NEVADA'S UNFAIR CLAIMS SETTLEMENT PRACTICES ACT NRS 686A.310

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Nevada does things its own way. That is true even when insurance claim regulations are involved. Nevada's version of the Unfair Claims Settlement Practices Act (UCSPA), NRS 686A.310 is evidence of this fact. This article will consider the history of unfair claims settlement practice regulation and how Nevada has taken its own path relative to the Model Unfair Claims Settlement Practices Act.

History of the Unfair Claims Settlement Practices Act

Many industries have adopted model standards of conduct for their professionals. The insurance industry is no different. The insurance institution that took the lead on writing its claims handling standards was the National Association of Insurance Commissioners (NAIC). The NAIC identifies itself as the "standard-setting and regulatory support organization created and governed by the chief insurance regulators," from across the country: http://naic.org/index_about.htm. The "purpose" of the NAIC Model Act explains that the UCSPA was meant to "set forth standards for investigation and disposition of claims arising under policies or certificates of insurance."

Nevada first adopted the UCSPA in 1975. Nevada has amended and updated the law over the years. The 1987 amendments gave rise to many substantial changes to Nevada's version of the UCSPA.

Contrast the NAIC Model Act and Nevada's UCSPA

Many of the provisions of the NAIC Model Act and Nevada's UCSPA are similar. However, there are a number of remarkable differences.

Nevada's UCSPA specifically authorizes a private right of action for first-party claimants

One of the most distinguishing characteristics of the Nevada law is the remedy made available to those who are impacted by the prohibited claims-handling practices. The NAIC Model Act specifically says: "Nothing herein shall be construed to create or imply a private cause of action for violation of this Act."

In contrast, Nevada's version of the UCSPA specifically provides for a private right of action. NRS 686A.310 (2) says: "In addition to any rights or remedies available to the Commissioner, an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice."

Nevada's UCSPA provides a remedy that the NAIC Model Act forbids. Nevada is one of only 10 states that allows a private right of action for violations of the UCSPA. For more information on other UCSPA states, e-mail Mike@MCMillslaw.com or browse to the UCSPA Table at www.NevadaCoverageLaw.com.

The Nevada Supreme Court has rejected attempts to extend the private right of action to third-party Nevada claimants. In *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 346, 830 P.2d 1335 (1992), the court said that an injured person "has no private right of action as a third-party claimant under NRS 686A.310." See also *Wilson v. Bristol West Ins. Group*, 209-CV-00006, 2009 WL 3105602, at *2 (D. Nev. Sept. 21, 2009). This does not mean that a third-party claimant is left without remedy. Instead, relief for third-party claimants is limited to filing a complaint with the Nevada Insurance Commissioner.

Even though it creates a private right of action, Nevada's UCSPA does not preempt common law bad faith and a UCSPA violation is not bad faith *per se.*

In the case of *Hart v. Prudential Property and Casualty Ins. Co.*, 848 F. Supp. 900 (D. Nev. 1994) the court distinguished common law bad faith and violations of the UCSPA.

The court said:

> The Nevada Unfair Practices Act focuses upon different conduct than does the common law tort of

bad faith. The statute proscribes specific actions taken by an insurer which Nevada has deemed to be unfair whether or not they are related to a denial of insurance benefits.... While the statute and the common law may overlap to a limited extent, the statute reaches different conduct than that which is contemplated by the common law tort.
(Id. at 904.)

The NAIC Model Act requires that a violation be committed flagrantly, consciously or with frequency so as to constitute a "general business practice." In contrast, Nevada's law has eliminated the "general business practice" requirement, but will one act be enough to give rise to a violation?

The NAIC Model Act clearly states that a single, unintentional act does not amount to a citable violation. It says:

> It is an improper claims practice for a domestic, foreign or alien insurer transacting business in this state to commit an act defined in Section 4 of this act if:
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> a. It is committed flagrantly and in conscious disregard of this Act or any rules promulgated hereunder; or
> b. It has been committed with such frequency to indicate a general business practice to engage in that type of conduct.

In other words, in order to violate the Model Act, you have to act either in conscious disregard of the act, or you have to commit the violation over and over again to the point where it appears to be a general business practice.

This language is in sharp contrast to Nevada's UCSPA preamble, which says:

> 1. Engaging in any of the following activities is considered to be an unfair practice…

Nevada's law then goes on to list those prohibited acts that might constitute a violation. NRS 686A.310(1)(a)-(p). Because the legislature removed the language of intent or "general business practice," one might conclude that proof of a single violation is enough to give rise to a violation. The court in *Hart, supra* at 903, thought so. However, the *Hart* court failed to acknowledge that the use of the plural instead of singular suggests that one act may not be enough to result in a violation. For example, section 1(a) prohibits misrepresenting pertinent facts or policy provisions to "insured**s** or claimant**s**." Section 1(b) requires prompt communications with respect to "claim**s** arising under insurance polic**ies**." Section 1(d) obligates the company to affirm of deny coverage of "claim**s**" within a reasonable period of time. There are a number of other plural nouns throughout the list of prohibited acts. While there may no longer be a need to demonstrate an intent or a general business practice, the fact that these words are plural rather than singular can be construed as requiring proof of more than a single act before there is a violation. Evidence that this construction is correct is found in subsections 1(n), (o) and (p) where singular nouns are used instead of plural.

The *Hart* court also ignored NRS 686A.270 which requires that before an insurance company can be found guilty of violating NRS 686A.310, there must be proof that an officer, director or department head either knowingly permitted the violation or had prior knowledge before it happened.

Both the NAIC Model Act and the Nevada UCSPA regulate "insurers"

The NAIC Model Act identifies an insurer as any "legal entity engaged in the business of insurance, including agents, brokers, adjusters and third party administrators." Nevada law identifies insurers as "every person engaged as principal and as indemnitor, surety or contractor in the business of entering into contracts of insurance. NRS 679A.100. Nevada recently expanded its definition of the term "insurer" to specifically include independent adjusters to the list of those who are subject to the UCSPA. NRS 684A.035.

Attempts to extend the application of Nevada's UCSPA into the real property arena have been unsuccessful. *Nevada Assoc. Svcs., Inc. v. First American Title Ins. Co*., No. 2:11-CV-02015-KD-VCF, Order (D. Nev. July 30, 2012). *Downs v. River City Group, LLC*, No. 3:11-cv-0885-LRH-WGC Amended Order (D. Nev. May 9, 2012).

Potential Damages

Nevada's legislature said that a first-party claimant could recover "any damages sustained by a first-party insured as a result of the commission of any act that amounts to an unfair practice." NRS 686A.310(2). The claimant must demonstrate that the damages arose from the improper claims handling rather than from the underlying injury. *Yusko v. Horace Mann Svcs. Corp.,* No.: 2:11-CV-00278-RLH-GWF, Order at 6 (D. Nev. Feb. 10, 2012). Damages arising from improper claims handling might include:

- Interest (See, *Ramparts, Inc. v. Fireman's Fund Ins. Co.,* No.: 2:09-CV-00371-RLH-LRL, Order (D. Nev. August 22, 2011))
- Attorney's fees (See *Tracey v. American Family Mut. Ins. Co.*, No.: 2:09-CV-1257-GMN-PAL Order (D. Nev. Dec. 30, 2010.) where the court specifically held that attorney's fees were an element of damages for violation of NRS 686A.310(1)(f) plus interest on the attorney's fees).
- Consequential economic damages, and
- Emotional distress (but may require proof of a physical manifestation of emotional distress before damages are recoverable, See *Betsinger v. D.R. Horton*, 126 Nev. Adv. Op. 17, 232 P.3d 433 (2010)).

Nevada's version of the Unfair Claims Settlement Practices Act is unique. It grants first-party claimants a private right of action to enforce violations and allows recovery of damages arising therefrom. As the courts further develop Nevada law, we will continue to find Nevada on its own road less travelled.

For more than 20 years, attorney **MIKE MILLS** has been solving problems for insurance carriers that do business in Nevada, through consultations, opinions and trials. Additionally, Mills & Associates publishes a coverage and bad faith law blog at www.NevadaCoverageLaw.com. Mills can be reached by phone at (702)240-6060 x114 or by e-mail at mike@mcmillslaw.com.