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January 28, 2019

Representative Taylor Barras  
Speaker of the House of Representatives  
P.O. Box 94062  
Baton Rouge, Louisiana 70804

Senator John A. Alario, Jr.  
President of the Senate  
P.O. Box 94183  
Baton Rouge, Louisiana 70804

**RE: HOUSE CONCURRENT RESOLUTION NO. 89 OF THE 2018 REGULAR SESSION**

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits its report to the legislature relative to prescription of bad faith insurance claims.

Sincerely,

A handwritten signature in blue ink that reads "Guy Holdridge".

Guy Holdridge  
Director

cc: Representative Walt Leger, III  
Representative Raymond E. Garofalo, Jr.

email cc: David R. Poynter Legislative Research Library  
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**LOUISIANA STATE LAW INSTITUTE  
PRESCRIPTION COMMITTEE**

**REPORT TO THE LEGISLATURE  
IN RESPONSE TO HCR NO. 89 OF THE 2018 REGULAR SESSION**

**Relative to prescription of bad faith insurance claims**

Prepared for the  
Louisiana Legislature on

**January 28, 2019**

Baton Rouge, Louisiana

**LOUISIANA STATE LAW INSTITUTE  
PRESCRIPTION COMMITTEE**

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Ronald J. Scalise, Jr., Reporter  
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2018 Regular Session

HOUSE CONCURRENT RESOLUTION NO. 89

BY REPRESENTATIVES LEGER AND GAROFALO

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study the laws of prescription as they apply to violations of the duty of good faith and fair dealing to the persons insured by insurance companies, and to submit a written report of its findings and recommendations to the legislature.

WHEREAS, insurance companies owe a duty of good faith and fair dealing to the persons they insure; and

WHEREAS, many states, including Louisiana, have enacted laws to ensure such good faith and fair dealing with the insured; and

WHEREAS, it is in the best interest of the citizens of the state of Louisiana for there to exist certainty in the application of laws related to prescriptive periods for claims against insurance companies for violations of the obligation of good faith and fair dealing, and the issue of the applicable prescriptive period continues to be litigated by parties in Louisiana courts; and

WHEREAS, depending on whether a court determines the claim to be based in tort or contract may result in a court applying either a one-year or ten-year prescriptive period; and

WHEREAS, it would be beneficial to the Legislature of Louisiana to know the history of how these claims are treated, both across the nation and within Louisiana.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to study the laws of prescription and other similar laws throughout the United States as they apply to violations of the duty of good faith and fair dealing to the persons insured by insurance companies, and to submit a written

report of its findings and recommendations to the legislature no later than February 1, 2019, in order to clarify the law with respect to the applicable prescriptive period in Louisiana.

BE IT FURTHER RESOLVED that a suitable copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

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SPEAKER OF THE HOUSE OF REPRESENTATIVES

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PRESIDENT OF THE SENATE

January 28, 2019

To: Representative Taylor F. Barras  
Speaker of the House of Representatives  
P.O. Box 94062  
Baton Rouge, Louisiana 70804

Senator John A. Alario, Jr.  
President of the Senate  
P.O. Box 94183  
Baton Rouge, Louisiana 70804

During the 2018 Regular Session, a bill was introduced to enact a ten-year liberative prescriptive period on claims for breach of an insurer's duty of good faith and fair dealing in the payment and adjustment of claims. Specifically, House Bill No. 720 of the 2018 Regular Session proposed the addition of a provision to R.S. 22:1892 and 1973 stating that "[n]otwithstanding any other provision of law, an insured's action pursuant to this Section is subject to a liberative prescription of ten years. This prescription commences to run at the time of each bad faith act in violation of this Section." The bill was not reported favorably from the House Civil Law and Procedure Committee.

During the same Session, however, the legislature adopted a study resolution, House Concurrent Resolution No. 89 of the 2018 Regular Session, which asked the Law Institute to study "the laws of prescription as they apply to violations of the duty of good faith and fair dealing to persons insured by insurance companies," as well as the history of bad-faith claims and how they are treated "both across the nation and within Louisiana." The Law Institute was tasked with reporting its findings and recommendations to the legislature "no later than February 1, 2019."

In fulfillment of above request, the Law Institute's Prescription Committee conducted its own independent research and also considered submissions by various interested parties, including position papers from United Policyholders and on behalf of the American Insurance Association, the Property Casualty Insurers Association, and the National Association of Mutual Insurance Companies. The Committee also heard oral presentations and received submissions from various attorneys representing interested parties.

## **I. Background**

As a general matter, the laws regulating the insurance industry in Louisiana include a variety of specific statutes pertaining to various types of insurance coverage, such as health, life, and many others. Moreover, despite Louisiana's general aversion to punitive damages, there are no fewer than five "penalty" statutes that exist to provide "remedies to insureds whose insurance claims are improperly handled or to whom payment is unreasonably delayed."<sup>1</sup> These are so-

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<sup>1</sup> WILLIAM SHELBY MCKENZIE & H. ALSTON JOHNSON, III, INSURANCE LAW AND PRACTICE, *in* 15 LA. CIV. L. TREATISE § 11:1 (4th ed.).

called “bad faith” denials of coverage by an insurer. Two specific provisions – R.S. 22:1892(A) and 1973 – govern “the vast majority of jurisprudence” in this area<sup>2</sup> and appear to be the crux of the resolution for study. According to commentators, “[u]nder La. R.S. 22:1973 and 22:1892 all insurers issuing any type of insurance, other than those specified in Louisiana Revised Statutes, have a duty of fair dealing and good faith to insureds to ‘adjust claims fairly and promptly and to make reasonable efforts to settle claims with insureds.’”<sup>3</sup> Regrettably, these two statutes are not necessarily consistent and were not enacted at the same time.<sup>4</sup>

The first, R.S. 22:1892 dates from 1958 and has been subsequently amended about a dozen times, most recently in 2018. Although it does not specifically impose an obligation of good faith and fair dealing, R.S. 22:1892 does impose an obligation on an insurer to pay claims within a specified period of time. Paragraph (A)(3) of the statute further imposes penalties upon an insurer who fails to comply with the act. Currently, the relevant part of the statute provides as follows:

A. (1) All insurers issuing any type of contract, other than those specified in R.S. 22:1811, 1821, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest. The insurer shall notify the insurance producer of record of all such payments for property damage claims made in accordance with this Paragraph.

(2) All insurers issuing any type of contract, other than those specified in R.S. 22:1811, R.S. 22:1821, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any third party property damage claim and of any reasonable medical expenses claim due any bona fide third party claimant within thirty days after written agreement of settlement of the claim from any third party claimant.

(3) Except in the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses within fourteen days after notification of loss by the claimant. . . . Failure to comply with the provisions of this Paragraph shall subject the insurer to the penalties provided in R.S. 22:1973.

(4) All insurers shall make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim. (emphasis added).

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The second statute at issue, R.S. 22:1973, was enacted by Act No. 38 of the 1990 Regular Session. Unlike R.S. 22:1892, R.S. 22:1973 does impose an explicit obligation of “duty of good

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<sup>2</sup> *Id.*

<sup>3</sup> JAMES S. HOLLIDAY, JR. ET AL., LA. PRAC. CONSTR. LAW § 16:7.

<sup>4</sup> MCKENZIE & JOHNSTON, *supra* note 1, at § 11:1.

faith and fair dealing” on the insurer in favor of the insured. Specifically, R.S. 22:1973 states as follows:

A. An insurer, including but not limited to a foreign line and surplus line insurer, owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A of this Section:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.

(2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.

(3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.

(4) Misleading a claimant as to the applicable prescriptive period.

(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.

(6) Failing to pay claims pursuant to R.S. 22:1893 when such failure is arbitrary, capricious, or without probable cause. (emphasis added).

\* \* \*

Neither statute contains a specific prescriptive period. Consequently, courts have been called upon to determine the applicable prescriptive period for a cause of action for the bad faith of an insurer.

To ascertain the appropriate prescriptive period for a cause of action in general, the Louisiana Supreme Court has instructed that the “nature” of the cause of action or obligation must be evaluated. Specifically, in *Dean v. Hercules, Incorporated*<sup>5</sup> the Louisiana Supreme Court evaluated the relevant prescriptive period applicable to an action for damages under Civil Code Article 667 regarding obligations of vicinage (neighborhood). In concluding that the action was analogous to a tort and subject to a one-year prescriptive period, the Court noted that it is the “[t]he

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<sup>5</sup> *Dean v. Hercules, Inc.*, 328 So. 2d 69 (La. 1976).



nature of the obligation breached [that] determines the applicable prescriptive period.”<sup>6</sup> The Court reaffirmed its assessment in *State v. City of Pineville* in noting that “[t]he nature of a cause of action must be determined before it can be decided which prescriptive term is applicable.”<sup>7</sup> According to the Court, the nature of an action in ascertaining prescription is either contractual, quasi-contractual, delictual, or quasi-delictual.<sup>8</sup> Consequently, in determining the appropriate prescriptive period for a bad-faith breach of an insurance contract, the nature of the underlying obligation must first be determined.

## II. Louisiana Jurisprudence

Unfortunately, Louisiana jurisprudence is not consistent in its treatment of claims for violation of the duty of good faith and fair dealing in the insurance context. Commentators have noted that “Louisiana courts in disposition of claims against an insurer by an insured for refusal to settle have rarely discussed the nature of the duty imposed on the insurer by his contract.”<sup>9</sup> Some courts have found acts of bad faith to be delictual in nature and therefore subject to a one-year prescriptive period.<sup>10</sup> Other courts have found the duty of good faith on the part of the insurer to be implicit or implied by the insurance contract itself and thus characterized an action for breach of the obligation to be contractual and subject to a ten-year liberative prescriptive period.<sup>11</sup>

Although the Louisiana Supreme Court has never directly decided this issue, one can find statements in *dicta* supporting either position. On the one hand, the Louisiana Supreme Court has stated “that the duties of an insurer under La. R.S. 22:1220 are separate and distinct from its duties under the insurance contract,”<sup>12</sup> seemingly lending support to finding the duty of good faith to be an extra-contractual one. Specifically, in *Wegener v. Lafayette Ins. Co.*, the Court, in deciding whether an insured’s claim for mental distress is limited by provisions of the Civil Code, concluded that the plaintiffs’ claims for mental distress did “not arise from a breach of their insurance contract with [their insurer].”<sup>13</sup> Instead, the claim was based upon an “alleged violation of its statutory duty under La. R.S. 22:1220.”<sup>14</sup> The statute “sets forth certain prohibited acts, which when knowingly committed by an insurer, constitutes a breach of this duty.”<sup>15</sup> The damages associated with a breach of the statute are “directed at misconduct outside of the scope of an ordinary breach of contract.”<sup>16</sup>

Similarly, in *Durio v. Horace Mann Ins. Co.*, the Court examined whether the penalty provision in R.S. 22:1220, which allows an insured to recover for the bad faith actions of the insurer an amount “not to exceed two times the damages sustained,” included consideration of the

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<sup>6</sup> 328 So. 2d at 70.

<sup>7</sup> *State v. City of Pineville*, 403 So. 2d 49 (La. 1981).

<sup>8</sup> *Dean*, 328 So. 2d at 72.

<sup>9</sup> Katherine L. Shaw, Comment, *Duty of Insurer to Settle*, 30 LA. L REV. 622, 630 (1969).

<sup>10</sup> “Delictual actions are subject to a liberative prescription of one year.” LA. CIV. CODE art. 3492.

<sup>11</sup> “Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years.” LA. CIV. CODE art. 3499.

<sup>12</sup> See *Wegener v. Lafayette Ins. Co.*, 60 So. 3d 1220, 1229 (La. 2011).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

damages due for breach of the insurance contract or solely the damages due to the insurer's wrongful conduct. In concluding the damages due to breach of the insurance contract were excluded from the term "damages sustained," the Court noted that "[t]he duties of an insurer under La. R.S. 22:1220 are separate and distinct from its duties under the insurance contract.... Thus, a claim against an insurer for breach of the insurance contract and a claim against an insurer for breach of its duty of good faith and fair dealing under La. R.S. 22:1220 are two separate causes of action."<sup>17</sup>

On the other hand, the Louisiana Supreme Court has also characterized the "duty of good faith and fair dealing" in the insurance context as an outgrowth of the contractual relationship between the insurer and the insured,<sup>18</sup> seemingly lending support to finding the duty of good faith to be a contractual one. In *Theriot v. Midland Risk Insurance Company*, the Court was called upon to evaluate the extent to which an insurer owes a duty of good faith to a third-party claimant rather than its insured. Specifically, an injured plaintiff involved in a multi-car collision sued the insurers of the other drivers claiming, among other things, penalties under the statute for breach of the obligation of good faith. In concluding that an insurer's liability for penalties to third parties is limited to specifically enumerated conduct in Subsection B of R.S. 22:1220, the Court noted that insurers do not owe "a broad duty to third-party claimants to make a reasonable effort to settle all claims."<sup>19</sup> Rather, "[t]he first sentence of Subsection A of [R.S. 22:1973] recognizes the jurisprudentially established duty of good faith and fair dealing owed to the insured, which is an outgrowth of the contractual and fiduciary relationship between the insured and insurer."<sup>20</sup>

Commentators appear similarly divided in their views as to whether a claim for bad faith against an insurer is subject to a one- or ten-year prescriptive period. Shelby McKenzie and Alston Johnson in their insurance treatise seem to endorse the ten-year limit. They state simply that "[u]nless otherwise provided by statute, claims under the penalty statutes prescribe in ten years."<sup>21</sup> Other commentators differ and conclude that a one-year period applies. One author writes, "I do not know of any cases holding that 'bad faith' cases are breach of contract cases and therefore subject to a 10 year prescriptive period. I treat all potential 'bad faith' cases as tort cases and file suit within one year of the date of the allegedly wrongful conduct."<sup>22</sup>

The jurisprudence from the state appellate courts and from the federal courts, some of which is evaluated below, is no more decisive. While many cases addressing the appropriate prescriptive period for bad-faith claims tend to be federal district court cases, some state appellate court cases have considered the issue as well. Regrettably, few cases on either side have thoroughly analyzed the issue, with most courts merely stating a prescriptive period and citing or quoting an earlier case concluding the same.

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<sup>17</sup> *Durio v. Horace Mann Ins. Co.*, 74 So. 3d 1159, 1170 (La. 2011).

<sup>18</sup> See, e.g., *Theriot v. Midland Risk Ins. Co.*, 694 So. 2d 184, 187 (La. 1997); *Kelly v. State Farm Fire & Cas. Co.*, 169 So. 3d 328 (La. 2015) (quoting *Theriot*).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> WILLIAM SHELBY MCKENZIE & H. ALSTON JOHNSON, III, *INSURANCE LAW & PRACTICE* §11:25, 15 LA. CIV. L. TREATISE (4<sup>th</sup> ed.).

<sup>22</sup> Lindsey J. Leavoy, *Bad Faith Law and the Origin of the Set-Up: Problematic First-Party Loss Claims*, in NATIONAL BUSINESS INSTITUTE, *INSURANCE BAD FAITH "SET-UP" IN LOUISIANA* 23 (2016).

### A. One-Year Prescriptive Period

One of the earliest cases holding that a one-year prescriptive period applies to claims for bad faith breach by an insurer is *Zidan v. USAA Property & Casualty Insurance Company*, from the Louisiana Court of Appeal for the First Circuit. There, the court considered a case by a passenger involved in a vehicle collision who had sued various insurers. Without much analysis, the court dismissed the suit because the suit was filed one year and one day from the date of the injury, and “[d]elictual actions are subject to a one year liberative prescription which commences to run from the day of injury.”<sup>23</sup>

One of the earlier federal cases to address the issue is *Brown v. Protective Life Insurance Company*, where the court evaluated a claim by the plaintiffs that vehicle dealers had defrauded the plaintiffs by requiring them to pay “inflated premiums for ordinary life insurance that was misdescribed as credit life insurance and sold at prices far exceeding those in the competitive market.”<sup>24</sup> Simply citing *Zidan*, the court noted that the claim had prescribed, as “Section 22:1220 is subject to a one year liberative prescription.”<sup>25</sup>

Similarly, in *Rodriguez v. Travelers Insurance Company*, the plaintiffs sued his insurer for an alleged “arbitrary and capricious refusal to pay” the costs of roof repair to his property resulting from hail damage.<sup>26</sup> In dismissing the plaintiffs’ claim, the court noted that the “[p]laintiffs’ claim for breach of a duty imposed by La. R.S. 22:1220 is a tort claim subject to a one year liberative prescriptive period which commences on the date of the injury.”<sup>27</sup> Because the plaintiffs’ claim was filed outside that period, it had prescribed.

Most of the federal cases finding a one-year prescriptive period to apply merely cite either *Zidan* or *Brown* without conducting an independent analysis of the issue. For example, in *Lundy Enterprises, L.L.C. v. Wausau Underwriters Insurance Company*, the owners of various Pizza Hut stores accused their insurers of a bad-faith denial of coverage as a result of flooding damage sustained by Hurricane Katrina.<sup>28</sup> In concluding the claim had not prescribed, the court, citing *Brown* and *Zidan*, noted that “Louisiana Revised Statute § 22:1220 is subject to Louisiana’s one-year prescriptive period applicable to torts.”<sup>29</sup>

Similarly, in *Marketfare Annunciation, LLC v. United Fire & Casualty Company*, a federal district court evaluated a claim by the plaintiffs for alleged conspiracy between various insurers and adjustors for “refus[ing] or delay[ing] insurance payments in violation of either an insurance contract or the Louisiana Insurance Code.”<sup>30</sup> In dismissing the plaintiffs’ claims, the court noted

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<sup>23</sup> *Zidan v. USAA Prop. & Cas. Ins. Co.*, 622 So. 2d 265 (La. App. 1 Cir. 1993). Although the plaintiff invoked *contra non valentem* because the insurer allegedly misrepresented or concealed the fact that coverage existed the driver’s vehicle – a violation of the obligations imposed on the insurer under R.S. 22:1220 – the court found the doctrine to be inapplicable. *Id.*

<sup>24</sup> *Brown v. Protective Life Ins. Co.*, 353 F. Supp. 2d 739, 743 (E.D. La. 2004).

<sup>25</sup> *Id.*

<sup>26</sup> *Rodriguez v. Travelers Ins. Co.*, 2002 WL 31409452 (E.D. La. 2002).

<sup>27</sup> *Id.*

<sup>28</sup> *Lundy Enterprises, L.L.C. v. Wausau Underwriters, Ins. Co.*, 2009 WL 5217412 (E.D. La. 2009).

<sup>29</sup> *Id.*

<sup>30</sup> *Marketfare Annunciation, LLC v. United Fire & Cas. Co.*, 2007 WL 837202 (E.D. La. 2007).

that the plaintiffs' claims implicated, among other things, R.S. 22:1220 and concluded that "[t]he Court has no reason to dispute that a violation of the Insurance Code sounds in tort."<sup>31</sup>

In addition, in *Ross v. Hanover Insurance Company*, an insurer denied coverage to a property owner after Hurricane Gustav based upon alleged pre-existing damage to the structure from Hurricane Katrina.<sup>32</sup> After the death of the insured, his succession administratrix filed suit and then amended the complaint to assert that the same insurer had engaged in an "arbitrary and capricious refusal to properly compensate" the property owner after Hurricane Katrina.<sup>33</sup> Although the court allowed the amendment to the complaint, it noted that "[c]laims under La.Rev.Stat. 22:1973 are delictual in nature and are subject to a liberative prescription of one year."<sup>34</sup>

Perhaps the most thorough analysis comes from the recent Louisiana Court of Appeal for the Fourth Circuit case, *Johno v. Doe*.<sup>35</sup> There, the court examined a contractual assignment from an insured to a third party conferring upon the third-party assignee the right to bring the insured's claim for bad faith failure to settle against its insurer. Although the holding of the court was not unanimous, the majority concluded that the assignment did not transfer such a right because the assignment transferred only some of the assignor's "contractual" rights. According to the court, "[i]t is settled that a bad-faith failure-to-settle claim arises *not* from the contract of insurance itself but rather from an insurer's violation of its statutory duties under La. R.S. 22:1973."<sup>36</sup>

Despite the terseness of the courts' analyses of the issue of bad faith, argument can be made in favor of the delictual nature of bad faith and a corresponding one-year prescriptive period. Namely, the source of the obligation of "good faith and fair dealing" in an insurance context and the claims by an insured for breach of the duty arise by virtue of a statutory grant, as opposed to a contractual provision. Some courts have noted that the claim for bad faith is not a "breach of an obligation imposed by contract, but instead ... the breach of a separate duty implied by law or imposed by statute."<sup>37</sup> Moreover, the penalties provided for a bad-faith denial of coverage are punitive and do not exist in the insurance contract between the parties. In fact, punitive damages generally do not exist in the realm of contract law at all. Exceptionally, punitive damages are awarded in Louisiana in tort cases when provided by statute, such as instances of "wanton and reckless" acts of criminal sexual abuse or domestic violence.<sup>38</sup> Here, the insurance statutes explicitly provide for punitive damages.

Furthermore, the duty of "good faith" is arguably a general one that pervades the law and is applicable not merely between an insurer and the insured, but a duty owed by all persons to all persons. Delictual principles recognize the duty in the general statement of tort liability contained in Civil Code Article 2315 – "[e]very act whatever of man that causes damage to another obliges

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<sup>31</sup> *Id.*

<sup>32</sup> *Ross v. Hanover Ins. Co.*, 2009 WL 2762713 (E.D. La. 2009).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Johno v Doe*, 187 So. 3d 581 (La. App. 4 Cir. 2016).

<sup>36</sup> *Id.*

<sup>37</sup> *White v. State Farm Mutual Automobile Ins. Co.*, 479 Fed. Appx. 556, 561 (5th Cir. 2012) (discussing the district court's ruling).

<sup>38</sup> LA. CIV. CODE arts. 2315.7 & 2315.8.

him by whose fault it happened to repair it.”<sup>39</sup> Although various insurance statutes do specifically recognize the availability of punitive damages, these statutes do not limit those claims to disputes between insurers and insureds. While R.S. 22:1973(A) is limited to insureds and does not extend to third-party claimants, third parties may assert claims for bad-faith penalties under the statute for specific conduct delineated in Subsection B.<sup>40</sup> Specifically, third-party claimants may sue an insurer for misrepresenting pertinent facts relating to coverage, for failing to pay a settlement within thirty days after an agreement is reduced to writing, and for misleading a claimant about the prescriptive period.<sup>41</sup>

Finally, even though “bad faith” has not specifically been recognized as a tort in Louisiana law, Louisiana courts have recognized that fraud or fraudulent misrepresentations may constitute a delictual cause of action under Civil Code Article 2315.<sup>42</sup> Specifically, “[t]o succeed in a claim for intentional/fraudulent misrepresentations, the petition must contain allegations of: ‘(1) a misrepresentation of material fact, (2) made with the intent to deceive, (3) causing justifiable reliance with resulting injury.’”<sup>43</sup> Although the prescriptive period on tort claims generally “commences to run from the date injury or damage is sustained,” for a fraud claim accrual of prescription does not occur until “one year from the date plaintiff knew or reasonably should have known of a defendant's fraudulent act.”<sup>44</sup>

## B. Ten-Year Prescriptive Period

Argument can also be made and cases can also be found to support the contractual nature of good faith and thus a ten-year prescriptive period. A criterion often invoked by courts in ascertaining whether a cause of action is contractual or delictual is whether the duty “is general because it is owed by everyone to all other persons, or to society at large” or whether the duty “is particular because it is owed by one person just to one other, or others, with whom he is bound by a contract.”<sup>45</sup> The duty of the insurer to perform his obligations under the law is not a duty owed in general by everyone to all other persons, but a special duty owed by virtue of a contractual relationship between an insurer and the insured.

Although the specific instances and consequences of an insurer’s bad faith are provided by statutory provisions rather than by contract, the underlying source of the liability and damages is the insurance contract and the special relationship between an insurer and its insured. Parties to any contract, not solely an insurance one, are governed by the obligation of good faith. After all,

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<sup>39</sup> *Id.* art. 2315.

<sup>40</sup> *Theriot v. Midland Risk Ins. Co.*, 694 So. 2d 184, 187 (La. 1997); *Kelly v. State Farm Fire & Cas. Co.*, 169 So. 3d 328 (La. 2015); *Starr v. Brou*, 8 So. 3d 674 (La. App. 5 Cir. 2009). In addition, an insured may assign his bad-faith claim to a third party. *Kelly v. State Farm Fire & Cas. Co.*, 169 So. 3d 328 (La. 2015); *Starr v. Brou*, 8 So. 3d 674 (La. App. 5 Cir. 2009); *Smith v. Audobon Ins. Co.*, 679 So. 2d 372 (La. 1996); *Gourley v. Prudential Prop. & Cas. Co.*, 734 So. 2d 940 (La. App. 1 Cir. 1999).

<sup>41</sup> R.S. 22:1973(B)(1), (2), and (4). Jurisprudence has concluded that other causes of action under R.S. 22:1973(B), such as Paragraphs (B)(3) and (5) are inapplicable. *See, e.g., Toerner v. Henry*, 812 So. 2d 755 (La. App. 1 Cir. 2002); *Venible v. First Financial Ins. Co.*, 718 So. 2d 586 (La. App. 4 Cir. 1998).

<sup>42</sup> *See generally* FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *LOUISIANA TORT LAW* § 2.07 (2d ed. 2017).

<sup>43</sup> *Sys. Eng'g & Sec., Inc. v. Sci. & Eng'g Ass'ns*, 962 So. 2d 1089 (La. App. 4 Cir. 2007).

<sup>44</sup> *AGEM Management Serv. LLC v. First Tenn. Bank Nat. Ass'n*, 942 F.Supp.2d 611 (E.D. La. 2013).

<sup>45</sup> SAÚL LITVINOFF, *THE LAW OF OBLIGATIONS*, §16.17, *in* 6 LA. CIV. L. TREATISE (1999)

the Civil Code commands that “[c]ontracts must be performed in good faith.”<sup>46</sup> Moreover, a bad-faith breach by a party to any contract makes the breaching party liable for damages in excess of those ordinarily recoverable. Under general contract law, “[a]n obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.”<sup>47</sup> Similarly, when an obligor, through his failure to perform, intends “to aggrieve the feelings of the obligee,” he may be liable under the Civil Code for nonpecuniary damages.<sup>48</sup> Although these liabilities exist by virtue of legislation and irrespective of the inclusion *vel non* in the provisions of a contract, they are contractual claims, nonetheless, and thus subject to a ten-year prescriptive period.

Moreover, it is clear that in the contractual realm, parties are bound not only by the explicit terms of their agreements but also by “whatever the law, equity, or usage regards as implied in a contract of that kind.”<sup>49</sup> In addition, “[g]ood faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.”<sup>50</sup> In other words, the statutory provisions of the insurance law are incorporated into the contract of the parties, and violations of those provisions can equally be seen as contractual ones without employing the fiction of tort liability superimposed upon the parties. In short, “[g]ood faith is the mere extension of the binding force of a contract....”<sup>51</sup>

Although the above argument is not usually fleshed out in detail by the courts, some courts do appear to adopt it, even if in a conclusory manner. For instance, in *White v. State Farm Mutual Automobile Insurance Company*,<sup>52</sup> the United States Court of Appeals for the Fifth Circuit characterized a bad faith breach of contract as a contractual claim subject to a ten-year liberative prescription. In *White*, an African-American insurance agent’s contract was not renewed by the insurance company. The agent sued claiming racial discrimination and breach of contract. The insurance company alleged that the plaintiff’s claims had prescribed under the one-year prescriptive period provided in the Louisiana Employment Discrimination Law. Although the district court held that the plaintiff’s claims had prescribed, the United States Court of Appeals for the Fifth Circuit reversed the holding that the bad faith claim had prescribed. The Court noted that although the duty of good faith arises by virtue of law rather than the contract exclusively, “that is true of all Louisiana-law contractual obligations.”<sup>53</sup> In short, the Court stated, “[w]e believe that the Louisiana Supreme Court would regard claims alleging breach of a contractual duty in bad faith as a species of breach-of-contract claim rather than one sounding in tort.”<sup>54</sup>

Similarly, in *Prudhomme v. Geico Insurance Company*,<sup>55</sup> a federal district court evaluated a claim by an insured against his insurer for allegedly intentionally undervaluing the loss associated with a collision involving the insured’s vehicle. The plaintiff brought a claim for an

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<sup>46</sup> LA. CIV. CODE art. 1983.

<sup>47</sup> *Id.* art. 1997.

<sup>48</sup> *Id.* art. 1998.

<sup>49</sup> *Id.* art. 2054.

<sup>50</sup> *Id.* art. 1759.

<sup>51</sup> ALAIN LEVASSEUR, LOUISIANA LAW OF CONVENTIONAL OBLIGATIONS: A PRÉCIS 86 (2010).

<sup>52</sup> *White v. State Farm Mutual Automobile Ins. Co.*, 479 Fed. Appx. 556 (5th Cir. 2012).

<sup>53</sup> 479 Fed. Appx. at 561.

<sup>54</sup> *Id.*

<sup>55</sup> *Prudhomme v. Geico Ins. Co.*, 2015 WL 2345420 (W.D. La. 2015)(unreported).

alleged “arbitrary, capricious and/or intentionally fraudulent” refusal to pay under R.S. 22:1973. In noting that R.S. 22:1973 “does not include a provision establishing a prescriptive period for asserting bad faith claims arising under that statute,” the court determined the proper prescriptive period by investigating the nature of the underlying cause of action.<sup>56</sup> The court reasoned that the case before it “involve[d] a claim by an insured against its insurer and is therefore a contract claim ... subject to a liberative prescription of ten years.”<sup>57</sup>

Furthermore, in *Aspen Specialty Insurance Company v. Technical Industries Incorporated*, yet another federal district court examined the issue of the relevant prescriptive period for bad faith insurance claims.<sup>58</sup> Although the facts in the case are not disclosed, the court reasoned that the relevant prescriptive period was ten years rather than one. In doing so, the court assessed the nature of the underlying cause of action and noted that although “[i]t is logical that the claim by a third-party to an insurance contract against an insurer would be classified as a tort and subject to the one-year prescriptive period for delictual actions, ... it is not logical that a first-party claim ... would be classified as a delictual claim.”<sup>59</sup> Rather, the court reasoned that a first-party claim “arises out of the relationship created by the insurance contract” and, consequently, is either “contractual or quasi-contractual in nature.”<sup>60</sup>

Louisiana appellate courts from the First and Second Circuits have also concluded that the ten-year contractual prescription applies to a bad-faith claim by an insured against his insurer, but the analysis has often been sparse. For instance, in *Cantrelle Fence and Supply Company v. Allstate Insurance Company*, the court evaluated a claim by an insured against his insurer for penalties and attorney fees related to the insured’s uninsured motorist coverage policy in connection with a collision.<sup>61</sup> Although the court noted that the penalty provision in the statute is “separate from the provisions in the motor vehicle insurance” policy, it concluded the ten-year default prescription in Civil Code Article 3499 applies, as it could find “no other prescriptive period specifically established” for the action.<sup>62</sup> Similarly, in *Keith v. Comco Insurance Company*,<sup>63</sup> the Louisiana Court of Appeal for the Second Circuit considered a claim by a driver who collided with the horses of a resident in Ouachita Parish. The horse owner was found liable, and the driver obtained a judgment against both the owner of the horses and his insurer. In finding the insurer liable for bad faith refusal to settle, the court noted that “[a]n action against an insurer for failure to defend a claim or settle within the policy limits is in contract.... It therefore prescribes in 10 years.”<sup>64</sup> Finally, in *We Sell Used Cars, Inc. v. United National Insurance Company*,<sup>65</sup> the Second Circuit evaluated a claim by an insured against his automobile insurer for penalties and attorney fees due to an alleged “arbitrary and capricious refusal to pay” a claim for property damage.<sup>66</sup> The insurer filed a peremptory exception of prescription, arguing that the

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 5.

<sup>58</sup> *Aspen Specialty Ins. Co. v. Technical Indus. Inc.*, 2015 WL 339598 (W.D. La. 2015).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Cantrelle Fence and Supply Co. v. Allstate Ins. Co.*, 550 So. 2d 1306 (La. App. 1 Cir. 1989).

<sup>62</sup> *Id.*

<sup>63</sup> *Keith v. Comco Ins. Co.*, 574 So. 2d 1270 (La. App. 2 Cir. 1991).

<sup>64</sup> *Id.*

<sup>65</sup> *We Sell Used Cars, Inc. v. United National Ins. Co.*, 715 So. 2d 656 (La. App. 2 Cir. 1998).

<sup>66</sup> *Id.*

claim was delictual in nature, subject to a one-year prescription, and therefore prescribed. Although the trial court granted the exception, the court of appeal reversed, concluding that the nature of the claim was contractual, subject to a ten-year prescriptive period, and therefore timely.<sup>67</sup>

### III. Good Faith and Fair Dealing Regarding Insureds in Other States

Although the existence of a claim by an insured against his insurer for bad faith exists throughout much of the nation, there are both a variety of approaches and a variety of prescriptive periods among the states. Like the Louisiana courts, national commentators have also noted the importance in characterizing the action for purposes of prescription: “Statutes of limitations typically distinguish in the first instance between tort and contract causes of action. Thus, to determine what statute of limitations applies to a cause of action for bad faith one must normally decide whether the plaintiff’s cause of action sounds in contract or tort and then choose among the applicable contract or tort limitations periods.”<sup>68</sup>

Starting in the 1950s, some courts began to recognize a common law tort for bad faith breach of an insurance contract.<sup>69</sup> Other courts, however, “read into contracts a covenant of good faith and fair dealing, ruling that one party to a contract may not unreasonably deny the benefit of the bargain to the other party.”<sup>70</sup> The latter approach found some support in the recognition of influential Restatements and Uniform Acts, stating that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”<sup>71</sup>

Although some commentators have suggested that a tort-based rationale for a bad-faith insurance claim is the dominant approach in the United States,<sup>72</sup> the Appendix suggests the picture is more nuanced and that states appear split between those that treat bad faith in the insurance context as a tort and those that view it as part of a contractual duty. In noting that some states have either judicially or by statute created a tort of bad-faith breach in the insurance context, the late Professor Litvinoff observed that “[t]he attempt did not succeed, however, to elevate the duty of good faith and fair dealing in the performance of a contract to the kind of general legal duty the violation of which constitutes a tort.”<sup>73</sup> Irrespective of the exact number of states that originally classified bad faith as a tort or an implied contractual obligation, many states now explicitly provide the cause of action and the prescriptive period by statute. Perhaps more importantly, there appears to be no uniformity on the relevant prescriptive period for bringing a bad faith claim by an insured against his insurer.

House Concurrent Resolution No. 89 of the 2018 Regular Session asks the Law Institute to consider the law “across the nation” in making its recommendation. As is obvious from the

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<sup>67</sup> *Id.*

<sup>68</sup> STEPHEN S. ASHLEY, *BAD FAITH ACTIONS: LIABILITY & DAMAGES* § 7.2 (2d ed.).

<sup>69</sup> Richard B. Graves, III, Comment, *Bad-Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination of Punitive Damages and Vicarious Liability*, 65 TUL. L. REV. 395, 397 (1990).

<sup>70</sup> *Id.*

<sup>71</sup> RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); *see also* U.C.C. § 1-203 (“Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”).

<sup>72</sup> ASHLEY, *supra* note 68, § 2.15.

<sup>73</sup> SAÚL LITVINOFF, *THE LAW OF OBLIGATIONS*, §16.12, *in* 6 LA. CIV. L. TREATISE (1999).



Table in the Appendix, both a one-year and a ten-year prescriptive period would be outliers from a national perspective. In addition, some have argued that a ten-year prescriptive period would greatly affect the insurance market and perhaps the availability of insurance in Louisiana, as insurers would negatively respond to a ten-year statute of limitations, which would be a longer prescriptive period than is allowed in the vast majority of states. Insurance companies would face increased exposure and pressure to restrict or eliminate coverage in Louisiana. Others, however, contend that a longer prescriptive period would protect policy holders and only be detrimental for bad-acting insurers. They contend that if a one-year prescriptive period were adopted, businesses and policy holders would be forced to file protective suits alleging bad faith after every denial of coverage, as an insured may not know of bad faith by the insurer until after the original denial. If an insured were required to bring a claim for bad faith at the time of denial of coverage, then an action could prescribe before the insured even knew of his claim. Protective suits would be the only effective means to prevent accrual of prescription, which would result in unnecessary expenses and increased congestion in courts.

Among the states, two, three, and four years are all quite common time limits, with some states extending the time to sue for five, six, or more years. What is clear is that very few states adopt either a one-year or a ten-year period. As noted above, one year is one of the shortest prescriptive periods in the country (other than Tennessee and West Virginia) but ten years would be one of the longest (other than Missouri and Puerto Rico). A rough estimate<sup>74</sup> as to the national average is 4.06 years.

#### **RECOMMENDATION:**

In light of the above competing arguments and divergent court interpretations, the Law Institute recommends that the legislature adopt an explicit statutory prescriptive period to bring certainty to this issue and uniformity in its application. In the Institute's view, the prescriptive period need not be either one or ten years, as such would be at odds with the analogous time periods in many other states. Moreover, a newly created prescriptive period that is neither one nor ten years would clearly signal that whatever the relevant prescriptive period previously was, the legislature has endorsed a fresh start in this area.

The Law Institute, however, does not have a particular prescriptive period to recommend, as it believes the choice of a specific prescriptive period on this issue to be a policy question, appropriately resolved by the legislature after considering the interests of the various stakeholders. It is hoped that the above report and comparative research will provide some basis for choosing a relevant prescriptive period. A recommended provision, without a recommended time period, is below:

*An action by an insured against an insurer for breach of the duty of good faith and fair dealing is subject to a liberative prescriptive period of \_\_\_\_\_, which commences to run from the day of breach.*

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<sup>74</sup> This estimate was obtained by averaging the 52 prescriptive periods in the Appendix. In cases in which there is lack of clarity or the potential for multiple prescriptive periods to apply, the average of those numbers was used.

**Appendix<sup>75</sup>**

	<b>State</b>	<b>Basis of Claim</b>	<b>Nature of Claim</b>	<b>Statute of Limitations<sup>76</sup></b>
1.	Alabama	Statute and judicial decisions	Tort	2 years
2.	Alaska	Common law	Tort	2 years
3.	Arizona	Common law	Tort	2 years
4.	Arkansas	Statute and judicial decisions	Tort/Contract	2 years statute; 3 years jurisprudence
5.	California	Common law	Tort	2 years
6.	Colorado	Statute and judicial decisions	Tort	2 years
7.	Connecticut	Statute and judicial decisions	Tort/Contract	3 years
8.	Delaware	Common law	Contract	3 years
9.	DC	Common law	Tort/Contract	3 years
10.	Florida	Statute	Unclear	4 years
11.	Georgia	Statute and judicial decisions	Tort/Contract	6 years
12.	Hawaii	Common law	Tort	2 years
13.	Idaho	Common law	Tort/Contract	Unclear; 5 years for contract claims, but 2 years for implied warranty claims
14.	Illinois	Statute and judicial decisions	Contract	5 years
15.	Indiana	Common law	Tort	2 years
16.	Iowa	Common law	Unclear	5 years
17.	Kansas	Statute and judicial decisions	Contract	5 years
18.	Kentucky	Statute and judicial decisions	Unclear	Unclear, but likely 5 years
19.	Louisiana	Statute	Unclear; split authority on tort or contractual	Unclear; 1 year if tort; 10 years if contract

<sup>75</sup> The information in this chart was taken from DRI INSURANCE BAD FAITH: A COMPENDIUM OF STATE LAW (2015) and includes an overview of all 50 states, as well as the District of Columbia and Puerto Rico.

<sup>76</sup> This periods of time are general default provisions in the context of bad faith denial of coverage. Some states, e.g., Texas, allow parties to contractually modify the statute of limitations.

20.	Maine	Statute and judicial decisions	Contract	6 years
21.	Maryland	Statute	Tort	3 years
22.	Massachusetts	Statute and judicial decisions	Contract	4 years
23.	Michigan	Common law	Contract	6 years
24.	Minnesota	Statute and judicial decisions	Contract	6 years
25.	Mississippi	Common law	Tort	3 years
26.	Missouri	Statute	Tort	Unclear, but likely 10, 5, or 3 years
27.	Montana	Statute and judicial decisions	Unclear	2 years statutory; 3 years common law
28.	Nebraska	Common law	Unclear; split authority on tort or contractual	4 years for tort; 5 years for contract
29.	Nevada	Statute and judicial decisions	Contract	6 years
30.	New Hampshire	Statute and judicial decisions	Contract	3 years
31.	New Jersey	Common law	Contract	Unclear, but likely 6 years
32.	New Mexico	Statute and judicial decisions	Unclear	4 years; 6 years
33.	New York	Common law	Contract	6 years
34.	North Carolina	Statute and judicial decisions	Tort/Contract	3 years
35.	North Dakota	Common law	Tort	6 years
36.	Ohio	Common law	Tort	4 years
37.	Oklahoma	Common law	Tort	2 years
38.	Oregon	Common law	Contract	6 years
39.	Pennsylvania	Statute	Unclear	2 years
40.	Rhode Island	Statute and judicial decisions	Unclear	Unclear; maybe 10 years if contractual, or 3 years if tortious
41.	South Carolina	Common law	Tort/Contract	3 years
42.	South Dakota	Common law	Tort/Contract	Unclear, but likely 6 year contractual period

43.	Tennessee	Statute and judicial decisions	Tort	1 year
44.	Texas	Statute and judicial decisions	Contract	4 years
45.	Utah	Common law	Contract	3 years
46.	Vermont	Common law	Contract	3 years; 6 years
47.	Virginia	Common law	Contract	2 years; 5 years
48.	Washington	Statute and judicial decisions	Tort	3 years
49.	West Virginia	Statute and judicial decisions	Unclear	1 year
50.	Wisconsin	Common law	Tort	2 years
51.	Wyoming	Common law	Tort/Contract	4 years
52.	Puerto Rico	Federal court decisions	Contract	15 years