CAN INDIVIDUAL CLAIMANTS RUN TO THE REGULATORY AGENCY TO RECOVER POLICY BENEFITS INSTEAD OF TO COURT?

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CAN INDIVIDUAL CLAIMANTS RUN TO THE REGULATORY AGENCY TO RECOVER POLICY BENEFITS INSTEAD OF TO COURT?

I. Introduction.

As part of the extensive regimen of state insurance regulation, commissioners throughout the country have broad powers to investigate and punish insurers for violations of the insurance codes and regulations of their states.

This system of regulation includes provisions aimed at protecting the public from a variety of improper or unfair practices in the processing and payment of claims for benefits under individual or group policies. Although various states have "improved" or otherwise altered it, the NAIC Model Unfair Claims Settlement Practices Act has been quite influential in the development of state statutes dealing with this subject.[1] The enforcement provisions of the Model Act and the state Acts based upon it give commissioners the power to issue cease and desist or restraining orders, penalties, and, in extreme cases, to order suspension or revocation of an insurer's license to issue policies in the state, especially upon a finding that an insurer has committed violations with flagrancy or such frequency as to indicate a general business practice to engage in that type of conduct.

In a large number of the states, the enforcement of Unfair Claims Settlement Practices Acts and associated regulations is relegated solely to the insurance commissioner, and individual claimants have no private right of action in court to enforce those statutes. In many jurisdictions, the statutes are focused on general business practice "actions" rather than claims decisions directed at a single insured.

However, in a small number of states, an insurance regulator may find a violation of the Act based upon action or inaction in connection with a single claim. In addition to other penalties which may be available, the insurance codes of certain of those states authorize the regulator to order relief which may include payment of policy benefits to individual insureds.

This paper will focus on those jurisdictions in which the insurance codes appear to authorize insurance commissioners to order payment of policy benefits to an individual insured as a result of a determination that the insurer has violated the Unfair Claims Settlement Practices Act.

Judicial decisions discussing or explaining the extent of a commissioner's power to order payment of policy benefits have not been located,[2] and the number of states in which this issue may arise is rather small. However, in that limited number of jurisdictions it would seem that insurers may be at risk in these proceedings – particularly if companies have become accustomed to dealing with the commissioners' staff in an informal manner and are not attuned to the possibility of direct involvement of the claims of an individual policyholder. Additionally, many states do not limit an individual's right to file suit against its insurer as a separate matter from the insurance commissioner's investigation. In that situation, a finding that an insurer has violated the Unfair Claims Settlement Practices Act with respect to its treatment of particular claimants certainly poses potential risks in any subsequent civil lawsuit, especially in those jurisdictions which permit recovery of first-party bad faith and other extra-contractual damages. However, that subject is beyond the scope of this paper.[3]

In view of the limited number of reported decisions on this subject, this effort may raise more questions than it answers. However, it is hoped that it may assist inside and outside counsel in evaluating and reporting to the interesting challenges posed by a regulatory proceeding involving allegations of violations of the insurance code with regard to the handling of a particular claim.

II. The NAIC Model Act.

The National Association of Insurance Commissioners promulgated its first model insurance trade practices act in 1947. This Act was amended in 1971 to add a section enumerating 14 activities considered unfair claim settlement practices.

In 1990, the NAIC adopted a free-standing Model Unfair Claims Settlement Practices Act separate from its Model Unfair Trade Practices Act.

In its current form, the Model Act states, in part:

> **Section 3. Unfair Claims Settlement Practices Prohibited**
> It is an improper claims practice for a domestic, foreign or alien insurer transacting business in this state to commit an act defined in Section 4 of this Act if:
> A. It is committed flagrantly and in conscious disregard of this Act or any rules promulgated hereunder; or
> B. It has been committed with such frequency

to indicate a general business practice of
engage in that type of conduct.

Section 4 of the Model enumerates 14 acts which, if committed in violation of Section 3, constitute an unfair claim practice.[4]

Upon a finding that an insurer has engaged in an unfair claims practice, the Model Act proposes that the commissioner be empowered to issue a cease and desist order and, in his/her discretion, order the payment of a monetary penalty and/or suspension or revocation of the insurer's license if the insurer knew or reasonably should have known the practice was a violation of the Act.[5]

Each of the 14 prohibited sections is couched in terms which require proof of multiple actions in order to constitute a violation of the statute. Further, the drafters of the Model Act made clear that they did not intend to recommend that private individuals be given the right to file suit to enforce provisions of the Act: "Nothing in this Model Act shall be construed to create or imply a private cause of action." Model Act, Section 1.[6]

The statutes of many states are consistent with the Model Act in focusing on multiple acts constituting a "general business practice" and in providing for the enforcement of its provisions only by the insurance commissioner through the use of cease and desist orders, monetary penalties and, in extreme cases, proceedings against an insurer's license.[7] These statutes would not appear to provide the basis for an award of benefits to a policyholder and, thus, those jurisdictions will not be a focus of particular concern in this paper.

However, a small number of states have "improved" on the Model Act and have added provisions which appear to make it possible for a commissioner to order the payment of policy benefits if he/she finds that they were wrongly withheld by virtue of an unfair claims practice. Some of these states authorize this relief only upon a determination that an insurer committed violations with such frequency as to indicate a general business practice to engage in that type of conduct. However, others appear to authorize a commissioner to award policy benefits to an individual insured upon proof of a single action in violation of the statute.[8]

This paper will be focused on this rather small group of states and the interesting questions which may arise if an insurance commissioner is willing to consider an award of policy benefits to individual claimants.

III. *Statutes Which Authorize An Award of "Restitution" or Individual Policy Benefits Based on Violation of the Unfair Claims Settlement Practices Act.*

Those jurisdictions which appear to authorize the commissioner to issue an award of restitution use varying terms to convey that power.

In certain states, the acts couch the commissioner's power in terms of "restitution" to any claimant who suffered economic damage as a result of the violation.[9] Two statutes authorize the commissioner to order payments pursuant to a policy in an amount to be determined by the commissioner as part of the penalties for violation of the Act.[10] Another formulation which would seem to offer some opportunity for an aggressive regulator to order payment of policy benefits is that used by states such as Delaware, Florida and Georgia. The Delaware and Georgia statutes permit the commissioner to award "such other and further relief as is reasonable and appropriate" in the event of a violation;[11] while the Florida Act authorizes "such other relief as may be provided in the Insurance Code."[12]

A. The Restitution Remedy.

Those states which specifically authorize an award of "restitution" by the commissioner employ slightly different formulations which could pose some interesting analytical issues.

For example, the Maryland and Massachusetts statutes authorize an award of restitution to any claimant who has suffered actual economic damages as a result of the violation of the Act.[13]

The Maryland Act further provides that "Restitution may not exceed the amount of actual economic damage sustained, subject to the limits of any applicable policy."[14] The District of Columbia statute permits the regulator to issue an order "requiring the violator to correct the violation including the restitution of money and property to a person aggrieved by the violation."[15] The Connecticut and Alaska statutes authorize an order requiring the restitution of sums obtained in violation of the statute.[16] In Texas, "[t]he Commissioner may direct . . . [an insurer] to make complete restitution to each Texas resident, each Texas insured, and each entity operating in this state that is harmed by a violation of, or failure to comply with, this code . . ." The Texas law further provides that restitution must be "in the form and amount and within the period determined by the Commissioner".[17] The Virginia Insurance Code provides that the "Commission may require a person to make restitution in the amount of the direct actual financial loss . . . for failing to pay amounts explicitly required by the terms of the insurance contract where no aspect of the claim is disputed by the

insurer."[18]

Restitution is a venerable concept in the law of remedies which has often been explained as being intended to avoid the unjust enrichment of one party at the expense of another. For example, the Restatement of Restitution defines restitution as having to do with "situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss." *Restatement of Restitution*, General Scope Note, p. 1. That authority further provides that "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Restatement of Restitution*, §1. "A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money."

> Another commentator has stated:
>
> > The remedy of restitution differs from the remedy in damages in that in awarding damages the purpose is to put the injured party in as good a position as he would have occupied, had the contract been fully performed, while enforcing restitution, the purpose is to require the wrongdoer to restore what he has received and thus tend to put the injured party in as good a position as that occupied by him before the contract was made. Ordinarily, restitution requires that the defendant shall give something back to the plaintiff; and it may be supposed that the defendant cannot do this unless he has received something of value at the plaintiff's hands.

5 *Corbin on Contracts*, §1107, at 573 (1964) (footnote omitted). *See also, Dobbs, Handbook on the Law of Remedies*, §4.1, at 224 (1973).

Although there are many decisions dealing with restitution in other circumstances, to date only one judicial decision has been located discussing restitution in the Unfair Claims Settlement Practice Act context. In *Magan v. Medical Mutual Liability Ins. Soc.*, 331 Md. 535, 629 A.2d 626 (1993), a physician appealed a trial court judgment which had affirmed the Insurance Commissioner's finding that the physician was not entitled to lost income or attorneys' fees for the time he was wrongfully denied malpractice insurance. The Maryland Court of Appeals rejected the doctor's argument that the restitution provision in the statute authorized the Commissioner to award damages for all financial injuries shown to have been caused by the violation of the statute, and

ruled that the Commissioner had correctly determined that lost income and attorneys' fees were not restitutory damages as authorized by the statute because they did not result in the unjust enrichment of the insurer. Consequently, the Court affirmed the trial court ruling. *Magan*, 331 Md. at 548-49.

In view of the scarcity of judicial decisions focused on the issue, it is difficult to speculate with confidence as to whether courts will apply the terms of these statutes broadly to permit a recovery of policy benefits and other economic damages caused by a violation or will confine the power to the narrower "unjust enrichment" concept applied by the Maryland Court in Magan. However, it would appear that the broader language of statutes such as those of Kansas, Texas and Virginia might provide a basis for the argument that such an award need not be limited by the "unjust enrichment" basis of traditional concepts of restitution.

B. The General Business Practice Limitations.

Some of the jurisdictions which authorize the commissioner to order restitution or an award of policy benefits do so only upon proof of violation of the statute by conduct of such severity or committed with such frequency as to constitute a general business practice.[19] With one exception,[20] the statutes do not describe what is meant by "general business practice." However, several courts have discussed the meaning of "general business practice" in the context of deciding whether an insured has a private right of action against the insurer for violations of a state's unfair claims settlement practices regulations. For example, in *Dodrill v. Nationwide Mut. Ins. Co.*, 301 W.Va. 1, 491 S.E.2d 1 (1996), a case in which a third-party claimant sued the insurer under the West Virginia Unfair Claims Settlement Practices Act for failing to promptly and fairly settle a personal injury claim, the Court stated that:

> we hold that to maintain a private action based upon alleged violations of W. Va. Code § 33-11-4(9) in the settlement of a single insurance claim, the evidence should establish that the conduct in question constitutes more than a single violation of [the statute], that the violations arise from separate, discrete acts or omissions in the claim settlement, and that they arise from a habit, custom, usage, or business policy of the insurer, so that, viewing the conduct as a whole, the finder of fact is able to conclude that the practice or practices are sufficiently pervasive or sufficiently sanctioned by the insurance company that the conduct can be considered a "general business practice" and can be

distinguished by fair minds from an isolated event.

Id. at 13, 491 S.E.2d at 14. In *Dodrill*, the Court found that there was sufficient evidence for the jury to conclude that the insurer had committed numerous unfair practices in the handling of a single personal injury claim.

The Supreme Court of Connecticut has also addressed the issue of what constitutes a "general business practice" in the context of alleged violations of the state's Unfair Insurance Practices Act. In *Lees v. Middlesex Insurance Co.*, 229 Conn. 842, 643 A.2d 1282 (1994), the Court stated that "[i]n requiring proof that the insurer has engaged in unfair claims settlement practices 'with such frequency as to indicate a general business practice,' the legislature has manifested a clear intent to exempt from coverage under [the Act] isolated instances of insurer misconduct." *Id*. at 849, 643 A.2d at 1285. The Court further stated that an insurer's "alleged improper conduct in the handling of a single insurance claim, without any evidence of misconduct by the defendant in the processing of any other claim, does not rise to the level of a 'general business practice' ..." *Id*. at 849, 643 A.2d at 1286.

Thus, there appear to be at least two views as to what constitutes a "general business practice." Some courts, like the Court in *Dodrill*, have held that multiple acts of misconduct in the handling of *one* insurance claim can constitute a "general business practice." Other courts, like the Supreme Court of Connecticut, have held that "general business practice" means that the insurer must have engaged in prohibited acts in the handling of more than one individual claim.

This distinction may be unimportant in assessing the risk and exposure to an award of restitution or policy benefits in one of the nine states requiring proof of a general business practice as a basis for such relief.

C. Procedural Issues.

The NAIC Model Act does not contain a detailed mechanism for determining a violation of the Act and enforcing its provisions. Especially in those states in which there is no private right of action to enforce the statute, the initial determination of whether an insurer has engaged in an unfair claims settlement practice is usually not made by a court.

Most jurisdictions have adopted some form of an Administrative Procedure Act and regulations detailing the way in which the insurance commissioner's office will enforce the statute and any appeal rights which may exist. These provisions may call for a hearing before a designee of the insurance commissioner, or an administrative law judge in the first instance or an appeal for

an initial determination. They will likely include detailed requirements concerning the burden of proof, the procedures to be followed at hearings, the issuance, review and appeal of the administrative decisions. They may also provide the regulator with some discretion as to the way in which the hearings are conducted. For example, the commissioner usually need not apply formal rules of evidence.[21] Intervention or participation by an aggrieved insured, in person or by counsel, may be permitted.[22] Hearsay evidence is often freely admitted, and some courts have held that hearsay evidence, standing alone, may support an administrative decision.[23] Appeals from an adverse ruling by an insurance commissioner may be on the record established at the administrative level.[24]

Although in some jurisdictions administrative proceedings involving alleged violations of the Unfair Claims Settlement Practices Acts may be perceived as careful and quite fair, it seems safe to say that in some jurisdictions aggressive regulators have the ability to approach these issues in a manner containing few of the "safeguards" inherent in the judicial process. Consequently, at least in those jurisdictions in which restitution or policy benefit awards are possible, these proceedings must be approached with great care and cannot be handled as part of the informal system of communication which sometimes exist between insurers and the staffs of state regulators.

IV. Group Insurance Issues.

A. Are the Unfair Claims Settlement Practices Acts Saved from Preemption Under ERISA?

By their terms, most State Unfair Claims Settlement Practices Acts apply equally to actions taken with regard to group and individual plans. From time to time, insurance commissioners have initiated proceedings under the statutes for action taken with regard to benefits under a group insurance policy issued to a welfare benefit plan. The obvious question arises as to whether such state law claims are preempted by ERISA or are saved from preemption as laws regulating insurance. Although this question may be of interest in any state in which an insurer is being pursued by the regulator for actions which it believes were required by the terms of the plan, for purposes of this discussion, it would seem to be most pertinent in those 14 states listed on Appendix 2 in which a zealous commissioner might seek to order payment of benefits to policyholders in contravention of the terms of the plan documents.

Courts in seven of the states in which the Unfair Claims Settlement Practices Acts authorize the Commissioner to consider an award of restitution or policy benefits have ruled that the enforcement of those statutes against a welfare benefit governed by ERISA was preempted by ERISA. *Harris v. Harvard*

Pilgrim Healthcare, 20 F. Supp. 2d 143 (D. Mass. 1998); *Sheets v. Lincoln Nat'l Life Ins. Co.*, 1997 U.S. Dist. LEXIS 17169 (D. N.C.); *Yardley v. U.S. Healthcare*, 698 A.2d 979 (Del. 1996); *Cole v. Durham Life Ins. Co.*, 754 F. Supp. 18 (D. Conn. 1991); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990); *Kelly v. Sears, Roebuck & Co.*, 882 F.2d 453 (10th Cir. 1989).

However, those decisions pre-date *UNUM v. Ward*, 526 U.S. 358 (1999), and in what some would regard as a clear misreading of the Supreme Court's decision and particularly its footnote 7,[25] one Insurance Commissioner has relied upon it to rule that the Unfair Claims Settlement Practices Act is saved from preemption as a law regulating insurance.

In his Memorandum and Final Order in *Ins. Comm. v. Connecticut Gen. Life. Ins. Co.*, Case Nos. MIA-349-7/00 and MIA-375-7/00, the Maryland Insurance Commissioner rejected the argument that enforcement of the various Maryland insurance code provisions, including the Unfair Claims Settlement Practices Act, to impose fines and an award of benefits is preempted by ERISA. The Commissioner ordered Connecticut General Life Insurance Company to pay disputed medical expense benefits together with fines in excess of $125,000 as a consequence of his determination that the company had violated those provisions of the insurance code.

These cases involved patient claims for coverage under group policies issued to their employers to provide part of the benefits offered by their welfare benefit plans. In each instance, the insurer denied coverage on the grounds that certain expenses were not "medically necessary." The patients complained to the Maryland Insurance Administration ("MIA"). After investigation, the MIA determined that the insurer had violated various provisions of the Maryland Insurance Code, and the company was ordered to pay the disputed benefits as well as administrative penalties.

The insurer requested a hearing before the Insurance Commissioner at which the sole issue presented was whether the orders and statutory provisions upon which they were based were preempted by ERISA. In his Memorandum and Final Order, the Commissioner assumed that the insurance code provisions at issue met the "relate to" test of the preemption provisions and turned to the consideration of whether those laws regulated insurance and were, thus, saved from preemption. The insurer argued that the laws in question did not regulate the business of insurance, citing *Custer v. Pan American Life Ins. Co.*, 12 F.3d. 410 (4th Cir. 1993) and *Tri-State Machine v. Nationwide*, 33 F.3d 309 (4th Cir. 1994), in which the Fourth Circuit had ruled that West Virginia Uniform Claims Practices Act claims against ERISA plans were preempted. The Commissioner

refused to follow those two decisions and concluded that field and conflict preemption did not apply to bar enforcement of the Maryland Insurance Code provisions on the plan based upon his reading of the decision of the Supreme Court in *UNUM v. Ward*, 526 U.S. 358 (1999). The Commissioner found further support for his conclusion that the State laws are not preempted in the recent Department of Labor Regulations addressing claims handling procedures for ERISA plans. He argued that because they established requirements for the processing of claims that overlap with State insurance laws relating to internal and external review of benefit denials and were issued together with a preemption analysis, they constituted a recognition by the Department of Labor that State external review laws survive preemption.

Consequently, the Commissioner rejected the arguments that the Maryland's insurance code provisions were preempted by ERISA and ordered that the insurer pay administrative penalties of $125,000 and pay for the health care services which were denied on grounds of lack of medical necessity.

On a Petition for Judicial Review filed by the insurer, the Circuit Court for Baltimore City issued an Order which reversed the Commissioner's Order that the disputed health insurance benefits be paid because the authority of the Commissioner to order such payment is preempted by ERISA. The Circuit Court affirmed the Commissioner's imposition of administrative penalties. Both parties appealed, and the matter is now before the Maryland Court of Appeals.

Although these decisions do not permit a confident prediction as to the outcome of this dispute, it would seem that the result may ultimately depend upon the Supreme Court's willingness to maintain the vitality of the "conflict" preemption doctrine espoused in *Pilot Life v. Dedeaux* and its progeny.[26]

B. Can the Aid of a Federal Court be Involved to Stay the Regulatory Proceedings Against a Plan?

Another interesting question is whether a group insurer, faced with a proceeding before a commissioner asserting violations of the Unfair Claims Settlement Practies Act as a result of denials or terminations of benefits, can file a declaratory judgment action in federal court seeking a ruling that ERISA preempts the application of the state statute to the plan and asking that the court stay the Commissioner's proceeding pending resolution of the federal court action.

There are a number of decisions which appear to establish the right of an insurer serving as a claims fiduciary of a plan to seek a declaratory judgment and injunctive relief in federal court with regard to any action which violates ERISA or the terms of the plan.[27] However, a clear answer has not yet developed as to

whether a federal court might find refuge in one of the prongs of the abstention doctrine as a justification for not interfering with the insurance commissioner's proceeding.[28]

Of some interest in this regard is the Fourth Circuit decision in *Employers Resource Management Co. v. Shannon*, 65 F.3d 1126 (4th Cir. 1995) *cert. den.* 516 U.S. 1094 (1996). In *Shannon*, the State Corporation Commission ("SCC") of the Commonwealth of Virginia (which regulates the business of insurance) initiated a state court proceeding against Employers Resource Management ("ERM") for operating without a license in establishing and maintaining employee welfare benefit plans in Virginia. In response, ERM filed suit in the federal court seeking declaratory and injunctive relief that the disputed statutes were preempted by ERISA. The Fourth Circuit ruled that the suit was barred by both the Anti-Injunction Act and by the *Younger* abstention doctrine. Further, in *Fuller v. Bartlett*, 894 F. Supp. 874 (D. Md. 1980), the Maryland court dismissed, on *Younger* abstention grounds, two federal court suits initiated to prevent the Maryland Insurance Administration from proceeding with administrative hearings challenging cease and desist orders issued to a welfare benefit plan. Noting that the plaintiffs would have an opportunity to assert their ERISA preemption arguments before the commissioner and on appeal through the state courts, the federal court dismissed the action before it. *Id*. at 878.

Accordingly, while there are undoubtedly limits to the abstention doctrine, it would seem that reliance upon a federal court declaratory judgment to stop a commissioner's enforcement of Unfair Claims Practices Act claim decisions must be considered risky at best.

V. Conclusion.

Although a majority of the states have enacted unfair claims settlement practices acts which do not provide for the award of benefits to an insured, a number of statutes do authorize such an award as a penalty for violation of the statute. Most of these states, however, require that the violation be proven to have been committed with such frequency as to indicate a general business practice.[29] In five jurisdictions, it would appear that an individual insured can enlist the aid of the insurance commissioner to obtain payment of benefits as a result of a single adverse claim decision.

Thus far, no judicial decisions have been located which thoroughly discuss these statutes, and consequently, conclusions can only cautiously be proposed. However, the language of the various statutes, together with some experience in one of the states with an Act authorizing restitution based upon a single claims decision, would seem to indicate that insurers and their outside counsel should

regard unfair claims settlement practices act proceedings by an insurance commissioner as the essential equivalent of a lawsuit, often without some of the important protections and guidelines of the litigation process.

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APPENDIX 1

Statutes Which Do Not Appear to Provide for an Award of Policy Benefits in Their Unfair Claims Settlement Practices Acts

1.) Alabama: Ala. Code § 27-12-21.

2.) Arizona: Ariz. Rev. Stat. Ann. § 20-456.

3.) Arkansas: Ark. Code Ann. § 23-66-210, § 23-66-215.

4.) California: Cal. Ins. Code §§ 790.05, 790.035.

5.) Florida: Fla. Stat. Ann. § 626.9581.

6.) Hawaii: Hawaii Rev. Stat. § 431:13-201.

7.) Idaho: Idaho Code § 41-1319.

8.) Illinois: Ill. Rev. Stat. ch. 215, para 5/154.8.

9.) Iowa: Iowa Code § 507 B.7.

10.) Kentucky: Ky. Rev. Stat. Ann. § 304.12.120.

11.) Louisiana: La. Rev. Stat. Ann. § 22:1217.

12.) Maine: Me. Rev. Stat. Ann. tit. 24-A, §2165-A.

13.) Michigan: Mich. Comp. Laws § 500.2038.

14.) Minnesota: Minn. Stat. Ann. § 72 A.25.

15.) Mississippi: Miss. Code Ann. §§ 83-5-39, 83-5-41.

16.) Missouri: Mo. Rev. Stat. §§ 375.942, 375.1010, 375.1012.

17.) Montana: Mont. Code Ann. §§ 33-18-1003, 33-18-1004, 33-18-1005.

18.) Nebraska: Neb. Rev. Stat. § 44-1539.

19.) Nevada: Nev. Rev. Stat. Ann. § 686.310.

20.) New Hampshire: N.H. Rev. Stat. Ann. § 417:4.

21.) New Jersey: N.J. Rev. Stat. § 17:29B-4.

22.) New Mexico: N.M. Stat. Ann. § 59A-16-20.

23.) New York: N.Y. Ins. Law § 2601(a).

24.) North Dakota: N.D. Cent. Code § 26.1-04-03.

25.) Ohio: Ohio Rev. Code Ann. § 3901-1-07.

26.) Oklahoma: Okla. Stat. tit. 36, § 1250.3.

27.) Oregon: Or. Rev. Stat. § 746.230.

28.) Pennsylvania: 40 Pa. Cons. Stat.. § 1171.5.

29.) Rhode Island: R.I. Gen. Laws § 27-9.1-3.

30.) South Carolina: S.C. Code Ann. § 38-59-20.

31.) South Dakota: S.D. Codified Laws § 58-33-67.

32.) Tennessee: Tenn. Code Ann. § 56-8-104.

33.) Utah: Utah Code Ann. § 31A-26-303.

34.) Vermont: Vt. Stat. Ann. tit. 8, § 4724(9).

35.) Washington: Wash. Rev. Code, §48.02.060

36.) West Virginia: W. Va. Code § 33-11-4.

37.) Wisconsin: Wis. Stat. §628.34

38.) Wyoming: Wyo. Stat. § 26-13-124.

APPENDIX 2

Statutes Which Do Appear to Grant the Insurance Commissioner the Power to Order Payment of Policy Benefits

A. *Upon a Showing of a Violation of the Statute as a General Business Practice*:

1.) Colorado: Colo. Rev. Stat. §§ 10-3-1104(h), 10-3-1108.

2.) Connecticut: Conn. Gen. Stat. § 38A-817.

3.) Delaware: Del. Code Ann. §§ 2304(16), 2308.

4.) District of Columbia: D.C. Law 13-265, §§ 117, 122.

5.) Georgia: Ga. Code Ann. §§ 33-6-8, 33-6-33.

6.) Kansas: Kan. Stat. Ann. §§ 40-2404, 40-2407.

7.) Maryland: Md. Code Ann. Ins., §27-304.

8.) North Carolina: N.C. Gen. Stat. § 58-63-10.

9.) Virginia: Va. Code Ann. § 38.2-218.

B. *Upon Showing of a Single Act in Violation of the Statute*:

1.) Alaska: Alaska Stat. § 21.36.320(d).

2.) Indiana: Ind. Code Ann. § 27-1-15.5-8(g).

3.) Maryland: Md. Code Ann. Ins., §§ 27-303, 27-305.

4.) Massachusetts: Mass. Gen. Laws Ann. ch. 176D, §§ 6-7.

5.) Texas: Texas Ins. Code Ann. § 82.053(a) and (b).

END NOTES

1. A useful chart of State Unfair Claims Settlement Practices Acts may be found in the *2001 Compendium of Uniform Claims Practices* published by the DRI Insurance Law Committee.

2. In those jurisdictions authorizing an award of policy benefits, there may well be a body of decisions by administrative law judges and commissioners. Such decisions will be valuable in understanding the commissioner's view of his power to order such relief upon a finding of violation of the Act. However, there appears to be no generally available source for those decisions so they may have to be obtained directly from the agency itself or from local counsel familiar with those decisions.

3. A number of states have included in their statutes provisions which establish that orders by the commissioner under the Unfair Claims Settlement Practices Act do not relieve an insurer of any other liability under the law. Consequently, even a successful resolution of the regulatory proceeding may not bar a subsequent lawsuit:

Alabama:	Ala. Code § 27-12-18(h); Ala. Code § 27-12-18(j)
Arizona:	Ariz. Rev. Stat. Ann. § 20-456(C)
Arkansas:	Ark. Code Ann. § 23-66-212(d)
California:	Cal. Ins. Code § 790.09
Connecticut:	Conn. Gen. Stat. § 38a-817(d)
Delaware:	De. Code Ann. tit. 18, § 2308(h)
District of Columbia:	D.C. Law 13-265 § 102(b)
Florida:	Fla. Stat. Ann. § 624.155(7)
Hawaii:	Haw. Rev. Stat. § 431:13-202
Idaho:	Idaho Code § 41-1319(10)
Illinois:	Ill. Rev. Stat. Insurance, § 215 ILCS 5/428
Indiana:	Ind. Code § 27-4-1-10
Iowa:	Iowa Code § 507B.8
Kansas:	Kan. Stat. Ann. § 40-2408(b)
Kentucky:	Ky. Rev. Stat. Ann. § 304.12-120(4)
Maine:	Me. Rev. Stat. Ann. tit. 24-A, § 2436-A(3)
Massachusetts:	Mass. Ann. Laws ch. 176D, § 8
Michigan:	Mich. Comp. Laws § 500.2049
Minnesota:	Minn. Stat. § 72A.29
Mississippi:	Miss. Code Ann. § 83-5-43(4)
Missouri:	Mo. Rev. Stat. § 375.944(4)
Montana:	Mont. Code Ann. § 33-18-1004(4)

4. Section 4 of the Model Act defines unfair claims practices as follows:

Any of the following acts by an insurer, if committed in violation of Section 3, constitutes an unfair claim practice:

A. Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue;

B. Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;

C. Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;

D. Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear; [added in 1990]

E. Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;

F. Refusing to pay claims without conducting a reasonable investigation;

G. Failing to affirm or deny coverage of claims within a reasonable time after having completed its investigation related to such claim or claims;

H. Attempting to settle or settling claims for less than the amount that a reasonable person would believe the insured or beneficiary was entitled by reference to written or printed advertising material accompanying or made aprt of an application;

I. Attempting to settle or settling claims on the basis of an application that was materially altered without notice to, or knowledge or consent of, the insured;

J. Making claims payments to an insured or beneficiary without indicating the coverage under which each payment is being made;

K. Unreasonably delaying the investigation or payment of claims by requiring both a formal proof of loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof of loss form; ["unreasonably" added in 1990]

L. Failing in the case of claims denials or offers of compromise settlement to promptly provide a reasonable and accurate explanation of the basis for such actions;

M. Failing to provide forms necessary to present claims within fifteen (15) calendar days of a request with reasonable explanations regarding their use; [added in 1990]

N. Failing to adopt and implement reasonable standards to assure that the repairs of a repairer owned by or required to be used by the insurer are performed in a workmanlike manner [added in 1990].

5. Section 6 of the Model Act provides that:

> If, after hearing, the commissioner finds an insurer has engaged in an unfair claims practice, the commissioner shall reduce the findings to writing and shall issue and cause to be served upon the insurer charged with the violation a copy of the findings and an order requiring the insurer to cease and desist from engaging in the act or practice and the commissioner may, at the commissioner's discretion, order:
>
> A. Payment of a monetary penalty of not more than $1,000 for each violation but not to exceed an aggregate penalty of $100,000, unless the violation

6. Numerous statutes follow the Model Act and include a provision that there is no private right to file a lawsuit to enforce the Act.

See, e.g., Hurt v. First Ins. Co. of Hawaii, Ltd., 82 Haw. 363,22 P.2d 976 (1996); *Greene v. Truck Ins. Exchange*, 114 Idaho 63, 753 P.2d 274 (1988); *Langendorf v. Travelers State Ins. Co.*, 625 F.Supp. 1103 (N.D. Ill. 1985); *Shapiro v. American Home Assur. Co.*, 616 F.Supp. 906 (D. Mass. 1985); *O'Reilly v. Allstate Ins. Co.*, 474 N.W.2d 221 (Minn. Ct. App. 1991); *Perzga v. Ohio Cas. Group of Ins. Companies*, 208 N.J. Super. 40, 504 A.2d 1200 (1986); *New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, 639 N.Y.2d 283, 662 N.E.2d 763 (1995); *D.W. Realty, Inc. v. Harford Mut. Ins. Co.*, 575 F.Supp. 654 (E.D. Pa. 1983); *Herrig v. Herrig*, 844 P.2d 487 (Wyo. 1992); *Whitson v. Western Agric. Ins. Co.*, 186 Ariz. Adv. Rep. 10 (Ariz. App. 1995); *Achmaker v. State*

Farm Mut. Auto. Ins. Co., 843 P.2d. 102 (Colo. App. 1992); *Neurological Resources, P.C.V. Anthen Ins. Co.*, 61 F. Supp. 2d 840 (S.D. Ind. 1999); *Earth Scientists v. USF&G*, 619 F. Supp. 1465 (1985); *Crosby v. Allstate Ins. Co.*, 400 N.W. 2d 625 (Mich. 1986).

7. A list of those states is included in Appendix No. 1.

8. A list of the statutes which appear to authorize an award of restitution or its equivalent is included in Appendix 2.

9. The statutes which contain specific restitution provisions are listed at Endnotes No. 10-18 below.

10. Colo. Rev. Stat., §10-3-1108; Tex. Ins. Code, Art. 82.053(a) and (b). In a somewhat similar approach, the Kansas legislature has provided that upon a finding of a violation of the Act, in addition to other penalties, the commissioner may order "redress of the injury to require the refund of any premiums paid by, the payment of any money withheld from, any consumer . . .". Kan. Stat. Ann., §40-2407(a).

11. 18 Del. Code §2308; O.C.G.A. §33-6-8.

12. Fla. Stat. §626.9581.

13. Md. Code Ann., Ins., §27-305(c)(1); Mass. Gen. Laws Ann., ch. 176D, §7.

14. Md. Code Ann., Ins., §27-305(c)(2).

15. D.C. Law 13-265, §122 (effective Jan. 2, 2001).

16. Conn. Gen. Stat., §38A-817; Alaska Stat., §21-36.320(d).

17. Tex. Ins. Code, Art. 82.053.

18. Va. Code Ann., Ins., §38.2-218.

19. *See* Section 3 of the NAIC Model Act, *supra*, p.3.

20. The Oregon unfair claims settlement practices statute states that a "general business practice is evidenced by: (a) a substantial increase in the number of complaints against the insurer received by the Department of Consumer and Business Services; (b) a substantial increase in the number of lawsuits filed against the insurer or its insureds by claimants; or (c) Other relevant evidence." O.R.S. § 746.230.

21. *E.g.*, N.C. Gen. Stat., §58-63-25(c); N.J. Stat., §17:29B-6(c).

22. *E.g.*, N.C. Gen. Stat., §58-63-25(b).

23. *Reynolds Metals Co. v. Industrial Comm.*, 98 Ariz. 97, 402 P.2d 414 (1965); *Eger v. Stone*, 253 Md. 533, 253 A.2d 372 (1979).

24. *E.g.*, Rules 7-206 - 7-209, Maryland Rules of Procedure.

25. *E.g., Walker v. Southern Co. Svcs.*, 2002 U.S. App. LEXIS 886*8 (11th Cir. 2002); *English v. Capital Risk Mgmt.*, 2001 U.S. Dist. LEXIS 11989 (D. Ala. 2001); *Chamblin v. Reliance Standard Life Ins. Co.*, 168 F. Supp. 2d 1168, 1179 (N.D. Cal. 2001); *Estate of Cenculay v. John Alden Life Ins. Co.*, 174 F. Supp. 2d 794, 801 (D. Ill. 2001); *Chilton v. Prudential Ins. Co. of America*, 124 F. Supp. 2d 673, 683-84 (D. Fla. 2000); *Clancy v. Employers Health Ins. Co.*, 82 F. Supp. 2d 589, 597 (D. La. 1999).

26. *Egelhoff v. Egelhoff*, 532 U.S. 44, 121 S. Ct. 1322, 1326-28 (2001); *Pilot Life v. Dedeaux*, 481 U.S. 41, 57 (1987); *Boggs v. Boggs*, 520 U.S. 833, 841 (1997); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 100 (1993); *Ingersoll-Rand Co. v. McClendon*m 498 U.S. 133, 145 (1990); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-65 (1987).

27. *See, e.g., Kentucky Ass'n of Health Plans v. Nichols*, 227 F.3d 352 (6th Cir. 2000) (fiduciaries requesting declaratory judgment and injunctive relief against Kentucky Department of Insurance that statutes dealing with discrimination by benefit plans against health care providers and interaction with chiropractors were preempted by ERISA); *Tiokol Corp. v. Dept. of Treasury, State of Michigan*, 987 F.2d 376, 380 (6th Cir. 1993) (fiduciaries requesting declaratory judgment and injunctive relief that certain provisions of Michigan's Tax Code were preempted by ERISA); *E-Systems v. Reynolds, Texas Board of Insurance*, 929 F.2d 1100 (5th Cir. 1991)(fiduciary seeking declaratory judgment and injunctive relief that ERISA preempts Texas Administrative Services Tax Act, Tex. Ins. Code §§ 1001-1461 has standing pursuant to 29 U.S.C. § 1132(a)(3), and state court lacks jurisdiction to decide dispositive issue); *Westinghouse v. Maryland Commission on Human Relations*, 520 F. Supp. 539 (D. Md. 1981) (fiduciary brought 502(a)(3) action for declaratory and injunctive relief that Maryland's retaliatory discharge statute was preempted by ERISA). *See*, *generally, Harris Trust & Sav. Bank v. Salomon Smith Barney,* 530 U.S. 238 (2000) (Section 502(a)(3) authorizes a fiduciary of a plan to bring a civil action to obtain appropriate equitable relief to redress violations of ERISA, including actions against a nonfiduciary); *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California,* 463 U.S. 1 (1983) ("Section 502(a)(3) of ERISA specifically grants trustees of ERISA-covered plans . . . a cause of action for injunctive relief when their rights and duties under ERISA are at issue, and that action is exclusively governed by federal law); *Leblanc v. Cahill*, 153 F.3d 134 (4th Cir. Va. 1998) (§502(a)(3) provides a cause of action by pension fund for equitable relief against a nonfiduciary, nonparty in interest whose interests are adverse to the interests of a pension plan subject to ERISA); *U.S. Steel Mining Co. v. District 17, United Mine Workers of America*, 897 F.2d 149, 152 (4th Cir. 1990) (plan administrator is clearly a fiduciary under § 502(a)(3)); *Prudential Ins. Co. of America v. National Park Medical Center*, 154 F.3d 812 (8th Cir. 1998)(health care insurers brought declaratory judgment action seeking declaration that Arkansas Patient Protection Act is preempted by ERISA); *Cemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 14 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 3014 (1992); *Winstead v. J.C. Penney Co.*, 933 F.2d 576 (7th Cir. 1991)(literal terms of ERISA civil enforcement state provided trustees with right to sue in federal court).

28. A thorough analysis of the details and application of the various prongs of the abstention doctrine is beyond the scope of this paper. However, the decisions which gave rise to those groups are: *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1956); *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

29. Model Act, Section 3B, Appendix 2, Section A.