

# Is New Jersey's Unfair Claim Settlement Practices Act Obsolete?

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Most states have some version of an Unfair Claim Settlement Practices Act (UCSPA), which is intended to prohibit insurers from engaging in unfair claims settlement practices. While the UCSPA is based off a model act, there are differences from state to state. For example, New Jersey's UCSPA does not allow a private cause of action against an insurer – instead, the Commissioner of Banking and Insurance retains sole enforcement authority under the UCSPA. In comparison, Nevada's version of the UCSPA creates a private cause of action for damages incurred as a result of a statutory violation.

The question this article addresses is whether counsel representing policyholders should consider the merits of pursuing a claim under New Jersey's UCSPA, especially since a private cause of action is not permitted under the statute. Is the UCSPA obsolete from the standpoint of policyholders? This author believes the answer is “not entirely” and that coverage counsel should still consider the statute when contemplating a bad faith claim against an insurance company.

## **Violations of the UCSPA**

The UCSPA applies to all types of insurance policies except ocean marine, fidelity and surety, boiler and machinery, workers' compensation, and certain commercial property and liability policies. The UCSPA lists fifteen separate actions by an insurer that would violate the act:

- Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
- Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- Refusing to pay claims without conducting a reasonable investigation based upon all available information;
- Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
- Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
- Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;
- Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

- Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;
- Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made;
- Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
- Delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
- Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;
- Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement;
- Requiring insureds or claimants to institute or prosecute complaints regarding motor vehicle violations in the municipal court as a condition of paying private passenger automobile insurance claims.<sup>1</sup>

A difficult aspect of New Jersey's UCSPA is that the Commissioner must find that a specific violation occurred "with such frequency as to indicate a general business practice." Random or singular violations of the act by an insurer will not be prosecuted. Further, any money recovered in fines and penalties via the prosecution of these violations does not go to the wronged insureds but is deposited in the state's coffers. This gives little comfort to an insured when an insurer acts in an unfair, unjust, or fraudulent manner in responding to a valid claim.

When a violation of the UCSPA is found, the Commissioner can either file an administrative law action against the insurer or a civil action can be brought by the New Jersey Attorney General's office. However, it is unclear how many claims the Commissioner brings against insurers each year. This is because unlike other departments in New Jersey's state government, the Department of Banking and Insurance does not file yearly reports that are easily available to the public.

### **Common Law Bad Faith**

Although New Jersey's UCSPA does not permit policyholders to recover damages for an insurer's unfair claim settlement practices, policyholders can pursue common law bad faith claims. In New Jersey, a right to pursue a third party bad faith claim against an insurer for failure to properly settle a claim was created in the 1974 case of Rova Farms Resort, Inc. v. Investors Insurance Co. of America. A right to pursue a claim for bad faith refusal to pay benefits against one's own insurer was later created in the 1993 case of Pickett v. Lloyd's. As per Pickett, to demonstrate a claim for bad faith, the policyholder has the burden of showing the absence of a reasonable basis for denying benefits and the insurer's knowledge or reckless disregard of the lack of reasonable basis for denying the claim.

The UCSPA can benefit an insured in proving common law bad faith, as insureds can allege violations of the UCSPA as evidence in support of a common law bad faith claim. However, failure to allege a "general business practice" may result in these allegations being stricken from any common law bad faith complaint. So although though the UCSPA

does not directly help insureds who have been subject to unfair and unjust claim settlement practices by their insurer, coverage counsel should still consider examining the statute to determine if it can be used to bolster the evidence in a common law bad faith suit.

### **NJ Inching Toward a Statutory Right to Bad Faith**

For decades, policyholder advocates have promoted codifying bad faith claims by creating a statutory right to file a bad faith claim against an insurance company. In the beginning of 2022, the Insurance Fair Conduct Act (IFCA) was signed into law by Governor Phil Murphy, creating a statutory private right of action for an insured to file a bad faith claim against its insurer. However, while early versions of the IFCA applied to a broad variety of insurance claims, the scope of the IFCA was narrowed in the legislative process so that the law only applies to automobile insurance claims. Under the IFCA, a claimant can file a civil suit against an automobile insurer for:

- An unreasonable delay of a claim for payment of benefits under an insurance policy;
- An unreasonable denial of a claim for payment of benefits under an insurance policy; or
- Any violation of the provisions of section 4 of P.L.1947, c.379 (C.17:29B-4), also known as the New Jersey Unfair Claims Settlement Practices Act (“UCSPA”).

This exposes automobile insurance companies to liability for the long list of potential violations listed above. Hopefully, with time, the New Jersey legislature will agree to give these statutory protections to all, no matter the type of insurance.

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