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THE JUDICIAL RESPONSE TO UNFAIR CLAIMS PRACTICES LAWS: APPLYING THE NATIONAL EXPERIENCE TO THE MINNESOTA ACT

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The enactment of the Minnesota Unfair Claims Practices Act in 1984 was intended to define which practices of an insurer would be actionable. The Act, however, has raised controversy on the issue of whether there is a private cause of action and of the number of violations required to bring the insurer's actions within the Act. At the writing of this Article, the Minnesota Court of Appeals has addressed one issue, holding that the Act provides for a private cause of action. Final disposition of the issue will probably require review by the Minnesota Supreme Court. The authors discuss this and other questions that arise from the Act by reviewing the law in other jurisdictions. Using these other laws, the authors suggest an interpretation consistent with these decisions and Minnesota common law.

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INTRODUCTION

In 1984, the Minnesota Legislature passed the "Unfair Claims Practices Act" (Act),[1] joining a number of states that have adopted similar laws to protect the public against the unfair claims practices of insurance companies.[2] From the results

1. Act of Apr. 25, 1984, ch. 555, 1984 MINN. LAWS 999 (codified as amended at MINN. STAT. § 72A, subds. 12-12a (1984)).

2. The following states have enacted unfair claims practices laws: ALA. CODE § 27-12-24 (1975); ALASKA STAT. § 21.36.125 (1984); ARIZ. REV. STAT. ANN. § 20-461 (Supp. 1984-85); ARK. STAT. ANN. § 66-3005(9) (Supp. 1980); CAL. INS. CODE § 790.03(h) (Supp. 1985); COLO. REV. STAT. § 10-3-1104(h) (1973 & Supp. 1981); CONN. GEN. STAT. § 38-61(6) (West Supp. 1985); DEL. CODE ANN. tit. 18, § 2304(16) (1974); FLA. STAT. ANN. § 626.9541(9) (West Supp. 1985); GA. CODE ANN. § 33-6-1 (Supp. 1985); HAWAII REV. STAT. § 431-643(10) (1976 & Supp. 1985); IDAHO CODE § 41-1329 (1977); IND. CODE ANN. § 27-4-1-4.5 (Supp. 1985-86); IOWA CODE ANN. § 507B.4(9) (West Supp. 1985); KAN. STAT. ANN. § 40-2404(9) (1981); MASS. GEN. LAWS ANN. ch. 176D, § 3(9) (West 1958 & Supp. 1985); MICH. COMP. LAWS ANN. § 500.2026 (West 1983); MINN. STAT. § 72A.20 (1984); MO. ANN. STAT. § 375.936(10) (Vernon Supp. 1985); MONT. CODE ANN. § 33-18-201 (1983); NEB. REV. STAT. § 59-11-13(I) (1984); N.Y. INS. LAW § 40-d (McKinney Supp. 1984-85); N.C. GEN. STAT. § 58-54.4(11) (1982); N.D. CENT. CODE § 26.1-04-03(9) (Supp. 1983); OHIO REV. CODE ANN. § 3901.19 (Page 1971 & Supp. 1984); OR. REV. STAT. § 746.230 (1983); PA. STAT. ANN. tit. 40 § 1171.5 (Purdon Supp. 1985); R.I. GEN. LAWS § 27-29-1 (1979); TENN. CODE ANN. § 56-8-104(8) (1980); TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981); VT. STAT. ANN. tit. 8, § 4724(9) (1984); VA. CODE § 38.1-

in other states, it was apparent that the passage of the Act would give rise to litigation in Minnesota to determine the rights of regulators, insureds,[3] and third-party claimants.[4] Indeed, at the writing of this article, one case has been decided by the Minnesota Court of Appeals.[5] Final resolution of the issues presented in this case will require review by the Minnesota Supreme Court.

A survey of the litigation in this area reveals that unfair claims practices laws have often failed to sufficiently clarify legislative intent with regard to two basic issues. The first issue is whether an unfair trade practice creates a private cause of action with respect to the insured, third-party claimants, or both. Second, if a private cause of action is created by the unfair claims practices law, does an unfair trade practice arise from a single violation of a proscribed practice under the Act, or must a private litigant show a "general business practice" of such violations. Unfortunately, the legislatures' failure to address these issues has led to judicial resolution.[6]

The Minnesota Act, while the most recent and most compre-

52-9 (1981); W. VA. CODE § 33-11-4(9) (1982). Other states have enacted provisions generally prohibiting unfair and deceptive acts and practices in language similar to that contained in the Model Act. *See infra* notes 12-38 and accompanying text. These acts do not, however, contain provisions specifically relating to claims settlement practices. *See, e.g.*, ILL. ANN. STAT. ch. 73, §§ 1030-1031 (Smith-Hurd 1965 & Supp. 1985); KY. REV. STAT. § 304.12.010-.015 (Bobbs-Merrill 1981 & Supp. 1984); LA. REV. STAT. ANN. § 22:1214 (West 1978); ME. REV. STAT. ANN. tit. 24A, § 2151 (1964 & Supp. 1984-85); MD. ANN. CODE art. 48A, § 212 (1979 & Supp. 1984); MISS. CODE ANN. § 83-5-33 (1973); OKLA. STAT. tit. 36, § 1204 (West 1976); S.C. CODE ANN. § 38-55-10 (Law. Co-op 1985); S.D. CODIFIED LAWS § 58-33-1 (1978); UTAH CODE ANN. § 31-27-1 (1974); WASH. REV. CODE § 48.30.010 (1975); WIS. STAT. ANN. § 628.34 (West 1980).

3. The Act defines an insured as "an individual, corporation, association, partnership, or other legal entity asserting a right to payment under their insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by the policy or contract." MINN. STAT. § 72A.20, subd. 12a(c)(8) (1984).

4. Claimants or third-party claimants, are not parties to the insurance contract, but they may assert a claim against an individual insured under a liability insurance policy. The Act defines claimant as "any individual, corporation, association, partnership, or other legal entity asserting a claim against any individual, corporation, association, partnership, or other legal entity which is insured under an insurance policy or insurance contract of an insurer." MINN. STAT. § 72A.20, subd. 12a(c)(5) (1984).

5. Morris v. American Family Mut. Ins. Co., 371 N.W.2d 620 (Minn. Ct. App. 1985); *see infra* notes 222-41 and accompanying text.

6. A few states have unfair claims practices laws which specify that no private cause of action is created by a violation of the law. *See, e.g.*, IND. CODE ANN. § 27-4-1-18 (West Supp. 1985); TENN. CODE ANN. § 56-8-104(8) (Supp. 1984). At least one

hensive unfair claims practices law yet adopted, has failed to avoid the ambiguities that have caused litigation in other states. There is much at stake in the resolution of these open questions in Minnesota. A finding that the Act creates a private cause of action might allow insureds and third-party claimants to recover punitive damages and damages for emotional distress previously unavailable in contract actions against insurers.[7] In addition, third-party claimants might have the right to bring a direct action against insurers, a right not presently available under Minnesota law.[8] For these reasons, the passage of the Act and the judicial construction of its ambiguities may have a dramatic impact on the insurance law of Minnesota.[9]

This Article examines the judicial response to the unfair claims practices laws nationally and suggests an interpretation of the Minnesota Act on that basis. First, it reviews the background and the general provisions of the Model Unfair Claims Practices Act,[10] which has been substantially adopted in most states.[11] Second, it discusses the history and special provisions of the Minnesota Act and provides an overview of Minnesota common law in this area. Third, it examines the judicial response to unfair claims practices laws in jurisdictions throughout the country and reconciles these holdings. Fourth, the Article presents an interpretation of the Minnesota Act consistent with other decisions and with Minnesota's judicial climate. Finally, the authors discuss the legislative alternatives that could be adopted in Minnesota to clearly answer the significant issues raised by the passage of the Act.

The Act contains significant ambiguity with respect to the resolution of these critical issues. It is possible to reach a

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jurisdiction has specifically provided for a private cause of action for a violation of its unfair claims practices law. *See* FLA. STAT. ANN. § 624.155.

7. *See infra* notes 58-63 and accompanying text.

8. *See infra* notes 53-57 and accompanying text.

9. *See generally* Amicus Briefs, Morris v. American Family Mut. Ins. Co., 371 N.W.2d 620 (Minn. Ct. App. 1985). The amicus briefs filed by the Insurance Federation of Minnesota, the Minnesota Trial Lawyers Association, and the Minnesota Defense Lawyers Association indicate the breadth of interest in the construction of the Act.

10. *Model Unfair Claims Practices Act* §§ 1-15, 1 N.A.I.C. PROC. 493-518 (1972)[hereinafter cited as MODEL ACT]. The National Association of Insurance Commissioners (N.A.I.C.) is a voluntary organization of state insurance commissioners.

11. *See supra* note 2 and accompanying text.

number of different conclusions based upon plain language interpretation and constructions of legislative intent. The courts should interpret the Act consistently with existing law, as dramatic changes should be made only upon evidence of clear legislative intent. Such intent is manifestly lacking in this instance.

I. BACKGROUND

A. The Model Unfair Claims Practices Act

The Model Unfair Claims Practice Act (Model Act)[12] is a present day derivative of the Model Trade Practices Law.[13] The Model Trade Practices Law was developed in response to the 1944 United States Supreme Court decision in *United States v. Southeastern Underwriters Association.*[14] The Supreme Court ruled in this case that the insurance industry engages in interstate commerce and consequently, is subject to federal regulation.[15] The Court reversed an earlier decision that insurance was not commerce and thus subject solely to state control.[16] Congress quickly reacted to the *Southeastern Underwriters Association* decision by passing the McCarran-Ferguson Act,[17] which forms the basis for the current regulation of the industry. The McCarran-Ferguson Act provides that state laws regulating insurance are valid to the extent that federal law does not specifically regulate insurance.[18] By special reference, the Sherman

12. *See supra* note 10.

13. *Model Trade Practices Law,* 2 N.A.I.C. PROC. 392-400 (1947)[hereinafter cited as MODEL TRADE PRACTICES LAW].

14. 322 U.S. 533 (1944).

15. *Id.* at 553.

16. Paul v. Virginia, 75 U.S. 168, 183 (1868).

17. McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified at 15 U.S.C §§ 1011-1015 (1982)).

18. The McCarran-Ferguson Act provides, in pertinent part, as follows:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011.

The Congress also addressed the issue of preemption in the McCarran-Ferguson Act by providing the following:

(a) State Regulation.

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

Act,[19] the Clayton Act,[20] and the Federal Trade Commission Act[21] remained applicable to insurance, but only "to the extent that such business [of insurance] is not regulated by State Law."[22]

To avoid the loss of state regulatory authority to the Federal Trade Commission,[23] state regulators and the insurance industry jointly sponsored legislation preserving the powers of the state commissioners to regulate the business of insurance. The National Association of Insurance Commissioners (NAIC) developed the Model Fair Trade Practices Law for that purpose,[24] which was quickly adopted by the majority of the states. The stated purpose of the trade practices law was to:

> [R]egulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub. L. 15, 79th Cong.), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.[25]

The original Model Act, which was adopted by most states in

(b) Federal Regulation.

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1924, as amended, known as the Clayton Act, the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, [15 U.S.C. § 41], 15 U.S.C. § 1012 shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Id. § 1012.

19. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

20. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1982)).

21. Federal Trade Comm'n Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1982)).

22. 15 U.S.C. § 1012(b).

23. *Id.* § 1013. Section 1013 [McCarran-Ferguson Act] provides that the application of certain federal laws would be suspended until June 30, 1948. *Id.*

24. MODEL TRADE PRACTICES LAW, *supra* note 13.

25. *Id.* § 1. The model language was incorporated into Minnesota law. Act of March 24, 1947, ch. 129, 1947 Minn. Laws 188. The Act was later repealed and replaced by new language. Act of May 11, 1967, ch. 395, art. 12 §§ 17, 40, 1967 Minn. Laws 587, 832, 846. The Act was amended to include unfair claims practices. Act of April 25, 1984, ch. 555, 1984 Minn. Laws 999 (codified at MINN. STAT. § 72A.20 (1984)).

1947, contained broad definitions of unfair or deceptive practices, but made no specific mention of unfair claims practices.[26] The Model Act, however, was revised twice by 1971.[27] A number of claims practices were specifically deemed unfair trade practices if "committed or performed with such frequency as to indicate a general business practice."[28] The revised Model Act has been substantially adopted by a majority of the states,[29] and its provisions have been the basis of unfair claims practices litigation.[30]

The 1971 Model Act contained fourteen rules defining those claims practices that might be deemed unfair trade practices.[31]

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26. MODEL TRADE PRACTICES LAW, *supra* note 13, § 4(1)-(8). The definition provides for unfair practices based on misrepresentations and false advertising, false information and advertising generally, defamation, boycott, coercion and intimidation, false financial statements, stock operations and advisory board contracts, unfair discrimination and rebates. *Id.*

27. The 1947 Model Act went through major revisions in 1960. *See* 2 N.A.I.C. PROC. 509-14 (1960). The current state of the Act is a result of revision in 1971. *See* MODEL ACT, *supra* note 10.

28. MODEL ACT, *supra* note 10, § 4(9).

29. *See supra* note 2 and accompanying text.

30. *See infra* notes 78-88 and accompanying text.

31. Section 9 of the MODEL ACT provides:

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
(b) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
(c) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
(d) refusing to pay claims without conducting a reasonable investigation based upon all available information;
(e) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
(f) not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
(g) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;
(h) attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
(i) attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;
(j) making claims payments to insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments are being made;
(k) making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
(l) delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and

In general, these rules prohibit misrepresentations, require reasonable communications, and set forth those settlement practices that have been deemed to be inherently unfair. As discussed later in this Article, most of the litigation has been based on the Model Act's definition of an unfair claims practice as "not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear."[32]

The NAIC has also promulgated model regulations (Model Regulations)[33] which elaborate upon the minimum standards required by the Model Act. For example, one of the subsections of the Model Act provides that an insurer must "acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies."[34] The Model Regulations describe the specific time periods that are required for response.[35]

With regard to enforcement, the Model Act empowers a state insurance commissioner to investigate alleged violations, hold hearings, issue cease and desist orders, assess monetary penalties, and revoke an insurer's certificate of authority for violations.[36] The NAIC never intended the Model Act to provide anything other than expansion of administrative enforcement of unfair trade practices laws.[37] The NAIC did intend,

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then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
(m) failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under the other portions of the insurance policy coverage;
(n) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

MODEL ACT, *supra* note 10, § 9(a)-(n).

32. *Id.* § 4(9)(f).

33. *Unfair Claims Settlement Practices Model Regulation*, 2 N.A.I.C. PROC. 367-70 (1976)[hereinafter cited as MODEL REGULATION].

34. MODEL ACT, *supra* note 10, § 4(9)(b).

35. *See, e.g.*, MODEL REGULATION, *supra* note 33, § 6(a) (acknowledging receipt of notification of claim within 10 working days); *id.* § 6(b) (respond to insurance department inquiries within 15 working days); *id.* § 7 (complete investigation of a claim within 30 working days).

36. MODEL ACT, *supra* note 10, §§ 6-8.

37. "In any event, the intent of the NAIC as evidenced by the language of the Model Act and the NAIC Proceedings, and supplemented by this Report, was clearly not to create a new private right of action for trade practices which are prohibited by the Model Act." *Report of Director Robert Ratchford, Jr. of Ohio, Regarding a Private Right of Action under Section 4(9) of the NAIC Model Unfair Trade Practices Act*, 2 N.A.I.C. PROC. at 350 (1980).

however, that other state laws and common law rights be preserved and included the following section in the Model Act:

> No order of the (commissioner) under this Act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability *under any other laws* of this state.[38]

Paradoxically, this "savings clause" language[39] has been held to create a private cause of action and to provide specific grounds for denying one.[40]

B. The Minnesota Unfair Claims Practices Act

Until 1973, Minnesota had only enacted the original language of the 1947 NAIC Model Act,[41] which made no specific reference to claim settlement practices.[42] In 1973, the legislature added the following language to Minnesota Statutes section 72A.20, subdivision 12, thereby defining an additional unfair trade practice as the following:

> Causing or permitting with such frequency to indicate a general business practice the claims and complaints of insureds to be processed in an unreasonable length of time, or in an unfair, deceptive or fraudulent manner, or in violation of such regulations as the commissioner of insurance shall make in the public interest to insure the prompt, fair, and honest processing of such claims and complaints.[43]

No further action was taken to regulate claim practices until 1983, when the Minnesota Department of Commerce informally released drafts of claims regulations. These regulations became the subject of lengthy negotiations between the insurance industry and the Commissioner of the Minnesota Depart-

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38. MODEL ACT, *supra* note 10, § 9(d) (emphasis added).

39. Because this section of the Model Act was intended to preserve any other rights an individual might have regarding unfair claims practices, it is referred to in this Article as the "savings clause."

40. *Compare* Sparks v. Republic Nat'l Life Ins. Co., 647 P.2d 1127, 1139 (Ariz. 1982), *cert. denied,* 459 U.S. 1070 (1982) ("[W]e believe that this section contemplates a private suit to impose civil liability irrespective of governmental action against the insurer.") *with* Tufts v. Madesco Inv. Corp., 524 F. Supp. 484, 487 (E.D. Mo. 1981) ("The reasonable implication of the phrase 'any *other* laws of this state' is that civil liability will not arise from a violation of the Unfair Claims Settlement Act or the Unfair Insurance Practices Act.").

41. *See supra* note 25.

42. *See supra* note 26.

43. Act of May 21, 1973, ch. 474, § 1, 1973 Minn. Laws 474 (codified at MINN. STAT. § 72A.20, subd. 12 (1984)).

ment of Commerce. The negotiations continued into 1984 in the shadow of proposed legislation that would have authorized punitive damages in actions against insurance companies.[44] The claimed objective of the punitive damages bill was the deterrence of unfair claims practices.[45] The insurance industry, therefore, took the position that the adoption of a comprehensive set of claims handling regulations was a preferable approach to achieving the desired social objective. After numerous drafts, proposed regulations were published in the State Register.[46] The industry continued to negotiate with the commissioner for change because the industry viewed some of the proposed regulations to be unreasonable. The negotiations were unsuccessful and the commissioner sought to have the legislature enact the regulations as part of the Minnesota Statutes. The proposed regulations ultimately emerged as the Minnesota Act. The Minnesota Act is the most comprehensive claims practices law in the country. The Act is, in fact, the statutory enactment of the fourteen provisions of the NAIC Model Act[47] and an expanded version of the Model Regulations. Subdivision 12 of the Act contains the Model Act, and subdivision 12a is similar to the Model Regulations.[48]

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44. *See* S.F. No. 701, H.F. No. 735, 73rd Minn. Leg., 1983 Sess. (copy on file at the William Mitchell Law Review office).

45. *Id.*

46. 8 Minn. Admin. Reg. 1562 (Jan. 2, 1984).

47. *See supra* note 25.

48. Some of the differences between subdivision 12a of the Act and the Model Regulations should be noted because they make significant changes in Minnesota common law and could be the subject of future litigation. One change involves an insurer's duty to fully investigate a claim. MINN. STAT. § 72A.20, subd. 12(4). Subdivision 12a(d)(11) allows an insurer no more than 60 days after receipt of a proof of loss to accept or deny a claim. The comparable section of the Model Regulations allows an insurer additional response time when necessary to complete an investigation. MODEL REGULATION, *supra* note 33, § 9. An insurer may be faced with a conflict between its statutory and common law duty to fully investigate a claim before making a claims decision and its statutory obligation to accept or deny a claim within 60 days after the insurer has received proof of loss. *See, e.g.*, Egen v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979), *cert. denied*, 445 U.S. 912 (1980). One example in which the 60 day requirement could prove troublesome is a life insurance case where the insured has been murdered and the beneficiary is a suspect. In such cases, the proof of loss is the death certificate which may be submitted with the claim, leaving an insurer 60 days to investigate a case on which the police may work for several additional months. It remains to be seen whether an insurer may deny a claim pending further investigation and still be in compliance with the Act. An insurer providing group insurance may also be concerned about conflicting statutory obligations due to claims regulations and the fiduciary duty to investigate under the Employee Retirement Income Security Act of 1974. *See* Russell v. Massa-

The Act contains three significant references which merit identification at this point, since the nation's courts have interpreted comparable language to determine the outcome of unfair claims practices litigation. The first of these references defines an "unfair service" or violation of subdivision 12 as "causing or permitting with such frequency to indicate a general business practice" one or more of the fourteen proscribed practices.[49] This language raises the issue of whether an unfair trade practice can result from a single violation. The issue of what constitutes a general business practice is significant since the Minnesota Court of Appeals ruled that an individual has the right to bring a private suit against an insurer for the commission of an unfair trade practice.[50]

The language of subdivision 12 must be contrasted with the second key reference, which is contained in the introduction to subdivision 12a, captioned "Administrative enforcement." This introductory paragraph goes on to provide that: "The commissioner may . . . [pursuant to the administrative procedures set forth in the Chapter], seek and impose appropriate administrative remedies, including fines, for (1) a violation of [the subdivision 12a rules]; or (2) a violation of section 72A.20, subdivision 12."[51] The next sentence provides that the "commissioner need not show a general business practice in taking an administrative action for these violations." The third key

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chusetts Mut. Life Ins. Co., 722 F.2d 482 (9th Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 3085 (1985).

Another conflict with common law arises under subdivision 12a(h)(4), which makes it improper for an insurer to deny a liability claim because the insured has failed or refused to report a claim unless an independent evaluation of available information indicates there is no liability. This contradicts an insurer's common law right to demand notice of loss by an insured. *See, e.g.*, Sterling State Bank v. Virginia Sur. Co., 285 Minn. 348, 173 N.W.2d 342 (1969). The Minnesota Supreme Court stated the following in *Sterling*:

> [T]he requirement that the insured provide notice of loss and proof of loss is a commonly recognized and accepted part of an insuring agreement . . . . It is only reasonable to require that the insurer be given an opportunity for prompt investigation so as to protect itself against fraudulent or exhorbitant claims and, while the matter is fresh in the minds of all, to appraise and determine a disposition by way of settlement or defense.

Id. at 354, 173 N.W.2d at 346 (citations omitted). The protections afforded an insurer under common law have apparently been eliminated by the Act.

49. MINN. STAT. § 72A.20, subd. 12.

50. *See Morris*, 371 N.W.2d at 623. For a discussion of *Morris*, see *infra* notes 222-41 and accompanying text.

51. MINN. STAT. § 72A.20, subd. 12a. Subdivision 12 contains the 14 rules of the Model Act. *See supra* note 31.

provision in subdivision 12a of the Act is the reference to section 8.31 of the Minnesota Statutes. The Act provides that "[N]o individual violation constitutes an unfair, discriminatory, or unlawful practice . . . for the purpose of § 8.31."[52]

At least one commentator has placed great emphasis on this seemingly contradictory series of standards.[53] As set forth more fully later in this Article,[54] undue importance should not be attached to these distinctions unless they are found to be a clear statement of legislative intent. This apparent contradiction of standards for subdivision 12 violations should not cause a court interpreting these sections to draw significant inferences from imprecise drafting.

C. *Minnesota Insurance Law*

An exhaustive discussion of Minnesota insurance law is beyond the scope of this Article. A brief review is necessary, however, since any interpretation of the Act must contemplate the common law in this area.[55]

The Minnesota courts consider an insurance policy as a contract between two parties—the insurer and the insured.[56] The Minnesota courts follow the general rules of construction, which favor insureds in interpreting these contracts. The courts recognize the disparity of bargaining power between the parties and the public trust that society has placed in these contracts.[57] If an insurer breaches the contract, the insured (first party) may sue for damages. The measure of damages for breach of this contract is, by and large, the same afforded other contracting parties; specifically, the amount owing under the

52. MINN. STAT. § 72A.20, subd. 12a.

53. *See* Hatch, *Unfair Claims Practices Act Creates Private Cause of Action*, MINN. TRIAL LAW., Spec. Ed. (1984) (copy on file at the William Mitchell Law Review office).

54. *See infra* notes 169-76 and accompanying text.

55. A rule of statutory construction in Minnesota is that the common law is particularly important when legislative intent is ambiguous. *See, e.g.*, Agassiz & Odessa Mut. Fire Ins. Co. v. Magnusson, 272 Minn. 156, 166, 136 N.W.2d 861, 868 (1965) (statutes are presumed not to modify the common law unless expressly provided).

56. *See* Bobich v. Oja, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960) ("[S]ubject to the statutory law of the state, a policy of insurance is within the application of general principles of the law of contracts.").

57. Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271 (Minn. 1985). The court has adopted a reasonable expectations doctrine. This doctrine implies that the contract should be construed to give credence to the insured's expectations of policy coverage.

contract.[58]

Third-party claimants, who may be affected by the contracts, are not in contractual privity with the insurer. An insurer owes no special duty to an individual bringing an action against its insured. These third-party claimants have not been allowed to bring their own cause of action against an insurer in Minnesota,[59] although a third-party claimant may pursue a claim that has been assigned by the insured.[60]

Minnesota courts have not awarded punitive damages in contract actions brought against insurers,[61] following the general rule that punitive damages are not available in breach of contract actions.[62] A number of courts in other jurisdictions, however, have found an extracontractual duty of good faith, the breach of which constitutes an independent tort.[63] In these jurisdictions, a bad faith breach can give rise to damages for emotional distress and punitive damages.[64] Minnesota, however, follows the traditional rule that "a malicious or bad-

58. *See, e.g., id.* at 277.

59. Only Florida has found that under common law a third-party claimant may bring a direct cause of action against an insurance company on a third-party beneficiary theory. *See* Thompson v. Commercial Union Ins. Co., 250 So.2d 259 (Fla. 1971). *But see* Fidelity & Cas. Co. v. Cope, 462 So.2d 459 (Fla. 1985). Other states have specifically rejected that theory. *See, e.g.,* Bean v. Allstate Ins. Co., 285 Md. 572, 403 A.2d 793 (Md. Ct. App. 1979). *See generally* Note, *Excess Liability of Insurers for Bad Faith Refusal to Settle: A Boon to the Individual Insured that Works to the Detriment of Consumers,* 3 SUFFOLK U.L. REV. 377 (1984); Comment, Royal Globe Insurance Co. v. Superior Court: *Right to Direct Suit Against an Insurer by a Third Party Claimant,* 31 HASTINGS L. REV. 1161 (1980) ([hereinafter cited as Comment, Royal Globe] discussion of *Royal Globe* and extra-contractual liability of insurer); Comment, *Liability Insurers and Third-Party Claimants: The Limits of Duty,* 48 U. CHI. L. REV. 125, 140 (1981) (discussion of third-party beneficiary theory); Comment, *Extending the Insurer's Duty of Good Faith and Fair Dealing to Third Parties Under Liability Insurance Policies,* 25 UCLA L. REV. 1413 (1978) (discussing state law imposing duty of good faith and fair dealing on insurer).

60. *See* Boerger v. American Gen. Ins. Co., 257 Minn. 72, 100 N.W.2d 133 (1959).

61. *See* Haagenson v. National Farmers Union Property & Casualty Co., 277 N.W.2d 648, 653 (Minn. 1979).

62. RESTATEMENT OF CONTRACTS § 342 (1932); 5 A. CORBIN, CORBIN ON CONTRACTS § 1077, at 438 (1964); 11 S. WILLISTON, TREATISE ON THE LAW OF CONTRACTS, § 1340 (3d ed. W. Jaeger 1968).

63. *See, e.g.,* Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 538, 647 P.2d 1127, 1136 (1982); Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 578, 510 P.2d 1032, 1040, 108 Cal. Rptr. 480, 488 (1973); Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 686, 271 N.W.2d 368, 374 (1978).

64. The courts have generally recognized that different standards are appropriate for awarding damages for emotional distress and punitive damages. *See, e.g., Anderson,* 85 Wis. 2d at 696, 271 N.W.2d at 379 (an evil intent, a wanton disregard of duty, or gross or outrageous conduct is required for a punitive damages claim).

faith motive in breaching a contract does not convert a contract action into a tort action."[65] Thus, punitive damages are not available for breach of insurance contracts in Minnesota.[66]

Although not a specific part of Minnesota insurance law, Minnesota has a statute explicitly authorizing punitive damages under certain circumstances. Section 549.20 of the Minnesota Statutes provides that punitive damages can only be awarded in civil actions upon "clear and convincing evidence that the acts of the defendants show a willful indifference to the rights or safety of others."[67] The Minnesota Supreme Court has made it clear that the punitive damages statute does not apply in a contract action in the absence of an independent tort.[68]

The final element of the preexisting legal framework which must be considered is subdivision three of Minnesota Statutes section 8.31.[69] This provision allows persons injured by a violation of certain Minnesota trade practice laws to bring civil action for actual losses. Additionally, the section offers equitable remedies.[70] Although insurance companies were specifically exempted from that law,[71] the provision containing that

65. *Haagenson*, 277 N.W.2d at 652 (citing Wild v. Rarig, 302 Minn. 419, 442, 234 N.W.2d 775, 790 (1975), *cert. denied*, 425 U.S. 902 (1976)).

66. It should be noted, however, that such damages are available if an insurer has committed a tort such as fraud independent of the contract. In addition, extracontractual damages may be awarded in third-party cases in which an insurer breaches its fiduciary duty to deal in good faith with its insureds by refusing to settle a claim. An insurer has a duty to its insureds to settle in good faith when liability is reasonably clear. *See* Short v. Dairyland Ins. Co., 334 N.W.2d 384, 387 (Minn. 1983). The insurer will be liable for the amount of the judgment in excess of the policy limits. *See* Peterson v. American Family Mut. Ins. Co., 280 Minn. 482, 486, 160 N.W.2d 541, 543-44 (1968). While an insurer may be liable to its insured for an excess judgment, in the absence of an independent tort, damages for emotional distress and punitive damages are not available.

67. MINN. STAT. § 549.20, subd. 1 (1984).

68. *See* Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n, 294 N.W.2d 297, 311 (Minn. 1980) (the fact that statutory punitive damages are authorized in civil cases under MINN. STAT. § 549.20 does not overrule the line of cases prohibiting punitive damages in contract actions).

69. MINN. STAT. § 8.31, subd. 3 (1984).

70. *Id.* The extent of the "equitable" remedies provision is unclear. It may or may not have the effect of providing tort remedies to actions based on breach of contract.

71. Subdivision 4 of section 8.31 provided: "The provisions of this section shall not apply to any person, firm or corporation engaged in the insurance business and as such subject to sections 72A.17 to 72A.30." MINN. STAT. § 8.31, subd. 4 (1982) *repealed by* Act of July 1, 1983, ch. 290, 1983 Minn. Laws 173.

exemption was deleted in 1983.[72] It has been argued that this deletion created a section 8.31 private cause of action against insurance companies that have committed an unfair trade practice.[73] As discussed later in this Article, that interpretation is open to question.[74]

A brief review of current Minnesota law sets a framework for an analysis of the possible interpretations of the Act. It identifies the magnitude of the change in the existing common law presented by certain interpretations. Some interpretations would transform suits against insurers, currently limited to contract remedies, into tort actions demanding damages for emotional distress and punitive damages. In addition, third-party claimants would be able to sue insurance companies for their own damages, instead of being limited to bringing the assigned claim of the insured.[75]

II. Litigation Under the Unfair Claims Practices Laws

This section of the Article discusses the issues identified and the holdings reached by other courts in addressing the unfair claims practices laws. After briefly discussing *Royal Globe Insurance Co. v. Superior Court,*[76] the first case to hold that an unfair claims practices act created a private cause of action, the Article reviews other jurisdictions' interpretations of the issues addressed in *Royal Globe.* Finally, the authors attempt to reconcile the apparent inconsistent results reached by the courts.

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72. *See id.*

73. *See* Hatch, *supra* note 53, at 6.

74. *See infra* notes 177-85 and accompanying text.

75. While the merits of direct liability to third-party claimants have been the subject of considerable commentary, the vantage point of this Article is only that such actions would present a dramatic change from the current state of Minnesota law. In addition, this Article does not explore the relative merits of awarding punitive damages in insurance actions. That issue has been explored extensively elsewhere, and this Article only notes the present status of Minnesota law on this point. *See generally* Creedon, *Punitive Damages for Breach of Contract—Does the Punishment Fit the Crime,* 1983 Det. C.L. Rev. 1149; Riley, *Disciplining the Recalcitrant Insurer: Punitive Damages for Breach of Contract,* 57 N.Y. St. B.J. 30 (Feb. 1985); Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change,* 61 Minn. L. Rev. 207 (1977); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 Va. L. Rev. 269, 272 (1983); *Punitive Damages Symposium,* 11 Wm. Mitchell L. Rev. 309-417 (1985).

76. 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979).

A. Royal Globe Insurance Co. v. Superior Court

Royal Globe, decided by the California Supreme Court in 1979, marked the first time that an unfair claims practices act was held to create a private cause of action. The case has sparked considerable controversy and commentary as courts throughout the country have grappled with the issues that it raised.[77]

There are two critical elements of the *Royal Globe* decision. First, the court concluded that a private party[78] may bring a civil action seeking damages resulting from an insurer's violation of the California Unfair Claims Practices Act (California Act).[79] Second, the court interpreted the California Act to allow a private action or a single violation "knowingly committed."[80]

The section of the California Act defining its scope is identical to the Model Act, except that the California Legislature added the adverb "knowingly."[81] The relevant portion of the California Act defines an unfair practice as "knowingly" committing or performing unfair claims practices with such frequency as to indicate a general business practice.[82]

Since punitive damages could result from the finding of a private cause of action under the Minnesota Act, it should be noted that the California court previously recognized the availability of punitive damages arising from an independent tort in insurance contract cases.[83] The availability of such damages was not in derogation of California common law with respect to first-party insureds and their assignees.[84] Another state's common law, however, could be completely reversed by that

77. *See generally* Gornblum, *Extracontract Actions Against Insurers: What's Ahead in the Eighties,* 19 FORUM 58 (1983); Howser, *Unfair Claims Settlement Practices Act-How the Courts Have Interpreted the Act,* 15 F. 336 (1970); Note, *Bad Faith: Defining Applicable Standards in the Aftermath of* Royal Globe v. Superior Court, 23 SANTA CLARA L. REV. 917 (1983); Comment, Royal Globe, *supra* note 59.

78. The plaintiff, who slipped and fell in a market, brought suit against the market and joined the market's liability insurer for failing to settle in good faith. *Royal Globe,* 23 Cal. 3d at 884, 592 P.2d at 331-32, 153 Cal. Rptr. at 844-45.

79. CAL. INS. CODE § 790.03 (West 1985).

80. *Royal Globe,* 23 Cal. 3d at 884, 592 P.2d at 331-32, 153 Cal. Rptr. at 844-45.

81. CAL. INS. CODE § 790.03.

82. *Id.*

83. *See Gruenberg,* 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

84. Until *Royal Globe,* California law did not allow a third-party claimant to sue an insurer directly. Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 941-42, 553 P.2d 584, 586-87, 132 Cal. Rptr. 424, 426-27 (1979).

approach.[85]

B. *The Private Cause of Action*

The resolution of the issue of whether the breach of an unfair claims practice law gives rise to a private cause of action has involved an integrated approach. In the first level of analysis, courts examine the language of the statute to find whether that language explicitly or implicitly provides for a private cause of action.[86] The second level of analysis occurs when a court finds the statute to be silent on the creation of a private cause of action.[87] The courts then examine the statute as a whole to determine whether finding an implied private cause of action is consistent with the purpose of the statute.[88] In these situations, courts have applied common law tests adopted to determine the existence of an implied private cause of action under regulatory statutes. As part of that analysis, many courts have considered the degree to which the proposed interpretation varies from, or is in derogation of, existing common law.[89]

1. *The Clear Implication Test*

No court has found the unfair claims practices laws to explicitly authorize or preclude a private cause of action. Several courts, however, have found sufficient guidance in particular phrases in the unfair claims practices laws to create or deny an implied private cause of action.[90] A prime example is the *Royal*

85. Since Minnesota does not consider breach of an insurance contract to be a tort, such expanded remedies would mark a significant shift from the common law. This Article attempts to delineate and analyze the private right of action for first parties and for third-parties as discrete issues. The issues, however, and arguably the court's motivations are inextricably interwoven. Third-party claimants are most likely to argue the existence of a private cause of action, since they have no common law right to bring an action against an insurance company for refusing to settle in good faith. *See* Bean v. Allstate Ins. Co., 285 Md. 572, 574, 403 A.2d 793, 794-95 (1979) (general review of authority). *See generally* Annot., 63 A.L.R. 3d 677 (1975 & Supp. 1984) (discussion of injured person's right to recover against insurer).

In those states which have not recognized the tort of bad faith, an insured would also have an interest in alleging a violation of an unfair claims practices act in hopes of receiving damages for emotional distress and possibly punitive damages. Punitive damages are not available for breach of contract.

86. *See infra* notes 90-101 and accompanying text.

87. *See infra* notes 102-20 and accompanying text.

88. *Id.*

89. *See infra* notes 121-37 and accompanying text.

90. *See infra* notes 102-20 and accompanying text.

Globe court's finding that a private cause of action was implied under the unique language of the California Act. The savings clause of the Model Act provides that: "No order of the (Commissioner) under the Act or order of a court to enforce the same shall in any way release or absolve any person affected by such order from a liability under any *other* laws of this state."[91]

The California Act, however, did not refer to the "other laws of this state," but stated that civil actions would be allowed "under the laws of this state arising out of the methods, acts, or practices found unfair or deceptive."[92] The court ruled that the legislature intended civil liability to arise under the California Act,[93] finding precedent for that conclusion in other California decisions.[94] The *Royal Globe* court categorized the variation of the language of the savings clause from the Model Act as evidence of a conscious decision on the part of the legislature to alter the common law.[95]

Some courts, in refusing to find an implied cause of action, have based their decision on the absence of the word "other," which is found in California's statute. This distinction was the dispositive factor in *Tufts v. Madesco Investment Corp.*,[96] in which the federal district court in Missouri denied a private cause of action. The court distinguished *Royal Globe,* stating that "the reasonable implication of the phrase 'any *other* laws of the state' is that civil liability will not arise from a violation of the Unfair Claims Practices Act."[97] In addition, the Illinois Court of Appeals determined that the absence of the word "other" was

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91. MODEL ACT, *supra* note 10, § 9(d) (emphasis added).

92. CAL. INS. CODE § 790.09 (West 1985).

93. *See Royal Globe,* 23 Cal. 3d at 884, 592 P.2d at 332, 153 Cal. Rptr. at 845.

94. *See id.* at 885-86, 592 P.2d at 333, 153 Cal. Rptr. at 846. The court in *Royal Globe* relied on Shernoff v. Superior Ct., 44 Cal. App. 3d 406, 118 Cal. Rptr. 680 (1975), and Greenberg v. Equitable Life Assurance Soc'y, 34 Cal. 3d 994, 110 Cal. Rptr. 470 (1973), in reaching its conclusion that civil liability arises out of the California Act. *Royal Globe,* 23 Cal. 3d at 886, 592 P.2d at 340-41, 153 Cal. Rptr. at 846 . As pointed out in the *Royal Globe* dissenting opinion, *Greenberg* involved a suit by an insured for an illegal tie-in arrangement. *Id.* at 897, 592 P.2d at 340-41, 153 Cal. Rptr. at 853-54 (Richardson, J., dissenting). Similarly, *Shernoff* involved a price-fixing arrangement in restraint of trade. Thus, the precedent cited by the court has not been previously applied to the California Act.

95. *See Royal Globe,* 23 Cal. 3d at 885, 529 P.2d at 332-33, 153 Cal. Rptr. at 845-46.

96. 524 F. Supp. 484, 486-87 (E.D. Mo. 1981) (allegation of insurer's bad faith dealing failed to state a cause of action under either Missouri common law or the Missouri Unfair Claims Settlement Act).

97. *Id.* at 487.

also a contributing, but not a dispositive, factor in denying a private cause of action.[98] The Colorado Court of Appeals also found that the Colorado unfair claims practices statute[99] did not expressly provide or authorize a private civil remedy.[100] The Colorado court held that in the absence of contrary legislative intent, the specific remedies designated are exclusive.[101]

2. *The* Cort *Test*

A majority of courts have found the savings clause of the unfair claims practices acts to provide insufficient direction to guide them in determining whether to imply a private cause of action from a silent statute. Several of these courts have applied a variation of a four-part test established by the United States Supreme Court in *Cort v. Ash*[102] to determine whether a statute creates a private cause of action.

The first question under this test is whether the plaintiff is a member of the class for whose special benefit the statute was enacted. Second, was there legislative intent, either explicit or implicit, to create or deny a remedy? Third, is a private cause of action consistent with the underlying purpose of the unfair claims practices law? Fourth, will the implication of a private cause of action intrude into an area within the exclusive jurisdiction of the federal government or which has been delegated exclusively to a state administrative agency?[103]

The first application of this test was by the Illinois Court of Appeals in 1979 in a third-party action.[104] The court articu-

98. Scroggins v. Allstate Ins. Co., 74 Ill. App. 3d 1027, 1035-36, 393 N.E.2d 718, 724 (1979).

99. COLO. REV. STAT. §§ 10-3-1101 to 1104 (1973).

100. Farmers Group, Inc. v. Trimble, 658 P.2d 1370, 1378 (Colo. Ct. App. 1982).

101. *Id.* at 1377-78.

102. 422 U.S. 66, 78 (1975). The Supreme Court has looked at the implied private cause of action test several times after the *Cort* test. *See, e.g.,* Middlesex County Sewerage Auth. v. National Sea Clammers Assoc., 453 U.S. 1 (1981) (two-part test focusing on legislative intent). The *Cort* test, however is still applicable.

103. The fourth part of the *Cort* test is whether the cause of action is one traditionally relegated to state law in an area basically of state concern, making it inappropriate to invoke a remedy from federal law. Several state courts have modified the fourth part of the *Cort* test to apply to the state court context. *See, e.g.,* Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 43 (Iowa 1982) ("Will the implication of a private cause of action intrude into an area over which the federal government has exclusive jurisdiction or which has been delegated exclusively to a state administrative agency?").

104. *Scroggins,* 74 Ill. App. 3d at 1027, 393 N.E.2d at 718.

lated the *Cort* rule, but did not specifically apply the entire test, since it concluded that the first, or special benefit part, was not satisfied.[105] The court ruled that the statute was enacted specifically to protect the insured and to provide administrative enforcement in the interest of the general public.[106] Therefore, no private cause of action could be implied for third-party claimants.[107]

The application of the *Cort* analysis yielded a different result in *Jenkins v. J.C. Penney*.[108] The West Virginia Supreme Court found that a private cause of action may be implied under the West Virginia Unfair Claims Practices Act.[109] Unlike the Illinois court, the *Jenkins* court had no trouble concluding that a third-party claimant is among the class of persons for whose benefit the statute was enacted.[110] In its attempt to find evidence of the legislature's intent to create or deny a private cause of action, the court found no explicit indication of legislative intent.[111] The *Jenkins* court found, however, that a private cause of action is consistent with the purpose of the unfair claims practices law, thereby satisfying the third prong of the *Cort* test.[112] Finally, the *Jenkins* court found no interference with a regulatory area relegated exclusively to the federal government.[113] The court concluded that a private cause of action should exist.[114]

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105. *Id.* at 1034-35, 393 N.E.2d at 723.

106. *Id.*

107. *Id.* The court stated: "While other unfair practices defined in this statute may refer to claimants, we believe that a more explicit legislative intent to extend the duty to settle to third party claimants should be required where imposition of such duty would be in derogation of so much common law." *Id.* at 1036, 393 N.E.2d at 724.

108. 280 S.E.2d 252 (W. Va. 1981).

109. *Id.* at 255.

110. *Id.* at 255-56. The court relied primarily on the statutory references to "claimants" as well as to "insureds." *Id.*

111. *Id.* The court noted an overriding policy of the state to provide such rights generally, pointing to West Virginia's unique implied right of action arising out of a statutory requirement to maintain sidewalks. *Id.*

112. *Id.* at 258. The deterrent value of civil actions was perceived as wholly consistent with the underlying intent of the law.

113. *Id.*

114. *Id.* The West Virginia court's literal application of the fourth part of the *Cort* analysis may be inappropriate in the interpretation of a state statute. One would expect the Supremacy Clause of the U.S. Constitution to be dispositive of this issue. *See* U.S. CONST. art. VI, § 2. When dealing with state statutes, it would appear that the test should inquire as to whether the legislature has delegated the regulatory burden exclusively to a state, rather than to a federal, agency. In two other jurisdic-

In *Seeman v. Liberty Mutual Insurance Co.*,[115] the Iowa Supreme Court determined that third-party claimants were a special class under the law's protection.[116] The court applied the more recent modifications of the *Cort* decision.[117] The Iowa court concluded that the second element of the *Cort* test was not satisfied. Because of the explicit administrative remedies in the statute, the court found that there was no implicit legislative intent to create a private cause of action since the statute was "essentially regulatory in nature."[118] Thus, the private cause of action would also intrude into an area delegated exclusively to a state administrative agency.[119]

The cases where the *Cort* test has been applied do not establish a consistent interpretation. As a result, the examination of court holdings appropriately reflects the subjective nature of the tests. The cases also establish the condition precedent for application of the tests, that is, a statute must be silent on the point. There is some consistency, however, in the way most of the courts applied the second part of the test in finding no legislative intent to create a private remedy. Since the Model Act was essentially designed for administrative enforcement,[120] it is not surprising that the courts reached this conclusion. The differences in application make it apparent that the *Cort* test is not a mechanistic rule of interpretation. The application of the

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tions, Montana and Iowa, the courts modified the fourth part of the test in this manner, although neither court found the delegation exclusive and did not deny a private cause of action on that basis. *See Seeman,* 322 N.W.2d at 40; Klaudt v. Flink, 658 P.2d 1065, 1067 (Mont. 1983).

115. 322 N.W.2d 35 (Iowa 1982). The Iowa Supreme Court applied the Supreme Court's more recent modification of the *Cort* decision. If legislative intent is ambiguous, the court must apply the *Cort* test. *See* Merrill Lynch, Inc. v. Curran, 456 U.S. 353, 388 (1982). Since the statute and collateral materials were unclear, the Iowa court was forced to consider whether the test would create an implied private cause of action. *Seeman,* 322 N.W.2d at 41.

116. 322 N.W.2d at 41. While the *Seeman* court found that the fourth part of the test would not be satisfied, it based its findings on the fact that the legislature intended that the law be enforced exclusively by the insurance commissioner, and therefore a private cause of action would intrude on the commissioner's authority. *Id.* at 43.

117. *Id.* at 41.

118. *Id.* at 42. *But cf. Jenkins,* 280 S.E.2d at 257 ("[T]he strong policy declaration . . . against the unfair insurance practices initially suggest the appropriateness of a private cause of action.").

119. *Seeman,* 322 N.W.2d at 43.

120. *See supra* note 37 and accompanying text.

Cort test, like the other tests used by the courts, may be explained as a function of the judicial climate in a particular state.

3. The Derogation of Common Law Test

The remaining courts that have examined the private cause of action issue also found no express direction in the statute. The courts that have not applied the *Cort* test also base their analysis on legislative intent. In the absence of clear legislative directives, however, these courts have asked whether finding an implied private cause of action would modify the existing common law of their jurisdiction. At the risk of oversimplification, the analysis applied by these courts is broadly classified as the "derogation of common law" approach. While some courts have made this only a part of their analysis,[121] other courts have emphasized this issue in their rulings. The courts in Wisconsin, Oregon, and New Mexico illustrate this approach.[122]

In *Kranzush v. Badger State Mutual Casualty Co.*,[123] the Wisconsin Supreme Court found that the Wisconsin Unfair Claims Practices Act did not create a private cause of action.[124] The court recognized that under common law, a third-party claimant could not bring its own cause of action against an insurer for a bad faith refusal to settle.[125] Under Wisconsin law, statutes will not be construed to change the common law unless clearly expressed "beyond any reasonable doubt."[126] Thus, the key to the analysis in *Kranzush* is the requisite clarity of the legislative intent needed to change the common law.[127]

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121. *See supra* note 107 and accompanying text.

122. *See infra* notes 123-37 and accompanying text.

123. 103 Wis. 2d 56, 307 N.W.2d 256 (1981).

124. *Id.* at 81-82, 307 N.W.2d at 269.

125. *Id.* at 73-74, 307 N.W.2d at 265.

126. *Id.* at 74, 307 N.W.2d at 266 (citing Grube v. Moths, 56 Wis. 2d 424, 202 N.W.2d 261 (1972)). The Wisconsin Supreme Court recognized that the common law prevails. If the legislature wants to overturn judicial interpretation of law, the statute must do so clearly and unambiguously. *See* Wisconsin Bridge & Iron Co. v. Industrial Comm., 233 Wis. 467, 472, 290 N.W. 199, 202 (1940).

127. *Kranzush*,103 Wis. 2d at 74-75, 307 N.W.2d at 266 (citing McNeill v. Jacobson, 55 Wis. 2d 254, 198 N.W.2d 611 (1972)). Under Wisconsin law, the legislative intent is to be determined from the language of the statute, the evil to be remedied, and whether the statute was enacted for the general welfare or to protect a special class. Applying this test, the *Kranzush* court found that the language of the statute did not mention a private cause of action. The administrative remedies were apparently exclusive. *See id.* at 76-79, 307 N.W.2d at 267-68. Even though the court held that

The analysis employed by the Oregon Supreme Court in *Farris v. United States Fidelity and Guaranty Co.*[128] could be significant to the issues in Minnesota. The action in this case was brought by insureds against an insurer for failing to properly issue a liability policy. The insureds asked for damages for emotional distress and for punitive damages in addition to traditional breach of contract remedies.[129] The court's discussion is significant because, like Minnesota, Oregon neither recognizes the tort of bad faith nor allows punitive damages in insurance contract actions.[130] The Oregon court proceeded to review its unfair claims practices statute,[131] closely patterned after the Model Act. The court found the statute applied to both claimants and insureds.[132] It concluded, however, that the legislature did not intend to transform breach of contract actions into tort actions, which would change the measure of damages.[133] The court found no indication in the statute of a public policy allowing damages for emotional distress for breach of an insurance contract.[134]

Another example of the "derogation of common law" approach may be found in *Patterson v. Globe American Casualty Co.*[135] In *Patterson,* the New Mexico Supreme Court employed a straightforward analysis to determine the availability of a private cause of action for a third-party claimant. In order to determine legislative intent, the court examined the language used, the purpose to be accomplished, and the wrong to be rectified.[136] The court stated that under New Mexico law, if a statute creates a right that did not exist under common law,

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both claimants and insureds were protected by the statute, the court failed to recognize a private cause of action without a specific legislative directive. *Id.*

It is interesting to note that while the Wisconsin Supreme Court did not formally apply the Supreme Court's four part test, it employed a similar analysis. The court based its decision on the extent to which finding a private cause of action would be in derogation of common law.

128. 284 Or. 453, 587 P.2d 1015 (1978).

129. *Id.* at 455, 587 P.2d at 1016.

130. *Id.* at 458, 587 P.2d at 1018-19.

131. *Id.* at 456-58, 587 P.2d at 1017-18; *see* OR. REV. STAT. § 746.230 (1983).

132. *Farris,* 284 Or. 457, 587 P.2d at 1017.

133. *Id.* at 458, 587 P.2d at 1018.

134. *Id.*

135. *Patterson,* 685 P.2d 396, 398 (N.M. Ct. App. 1984).

136. *Id.* at 398. The court refused to imply a private cause of action, since the unfair claims practices law contained express administrative remedies. *Id.* at 399. The court was referring to § 59-11-10, and §§ 59-11-14 to 59-11-19, of the New Mexico Unfair Insurance Practices Act. In addition, the *Farris* court stated that in

then the statutory remedy must be exclusive.[137]

4. *Independent Torts*

Several courts have examined the duties created under an unfair claims practices statute to determine whether they can form the basis of an independent tort of bad faith. Cases containing this analysis are distinguishable from the previously discussed cases which involved the recognition of a direct cause of action under the unfair claims practices statute. The cases in this section involve the use of the statute as a measure of an insurer's duty to insureds or to third-party claimants.

The Kansas Supreme Court, in *Spencer v. Aetna Life and Casualty Insurance Co.*,[138] considered the presence of a comprehensive regulatory scheme as significant in its consideration of whether to create a new tort.[139] As its rationale for refusing to create this new remedy, the court reasoned that the legislative remedies were sufficient to protect insureds.[140] Similarly, the Pennsylvania Supreme Court in *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co.*,[141] found that the administrative remedies established under the Pennsylvania unfair claims practices law deterred bad faith conduct, and the creation of a new cause of action would not be appropriate.[142]

In contrast, the Arizona Supreme Court, in *Sparks v. Republic*

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other statutes, the legislature had shown it could expressly create a private cause of action. *Patterson*, 685 P.2d at 399.

Since *Patterson*, the law in New Mexico has changed. The legislature has created a private cause of action in insurance unfair claims practices cases. Sections 59-11-10 and 59-11-14 to 59-11-19 have been repealed. The current statute, § 59A-16-30 allows the party damaged by an insurer's or agent's violation of article 16 of the Insurance Code, to bring a private cause of action. N.M. STAT. ANN § 59A-16-30 (1985). The analysis in *Patterson*, however, provides insight into the court's decision when there was no express private cause of action.

137. *Patterson*, 685 P.2d. at 399 (citing Munro v. City of Albequerque, 48 N.M. 306, 150 P.2d 733 (1943)). The court held that "when a right is created which did not exist at common law and for that right a remedy is by statute prescribed, the whole matter of right and remedy is within the statute and no part of either otherwise exists." *Id.*

138. 227 Kan. 914, 611 P.2d 149 (1980).

139. *Id.* at 922-23, 611 P.2d at 156.

140. *Id.* at 926, 611 P.2d at 158. Like the Oregon court in *Farris*, the Kansas court stated that the statute did not indicate that damages for emotional distress could be recoverable through a tort of bad faith. *Id.* The court concluded that since the legislature had provided detailed and effective remedies, "we find it undesirable for us to expand those remedies by judicial decree." *Id.*

141. 494 Pa. 501, 431 A.2d 966 (1981).

142. *Id.* at 509, 431 A.2d at 970. The court held that an insured was not entitled

National Life Insurance Co.,[143] found that an insured could allege an independent tort of negligent misrepresentation[144] based on the duties specified in the Arizona unfair trade practices law.[145] This holding is not inconsistent with Arizona common law, which allows the tort of bad faith in insurance cases.[146]

C. *The Definition of an Unfair Trade Practice*

Courts recognizing a private cause of action have also had to interpret the unfair claims practices acts in order to determine when proscribed conduct constitutes a violation of the statute. In so doing, the courts have generally looked to the definition provided in the Model Act, which provides limited guidance on the issue.

The Model Act defines an unfair trade practice as "committing or performing [unfair claims practices] with such frequency as to indicate a general business practice."[147] In *Royal Globe,* the California Supreme Court interpreted the unique language of the California unfair claims practices statute. The statute contained the standard of "*knowingly committing* or performing with such frequency as to indicate a general business practice."[148] The court found that a single knowing violation of the statute constituted an unfair trade practice.[149] The court

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to supplement the remedies in the Pennsylvania Unfair Insurance Practices Act by an action in trespass to obtain damages for emotional distress and punitive damages. *Id.*

143. 132 Ariz. 529, 647 P.2d 1127 (1982), *cert. denied,* 459 U.S. 1070 (1982).

144. *Id.* at 540-41, 647 P.2d at 1138-39. The court used an analogy to the consumer fraud statutes in Arizona. The Arizona Supreme Court had previously held that the Consumer Fraud Act created a private cause of action. That law did not specifically provide for a private cause of action. The court, however, inferred such action from language in ARIZ. REV. STAT. ANN. § 44-1433 which states that the act does not bar any claim resulting from "any practice declared to be unlawful in the [consumer fraud] article." *See* Sellinger v. Freeway Mobile Homes Sales, Inc., 110 Ariz. 573, 577, 521 P.2d 1119, 1122 (1974).

The Arizona unfair claims practices law similarly provides that "[n]o order of the director . . . may in any manner relieve or absolve any person affected by the order or hearing from any other liability, penalty or forfeiture under law." ARIZ. REV. STAT. ANN. § 20-443. The court stated that it found such language to "contemplate a private suit to impose civil liability irrespective of governmental action against the insurer." *Sparks,* 132 Ariz. at 541, 647 P.2d at 1139.

145. *Id.* at 541, 647 P.2d at 1139 (citing ARIZ. REV. STAT. ANN. § 20-443 (1956 & Supp. 1984-85).

146. *See* Noble v. National Am. Life Ins. Co., 624 P.2d 866 (Ariz. 1981) (recognizing a cause of action in tort for an insurer's bad faith refusal to pay a valid claim).

147. MODEL ACT, *supra* note 10, § 4(9).

148. CAL. INS. CODE § 790.03(h) (West 1979 & Supp. 1985) (emphasis added).

149. *Royal Globe,* 23 Cal. 3d at 891, 592 P.2d at 336, 153 Cal. Rptr. at 849.

concluded that the conjunction "or" allowed the finding of a violation based upon a single knowing violation, or alternatively, upon a series of "performances" (presumably based upon negligent action), which collectively constitute a general business practice.[150] In what appears to be a circular argument, the court's justification for this distinction was based upon its ultimate conclusion that the statute creates a private cause of action.[151]

Few other courts have actually had to face this issue. Either they did not find a private cause of action, or the plaintiff alleged that the insurer had committed violations as a general practice.[152] Other states have not considered this issue because their state's unfair claims practices act contained language varying from the Model Act's "committing or performing." These courts have found their state statutes to be unambiguous. For example, the Illinois statute construed in *Scroggins v. Allstate Insurance Co.*[153] provided that an unfair claims practice arose if violations were "committed without just cause *and* performed with such frequency as to indicate a general business practice."[154]

One court that was forced to face the issue was the West Virginia Supreme Court in *Jenkins.*[155] West Virginia had adopted the Model Act's language defining an unfair trade practice as "commit[ting] or performing [unfair acts] with such frequency as to indicate a general business practice."[156] The court considered the *Royal Globe* case and stated:

While our statutory language does not contain the word

150. *Id.*

151. *Id.* The court asserted that "[t]here would be no rational reason why an insured or third-party claimant injured by an insurer's unfair conduct, knowingly performed, would be required to demonstrate that the insurer had frequently been guilty of the same type of misconduct involving other victims in the past." *Id.*

152. *See, e.g., Patterson,* 685 P.2d at 396 (court refused to find private cause of action).

153. 74 Ill. App. 3d 1027, 393 N.E.2d 718 (Ill. App. Ct. 1979).

154. *Id.* at 1033, 393 N.E.2d at 721 (emphasis added). The court did not go beyond acknowledging the defendant's argument that a general business practice would not be required, since the court found the statute did not create a private cause of action. *See* Ill. Ins. Code § 154.3, *codified* at ILL. REV. STAT. ch. 73, § 766.3 (1965) (emphasis added), *repealed by* P.A. 80-926, § 73, eff. Sept. 22, 1977 (current version at ILL. REV. STAT. ch. 73, § 766.5 (Supp. 1985)). The current version uses "committed knowingly" language. ILL. REV. STAT. ch. 73, § 766.5 (Supp. 1985).

155. 280 S.E.2d 252 (W. Va. 1981).

156. W. VA. CODE § 33-11-4(9) (1982).

> 'knowingly' and, therefore, this is not an element of our statutory violation, it does seem clear that more than a single violation of West Virginia Code, 33-11-3(9), must be shown in order to meet the statutory requirements of an indication of "a general business practice," which requirement must be shown in order to maintain the statutory implied cause of action.[157]

Thus, the *Jenkins* court distinguished the *Royal Globe* argument with little analysis.

The most detailed analysis of the question comes from the dissent in *Royal Globe.*[158] The dissent first constructed a grammatical argument, noting that no comma separates the words "committing or performing," thereby suggesting that the words should be read together.[159] In addition, both of the two present participles, "committing" and "performing" are modified by the "frequency" clause. The dissent also answered the majority's contention that the legislature could not have intended to require an individual to show that the rights of others had been violated before being entitled to bring a cause of action. The dissenting judge's obvious solution was that the legislature did not intend to create a private cause of action at all, and that the language of the statute was directed only to administrative enforcement.[160]

The Wisconsin Supreme Court, in considering the question of whether a single violation of an unfair claims practices law constitutes an unfair trade practice, stated in dicta: "We do not foreclose the possibility that an insurer's treatment of one claimant during the course of the handling of one claim could be considered a business practice, but we have some doubt that it could be considered general."[161] Finally, a lower Connecticut court has stated that administrative enforcement of the unfair claims practices law is limited to "general business practices."[162]

The "general business practice" approach has the greater

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157. *Jenkins,* 280 S.E.2d at 260.

158. 23 Cal. 3d at 892-98, 592 P.2d at 337-39, 153 Cal. Rptr. at 850-54 (Richardson, J., concurring in part and dissenting in part, joined by Clark and Manuel, J.J.).

159. *Id.* at 894, 592 P.2d at 338, 153 Cal. Rptr. at 851.

160. *Id.* at 897, 592 P.2d at 340, 153 Cal. Rptr. at 852.

161. *Kranzush,* 103 Wis. 2d at 81, 307 N.W.2d at 269.

162. Cindeb Corp. v. Covenant Ins. Co., 7 *Conn. L. Trib.,* No. 6, p. 17 (February 9, 1981). *See* Bartlett and M. Ramano, *Connecticut Unfair Trade Practices Act and Connecticut Unfair Insurance Practices Act: Expanding Legal Horizons,* 58 CONN. B.J. 302 (Aug. 1984).

support by way of grammatical construction and plain meaning. Accepting this position, however, does not end the inquiry. As a result, this approach creates the collateral issue of what is meant by a "general business practice." In the *Jenkins* case, the West Virginia court ruled that multiple violations occuring in the same claim could be sufficient to demonstrate a general business practice, "since the term 'frequency' in the statute must relate not only to repetition of the same violation but to the occurrence of different violations."[163] Similarly, in *Klaudt v. Flink*,[164] the Montana Supreme Court cited the *Jenkins* test with approval, stating that "multiple violations [presumably of separate proscribed activities] occurring in the same claim could be sufficient to show a frequent business practice, as would violations by the same company in different cases."[165]

If a court must address this issue, it should consider the nature of the violation, the evidence presented by the insurer's claims manuals and written instructions, the claim files and the complaint files maintained by the insurer. A "facts and circumstances" test should be applied.[166] If a plaintiff demonstrated that an insurer had established a formal plan to delay payments, then even two such intentional violations should indicate a general business practice. In the other extreme, if an insurer is attempting to maintain the highest standards, but one employee or agent has negligently failed to act in a timely manner on several occasions before being discovered and dismissed, that practice does not indicate that the insurer made a general business practice of delaying payments. A court should examine all the relevant factors before determining that an insurer's actions constitute a general business practice.

D. Reconciling the Judicial Response

The review of the judicial response to unfair claims practices laws suggests that the decisions are, at least superficially, in-

163. *Jenkins*, 280 S.E.2d at 260.
164. 658 P.2d 1065 (Mont. 1983).
165. *Id.* at 1068.
166. In Minnesota, the application of a "facts and circumstances" test has been adopted in the "Construction" section of the Act. Subdivision 12a(b) provides: "The policy of the department of commerce, in interpreting and enforcing this subdivision, will be to take into consideration all pertinent facts and circumstances in determining the severity and appropriateness of the action to be taken in regard to any violation of this subdivision." MINN. STAT. § 72A.20, subd. 12a(b).

consistent.[167] The reconciliation of the judicial response lies in the essence of the question presented to the judiciary. This question is whether a court should imply a private cause of action where: (1) the statute is essentially silent on that point; (2) the statute was not designed by the model drafters to be amenable to other than administrative enforcement;[168] and (3) the finding of a private cause of action may be in derogation of common law. The jurisprudence of most states requires the courts to rule in favor of insureds and against

167. While the majority of the cases have not recognized a private cause of action, the reasons for doing so varied. Of the courts that found direction in the language of the statutes, some have found the word "other" (in the provision regarding civil liability under any "other" law of this state) to be a clear indication that the legislature did not intend to create a private cause of action. *See, e.g., Tufts,* 524 F. Supp. at 484. Other courts have ruled that the word "other" in the same statutory language implied a clear legislative intent to allow a private cause of action. *See, e.g., Klaudt,* 658 P.2d at 1065. The *Royal Globe* court, in a class by itself because of the omission of the word "other" in its statute, used that fact as the basis for creating a private cause of action. *See Royal Globe,* 23 Cal. 3d at 880, 592 P.2d at 329, 153 Cal. Rptr. at 842.

Some courts have found that the unfair claims practices laws create a duty owed to both insured and to third parties. *See, e.g., Seeman,* 322 N.W.2d at 41; *Klaudt,* 658 P.2d at 1067. One court has ruled that a duty is owed to insureds, but not to third-party claimants. *Scroggins,* 74 Ill. App. 3d at 1027, 393 N.E.2d at 718. Still another court has found that a duty is owed to the general public and not to insureds or claimants as a special class. *Kranzush,* 103 Wis. 2d at 56, 307 N.W.2d at 256. Some courts have ruled that the breach of the statutory duty creates a private cause of action in tort. *See, e.g., Sparks,* 132 Ariz. at 529, 647 P.2d at 1127. In other instances, courts have ruled that a breach of the statutory duty does not create a cause of action if a tort for bad faith breach of contract was not previously recognized under common law. *See Spencer,* 611 P.2d at 149; *D'Ambrosio,* 431 A.2d at 966. Several decisions proclaimed that a private cause of action was unavailable because administrative remedies were intended to be exclusive, while other courts have reached the opposite conclusion. *Compare Seeman,* 322 N.W.2d at 39; *Scroggins,* 74 Ill. App. 3d at 755, 393 N.E.2d at 721; *Patterson,* 685 P.2d at 398 *with Klaudt,* 658 P.2d at 1067.

With regard to the definition of an unfair trade practice, in *Royal Globe* the existence of the word "knowingly" combined with the use of "or" between "commits" and "performs" was the key to finding that a single violation of the California law constituted an unfair trade practice. *See Royal Globe,* 23 Cal. 3d at 890, 592 P.2d at 335-36, 153 Cal. Rptr. at 849. Other courts have decided that both "commits" and "performs" refer "to a general business practice." *Klaudt,* 658 P.2d at 1068; *Jenkins,* 280 S.E.2d at 259-60. One other court simply reasoned that "general" is the more determinative word. *Kranzush,* 307 N.W.2d at 268. When applying the same basic four-part test, the courts have varied considerably in their reasoning. Moreover, the courts have not been uniform in selecting which test to apply. Some courts rigidly apply the Supreme Court's test in *Cort* and its progeny. *See Seeman,* 322 N.W.2d at 38; *Klaudt,* 658 P.2d at 1067. Others applied multi-part tests that evolved in their own jurisdictions. *See, e.g.,* Farmers Group, Inc. v. Trimble, 658 P.2d 1370, 1377-78 (Colo. Ct. App. 1982); *Patterson,* 685 P.2d at 399; *Jenkins,* 280 S.E.2d at 257; *Kranzush,* 307 N.W.2d at 261-70.

168. *See supra* note 36 and accompanying text.

insurance companies when construing ambiguities.[169] The courts have been called upon to consider these issues in the context of the totality of their jurisprudence. The courts, however, have succeeded in producing a result consistent with the development of the common law in their jurisdiction.[170]

For example, if a court has not reasoned that the bad faith breach of an insurance contract creates an independent tort, the court would have little basis for the creation of the tort by reading legislative intent into an ambiguous statute with little or no legislative history on that point. Similarly, if a court has ruled that under common law a third-party claimant does not have the right to bring a direct action against an insurer, then it would not be consistent to establish such a private cause of action without a clear legislative directive under the statute. It would also follow that if a tort of bad faith has been established on behalf of insureds, a court should not find it a significant departure from principle to view a violation of statutory duty as sufficient to support a private cause of action for insureds.

It cannot be disputed that there are instances when a court feels that justice requires the modification of common law and the creation of a new remedy for unfair insurance practices. The decisions made by the California and West Virginia courts are consistent with the evolution of the common law in those jurisdictions. California has established a pattern of developing new remedies in insurance cases.[171] Thus, it was consistent for these courts to find a private cause of action in an ambiguous unfair claims practices law. Viewing the interpretation of

169. The lengths that some courts have gone to interpret apparently clear policy language against insurance companies has led to the coining of the maxim that "equity abhors an insurance company." *See, e.g.,* Taulelle v. Allstate Ins. Co., 296 Minn. 247, 251, 207 N.W.2d 736, 738 (1973) (motorcycle is "automobile" under policy language).

170. An alternative explanation of the inconsistency in these decisions may be found under the philsophy of "legal realism," which postulates that the legal rules which are applied by the courts do not form the actual basis of the courts' decisions. As stated in Llewelyn's early writings, "[t]he theory that rules decide cases seems for a century to have fooled, not only library-ridden recluses, but judges." Llewelyn, *The Constitution as an Institution,* 34 COLUM. L. REV. 1, 19 (1934). For an interesting modern application of legal realism, see generally Nowak, *Professor Rodell, The Burger Court, and Public Opinion,* 1 CONST. COMMENTARY 107 (1984). While legal realism may present an alternative explanation, it nevertheless appears that the courts have based their decisions on firm common law foundations, despite the apparent inconsistencies in their decisions.

171. *See, e.g., Gruenberg,* 9 Cal. 3d at 489, 510 P.2d at 1041, 108 Cal. Rptr. at 489.

the unfair claims practices acts of the various states as an extension of the common law rules, it is apparent that the courts have attempted to reach results consistent with the common law.[172] The courts have applied a variety of rules in a seemingly inconsistent manner to accomplish that end.

Two themes have emerged from these cases. First, regardless of the means used to discern the overall purpose of these acts, most courts have concluded that the purpose is to establish a comprehensive administrative scheme to regulate insurers. Second, in the absence of a very specific legislative directive, most courts have not made a major change in this well-developed area of common law. The courts that modified the common law did so as an extension of the direction the common law was already taking in that state.

III. Interpreting the Minnesota Unfair Claims Practices Act

The Minnesota Act provides the basis for one of the most complex decisions faced by a court in determining the impact of an unfair claims practices law.[173] First, Minnesota's law basically incorporates both the Model Act (subdivision 12 of the Minnesota Act) and a complex set of regulations (subdivision 12a of the Minnesota Act) in the same statute. Second, the Minnesota Act states that a single violation of either subdivision 12 or 12a of the Act is not an unfair trade practice for purposes of section 8.31. Third, the Commissioner of Commerce in Minnesota has opined that the Act creates a private cause of action and provides grounds for awards of punitive damages.[174] The NAIC has taken a contrary position.[175]

This section of the Article analyzes the issues arising out of the Act's passage that have been previously examined by the other courts. A conclusion is suggested which is consistent

172. *See supra* notes 103-07 and accompanying text.

173. *See* Minn. Stat. § 72A.20 (1984). On the other hand, the Minnesota courts can take notice of the underlying basis of the decisions rendered in other jurisdictions. Most courts that have addressed the issue have found that these laws were intended to create a comprehensive regulatory scheme and not a private cause of action. These courts refused to find an implied cause of action where such a finding would be in derogation of the common law.

174. *See* Hatch, *supra* note 53.

175. *See supra* note 37 and accompanying text.

with the language of the Act, the legislative intent of the Act, and the existing common law of the State of Minnesota.

A. The Clear Implication Test

The primary issue the Minnesota courts will decide is whether the commission of an unfair trade practice under the Act gives rise to a private cause of action. There is no language in the Act which expressly provides such rights. Thus, the Minnesota courts must review the Act to determine if any particular language forms the basis for implying a private cause of action. The two provisions that must be examined are the "savings clause"[176] and the reference to section 8.31 included in subdivision 12a.[177]

The savings clause in the Act does not provide the basis for implying a private cause of action. As a general rule, the courts examining this question have found that the savings clause does not provide sufficient grounds for creating an implied private cause of action in a statute that is otherwise silent on that point.[178] As stated by the Missouri court in *Tufts,* "the reasonable implication of the phrase 'any *other* laws of the state' is that civil liability will not arise from a violation of the unfair claims practices act."[179] It is clear that the savings clause neither creates nor precludes a private cause of action.

The next provision which must be reviewed is subdivision 12a, the administrative enforcement section.[180] That language provides: "No individual violation constitutes an unfair, discriminatory, or unlawful practice in business, commerce, or trade for purposes of Section 8.31."[181] This language is not by itself a sufficient indication of legislative intent for implying a private cause of action. The language, however, necessitates a separate analysis of section 8.31, which follows in this Article.[182] It is inconceivable that the Act's negative reference to

176. The savings clause of the Minnesota Unfair Trade Practices Act is codified at MINN. STAT. § 72A.29, subd. 1 (1984). The clause provides: "No order of the commissioner . . . shall in any way relieve or absolve any person affected by such order or decree from liability under any other laws of this state." *Id.*

177. *See supra* note 52 and accompanying text.

178. *See supra* notes 90-101 and accompanying text.

179. *Tufts,* 524 F. Supp. at 486-87.

180. MINN. STAT. § 72A.20, subd. 12a(a).

181. *Id.*

182. *See infra* notes 212-21 and accompanying text.

section 8.31 alone could be construed as an independent basis for implying a private cause of action.[183] A Minnesota court's inquiry must proceed to determine whether a private right of action should be implied from a statute that is silent on that point.

B. Tests for an Implied Private Cause of Action

Since the language of the Act alone does not provide a basis for implying a private cause of action, then the Minnesota courts must employ a common law test to decide whether the legislature intended the Act to create that right. The predominant tendency has been to follow the guidelines of the United States Supreme Court set forth in *Cort v. Ash* and its progeny.[184] To reach an interpretation consonant with the common law of this state, a Minnesota court should employ the following analysis in applying the *Cort* test to the Act.[185]

The first step in the analysis would be to determine whether the Act was intended to protect insureds or claimants as a special class or if the Act was adopted for the protection of only insureds, or for the general welfare.[186] At least one court has concluded its analysis by answering this first question.[187] The court found that third-party claimants, while covered by the statute, were not the special class intended for protection.[188] Considering the clear distinctions made under Minnesota common law between insureds and third-party claimants, it would not be inappropriate to make that distinction in a case brought by a third-party claimant. That argument could not be applied, however, in an action brought by an insured.

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183. The legislative history of the Act is not extensive, but it is clear that the Act itself was not designed to create a private cause of action. Transcripts were produced of hearings in which Commissioner Hatch, as sponsor of the legislation, took the position that the Act itself would not create any private remedies. The Commissioner asserted, however, that if an insurer violates the claim handling standards with such frequency as to constitute a general business practice, then that could give rise to a private cause of action arising under Section 8.31. *Unfair Claims Practices Act: Hearing on H.F. 735 Before the House Judiciary Committee,* 74th Minn. Leg., 1985 Sess., March 26, 1985 (audio tape).

184. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 17.

185. For a complete analysis of the courts utilizing the *Cort* test, see *supra* notes 95-113 and accompanying text.

186. *Cort,* 422 U.S. at 78.

187. *Scroggins,* 74 Ill. App. 3d at 1034-35, 393 N.E.2d at 723.

188. *Id.*

The second prong requires the examination of legislaive intent, either explicit or implicit, to create or deny a remedy.[189] There are no clear indications in the language as to private causes of action. It is apparent that the legislature intended to create a comprehensive administrative scheme of enforcement. The scheme of the Minnesota Act is much more detailed and rigorous than other states' acts. Other courts have ruled that their legislature's intent was to provide for an exclusive administrative regulation.[190] The Minnesota courts should conclude that the comprehensive regulatory scheme was the only remedy created by the Act.

The third question is whether a private cause of action would be consistent with the purposes of the Act.[191] It is clear that the purpose of the Act is to give the Commissioner of Commerce broad and comprehensive powers to regulate the claims practices of insurers.[192] The creation of new causes of action is not consistent with the scheme to control the behavior of insurance companies by regulation.

The fourth question is whether any federal legislation or state regulation would preclude adopting a private cause of action.[193] If the regulatory scheme is to be considered the exclusive statutory remedy, then this part of the test should be interpreted to deny the creation of a private cause of action.

The *Cort* test is basically a formula for determining legislative intent to create a private cause of action from a statute that is silent on that point. If a Minnesota court applies this test, it is clear that all four requisite parts would not be satisfied and a private cause of action could not be created.

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189. *Cort*, 422 U.S. at 78.

190. The courts that have found the unfair claims law to be a comprehensive administrative remedy were interpreting statutes that were similar to the Model Act. *See, e.g., Seeman*, 322 N.W.2d at 41 (interpreting IOWA CODE § 507B.4(9)(f)(1982)); *Spencer*, 227 Kan. at 924, 611 P.2d at 157 (interpreting KAN. STAT. ANN. § 40-201 to 40-2414 (Supp. 1979)). The Minnesota Act is broader than both the Model Act and the Model Regulations.

The Minnesota Department of Commerce has recently levied fines of $12,000 and $40,000 against individual insurance companies for violations of the Act. The substantial fines assessed shortly following the passage of the Act indicate the power of this regulatory scheme.

191. *Cort*, 422 U.S. at 78.

192. *See* MINN. STAT. § 72A.19, subd. 2. The statute gives the commissioner the power to "promulgate rules and regulations as he deems necessary to enforce and administer the provisions of this chapter."

193. *Cort*, 422 U.S. at 78.

C. *Derogation of Common Law Test*

Of course, the Minnesota courts do not have to apply the *Cort* test. The type of examination employed by the Wisconsin Supreme Court could also be utilized.[194] After examining the language of the Wisconsin statute, and searching for a clear legislative directive, the primary thrust of the Wisconsin test was whether the legislative intent to change the common law was expressed "beyond any reasonable doubt."[195] If this test was applied in Minnesota, a review of the language and purpose of the Act could not produce a legislative intent to change the common law beyond any reasonable doubt.

The findings of other courts applying the derogation of common law approach could also be applied in Minnesota. For example, the Oregon court concluded that there was no evidence that the legislature intended to transform breach of contract actions into tort actions.[196] A Minnesota court could also take note of the New Mexico court's reasoning[197] and find significance in the fact that the legislature has expressly created private causes of action in the past and failed to do so in this instance.[198]

The review of the decisions in this area make it clear that when courts develop a body of common law soundly based in the jurisprudence of their state, they will not abrogate that common law without a clear message from the legislature. As in the other states, a basic principle of Minnesota law is that the common law must not be significantly changed absent clear legislative direction.[199] Accordingly, it is not appropriate for a

194. *See Kranzush,* 103 Wis. 2d at 60-67, 307 N.W.2d at 260-65; *see also supra* notes 117-22 and accompanying text.

195. *Kranzush,* 103 Wis. 2d at 74, 307 N.W.2d at 266.

196. *Farris,* 284 Or. at 458, 587 P.2d at 1018.

197. *Patterson,* 685 P.2d at 397-99.

198. *Id.* For example, in 1983, a bill was proposed in the Minnesota Legislature that would have authorized punitive damages in insurance cases. The bill provided that "an insured or claimant injured by a violation of [the Act] may recover damages, including those set forth in MINN. STAT. § 549.20 (1984), in a civil action." S.F. No. 701, H.F. No. 735, 73rd Minn. Leg., 1983 Sess. *See also infra* note 212 and accompanying text.

199. *See, e.g.,* MINN. STAT. § 645.16 (1984) (Derogatory Statutes). The Minnesota Supreme Court has previously held that it will not infer a cause of action. *See* Barr/Nelson, Inc. v. Tonto's, Inc., 336 N.W.2d 46 (Minn. 1983). The court, in *Barr/Nelson,* stated "[w]e believe that if the legislature had intended to overrule the line of cases prohibiting punitive damages in contract cases, it would have specifically provided for such awards in the statute." *Id.* at 52 (quoting Minnesota-Iowa Televi-

Minnesota court to make major changes in the state insurance law based on the provisions of an ambiguous statute.

D. Violation of the Act as an Independent Tort

In his article in support of a private cause of action, Michael A. Hatch, Commissioner of the Minnesota Department of Commerce, stated:

> The Minnesota court has, however, made clear that, with certain exceptions, violations of a statute constitutes[sic] a tort. Accordingly, with the passage of the Unfair Claims Practices Act, combined with the repeal of the insurance exemption under Minn. Stat. § 8.31, not only is a specific statutory tort authorized, but also punitive damages are potentially available.[200]

As discussed earlier in this Article, the courts have examined the right to a private cause of action in several contexts. The language of a statute can specifically create a private cause of action.[201] The duties created by a statute can provide the grounds for an independent tort of bad faith.[202] Finally, the breach of a statutory duty may automatically give rise to a private cause of action, as reflected in the public policy of West Virginia.[203] It is this latter argument, that the breach of a statute is itself an independent tort, which is in question here.

Unlike the West Virginia judiciary, the Minnesota courts have not found that the breach of a statute creates an independent tort. The Minnesota Supreme Court has ruled that if certain criteria are satisfied, then the breach of a statute may serve as evidence of negligence.[204] That is quite different from saying the breach of a statute creates an independent tort. As

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sion Co. v. Watonwan T.V. Improvement Ass'n, 294 N.W.2d 297, 311 (Minn. 1980)); *see also* Agassiz & Odessa Mut. Fire Ins. Co. v. Magnusson, 272 Minn. 156, 166, 136 N.W.2d 861, 868 (1965) (statutes are not presumed to alter or modify common law unless legislature expressly provides); Fuller v. City of Mankato, 248 Minn. 342, 347, 80 N.W.2d 9, 12 (1956) (legislative enactment absent specific authority does not change common law); Bubar v. Dizdar, 240 Minn. 26, 28, 60 N.W.2d 77, 79 (1953) (statute in derogation of common law will not be extended); Braufman v. Hart Publication, Inc., 234 Minn. 343, 347, 48 N.W.2d 546, 551 (1951) (statute presumed not to alter common law without express intent).

200. Hatch, *supra* note 53, at 7.

201. *See, e.g., supra* notes 83-88 and accompanying text.

202. *See supra* notes 138-40 and accompanying text.

203. *See supra* note 104 and accompanying text.

204. *See, e.g.,* Johnson v. Farmers and Merchants State Bank, 320 N.W.2d 892, 898 (Minn. 1982).

explained by the Iowa Supreme Court in *Seeman,* evidence of negligence is an element that is significant only if there is a preexisting common law right to bring a tort action for breach of an insurance contract.[205] Since the negligent or bad faith breach of an insurance contract does not provide a separate cause of action under Minnesota law,[206] the use of a statutory violation as evidence of negligence would not have any practical application.

The Minnesota Supreme Court has expressed this position in the context of a breach of an insurance statute.[207] The court stated that: "Even though there was . . . [a] violation of the statute, such violation does not establish or constitute actionable negligence."[208] Therefore, the mere fact that there has been a breach of the Minnesota Act would not automatically be an independent tort.

E. Definition of an Unfair Trade Practice

The definition of an unfair trade practice is set out in subdivision 12 of the Act. The Act prohibits insurers from:

> Causing or permitting with such frequency to indicate a general business practice any unfair, deceptive, or fraudulent act concerning any claim or complaint of an insured or claimant including, but not limited to, the following practices. . . .[209]

The universal conclusion reached by courts interpreting such language is that an unfair trade practice must be based on a general business practice.[210] The requisite demonstration of a general business practice must apply both to administrative enforcement and to private causes of action. Subdivision 12a of the Act, however, states the following:

> (a) Administrative enforcement. The commissioner may, in accordance with Chapter 14, adopt rules to insure the prompt, fair and honest processing of claims and complaints. The commissioner may, in accordance with section

205. *Seeman,* 322 N.W.2d at 37.

206. *See supra* note 65 and accompanying text.

207. *See Haagenson,* 277 N.W.2d at 653. The court stated that the "[p]laintiffs cite no decisions which have held that an intentional breach of a statutorily mandated contract is an independent tort which will allow recovery of extra-contract damages." *Id.*

208. *Id.*

209. MINN. STAT. § 72A.20, subd. 12.

210. *See supra* notes 152-65 and accompanying text.

> 72A.22 to 72A.25, seek and impose appropriate administrative remedies, including fines, for (1) a violation of this subdivision or the rules adopted pursuant to this subdivision; or (2) a violation of section 72A.20, subdivision 12. *The commissioner need not show a general business practice in taking an administrative action for these violations.*[211]

These two sections present an immediate contradiction. Under subdivision 12, the commissioner is not entitled to bring an administrative action without first demonstrating a general business practice. Subdivision 12a provides that the commissioner need not demonstrate a general business practice.

Several rules emerge from these confusing standards. First, the commissioner has the power to impose administrative remedies for a single violation of the Act. Second, if an individual could bring a private cause of action for a violation of the Act, he would have to demonstrate a violation of subdivision 12 by showing a general business practice. Thus, subdivision 12a only addresses administrative enforcement. Third, if the attorney general is empowered to bring an action against an insurer, it could only be for an unfair trade practice. The action would require demonstration of a general business practice.

Since the majority of courts have ruled that no private cause of action is available under the unfair claims practices laws, the issue of defining a violation generally has been rendered moot. Although it is clear that the Minnesota Act does not create a private cause of action, it is arguable that such a right is available under section 8.31. Therefore, the inquiry must examine whether an insured or third-party claimant can bring an action for a violation of subdivision 12 under section 8.31.

F. Section 8.31

Section 8.31 of the Minnesota Statutes is entitled "Additional Duties of the Attorney General." Subdivision 1 provides that the attorney general will investigate and have enforcement powers over unfair trade practices. While any unfair trade practice is within the attorney general's jurisdiction, the law specifies a number of areas of regulation that are to be the attorney general's focus. No reference is made in subdivision 1

211. MINN. STAT. § 72A.20, subd. 12a (emphasis added).

to insurance regulation.[212]

Subdivision 3a of section 8.31 is the criticial language in the inquiry. Since this language applies to regulation of the insurance industry, a private cause of action could be available for violation of the Act. Subdivision 3a provides for private remedies as follows:

> In addition to the remedies otherwise provided by law, *any person injured by a violation of any of the laws referred to in subdivision 1* may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court. The court may, as appropriate, enter a consent judgment or decree without the finding of illegality. In any action brought by the attorney general pursuant to this section, the court may award any remedies allowable under the subdivision.[213]

Section 8.31 gives a private citizen the right to bring actions for violations of "any of the laws referred to in subdivision 1." No insurance code provisions are referred to in Subdivision 1.[214] While the language of section 8.31 could be broadly construed to allow a private cause of action, the legislative history does not indicate such an intended interpretation.

When section 8.31 was enacted it contained a subdivision that specifically exempted insurance companies from the attorney general's enforcement powers.[215] Inasmuch as insurance has been traditionally regulated exclusively by a comprehensive set of statutes that apply only to the industry, and the statutes are enforced by the insurance commissioner, that

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212. Subdivision 1 of Minnesota Statutes section 8.31 provides:

> The attorney general shall investigate violations of the law of this state respecting unfair, discriminatory and the unlawful practices in business, commerce, or trade, and specifically, but not exclusively, the act against unfair discrimination and competition (sections 325D.01 to 325D.08), the unlawful trade practices act (sections 325D.09 to 325D.16), the automobile dealer's anticoercion act (sections 325D.17 to 325D.29), the antitrust act (sections 325D.49 to 325D.66), section 325F.67, and other laws against false or fraudulent advertising, the antidiscrimination acts contained in section 325D.67, the act against monopolization of food products (section 325D.68), and the prevention of consumer fraud act (sections 325F.68 to 325F.70) and assist in the enforcement of those laws as in this section provided.

MINN. STAT. § 8.31, subd. 1.

213. MINN. STAT. § 8.31, subd. 3a (emphasis added).

214. *See supra* note 204.

215. Subdivision 4 provides: "The provisions of this section shall not apply to any person, firm or corporation engaged in the insurance business and as such subject to sections 72A.17 to 72A.30." MINN. STAT. § 8.31, subd. 4.

provision may have been intended only to clarify that point. The exclusion was repealed in 1983, however, in a housekeeping bill that amended nearly 100 unrelated statutes.[216] The repeal never went through any formal committee procedure, and the brief legislative discussion provides no evidence of an intent to create a private cause of action against insurance companies.[217] The deletion of the insurance industry exemption was viewed only as expanding the attorney general's enforcement powers,[218] especially since Minnesota had no unfair claims practices law in 1983. The considerable debate over two bills in the 1983-84 legislative session in which the legislature refused to adopt a statutory cause of action in insurance cases is evidence of an absence of consensus within the legislature as to the previous creation of a private cause of action.[219] Thus, the brief legislative history of section 8.31 provides no

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216. Act of June 8, 1983, ch. 301, 1983 Minn. Laws 235.

217. The House Judiciary Committee's discussion of the proposed bill provides no direction as to legislative intent. The discussion was limited as demonstrated by the following:

REPRESENTATIVE BISHOP: Mr. Chairman, this amendment is to delete from the Statutes relative to the Attorney General, and that's probably where we should put it in this bill. There is a subdivision in the Attorney General's duties at this time that restricts his duties relative to discovery and cooperation of any investigation and says 'The provisions of this section shall not apply to any person, firm or corporation engaged in the insurance business, and as such subject to sections 72A.17 through 72A.30 and it looks to me as though the Attorney General is locked out of the insurance industry.

(mumbled conversation & laughter)

CHAIR: Any objections?

CHAIR: So moved.

Judiciary Committee Discussion on H.F. No. 735, S.F. No. 701, 73rd Minn. Leg., 1983 Sess. (May 20, 1983) (audio tape) (transcribed copy on file at the William Mitchell Law Review office) [hereinafter cited as H.R. No. 735; S.F. No. 701].

218. *Id.*

219. The proposed legislation expressly provided for a private right of action and punitive damages:

> Sec. 2. [72A.295][Civil remedy]
> An insured or claimant injured by a violation of § 72A.17 to § 72A.32 may recover damages, including those set forth in § 539.20, in a civil action. This is in addition to any other rights, remedies, actions, claims for damages, or penalties which may be claimed or available.

H.F. No. 735; S.F. No. 701, *supra* note 217, § 2.

evidence that the legislature intended to create a private cause of action for third-party claimants, or to change the remedies available for breach of an insurance contract.

An examination of other recent Minnesota legislation demonstrates that the legislature has, on other occasions, made the attorney general's authority under section 8.31 applicable to statutes not specifically referred to in subdivision 1 of the section. For example, in the Minnesota automobile "lemon" law,[220] the enforcement section refers to actions by the attorney general under section 8.31 and sets forth the availability of a private cause of action under the lemon law itself.[221]

A review of the statutory language indicates that the legislature intended to change the common law in Minnesota by giving third-party claimants a direct cause of action against insurance companies. Moreover, the statute's language does not expand the remedies available to first party claimants in contract actions. In the absence of a clear legislative directive, a Minnesota court must refuse to imply a private cause of action under section 8.31.

G. Morris v. American Family Mutual Insurance Co.

The Minnesota Court of Appeals took the opportunity presented in *Morris v. American Family Mutual Insurance Co.*[222] to set forth its opinion on the key issues arising under the Minnesota Act. While it is questionable whether these issues were properly before the court,[223] the decision as it presently

220. MINN. STAT. § 325F.24, subd. 3 (1984). Subdivision 3 provides:

> The provisions of section 325F.22 may be enforced by the attorney general pursuant to section 8.31. . . . In addition to the remedies otherwise provided by law, any person injured by a violation of Section 325F.20, 325F.22, or 325F.23 may bring a civil action and recover damages together with costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court.

Id.

221. *Id.*

222. 371 N.W.2d 620 (Minn. Ct. App. 1985) (petition for review filed Aug. 29, 1985).

223. *Id.* at 623. The plaintiff's amended complaint apparently alleged a single violation of the Act: "That this Defendant's failure to pay Plaintiff's basic economic loss benefits, without reasonble investigation, and in various other manners, constitutes a violation of Minnesota Statutes 72A.20." Complaint of Plaintiff, D.C. No. B-57505 at 2 (January 14, 1985).

The court of appeals could have affirmed the trial court's ruling that the amended complaint did not state a cause of action. The court of appeals found as a matter of law that a general business practice is a "necessary element" to prove viola-

stands[224] could cause major changes in Minnesota insurance law.

The plaintiff appealed the trial court's denial of her motion to amend her complaint.[225] The plaintiff alleged that her insurer denied her claim without conducting a reasonable investigation based upon all available information.[226] This claim denial by the insurer would constitute a violation of the Act.[227] The trial court refused to allow the amendment, ruling that the Act and section 8.31 do not provide a private cause of action.[228] The court of appeals reversed, holding that section 8.31 of the Minnesota Statutes allows a private cause of action for violations of subdivision 12 of the Act.[229] It also concluded that a plaintiff must demonstrate that the insurer committed the alleged violation as part of a general business practice.[230]

The court of appeals began its analysis by stating that the cases in other jurisdictions discussing possible interpretations of unfair claims practices laws were not on point.[231] The court found Minnesota's statutory scheme to be unique.[232] Since the Act itself was not to be the basis of the decision, the court turned to section 8.31. The statute contains no specific reference to the unfair claims act.[233] The court, however, found the

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tion of MINN. STAT. § 72A.20, subd. 12. *Morris*, 371 N.W.2d at 623. The court found that "[i]t is unclear from the proposed pleading whether appellant intends to prove respondent had a general business practice of denying claims without making a reasonable investigation." *Id.* The court, however, did not hold that plaintiff's failure to establish a general business practice prevented her from bringing this cause of action. The court, instead, remanded for determination of the issue. *Id.*

224. Amicus petitions have been filed by the Insurance Federation of Minnesota for supreme court review. *See supra* note 222.

225. *Morris*, 371 N.W.2d at 623.

226. *See id.* at 622-23.

227. MINN. STAT. § 72A.20, subd. 12(4). The Act states that "refusing to pay claims without conducting a reasonable investigation based upon all available information" constitutes an unfair claims practice. It is interesting to note that an insurer has a clear common law duty to investigate before denying a claim. *See supra* note 48. The plaintiff could have brought this action under common law. Bringing the action under the Act could imply that the plaintiff was hoping that a private cause of action under the Act would provide remedies unavailable for breach of contract.

228. *See Morris*, 371 N.W.2d at 622.

229. *Id.* at 623.

230. *Id.*

231. *Id.* at 621. The court found that the question was a matter of statutory construction.

232. *See id.*. The court stated that the "Minnesota statutes in question are not the same as any other jurisdiction." *Id.*

233. MINN. STAT. § 8.31; *see supra* notes 212-21 and accompanying text.

language in section 8.31 broad enough to allow a private cause of action for unfair trade practices committed in violation of subdivision 12.[234]

The court next considered whether an individual violation of subdivision 12 could be grounds for a private cause of action. The court stated that it could not tell from the pleadings whether the plaintiff intended to demonstrate that the insurer had violated the Act as part of a general business practice.[235] Without further analysis, the court concluded that a general business practice is necessary to prove violation of the Act.[236] The court made no attempt to untangle the relationship between subdivisions 12 and 12a of the Act, except for noting that certain provisions were ambiguous.[237] Finally, after a brief review of Minnesota law regarding requests to amend complaints, the court held that the trial court erred by refusing to grant the plaintiff's request in this instance.[238]

By recognizing a private cause of action for violation of the Act, the court's holding makes fundamental and far-reaching changes in Minnesota common law. The court did not attempt the task of reconciling the applicable statutes to demonstrate the clear legislative intent required to make such sweeping changes. While it is clear that section 8.31 could be given such broad construction,[239] the court failed to consider the decisions of Minnesota courts regarding statutory construction and derogation of common law. In addition, the court discounted the decisions of other courts as not applying to a unique Minnesota statutory scheme. It is clear, however, that other states' decisions were largely based on the impact of a private cause of action on their state's common law.[240] The *Morris* decision does not produce a result consistent with the common law in

234. *Morris*, 371 N.W.2d at 622. The court based its decision on a finding that subdivision 3a provides a private cause of action for a violation of any "law of this state respecting unfair, discriminatory and other unlawful practices in business, commerce or trade." MINN. STAT § 8.31, subd. 1.

235. *Morris*, 371 N.W.2d at 623.

236. *Id.* The court found that a general business practice is a "necessary element" in proving a violation of the unfair claims practices act.

237. *See supra* notes 209-11 and accompanying text.

238. *Morris*, 371 N.W.2d at 623. The court of appeals stated that a court should be liberal in permitting amendments to complaints. *Id.* (citing Schroeder v. Jesco, Inc., 296 Minn. 447, 455, 209 N.W.2d 414, 419 (1973)).

239. *See supra* notes 209-11 and accompanying text.

240. *See supra* notes 121-37 and accompanying text.

Minnesota[241] and the decisions of other state and federal courts in this area. The *Morris* decision should be reconsidered by the Minnesota Supreme Court.

IV. ALTERNATIVE LEGISLATION

While the majority of legislatures have deferred to the courts the determination of whether a private cause of action is available under the state's unfair claims practices law, a number of states have demonstrated that the issue can be resolved by statute or regulation.[242] If the Minnesota Legislature should wish to clarify its intent on these important issues, there are several alternative examples available for consideration. It is interesting that none of the states' laws given as examples have been the forum for lawsuits seeking to determine the availability of a private cause of action.

An example of a statute that clearly creates a private cause of action is the Florida unfair claims practices law.[243] Under that statute, civil liability can arise in three circumstances. First, lia-

241. One result of the *Morris* decision would be to give third-party claimants the right to bring their own causes of action against insurers. With regard to actions brought by insureds and their assignees, it is not clear how the courts would apply the penalty provision of MINN. STAT. § 8.31, subd. 3a., which allows a plaintiff to recover damages, costs, reasonable attorney's fees, and other equitable relief as determined by the court. A broad construction could significantly change Minnesota insurance law by allowing damages for emotional distress or punitive damages. A narrow construction would not significantly change this aspect of Minnesota common law.

242. *See* ARIZ. REV. STAT. ANN. § 20-461(c) (Supp. 1984-85); FLA. STAT. ANN. § 624.155 (1977 & Supp. 1985); IND. CODE ANN. § 27-4-1-18 (Supp. 1985); TENN. CODE ANN. § 56-8-104(8) (1980 & Supp. 1984); UTAH CODE ANN. § 31-27-1 (2) (Supp. 1983).

243. The Florida unfair claims practices law provides:

(1) Any person may bring a civil action against an insurer when such person is damaged:
(a) By a violation of any of the following provisions by the insurer:
1. Section 626.9541(1)(i), (o), or (x);
2. Section 626.9551;
3. Section 626.9705;
4. Section 626.9706; or
5. Section 626.9707; or
(b) By the commission of any of the following acts by the insurer:
1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests;
(a)'+n2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
3. Except as to liability coverages, failing to promptly settle claims when the obligation to settle a claim has become reasonably clear, under one portion

bility arises if the insurer has not attempted in good faith to settle a claim where liability is clear.[244] Second, liability arises if the insurer has made benefit payments without explaining the scope of the coverage provided.[245] Third, an insurer falls within the statute if it fails to settle a non-liability claim where clear liability exists under one portion of the policy in order to influence the settlement of a claim based on another portion of the policy.[246]

Under the Florida law, an individual need not demonstrate that such violations were committed as part of the insurer's general business practice. In addition, the statute is structured so that an insurer is given sixty days after notification to correct a violation before an action can be brought.[247] Finally, the statute limits punitive damages in a manner similar to Minne-

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of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

Notwithstanding the provisions of the above to the contrary, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.

(2) As a condition precedent to bringing an action under this section, the department and the insurer must be given written notice of the violation. The notice shall state with specificity of the facts which allegedly constitute the violation and the law which the plaintiff is relying upon and shall state that such notice is given in order to perfect the right to pursue the civil remedy authorized by this section. No action shall lie if, within 60 days thereafter, the damages are paid or the circumstances giving rise to the violation are corrected.

(3) Upon adverse adjudication at trial or upon appeal, the insurer shall be liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff.

(4) No punitive damages shall be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are:

(a) Willful, wanton, and malicious;

(b) In reckless disregard for the rights of any insured; or

(c) In reckless disregard for the rights of a beneficiary under a life insurance contract.

Any person who pursues a claim under this subsection shall post in advance the costs of discovery. Such costs shall be awarded to the insurer if no punitive damages are awarded to the plaintiff.

(5) This section shall not be construed to authorize a class action suit against an insurer or a civil action against the department, its employees, or the Insurance Commissioner, or create a cause of action when a health insurer refuses to pay a claim for reimbursement on the ground that the charge for a service was unreasonably high or that the service provided was not medically necessary.

FLA STAT. ANN. § 624.155.

244. *Id.* § 624.155(1)(b)1.

245. *Id.* § 624.155(1)(b)2.

246. *Id.* § 624.155(1)(b)3.

247. *Id.* § 624.155(2).

sota's punitive damages law.[248]

If it is the intent of the legislature not to provide a private cause of action, then Indiana law provides an example of a statute that clearly shows that no private cause of action may be implied.[249] The Indiana statute provides, "This article does not create a cause of action other than a cause of action by: (1) the commissioner to enforce his order; or (2) a person, as defined in section 1 of this chapter, to appeal an order of the commissioner."[250] Another example of a statute restricting a private cause of action may be found under Tennessee law. The Tennessee Unfair Claims Settlement Practices Act provides that "the Commissioner shall have sole enforcement authority for this subdivision and, notwithstanding any other laws of this state, a private right of action shall not be maintained under this subdivision."[251]

The specificity contained in these statutes highlights the lack of clarity in the Minnesota statute. The Florida statute sets a clear pattern for an insured or a claimant to follow. Indiana law makes it equally clear that no private cause of action is available. The Minnesota Legislature should consider these and other alternatives if it chooses to clarify the ambiguities present in the current law.

CONCLUSION

The 1984 Minnesota Unfair Claims Practices Act is the most comprehensive regulation of insurance claims practices adopted by any state. Nevertheless, the law fails to specify whether a private cause of action is available for violations of the Act. Under present law, Minnesota does not allow third-party claimants to bring their own cause of action directly against an insurer, and does not permit damages for emotional distress or punitive damages in insurance actions. With the court of appeals decision in *Morris,* the insurance law of Minnesota could undergo an abrupt change.

The conclusion drawn from the decisions of other courts

248. Minnesota law provides: "Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others." MINN. STAT. § 549.20(1) (1984).

249. *See* IND. STAT. ANN. § 27-4-1-18 (Supp. 1985).

250. *Id.*

251. TENN. CODE ANN. § 56-8-104(8)(1980).

that have addressed this issue is that absent very specific legislative guidelines, the courts will not make drastic changes in the common law. While the courts have reached this conclusion by applying a number of tests in perhaps an inconsistent manner, it appears that the courts were looking to place the unfair claims practices laws in the context of their own jurisprudence, and the end result was consistent with their intent.

The review of the Act and of section 8.31 does not demonstrate a clear legislative intent to allow third-party claimants to sue insurers directly. Furthermore, the statute does not indicate that the legislature intended to create the possibility of punitive damages or damages for emotional distress in insurance contract actions. The Act should not be construed in derogation of well-established Minnesota common law.

It is also unlikely that a violation of the Unfair Claims Practices Act will be deemed an independent tort providing grounds for punitive damages. This result would be inconsistent with Minnesota common law and specific prior Minnesota decisions on statutory violations in insurance cases.

Finally, the example provided by several other state laws reveals the type of clarity that a legislature can manifest in setting forth whether private causes of action are available under unfair claims practices acts. Indeed, in other statutes the Minnesota Legislature has demonstrated the ability to clearly state when a private cause of action is available. In the absence of such clear legislative direction, it would not be appropriate for the Minnesota courts to create a private cause of action for third-party claimants, nor open up the question of whether damages for emotional distress and punitive damages will be available for breach of contract. Rather, the courts should give the legislature the opportunity to review the success or failure of the Minnesota Act as an administrative remedy before deciding whether further legislative action is needed.