

Improving State Regulation of Homeowners Insurance: The Essential Protections for Policyholders Project

Rutgers University has made this article freely available. Please share how this access benefits you.
Your story matters. <https://rucore.libraries.rutgers.edu/rutgers-lib/55985/story/>

This work is the **VERSION OF RECORD (VoR)**

This is the fixed version of an article made available by an organization that acts as a publisher by formally and exclusively declaring the article "published". If it is an "early release" article (formally identified as being published even before the compilation of a volume issue and assignment of associated metadata), it is citable via some permanent identifier(s), and final copy-editing, proof corrections, layout, and typesetting have been applied.

Citation to Publisher Feinman, Jay M. (2017). Improving State Regulation of Homeowners Insurance: The Essential Protections for Policyholders Project. *Connecticut Insurance Law Journal* 24(1), 163-187. <http://insurancejournal.org/volume-24-issue-1/>.

Citation to this Version: Feinman, Jay M. (2017). Improving State Regulation of Homeowners Insurance: The Essential Protections for Policyholders Project. *Connecticut Insurance Law Journal* 24(1), 163-187. Retrieved from [doi:10.7282/T3V40ZD6](https://doi.org/10.7282/T3V40ZD6).

Terms of Use: Copyright for scholarly resources published in RUcore is retained by the copyright holder. By virtue of its appearance in this open access medium, you are free to use this resource, with proper attribution, in educational and other non-commercial settings. Other uses, such as reproduction or republication, may require the permission of the copyright holder.

Article begins on next page

**IMPROVING STATE REGULATION OF HOMEOWNERS
INSURANCE:
THE ESSENTIAL PROTECTIONS FOR POLICYHOLDERS
PROJECT**

Jay M. Feinman^{*}

I. INTRODUCTION

Homeowners insurance provides financial security for 70 million American households¹ and stability to the communities in which they live—but only when it works. Homeowners insurance only works because it is supported and regulated by state law. This article describes the Essential Protections for Policyholders project, which aims to make state regulation, and therefore homeowners insurance itself work better.

As a project of the Rutgers Center for Risk and Responsibility at Rutgers Law School in cooperation with United Policyholders, Essential Protections for Policyholders draws on academic research, an extensive survey of state law, and practical experience.² The Center explores the ways in which society makes choices about risk, its proper allocation, and compensation for the harm caused when risks materialize, especially the ways insurance and insurance law enable and constrain risk allocation.³ United Policyholders is a non-profit organization whose mission is to be an

^{*} Distinguished Professor of Law, Rutgers Law School; Co-Director, Rutgers Center for Risk and Responsibility. This article was first presented at a University of Connecticut Insurance Law Center conference on “Insurance in the Age of Trump.” My thanks to the sponsors and participants. Also thanks to Nancy Talley, Evan Kerstetter, Jessica O’Connor, Brian Portny, Adam Scales, and Rick Swedloff for their help. Above all, thanks to Amy Bach and Dan Wade at United Policyholders, my partners every step of the way.

¹ Claire Wilkinson, *How Many Homes are Insured? How Many are Uninsured?*, TERMS + CONDITIONS: INS. INDUSTRY BLOG (<http://www.iii.org/insuranceindustryblog/?p=4339>).

² Rutgers Law School, ESSENTIAL PROTECTIONS FOR POLICYHOLDERS, <https://epp.law.rutgers.edu/> (all project documents are available through this webpage).

³ Rutgers Law School, CENTER FOR RISK AND RESPONSIBILITY, <http://crr.rutgers.edu/>.

information resource and an effective voice for consumers of all types of insurance throughout the nation.⁴

State regulation of homeowners insurance includes the licensing of insurance companies and intermediaries, regulation of the solvency of insurers, ensuring that premiums are “adequate, not excessive and nondiscriminatory,” approval of policy forms, and the catch-all category of market conduct regulation which includes the marketing and underwriting of policies and claim practices.⁵ The Essential Protections for Policyholders project addresses this last area, focusing on key elements of the relationship between insurance companies and their policyholders.

A starting point is the market for homeowners insurance. For the market to achieve optimal results, when consumers shop for and purchase insurance they must have access to good information about the extent of coverage provided by different policies, the price of that coverage, and the quality of insurance companies offering the coverage.⁶ Good information produces good buying decisions, and better-informed consumers spur more competition among insurers, leading to better products. Better information also affects policyholders’ decisions about risk after they have purchased policies and empowers them in the event of a claim. The first category of Essential Protections—Essential Protections When Buying Insurance—addresses information problems in the market for insurance.

But the market for homeowners insurance, like other consumer markets, cannot be perfected by providing more information to consumers. Consumers possess limited ability and inclination to process the information because of its complexity and because of their own cognitive limitations and biases.⁷

⁴ Its work includes Roadmap to Recovery, which provides policyholders tools and resources for solving insurance problems after an accident, loss, illness or other adverse event; Roadmap to Preparedness, which promotes disaster preparedness and insurance literacy; and Advocacy and Action, which advances pro-consumer laws and public policy related to insurance matters. See *Our Programs*, UNITED POLICYHOLDERS, <http://uphelp.org/>.

⁵ TOM BAKER & KYLE D. LOGUE, *INSURANCE LAW AND POLICY* 573-77 (3d ed. 2013).

⁶ ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 62 (5th ed. 2012).

⁷ John Y. Campbell, Howell E. Jackson, Brigitte C. Madrian, and Peter Tufano, *Consumer Financial Protection*, 25 J. ECON. PERSP. 91 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4076052/pdf/nihms31104>

These information defects are market failures that preclude the efficient operation of the market, and they are failures in a different sense as well. Policyholders typically perceive the insurance contract as a relation of security, not a discrete transaction; the content of that relation is not fully presentiated in the explicit terms of the written policy form but also is constructed from general social perceptions about insurance and even insurance company advertising.⁸ The gap between the policy terms and the policyholders' expectations presents a different kind of failure of the insurance market.

Essential Protections aims to correct both kinds of market failure by structuring coverage and processes in ways that more closely align with a well-functioning market and with the legitimate expectations of ordinary policyholders. Essential Protections for Coverage proposes key mandatory and optional terms and underwriting practices to cure information problems and to fulfill policyholders' reasonable expectations.⁹ Essential Protections for Disaster Victims deals with the special versions of those problems that arise when, in catastrophes, many policyholders suffer losses during the same event.

When losses occur, disputes may arise between insurer and policyholder arising from the terms of coverage, the facts of loss, or the gap between policy terms and broader expectations. For insurance to work effectively, there must be mechanisms in place to resolve the disputes and of course there are. Internal company processes, appeals to state regulators, alternative dispute resolution, and ultimately litigation aim to validate the underlying relation by resolving disputes, but they do not always do so effectively. Essential Protections in the Claim Process defines insurers' basic relationship to policyholders and provides remedies when disputes

4.pdf.

⁸ See Jay M. Feinman, *The Insurance Relationship as Relational Contract and the "Fairly Debatable" Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553 (2009).

⁹ The term "reasonable expectations" has a variety of meanings as both principle and doctrine in insurance law. Christopher C. French, *Understanding Insurance Policies as Noncontracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMPLE L. REV. 535, 560-64 (2017). The usage here is the less technical and more generic usage of the term as the basis of contract law in general. See Jay M. Feinman, *Good Faith and Reasonable Expectations*, 67 ARK. L. REV. 525, 534-49 (2017).

arise.

Thus, the Essential Protections for Policyholders project addresses key areas of market conduct regulation of homeowners insurance. It aims to improve the market for insurance (discussed in Part II of this article), to address deficiencies in the market (Part III), and to provide effective means of validating the insurance relation in case of loss (Part IV).

In each area, the project identifies a series of general principles that motivate the particular analysis and recommendations. These principles are for the most part noncontroversial. For example, in addressing the problem of improper nonrenewals and premium increases based on prior claims, it states the inarguable proposition that “Insurance companies must observe reasonable standards for canceling and renewing policies and reporting claims.” Then the principles are given more detail in recommendations about the direction state regulation should take. On this issue, the general recommendation states, “Insurance companies may not use an inquiry about a loss or a single claim as the basis for cancellation, nonrenewal or premium increase of a policy,” and the specific statutory recommendation is “States should prohibit insurance companies from refusing to issue, cancelling, surcharging increasing premiums, or refusing to renew policies because policyholders have made inquiries about coverage or potential claims or have filed one or a small number of claims.” In most cases, recommended statutory language is included. The recommendations are based on a discussion of the issue and a survey of current law. A unique feature of the project is that it rests on an extensive national database of state law regulating homeowners insurance. The database of law in the fifty-one jurisdictions also provides a basis for comparing and evaluating individual states’ current systems of regulation. Part of the project is to prepare scorecards comparing states’ homeowners protections on a variety of issues.

II. IMPROVING THE MARKET FOR HOMEOWNERS INSURANCE

Because homeowners insurance is a market good, the Essential Protections for Policyholders project recommends measures designed to improve the homeowners insurance market. A well-functioning market for homeowners insurance would offer consumers a variety of options of price, coverage, and quality, and consumers would have adequate information as to price, coverage, and quality to choose insurance that is appropriate for their needs. Currently, the market fails to provide two of those three elements.

Consumers generally have access to adequate information about the price of homeowners insurance. Consumers can easily obtain quotes from different insurance companies, increasingly through Internet tools as well as more traditional sources. Some states provide online premium comparison tools.

Comparing terms of coverage is more difficult. The traditional lore of insurance has been that policy forms are standardized, so homeowners insurance policies use the statutorily prescribed standard fire policy or ISO forms HO-3 or HO-5. If that was once true¹⁰ it is no longer the case; there is wide variation in the terms of policies.¹¹ Terms of coverage are not easily available to consumers. Insurers and intermediaries usually provide summaries of some policy terms to shoppers but refuse to provide the actual policy language until after the policy has been purchased.¹² Regulators in some states publish summaries of key policy provisions or the standard policies of leading companies online,¹³ but even then, consumers require diligence and expertise to discover and parse the relative merits of policy terms.

The quality of an insurance policy reflects two things: the ability of the insurer to pay claims, and its practices in doing so. The former is adequately addressed by the non-market solution of state solvency regulation, the area in which regulators have been most successful. The quality of claim practices, by contrast, is the area in which there is little information available to consumers. When choosing among insurers, consumers have few effective means of evaluating and comparing which insurer is more likely to pay promptly, fully, or at all for which type of claims.¹⁴

¹⁰ See French, *supra* note 9, at 546-48.

¹¹ Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394, 414-20 (2014).

¹² French, *supra* note 9, at 548-49.

¹³ E.g., *Policy Forms Used by the 10 Largest Homeowners' Insurance Groups in Nevada*, DEPARTMENT OF BUSINESS AND INDUSTRY: NEVADA BUSINESS OF INSURANCE <http://doi.nv.gov/Consumers/Homeowners-Insurance/Policy-Forms/>.

¹⁴ See Jay M. Feinman, *The Regulation of Insurance Claim Practices*, 5 U.C. IRVINE L. REV. 1319, 1321-26 (2015).

A. IMPROVING INFORMATION ABOUT COVERAGE

Insurance policies are complex legal documents. For a policyholder to evaluate a policy being considered for purchase, to determine whether to file a claim, or to resolve a dispute with an insurance company, the policy must be clearly organized and written in plain, non-technical language. An Essential Protection is to require insurance policies to conform to minimum standards of organization, presentation, and readability. At a minimum, the standards should prescribe that policies use clear layout, font, headings, spacing, and other measures of legibility, meet defined tests for readability and plain language, and contain a table of contents and index.¹⁵

Even the clearest insurance policy will not aid consumers in their buying decisions unless its terms are readily available prior to purchase. Insurance is an unusual product in that consumers do not know what they are buying before they buy it. Insurance companies almost never provide

¹⁵ Many jurisdictions have Plain Language laws governing insurance policies. The NAIC's Property and Casualty Insurance Policy Simplification Act sets a general standard requiring that policies be simplified, taking into consideration the following factors: (A) Use of simple sentence structure and short sentences; (B) Use of commonly understood words; (C) Avoidance of technical legal terms wherever possible; (D) Minimal reference to other sections or provisions of the policy; (E) Organization of text; and (F) Legibility. PROPERTY AND CASUALTY INSURANCE POLICY SIMPLIFICATION MODEL ACT § 6 (NAT'L ASS'N OF INS. COMM'RS 1993). The implementing Model Regulation adds requirements such as a table of contents, self-contained sections, legibility, and a minimum score on the Flesch Reading Ease Test of 40. PERSONAL LINES PROPERTY AND CASUALTY INSURANCE POLICY SIMPLIFICATION MODEL REGULATION § 3 (NAT'L ASS'N OF INS. COMM'RS 1993). The use of a Flesch score as a test of readability is common. *E.g.*, COLO. REV. STAT. ANN. § 10-4-110.8 (2017) (discussing fifty, or tenth-grade reading level); CONN. GEN. STAT. ANN. § 38A-297 (1991); FLA. STAT. ANN. § 627.4145 (2017); TEX. INS. CODE ANN. § 2301.053 (2007) (establishing minimum score established by the insurance commissioner). Other typical requirements include avoiding "unnecessarily long, complicated, or obscure words, sentences, paragraphs, or constructions." *See, e.g.*, CONN. GEN. STAT. ANN. § 38a-297(a); § 627.4145(1)(d); *See also* N.J. STAT. ANN. § 56:12-10(a) (1982) ("[Prohibiting] sentences that contain double negatives and exceptions to exceptions [and] sentences and sections that are in a confusing or illogical order...").

copies of policy language or complete summaries of policy terms to prospective policyholders. Essential Protections recommends that insurance departments should post online both the homeowners insurance policies of all insurance companies doing business in the state (or at least those companies that have a significant market share) and a policy comparison tool that enables consumers easily to compare key terms of insurance policies.¹⁶ The publication of policies and comparison tools would encourage better shopping by consumers. It also would encourage the development of concise ratings of different policies by consumer groups and websites as occurs in the United Kingdom, where the consumer organization, “Which?”, provides numerical ratings and five-star rankings of insurance policies and insurance companies.¹⁷

Even policies that are freely available, well-organized, and written in non-technical language are forbidding to most homeowners. In policies that are long and complex, consumers are not likely to pay attention to the details of their policies until they have a potential claim, and they may be unable to understand the terms if they do.¹⁸ Therefore, an Essential Protection is that applicants and policyholders be provided accessible summaries of the terms that are likely to be most important to them.¹⁹ At

¹⁶The National Association of Insurance Commissioners (NAIC) currently has in place a Transparency and Readability of Consumer Information Working Group. The charge of the Working Group is to “[s]tudy and evaluate actions that will improve the capacity of consumers to comparison shop on the basis of differences in coverage provided by different insurance carriers.” *Transparency and Readability of Consumer Information*, NAIC.ORG, http://www.naic.org/cmte_c_trans_read_wg.htm (Oct. 3, 2017); *Transparency and Readability of Consumer Information (Property and Casualty)*, NAIC.ORG (Feb. 18, 2017), http://www.naic.org/cipr_topics/topic_transparency_readability.htm. However, the progress of the Working Group has been limited; it has produced generic shopping tools but has not acted to recommend the publication of policy forms.

¹⁷ Jo Langenhan, *Best and Worst Home Insurance*, WHICH? <http://www.which.co.uk/money/insurance/home-insurance/guides/best-and-worst-home-insurance> (last visited July 2017).

¹⁸ See Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075, 1119 (2010). See also DeLaney v. Ins. Co., 52 N.H. 581, 587–88 (1873) (addressing the same problem).

¹⁹ An example in the health insurance context is the Summary of Benefits and Coverage mandated by the Affordable Care Act and developed by state insurance regulators; the Summary answers questions in a clear format, such as “[w]hat is the overall deductible?” and “[d]o I need

the time of renewal, policyholders especially need to be informed about changes in terms. The information should be provided in a standardized form prescribed by the state and should contain items such as the following information with understandable explanations of each:

- A simple explanation of the major coverages and exclusions of the policy.²⁰
- Whether the policy covers damage from flood, earthquake, windstorm, or other catastrophic causes, and whether other insurance is available for such losses from such causes.²¹
- Whether the policy contains special deductibles such as a Hurricane Deductible.²²
- Whether the policy contains Law and Ordinance or Building Code Upgrade coverage, and, if not, whether such coverage is available at an additional cost.²³

Consumers need the information at the times when the information is most useful—when they are shopping for insurance, when they are considering renewing their policies, and when they have a loss potentially covered by the policy. At the time of renewal, policyholders especially need to be informed about changes in terms.²⁴ At the time of loss, the summary provides a convenient reference on key terms of coverage.

B. IMPROVING INFORMATION ABOUT QUALITY

Quality is an important attribute of any product, including insurance. The two measures of quality for insurance are insurance companies' financial stability and their record of paying claims promptly

a referral to see a specialist?" U.S. CENTERS FOR MEDICARE & MEDICAID SERVICES, SAMPLE SUMMARY OF BENEFITS AND COVERAGE (2012) <https://www.cms.gov/CCIIO/Resources/Files/Downloads/sbc-sample.pdf>.

²⁰ See, e.g., LA. REV. STAT. ANN. § 22:132 (2009).

²¹ See, e.g., N.J. STAT. ANN. § 17:36-5.38 (2017); LA. REV. STAT. ANN. 22:132.B (2017); S.C. CODE ANN. § 38-75-755 (2014).

²² See, e.g., N.Y. INS. LAW § 3445 (2017).

²³ See, e.g., COLO. REV. STAT. § 10-4-110.8(6)(a)(2017).

²⁴ Many states require notifications that include some of this information. But typically, the required summary of information is provided with the policy, either initially or at renewal, which is too late.

and fairly. States do a good job of monitoring companies' financial stability, and easy-to-understand financial ratings are widely available. Claim practices are less closely regulated and the information on which consumers can compare companies is not publicly available. An Essential Protection is to provide consumers information that enables them to compare companies as to how promptly and fairly they pay claims.

Statistics that would enable consumers to compare companies include what proportion of claims are denied, how long it takes to pay claims, and how many policyholders need to sue to receive payment. This information includes, by line and by year, information such as the following:

- Number of claims opened, closed with payment, and closed without payment.
- Median days to final payment.
- Number of claims closed with and without payment within 0-30 days, 31-60 days, and so on.
- Number of suits by policyholders opened and closed.

States currently collect this information and report it to the National Association of Insurance Commissioners, which aggregates the data and reports it to state regulators and insurance companies. However, the NAIC Market Conduct Surveillance Model Law²⁵ and the National Conference of Insurance Legislators' Market Conduct Annual Statement Model Act²⁶ provide that claims data reported to or collected by the department are privileged and confidential²⁷. Therefore, the only people denied access to this information are the ones who need it most—consumers shopping for insurance. States should remove any privilege and should post online information about insurance companies' practices in paying claims for consumers to view and compare.

²⁵ MKT. CONDUCT SURVEIL. MODEL LAW § 7 (MODEL REGULATION SERV. 2004).

²⁶ MKT. CONDUCT ANNUAL STATEMENT ACT § 8 (NAT'L CONFERENCE OF INS. LEGISLATORS 2015).

²⁷ The NAIC Model Law has been adopted in substantially the same form in many states. *E.g.*, ARIZ. REV. STAT. § 20-158 (2017); HAW. REV. STAT. § 431:2D-107 (2007); OHIO REV. CODE § 3916.11 (2008); 27. R.I. GEN. LAWS § 27-71-8 (2017); WASH. REV. CODE § 48.37.080 (2007). Other states have statutes in different form that are similar in effect. *E.g.*, GA. CODE ANN. § 33-2-14 (2012).

As with information about coverage, many consumers will not closely examine statistics about claim payment practices, but consumer groups and websites can access the information to develop easily understandable ratings of insurance companies that consumers can use in shopping.

III. CORRECTING THE MARKET FOR HOMEOWNERS INSURANCE

Even if more and better information is provided to insurance consumers by insurance companies, state regulators, and intermediaries, the market for homeowners insurance will not work optimally. Consumers will not use the information to maximum effect in a way that will create an efficient market. Market failures will occur, and even an efficient market will not account for all the social objectives that are served by homeowners insurance. Therefore, direct regulation is necessary.

A. BASIC ELEMENTS OF PROTECTION

Essential Protections does not contemplate an ideal homeowners insurance policy. Homeowners insurance is not “one size fits all;” homeowners differ in what kind of insurance they need, want, or are willing to pay for. But for homeowners insurance to serve its purpose of providing basic financial security, all homeowners need certain basic coverage, and should have the opportunity to purchase other coverage that is best suited to them. Examples of basic coverage that states should mandate include provisions that effectuate the purpose of Replacement Cost coverage and adequate coverage for Additional Living Expense.

Replacement Cost, as its name suggests, covers the cost to repair or replace without a deduction for depreciation—often referred to as “new for old.”²⁸ To fulfill policyholders’ expectations about Replacement Cost coverage, several Essential Protections are needed. First, Replacement Cost coverage typically is capped at a dollar amount stated in the policy limit. Extended Replacement Cost coverage provides an additional percentage that may be recovered. This protection is necessary if the estimate of the cost to repair that is the basis for the policy limit—an estimate that often is provided by the insurance company—is too low, and is especially important after catastrophes, when the cost of labor and materials typically rises. To make sure that policyholders know what they are buying,

²⁸ BAKER & LOGUE, *supra* note 5, at 179.

Extended Replacement Cost should be offered at the time of purchase of Replacement Cost coverage. Second, if a homeowner chooses to rebuild or relocate at another location, the benefits of the policy still should be available, limited to the cost of replacement at the original location.²⁹ Third, repair or rebuilding of damaged property often requires that the property be improved from its prior condition because building codes have changed since the original construction. A damaged property must be repaired or rebuilt to conform to the current building code, which may require additional expense. Policyholders with Replacement Cost coverage reasonably expect that this additional cost—“Law and Ordinance Upgrade”—will be part of their policy.³⁰

Homeowners’ policies typically include coverage for loss of use of the property, of which the most important component is Additional Living Expense (“ALE”). ALE coverage reimburses the homeowner for losses caused by the primary residence being uninhabitable, such as the cost of renting a comparable property. Because repairs can take time, policies should provide a minimum time period of twelve months during which ALE may be incurred. Homeowners who want additional protection should be able to purchase ALE coverage that extends for an additional twelve months.³¹

B. “USE IT AND LOSE IT”

An important element of coverage is a policyholder’s ability to use the coverage when it is needed. An Essential Protection is to make sure that policyholders are not discouraged from filing claims or penalized for doing so by having their policies canceled or not renewed because they have filed a claim or even just have asked about coverage.

Insurance companies legitimately can use some elements of policyholders’ claims experience in deciding whether to issue or renew

²⁹ The ability to replace property at a different location is specified by statute in California. CAL. INS. CODE § 2051.5(C) (2006). It also is required by judicial interpretation of the insurance policy in other states. *E.g.*, *Huggins v. Hanover Ins. Co.*, 423 So. 2d 147, 150 (Ala. 1982); *Blanchette v. York Mut. Ins. Co.*, 455 A.2d 426, 427 (Mont. 1983).

³⁰ Several states require insurers to offer extended replacement cost and law and ordinance coverage. COLO. REV. STAT. § 10-4-110.8(6)(a) (2017); FLA. STAT. ANN. § 627.7011 (2017).

³¹ A few states specify by statute required ALE coverage. *E.g.*, COLO. REV. STAT. § 10-4-110.8; MD. CODE ANN, INSURANCE § 19-208 (2017).

policies and how to price them. However, companies should not be able to use elements that are not strongly correlated with future risk or that discourage policyholders from pursuing legitimate claims. This practice—“use it and lose it”—imposes significant costs on policyholders, makes some of them uninsurable, and, as knowledge of the practice becomes widespread, deters many others from pursuing valid claims.³² The most extreme version of this practice occurs when companies impose a premium increase or surcharge on policies, or refuse to insure or renew merely because policyholders have inquired about coverage without actually filing a claim. The problem is made worse by companies’ reliance on centralized databases about policyholders. Policyholders’ inquiries are reported to all companies, even if the inquiries were unrelated to actual losses. An Essential Protection is prohibiting insurance companies from refusing to issue, canceling, surcharging, increasing premiums, or refusing to renew policies because policyholders have made inquiries about coverage or potential claims or have filed one or a small number of claims.³³

³² See *Get a “CLUE”: Don’t Be a Victim of “Use It and Lose It”*, UNITED POLICYHOLDERS (2017), <http://uphelp.org/pubs/get-clue-dont-be-victim-use-it-and-lose-it>; *State-by-State Rankings: “Use It and Lose It”*, ESSENTIAL PROTECTIONS FOR POLICYHOLDERS <https://epp.law.rutgers.edu/node/28#overlay-context=node/29>.

³³ A number of states have adopted statutes that limit insurance companies’ ability to use inquiries as the basis of underwriting decisions. *E.g.*, DEL. CODE ANN. tit. 18, § 4131 (2017) (making underwriting decisions); MINN. STAT. § 65A.285 (2014) (imposing surcharges or higher premiums); TEX. INS. CODE ANN. § 551.113 (2015) (issuing, declining to issue, non-renewing, or canceling). The statutes typically are limited to homeowners’ or other property insurance. *E.g.*, HAW. REV. STAT. § 431:10E-124 (2012); N.J. STAT. ANN. § 17:29B-4 (2001). Some states also specifically prohibit insurance companies from reporting inquiries to national databases such as CLUE. *E.g.*, ARIZ. REV. STAT. ANN. § 20-1652 (2017). Some states limit insurance companies’ ability to cancel or refuse to renew policies except for stated reasons. With reference to the “use it and lose it” concept, the most relevant language prohibits adverse action unless there is an event such as: “a material change in the risk being insured,” LA. REV. STAT. ANN. § 22:1265(D); “[I]ncreased hazard or material change in the risk assumed that could not have been reasonably contemplated by the parties at the time of assumption of the risk.” N.C. GEN. STAT. ANN. § 58-41-15(a)(3) (1986). Some states specify a minimum number of claims that may trigger cancellation or nonrenewal. *E.g.*, LA.

C. IMPROVING PROTECTION FOR DISASTER VICTIMS

Often, disaster victims need more extensive protections because of the distinctive conditions created following disasters. After a disaster, policyholders may be unable to meet the ordinary conditions and time limits specified in insurance policies through no fault of their own. Entire communities may be inaccessible for periods of time, preventing policyholders from returning to their homes. Insurance companies are inundated with inquiries and claims, delaying communication with policyholders. Contractors are overwhelmed with work, delaying repairs, and rebuilding. In those circumstances, policyholders should be granted additional time for processing their claims. Some types of problems can be anticipated and specified in advance, such as the need to extend time limits for filing additional living expense and full replacement cost claims. Other types of problems depend on the situation and require action by insurance departments to make sure that insurance companies recognize the need to be flexible.

The Essential Protections for Disaster Victims mandate flexibility in the claim process, standards that prevent unexpected gaps in insurance due to unfair exclusions, and prevention of dislocation in the insurance market. States should adopt statutes that extend the time for Additional Living Expense and for filing claims after a disaster and that authorize insurance departments to extend other time limits. Insurance departments should exercise the authority granted to make sure that policyholders have adequate time to pursue claims after disasters.³⁴

Following a wildfire, hurricane, or other disaster that causes a large number of losses to a community or region, insurance companies sometimes react—over-react—by canceling, failing to renew or imposing a

REV. STAT. ANN. § 22:1265; TEX. INS. CODE ANN. § 551.107(d). Many states also have related provisions limiting the use of losses due to catastrophes or other weather-related events as a basis for cancellation, nonrenewal, or other underwriting decisions. *See* sources cited *infra* note 35.

³⁴ The California Insurance Code permits extension of time or coverage following disasters. CAL. INS. CODE § 2051.5 (2005). Other states took similar action in response to particular events such as Hurricane Katrina, Superstorm Sandy, and the Louisiana flooding of 2016. Responses to particular disasters are helpful, but the enactment of statutes to deal with all disasters provides certainty for policyholders and insurance companies and avoids the need for hasty action.

surcharge on existing policies, and declining to offer new policies in the affected areas. Over time, the companies may moderate their positions as the extent of losses and likely future risks become clearer, but in the meantime, insurance may be unavailable or unaffordable. An Essential Protection is to ensure that catastrophes or other significant events do not cause a sudden and often unjustified dislocation in the insurance market. States should limit the ability of insurance companies to cause temporary dislocations in the market by failing to write or renew policies or imposing higher costs after a major disaster.³⁵

A particularly controversial issue that arises on a large scale after a disaster, but also occurs in other cases, concerns losses that arise from covered and excluded causes.³⁶ Homeowners insurance policies cover losses caused by some risks and exclude coverage caused by other risks. For example, policies typically cover hurricane damage caused by high winds but exclude losses caused by flooding during a hurricane. In many cases, however, a loss will occur due to a covered cause and an excluded cause, acting either in sequence, together, or in a manner that cannot be determined after the fact. Many homeowners policies have language that attempts to deny coverage in these cases, even if it is clear that part of the damage was due to a covered cause of loss. Commonly used language bars coverage due to an excluded cause “regardless of any other cause or event contributing concurrently or in any sequence to the loss”—even if the

³⁵ Many states have statutes that prohibit adverse actions after disasters or due to weather-related losses. A large number of states prohibit cancellation or nonrenewal due to weather-related events other than catastrophes, such as prohibiting cancellation or nonrenewal because of a claim resulting from an “act of God.” *E.g.*, S.C. CODE § 38-75-790 (2017). By their terms, these statutes would include adverse action due to catastrophes. Statutes in other states refer specifically to disasters. *E.g.*, CONN. GEN. STAT. § 38a-316d (2014); N.M. STAT. ANN. § 59A-16-20.1 (2017). A few states authorize the insurance department to declare a cooling-off period following a disaster during which cancellations and nonrenewal are suspended. *E.g.*, FLA. STAT. ANN. § 627.4133 (2017); N.Y. INS. LAW § 3425 (2017). Or taking other actions. *E.g.*, ALA. CODE § 27-12-1 (2017).; R.I. INS. REG. § 110 (2013); ALA. DEP’T OF INS. BULLETIN 2010-10 (2010) (citing the Trade Practices Law).

³⁶ See generally Peter Nash Swisher, “*Why Won’t My Homeowners Insurance Cover My Loss?*”: *Reassessing Property Insurance Concurrent Causation Coverage Disputes*, 88 TUL. L. REV. 515 (2014).

“other cause” is covered under the policy.³⁷ Terms such as this—known as “anti-concurrent causation clauses”—disappoint the reasonable expectations of policyholders that they will be compensated for losses due to covered causes, and can be particularly problematic after catastrophic events. An Essential Protection ensures that losses due to covered causes are covered by limiting the scope of anti-concurrent causation clauses.³⁸

IV. IMPROVING THE CLAIM PROCESS

The point of homeowners insurance from the perspective of the policyholder is two-fold: to provide a sense of security before a loss arises, and to pay for a covered claim if a loss does occur. Therefore, the protection and security that insurance policies provide is most effective—or it fails—when policyholders file claims. To provide this protection, insurance companies must process claims promptly and fairly. But disputes may arise about the facts giving rise to a claim, the extent of coverage

37

INS.

INFORMATION INSTITUTE, HO 00 03 10 00, INS. HOMEOWNERS SPECIAL FORM 11 (1999), https://www.iii.org/sites/default/files/docs/pdf/HO3_sample.pdf.

³⁸ The majority of states observe the rule of “efficient proximate cause” in cases involving covered and excluded causes of loss. 5-44 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 44.03 (Matthew Bender & Company, Inc., 2017). Efficient proximate cause is often described as “the predominating cause of the loss” that “looks to the quality of the links in the chain of causation.” *Murray v. State Farm Fire & Cas. Ins. Co.*, 509 S.E.2d 1, 12 (W. Va. 1998). Although a few statutes define causation under insurance policies, *e.g.*, CAL. INS. CODE § 530 (2017); FLA. STAT. § 627.702(1)(b) (2017); and N.D. CENT. CODE § 26.1-32-01 (2017), it largely has been left to the courts (sometimes applying relevant statutes) to decide whether an anti-concurrent causation clause in an insurance policy can narrow the rule of causation that otherwise would be dictated by state law. The states are divided on this issue. Leading cases include: *Safeco Ins. Co. of Am. v. Hirschmann*, 773 P.2d 413 (Wash. 1989) (clause unenforceable), and *State Farm Fire & Cas. Ins. Co. v. Bongen*, 925 P.2d 1042 (Alaska 1996) (clause enforceable). *See* Dale Joseph Gilsinger, *Validity, Construction, and Application of Anticoncurrent Causation (ACC) Clauses in Insurance Policies*, 37 A.L.R. 6th 657 (2008).

under policy language, the policyholder's conduct in response to the loss, the insurer's processing of the claim, and more. A fair and efficient process that resolves disputes about claims provides the security that policyholders have purchased while it protects the interests of the pool of policyholders that the insurer represents.

The claim process is improved by many of the Essential Protections. Improving information about coverage makes consumers more aware of policies' content so they can better evaluate their rights in the event of a claim. Preventing "use it and lose it" removes a disincentive for policyholders to assert rightful claims. But disclosure and stronger terms will not prevent all disputes. Essential Protections directed at the claim process itself, including the dispute resolution process, are needed as well.

The most basic promise in a policy concerns the insurer's conduct in the event of a claim. The core requirement for insurance companies when handling claims is that they must act reasonably. An Essential Protection is to incorporate that requirement into law and to provide remedies for its violation. Reasonableness does not demand perfection; everyone makes mistakes, including insurance companies. Reasonableness does demand that insurance companies adhere not only to the express terms of policies but also to widely accepted industry standards of performance.³⁹

³⁹ See Jay M. Feinman, *The Law of Insurance Claim Practices: Beyond Bad Faith*, 47 TORT TRIAL & INS. PRAC. L.J. 693, 719 (2012).

Most states have adopted the NAIC's Model Unfair Claims Settlement Practices Act ("UCSPA") and the accompanying Unfair Property/Casualty Claims Settlement Model Regulation that define minimum standards of reasonableness. UNFAIR CLAIMS SETTLEMENT PRACTICE ACT (NAT'L ASS'N OF INS. COMM'RS 1997); UNFAIR PROPERTY/CASUALTY CLAIMS SETTLEMENT MODEL REGULATION (NAT'L ASS'N OF INS. COMM'RS 1997) For example, with respect to providing essential information about the claims process to policyholders, the UCSPA, §4.M requires insurance companies "to provide forms necessary to present claims within fifteen calendar days of a request with reasonable explanations regarding their use."

The Model Regulation, § 6.D, further provides, "[e]very insurer, upon receiving notification of claim, shall promptly provide necessary claim forms, instructions, and reasonable assistance to first party claimants so that they can comply with the policy conditions and the insurer's reasonable requirements." The UCSPA fails policyholders in one basic respect. It treats many unreasonable actions as if they were not violations of the statute, stating that insurance companies' unreasonable actions are only

Policyholders typically are at a disadvantage in the claim process.⁴⁰ They lack information and expertise about coverage under their policies and the claim process, and may be financially and emotionally vulnerable after a major loss. To correct this imbalance and to make sure that insurance companies honor their promises, an Essential Protection is that insurance companies provide adequate information to policyholders about the claims process and establish and implement reasonable standards for processing, investigating, evaluating, and paying claims.

A first step in redressing the information imbalance in the claim process is to require insurance companies to provide policyholders with information about the claim process and policyholder rights and, upon request, with a copy of the claim file. Policyholders are required to provide complete, accurate, and timely information in order to have their claims

wrong if they are committed intentionally or as a general business practice. Actions that are unreasonable are unreasonable whether or not they have these added elements.

Some states have adopted statutes other than the UCSPA that define claims practices standards. *E.g.*, COLO. REV. STAT. § 10-3-1115 (2017) (“A person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed.”); LA. REV. STAT. ANN § 22:1973 (2017) (“The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.”); MD. CODE ANN., INS. § 27-1001 (Lexis 2016) (“‘Good faith’ means an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim.”); MO. REV. STAT. § 375.296 (2017) (sanctioning refusal to pay that is “vexatious and without reasonable cause”); WASH. REV. CODE § 48.30.010(7) (2017) (“An insurer engaged in the business of insurance may not unreasonably deny a claim for coverage or payment of benefits to any first party claimant.”).

Courts in most jurisdictions also recognize that an obligation of good faith and fair dealing is embodied in every insurance policy as if it were written into the wording of the policy. The good faith obligation has been a major source of the law of claim practices, requiring the insurer to go beyond the letter of the insurance policy and to act fairly and reasonably in processing, investigating, evaluating, and paying a claim. *See* Feinman, *supra* note 39.

⁴⁰ *See* Feinman, *supra* note 14, at 1323-26.

paid. Insurance companies have an obligation to assist policyholders in this process by giving them the information they need about policy terms, time limits, other requirements for pursuing their claims, and information the companies have received or developed about the claims.⁴¹ Relevant information about the process includes a copy of relevant state statutes and regulations concerning claim practices; forms necessary to present claims; explanations of time limits applicable to the claim including time limits for filing the claim and other time limits stated in the policy or by operation of law; explanations of the claimant's rights in the event of a dispute including mediation and appraisal, and explanation of the availability and procedures for filing a complaint with the state insurance department.

Policyholders also should have full access to information relevant to their claims, including information the companies have received or developed about the claims. Insurance companies have a duty to conduct reasonable investigations and to assist policyholders in filing and documenting claims. To ensure that this duty is met, policyholders should have access to all information developed about their claims, commonly referred to as "the claim file."⁴² In claim practices litigation, the claim file is routinely available to policyholders in discovery.⁴³ The same information should be available to policyholders without the need to resort to litigation. Attorney work product, attorney-client privileged, and medically privileged documents are excluded, although those exclusions should be defined narrowly because "the payment or rejection of claims is a part of the regular business of an insurance company [so that] reports prepared by insurance investigators, adjusters, or attorneys before the decision is made

⁴¹ Many of these obligations are defined in detail in state adoptions of the Unfair Claims Settlement Practices Act, *e.g.*, UNFAIR CLAIMS SETTLEMENT PRACTICES ACT § 4.M (NAT'L ASSOCIATION OF INS. COMM'RS. 1997) and the Model Regulation, UNFAIR PROPERTY/CASUALTY CLAIMS SETTLEMENT MODEL REGULATION, *supra* note 39. Other state laws impose similar duties. *E.g.*, CAL. INS. CODE § 10103 (2017).

⁴² The duty to provide a copy of the claim file on request is specifically mandated in the California Insurance Code. CAL. INS. CODE § 2071 (2017). A similar requirement is contained in LA. REV. STAT. § 22:41 (2017).

⁴³ *See* *Genovese v. Provident Life & Accident Ins.*, 74 So. 3d 1064, 1068 (Fla. 2011); *Cedell v. Farmers Ins. Co. of Washington*, 295 P.3d 239, 245 (Wash. 2013); 2-16 NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 16.02 (Matthew Bender & Company, Inc., 2017); EDWARD H. WINDMANN, 2 LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 17:62 (Thompson Reuters 2017).

to pay or reject a claim are thus not privileged and are discoverable.”⁴⁴

Often, the most controversial issue in homeowners insurance claims is determining the value of the loss. This should not be an adversarial process; insurance companies are obligated to act reasonably and in the interest of their policyholders to determine the fair value of claims. This requirement is an application of the general principle that companies are required to act in good faith toward their policyholders. In particular, an Essential Protection is to require companies to observe reasonable standards for determining and paying the Actual Cash Value or the Replacement Cost of the claim, as applicable under the policy. For example, under an Actual Cash Value policy, these standards dictate that a deduction for depreciation only applies to components “that are normally subject to repair and replacement during the useful life of that structure.”⁴⁵ Likewise, under a Replacement Cost policy, in cases of partial loss homeowners expect that their policies enable them to repair or replace the damaged property without additional cost.⁴⁶ Repair or replacement often requires matching the damaged part of the property to the undamaged part to restore the property to the condition prior to loss; for example, replacing only damaged shingles on a roof fails to restore the uniform appearance.⁴⁷

After a loss, policyholders need time to collect information, retain contractors and other experts, make repairs, and restore their standard of

⁴⁴ *Melworm v. Encompass Indem. Co.*, 977 N.Y.S.2d 321, 323 (N.Y. App. Div. 2013).

⁴⁵ CAL. INS. CODE § 2051 (2017).

⁴⁶ This represents a “functional conception” of indemnity rather than an “economic conception.” KENNETH S. ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW AND REGULATION* 263 (6th ed. 2015).

⁴⁷ Matching to restore a uniform appearance is required by the National Association of Insurance Commissioners’ Unfair Property/Casualty Claims Settlement Practices Model Regulation. UNFAIR PROPERTY/CASUALTY CLAIMS SETTLEMENT PRACTICES MODEL REGULATION (NAT’L ASSOCIATION OF INS. COMM’RS. 1997). Many states have adopted statutes or administrative rules based on the Model Regulation. *E.g.*, 806 KY. ADMIN. REGS. 12 § 095 (2017); 210 NEB. ADMIN. CODE § 010 (2017). Other states have adopted the matching principle by court decision. *E.g.*, *Trout Brook S. Condo. v. Harleysville Worcester Ins. Co.*, 995 F. Supp. 2d 1035, 1042 (D. Minn. 2014); *Alessi v. Mid-Century Ins.*, 464 S.W.3d 529, 530 (Mo. Ct. App. 2015). Not all states agree. *E.g.*, *Woods Apartments v. U.S. Fire Ins.*, No. 3:11-CV-00041-H, 2013 WL 3929706, at *1 (W.D. Ky. 2013).

living, all while they are suffering the financial and emotional hardships caused by a loss. Insurance companies also need time to assist policyholders and to investigate and evaluate claims. These processes can take time, particularly where the losses are major or occur after natural disasters, where many losses place extraordinary demands on insurance companies, contractors, and others. Therefore, insurance companies must provide policyholders adequate time to make sure repairs are made, claims are fully documented, and the conditions for payment in insurance policies are fully complied with. If disputes arise, policyholders may require more time to retain legal representation and to initiate litigation. Time requirements in policies and statutes of limitations should recognize these considerations while balancing the need to prevent stale claims and to allow insurance companies to appropriately reserve for potential losses. An Essential Protection is to provide a reasonable statute of limitations, such as two years,⁴⁸ and to prevent an insurer from attempting to shorten the period in which a suit may be brought that is specified in the statute of limitations.⁴⁹ Policyholders may be unaware of time deadlines and their effect, so insurance companies should be required to give them timely and adequate notice so that they can comply with the deadlines.⁵⁰

⁴⁸ N.Y. INS. LAW § 3404 (2017). *See also* OR. REV. STAT. § 742.240 (2017); 27 R.I. GEN. LAWS § 27-5-3 (2017).

⁴⁹ Many states have statutes prohibiting and making unenforceable a provision in an insurance policy that attempts to shorten the period prescribed by the statute of limitations. *E.g.*, ARIZ. REV. STAT. ANN. § 20-1115 (2017); LA. STAT. ANN. § 22:868 (2017); MD. CODE ANN., INS. § 12-104 (LexisNexis 2017).

⁵⁰ *See* NAIC MODEL REGULATION § 5.D.; OKLA. ADMIN. CODE § 365:15-3-4 (2017); OHIO ADMIN. CODE § 3901-1-54 (2017) (providing that “[n]o insurer shall deny a claim based upon the failure of a first party claimant to give written notice of loss within a specified time limit unless the notice is required by a policy condition, or first party claimant’s failure to give written notice after being requested to do so is so unreasonable as to constitute a breach of the claimant’s duty to cooperate with the insurer.”). The language “unless the written notice is a written policy condition” has the effect of permitting insurance companies to act unreasonably simply by including a boilerplate condition in the policy, even when the failure to give notice or file a proof of loss does not prejudice their interests. An Essential Protection is to remove the insurance companies’ ability to rely on policy language in this way, as other states do. *See* UTAH CODE ANN. § 31A-21-312 (West 2017); W. VA. CODE R. § 114-14-4 (2017).

When a loss occurs, homeowners need to receive the benefits of their insurance policies quickly and fully in order to repair their property and begin rebuilding their lives. In order to facilitate rebuilding and to remove the pressure on a policyholder to prematurely conclude a claim, an Essential Protection requires companies to pay what they acknowledge they owe, even if other portions of claims are disputed, and not use the threat of litigation to coerce policyholders.⁵¹

When disputes arise, policyholders need efficient, effective, and expeditious means of resolving the disputes. Litigation ultimately may be necessary, but it is a last resort for policyholders because it takes time, delaying the process of recovery, and is financially and emotionally draining. Two alternatives to litigation that can be effective for homeowners are mediation and appraisal.

Mediation provides an informal but structured forum in which policyholders and insurers can meet with the aid of a qualified mediator to discuss and attempt to resolve disputes.⁵² There is widespread dispute among the policyholder bar, regulators, and insurers about the effectiveness of mediation. The imbalance of information and position inherent in the insurance relationship is reflected in mediation, too, and can prevent it from being effective. What is clear, however, is that mediation is effective if at all only if certain conditions are met. Essential elements of an effective mediation program include the following:

- Policyholders should be fully informed about their right to mediation and should be provided advice and counseling about

⁵¹ NEV. ADMIN. CODE § 686A.675 (2017) (“In any case involving a claim in which there is a dispute over any portion of the insurance policy coverage, payment for the portion or portions not in dispute must be made notwithstanding the existence of the dispute where payment can be made without prejudice to any interested party.”); W. VA. CODE R. § 114-14-6 (2017); *E.g.*, FLA. STAT. § 626.9541(1)(i)(4) (2017); 806 KY. ADMIN. REGS. 12:095 § 6(6) (2017); NEV. ADMIN. CODE § 686A.675(7) (2017); N.H. CODE ADMIN. R. ANN. INS 1002.07 (2015); The same requirement has been imposed by judicial decision. *E.g.*, *Chester v. State Farm Ins. Co.*, 117 Idaho 538, 541 (Idaho Ct. App. 1990); *Castellano v. State Farm Mut. Auto. Ins. Co.*, No. 5-12-0304, 2013 WL 5519596 (Ill. App. Ct. Oct. 2, 2013); *Dupree v. Lafayette Ins. Co.*, 51 So. 3d 673 (La. 2010).

⁵² Some states provide for mediation of insurance disputes, either in general or for claims arising after natural disasters. *E.g.*, FLA. STAT. § 627.7015 (2017).

the process.

- Policyholders should be able to request non-binding mediation in which insurance companies are required to participate.
- Mediators should be qualified in both the mediation process and property insurance issues.
- The costs of mediation should be borne by the insurance companies.

Appraisal provides a process by which neutral parties can assess loss and determine the costs of repair. Homeowner policies typically provide for appraisal, and some states require that it be available. Courts are divided on the issues appropriate for appraisal—whether, for example, appraisal is limited to determining the amount of damage and cost of repair or whether appraisal also may determine the scope of loss and issues of causation.⁵³ Appraisal is more effective if it includes both types of issues.⁵⁴

Companies sometimes attempt to prevent policyholders from having their day in court through forced arbitration clauses in insurance policies. Arbitration can be a fair and efficient means of dispute resolution if both parties agree to arbitrate a claim after a dispute has arisen, but it should not be imposed on policyholders by a policy term that is usually hidden in boilerplate or the consequences of which are not well understood. Arbitration often fails to protect policyholders because discovery is limited, arbitrators can be more favorable to insurance companies, arbitration rulings cannot be reviewed even for errors of law or fact, and the rulings are private, so they do not serve the public function of clarifying the law. Therefore, an Essential Protection is to bar the use of pre-dispute mandatory arbitration clauses in insurance policies.⁵⁵

⁵³ See COUCH ON INSURANCE §§ 209.8-9, 210.42 (3d ed. 2017).

⁵⁴ See N.Y. INS. § 3408(c) (Consol. 2014).

⁵⁵ More than a dozen states prohibit enforcement of arbitration clauses in insurance policies by statute or regulation. *E.g.*, ARK. CODE ANN. § 16-108-201 (2017); HAW. REV. STAT. § 431:10-221 (2017). Another ten states restrict the use of arbitration. *E.g.*, UTAH ADMIN. CODE R590-122 (2017); The Federal Arbitration Act as interpreted by the U.S. Supreme Court generally preempts state law that bars or limits arbitration, but state statutes should be upheld based on the reverse preemption provision of the McCarran-Ferguson Act under which states are permitted to regulate the business of insurance. *E.g.*, *Standard Security Life Insurance Co. v. West*, 127 F. Supp. 2d 1064 (2000); *Friday v. Trinity Universal of Kansas*, 939

The protections that policyholders have are only as good as the means available to enforce them. Every state recognizes that policyholders can sue their insurance companies for failing to pay what is owed under insurance policies; these are ordinary breach of contract suits. Because insurance is not an ordinary commercial contract but rather one that provides security and for which ordinary contract damages are not sufficient to redress the breach of security, some states provide for the award of attorneys' fees to a policyholder in the coverage case.⁵⁶ Some states also permit interest on the unpaid amount at a higher than ordinary rate.⁵⁷

Where insurance companies act unreasonably, the amounts owed under the policies are inadequate either to compensate policyholders for their losses, or to deter companies from unreasonable conduct in the future. When insurance claims are improperly delayed or denied, policyholders may suffer other financial losses and emotional harm. For example, homeowners who do not receive prompt payment may have additional expenses due to being out of their homes and may suffer extreme aggravation and distress. If policyholders have to pay attorneys and incur other litigation expenses to get what they are entitled to, they are never fully compensated for their losses. Moreover, if insurance companies only have to pay what they originally owed under their policies even where they act wrongfully, they have much less incentive to pay claims promptly and fairly; delaying claims increases their investment income and denying claims adds directly to their bottom line.⁵⁸

Therefore, Essential Protections require insurance companies to act reasonably in processing, investigating, evaluating, and resolving claims, and give policyholders the right to sue for appropriate damages if the companies do not do so.⁵⁹ Appropriate damages include the unpaid amount

P.2d 869 (1997).

⁵⁶ *E.g.*, GA. CODE ANN. § 33-4-6 (2017); WASH. REV. CODE § 48.30.015(2) (2017).

⁵⁷ *E.g.*, ME. STAT. 24-A § 2436 (2017) (1-1/2% per month); OKLA. STAT. 36, § 3629 (2017) (15% per year); 42 PA. CONS. STAT. § 8371 (2017) (prime rate plus 3%).

⁵⁸ *See generally* JAY M. FEINMAN, DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT (2010).

⁵⁹ Most states provide a remedy for violation of claim practices standards, sometimes referred to as "bad faith." In a majority of those states, insurance companies are liable only if they act unreasonably and if they know they have done so or acted in "reckless disregard" of the lack of a

of the clam, other actual damages,⁶⁰ attorneys' fees and costs,⁶¹ and extra-compensatory damages such as interest at a higher than statutory rate,⁶² or treble damages.⁶³

V. CONCLUSION

This article was first presented at a University of Connecticut Insurance Law Center conference on "Insurance in the Age of Trump." In the early days of the Trump Administration, presidential advisor Stephen Bannon defined one of the administration's objectives as the "deconstruction of the administrative state."⁶⁴ Whatever that phrase means

reasonable basis for their action. Other states only require unreasonable behavior for the cause of action. See Feinman, *supra* note 39, at 701-04.

⁶⁰ *E.g.*, *Gourley v. State Farm Mut. Auto. Ins. Co.*, 822 P.2d 374, 378 (Cal. 1991); *Farr v. Transamerica Occidental Life Ins. Co. of Cal.*, 699 P.2d 376, 382 (Ariz. Ct. App. 1984); *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 886 N.E.2d 127, 129–30 (N.Y. 2008); *Panasia Estates, Inc. v. Hudson Ins. Co.*, 886 N.E.2d 135, 137 (N.Y. 2008).

⁶¹ *E.g.*, ARK. CODE ANN. § 23-79-208 (2017); COLO. REV. STAT. § 10-3-1116 (2017); FLA. STA. § 627.428 (2017); MD. CODE ANN., CTS. & JUD. PROC. § 3-1701 (West 2017); N.M. STAT. ANN. § 39-2-1 (2017); 42 PA. CONS. STAT. § 8371 (2017).

⁶² *E.g.*, ME. REV. STAT. ANN. 24-A, § 2436 (2017) (1-1/2% per month); MD. CODE ANN., CTS. & JUD. PROC. § 3-1701 (2017) (10% per annum); OKLA. STAT. 36, § 3629 (2017) (15% per year); 42 PA. CONS. STAT. § 8371 (2017) (prime rate plus 3%).

⁶³ *E.g.*, GA. CODE ANN. § 33-4-6 (2017) ("[A]dditional damages up to 50% of the loss or \$5,000, whichever is greater, plus attorney's fees"); LA. STAT. ANN. § 22:1821 (2017) ("[D]ouble the amount of health and accident benefits plus attorney's fees."); LA. REV. STAT. ANN. § 22:1892(B)(1) (2017) (indicating a penalty of the greater of 50% of the amount owed or \$1,000); WASH. REV. CODE § 48.30.015(2) (2017) (indicating up to three times actual damages, plus attorney's fees). Other statutes authorize punitive damages, 42 PA. CONS. STAT. § 8371 (2017), or exemplary damages, MONT. CODE ANN. § 33-18-242 (2017), as determined by the trier of fact.

⁶⁴ Philip Rucker & Robert Costa, *Bannon vows a daily fight for 'deconstruction of the administrative state,'* WASHINGTON POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.90bf22f7e085.

as a matter of national policy, homeowners insurance will continue to be heavily regulated by the states. Across the divides between Democrats and Republicans, progressives and conservatives, industry lobbyists and policyholder advocates, there is no disagreement that regulation must remain robust. The Essential Protections for Policyholders project surveys the state of key elements of homeowners insurance regulation across the nation and recommends how it can be improved in the interest of policyholders and the communities in which they live.

