. 2011).
76. *See* State Farm Fire and Cas. Co. v. Licea, 685 So. 2d 1285 (Fla. 1996); Citizens Property Ins. Corp. v. Mango Hill Condo. Ass'n 12, Inc., 54 So. 3d 578 (Fla. 3d DCA 2011).
77. *See* Citizen's Prop. Ins. Corp. v. Gutierrez, 59 So. 3d 177 (Fla. 3d DCA 2011)(insured's compliance with post-loss conditions must be resolved before appraisal); *cf.* Sunshine State Ins. Co. v. Rawlins, 34 So. 3d 753, 754-55 (Fla. 3d DCA 2010)(Once the trial court determines that a demand for appraisal is ripe, the court has the discretion to control the order in which an appraisal and coverage determinations proceed); Kirkwood v. California State Auto. Ass'n Inter-Insurance Bureau, 193 Cal. App. 4th 49, 122 Cal. Rptr. 3d 480 (Cal. App. 1 Dist. 2011)(court has discretion to stay appraisal pending the resolution of legal issues of contract and statutory interpretation); In re Slavonic Mut. Fire Ins. Ass'n, 308 S.W.3d 556 (Tex. App. 2010)(same).
78. John J. Pappas and Matthew Pearie, "Appraising Windstorm Claims," Mealey's Litigation Report: Insurance Bad Faith, Vol. 17 #4 (June 18, 2003); John J. Pappas and John M. Odom, "Armageddon,"

- Mealey's Litigation Report: Insurance Bad Faith, Vol. 13, #18 (Jan. 18, 2000).
79. *See, e.g.*, QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n, 778 N.W.2d 393, 397 (Minn. App. 2010); Meineke v. Twin City Fire Ins. Co., 892 P.2d 1365 (Ariz. Ct. App. 1994).
 80. *See, e.g.*, Allstate Ins. Co. v. Suarez, 833 So. 2d 762 (Fla. 2002)(standard insurance policy appraisal provision calls for informal appraisal, not formal arbitration).
 81. An appraisal panel, governed by no rules of procedure or evidence, and subject to no oversight via appeal, may be determining the cause of damages. For example, if an insurer partially pays a hurricane claim because it is evident that some water damage was caused by the windstorm, but believes the vast majority of water damage was caused by the insured's pre-windstorm neglect of the property, an appraisal panel may be tasked with deciding how much of the water damage was caused by the windstorm and how much pre-existed the insured event. *See, e.g.*, Johnson v. Nationwide Mut. Ins. Co., 828 So. 2d 1021 (finding the court will determine which damages were caused by the covered loss if the insurer denies there is a covered loss entirely, while the appraisers will determine causation if there is an admitted loss but the amount is disputed); *see also* Lundstrom v. United Servs. Auto. Ass'n-CIC, 192 S.W.3d 78 (Tex. App. 2006)(allowing appraisers to determine not only the scope of damages, but also causation). As a practical matter, most appraisers are equipped to determine the value of damages, but not causation. The insurer and insured will present the appraisal panel competing expert reports on causation. Far too often the panel will resolve the dispute by the "Judgment of Solomon" approach (i.e., "splitting the baby").
 82. By agreement of its participating members, a non-profit organization known as Arbitration Forums, Inc., provides arbitration services for participating members throughout the United States and Canada. Boasting a membership of over 4,400 insurers and self-insureds, the organization reportedly resolves more than 500,000 disputes for its members worth nearly \$2.3 billion in claims each year. Retrieved June 7, 2011, from <https://www.arbfile.org/webapp>.
 83. *See, e.g.*, Florida Statutes s. 44.103; Shaker Village Condo. Ass'n, Inc. v. Certain Underwriters at Lloyd's, Not Reported in F. Supp. 2d, 2009 WL 2835185 (S.D. Fla. 2009); Burlington Ins. Co. v. Northland Ins. Co. — F. Supp. 2d —, 2011 WL 383939 (D. N.J. 2011).
 84. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).
 85. *See* Lloyds Underwriters v. Netterstrom, 17 So. 3d 732 (Fla. 1st DCA 2009).
 86. *Id.*
 87. *See, e.g.*, Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct 1032 (1991)(imposing punitive damages on insurer whose employee committed fraud was not a violation of insurer's right to due process under the Fourteenth Amendment of the United States Constitution); Strickland Ins. Group v. Shewmake, 642 So. 2d 1159 (Fla. 5th DCA 1994)(reversing trial court's ruling regarding personal jurisdiction over insurer as a violation of its due process rights guaranteed by the Fourteenth Amendment to the United States Constitution).
 88. *See, e.g.*, Okocha v. Fehrenbacher, 101 Ohio App. 3d 309, 655 N.E.2d 744 (Ohio App. 8 Dist.1995)(finding trial court erred when it denied insurer who was not formally served with summons and complaint its right to due process and its right to a jury trial); Stewart Title Guar. Co. v. McReynolds, 886 S.W.2d 233 (Tenn. App. 1994)(recognizing insurer's right to notice and an opportunity to be heard under state constitution).
 89. *See, e.g.*, Olin's, Inc. v. Avis Rental Car Sys. of Fla., 131 So. 2d 20 (Fla. 3d DCA 1961)(right to trial by jury for insurer is secured by Florida's state constitution); Southern Farm Bureau Cas. Ins. Co. v. Pro Lockshop, Inc., 681 So. 2d 840 (Fla. 4th DCA 1996)(trial court has no discretion to deny a jury trial to insurer on issues so triable); U.S. Fire Ins. Co. v. C & C Beauty Sales, Inc., 674 So. 2d 169 (Fla. 3d DCA 1996)(insurer has right to trial by on damages).
 90. *See, e.g.*, Allstate Ins. Co. v. Thornton, 781 So. 2d 416 (Fla. 4th DCA 2001)(requiring a new trial where trial court overruled the insurer's peremptory challenge of a juror).

91. *See, e.g., Church v. Allstate Ins. Co.*, 143 N.C. App. 527, 547 S.E.2d 458 (N.C. App. 2001)(right to appeal order denying motion to dismiss); *McNeel v. Farm Bureau General Ins. Co. of Michigan*, 289 Mich. App. 76, 795 N.W.2d 205 (Mich. App. 2010)(right to appeal trial court's denial of summary judgment motion); *Cherokee Ins. Co. v. Babin*, 37 So. 3d 45 (Miss. 2010)(right to appeal judgment on coverage issue).
92. *See, e.g., People ex rel. Schacht v. Main Ins. Co.*, 114 Ill. App. 3d 334, 340, 448 N.E.2d 950 (Ill. 1 Dist. 1983); *Twyman v. Smith*, 119 Fla. 365, 373, 161 So. 427 (Fla. 1935).
93. *See, e.g., Genovese v. Provident Life and Accident Ins. Co.*, — So. 3d —, 2011 WL 903988 (Fla. 2011)(finding that the protection against disclosure of legal advice is inviolate in both contractual and extra-contractual litigation unless the privilege is waived or placed at issue by the insurer).
94. *See, e.g., Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005)(holding that work product contained in the claim and related litigation file pertaining to coverage, benefits, liability, or damages is protected during the coverage claim, but becomes discoverable in a subsequent bad faith action).
95. *See, e.g., Westco, Inc. v. Scott Lewis' Gardening & Trimming, Inc.*, 26 So. 3d 620 (Fla. 4th DCA 2009) (granting writ of certiorari to protect confidential information from disclosure without due process); *American Express Travel Related Servs., Inc v. Cruz*, 761 So. 2d 1206 (Fla. 4th DCA 2000)(granting writ of certiorari to protect internal procedural manual, personnel records, and investigative report from disclosure without due process).
96. *See Allstate Fire Ins. Co. v. U.S.*, 223 Ct. Cl. 652, 1980 WL 4713 (Ct. Cl. 1980).
97. *See Langford v. Federated Guar. Mut. Ins. Co.*, 543 So. 2d 675 (Ala. 1989).
98. *See, e.g., Phoenix Aviation Managers, Inc. v. Southern Pine Helicopters, Inc.*, 91 Ark. App. 71, 208 S.W.3d 220 (Ark. App. 2005)(policy provided for surrender of title to aircraft upon payment of total loss); *Rocco Enterprises, Inc. v. Continental Cas. Co.*, 702 F. Supp. 596 (W.D. Va. 1988) (policy granted right to take all or part of the property at an agreed or appraised value).
99. *See, e.g., Rancher's Life Ins. Co. v. Banker's Fire & Marine Ins. Co. of Birmingham, Ala.*, 190 So. 2d 897 (Miss. 1966).
100. *Schonau v. GEICO General Ins. Co.*, 903 So. 2d 285 (Fla. 4th DCA 2005); *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115 (9th Cir. 2010)(applying California law).
101. For a practical guide to the successful pursuit of subrogation claims (in the context of windstorm losses), see Lee E. Branscombe, William C. Charvat & Scott Katz, *Subrogator* (p. 37, Winter 2007), published by the National Association of Subrogation Professionals. For a detailed discussion of some of the more significant obstacles to subrogation, see Richard B. Allyn & Margo S. Brownell, *The Brief*, Vol. 43, #4 (Summer 2003), published by the American Bar Association.
102. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115 (9th Cir. 2010)(applying California law). *Westport Ins. Co. v. Altertec Energy Conservation, LLC*, 82 A.D.3d 1207, 921 N.Y.S. 2d 90 (N.Y.A.D. 2d Dept. 2011).
103. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Johnson*, 18 So. 3d 1099 (Fla. 2d DCA 2009).
104. *See, e.g. Wasko v. Manella*, 269 Conn. 527, 849 A.2d 777, 781 (Conn. 2004). Note, however, that the insurance policy may limit an insurer's subrogation rights. *See, e.g., Mendez v. Allstate Property and Cas. Ins. Co.*, 231 S.W.3d 581 (Tex. App. 2007)(policy imposed conditions on insurer's right to subrogate).
105. *See, e.g., Mendez v. Allstate Property and Cas. Ins. Co.*, 231 S.W.3d 581 (Tex. App. 2007). ■

MEALEY'S LITIGATION REPORT: INSURANCE BAD FAITH

edited by Mark Rogers

The Report is produced twice monthly by



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ISSN 1526-0267