

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

WIN MYINT and wife, )  
PATTY K. MYINT, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
METROPOLITAN GOVERNMENT OF )  
NASHVILLE AND DAVIDSON COUNTY, )  
TENNESSEE, MAYOR PHIL BREDESEN, )  
and THE METROPOLITAN CODES )  
DIRECTOR TERRY COBB; and )  
ALLSTATE INSURANCE COMPANY, )  
 )  
Defendants. )

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WIN MYINT and wife, )  
PATTY K. MYINT, )  
 )  
Appellants/Cross-Appellants, )  
 )  
v. )  
 )  
ALLSTATE INSURANCE COMPANY, )  
 )  
Appellee/Cross-Appellee. )

Appeal No. 02A01-9512-CH-00558  
Davidson Chancery No. 92-3159-II

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**BRIEF OF AMICUS CURIAE STATE OF TENNESSEE**

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**[ Oral Argument Requested ]**

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## **JURISDICTIONAL STATEMENT**

Amicus Curiae, State of Tennessee, accepts the Jurisdictional Statement contained in Appellant's Brief.

## **QUESTIONS PRESENTED FOR REVIEW**

Amicus Curiae, State of Tennessee, accepts the Statement of Issues presented for Review contained in Appellant's Brief.

## **STATEMENT OF THE CASE**

Amicus Curiae, State of Tennessee, accepts the Statement of the Case contained in Appellant's Brief.

## **STATEMENT OF THE FACTS**

Amicus Curiae, State of Tennessee, accepts the Statement of the Facts contained in Appellant's Brief.

## ARGUMENT

- I. The bad faith statute was intended to expand, not limit, remedies available to insurance policy holders.
  - A. When the bad faith statute was passed it provided policy holders a new remedy, and did not displace any existing remedy.

The bad faith statute passed in 1901, when insurance policy holders unable to collect legitimate claims had few remedies. There was no common law tort for bad faith failure to pay an insurance claim,<sup>1</sup> nor was there a Tennessee Consumer Protection Act.<sup>2</sup> A policy holder could bring a contract action to recover the amount due under the contract, with interest, but could not recover punitive damages, attorneys' fees or other forms of consequential damages. Because the cost of bringing suit often outweighed or offset the potential recovery, insurance companies were in a favorable bargaining position when negotiating settlements. The bad faith statute addressed this situation by providing a new remedy to policy holders.<sup>3</sup>

Although the bad faith statute is often referred to as a "penalty" statute, its purpose is not to provide punitive or exemplary damages. The statute was meant to encourage fair settlements by insurance companies and to indemnify policy holders for losses caused by a bad faith failure to pay a claim.<sup>4</sup> The statute does not authorize a blanket 25% penalty -- it ties recovery to actual

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<sup>1</sup>See Chandler v. Prudential Ins. Co., 715 S.W.2d 615, 619, 621 (Tenn. Ct. App. 1986) (holding that the tort of bad faith is not recognized in Tennessee).

<sup>2</sup>The Tennessee Consumer Protection Act was adopted in 1977. 1977 Tenn. Pub. Acts ch.438, § 1.

<sup>3</sup>See Continental Fire Ins. Co. v. Whitaker & Dillard, 112 Tenn. 151, 170-71 (1903) (describing the hardships endured by policy holders before adoption of the bad faith statute).

<sup>4</sup>E.g., St. Paul Fire & Marine Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 72-73 (1913).

damages arising from an insurance company's failure to pay a claim.<sup>5</sup> Thus, the "penalty" is actually a measure of consequential damages.<sup>6</sup>

Before the bad faith statute was passed, consequential damages were not available in a contract action for failure to pay an insurance claim.<sup>7</sup> Tennessee and United States Supreme Court case law held that breach of a contractual obligation to pay money could not support a claim for consequential damages.<sup>8</sup> The law presumed that interest on a contractual obligation provided full compensation for a failure to meet that obligation.<sup>9</sup> The bad faith statute removed this impediment and made consequential damages available.

The statute also removed another impediment to recovery of consequential damages. The classic rule in contracts is that a plaintiff may only recover consequential damages that "may fairly and substantially be considered as arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract."<sup>10</sup> This is a difficult

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<sup>5</sup>Tenn. Code Ann. § 56-7-105(a) ("such additional liability . . . shall . . . be measured by the additional expense, loss, and injury thus entailed"); Rice v. Van Wagoner Cos., Inc., 738 F. Supp. 252, 255 (M.D. Tenn. 1990).

<sup>6</sup>Rice, 738 F. Supp. at 255.

<sup>7</sup>Id. ("The plaintiff can at least be grateful that the legislature's act opens the door to a wider recovery than that available under Loudon v. Taxing District, 104 U.S. 771 (1881).").

<sup>8</sup>Loudon v. Taxing District, 104 U.S. 771 (1881) (Tennessee case); Insurance Co. v. Piaggio, 83 U.S. 378, 386 (1872).

<sup>9</sup>Loudon, 104 U.S. at 774 ("all damages for delay in payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due"); Piaggio, 83 U.S. at 386 ("the plaintiff cannot recover special damages for the detention of money due to him beyond what the law allows as interest").

<sup>10</sup>Livermore Foundry & Machine Co. v. Union Storage & Compress Co., 105 Tenn. 187, 202-03, 58 S.W. 270 (1900) (quoting Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Reprint 145

standard to meet in the insurance context. When a contract is signed, the insurance company is unlikely to know precisely how a failure to pay a claim will affect a policy holder. Not only are consequential damages unlikely to be contemplated by parties to an insurance contract, they are likely to be contracted away. The bad faith statute allows recovery of consequential damages without any showing that the parties contemplated such damages or that the damages arose naturally from the breach of contract. The 25% limit on consequential damages is essentially a substitute for the usual requirement that consequential damages be reasonably foreseeable.

When it was passed, the bad faith statute did not limit damages otherwise available -- it gave policy holders a new cause of action. And the insurance industry reacted accordingly. The constitutionality of the statute was assailed in the Tennessee Supreme Court on the grounds that “no other business except insurance is operated in a similar manner.”<sup>11</sup> It was likewise attacked in the United States Supreme Court on the grounds that it “allow[ed] a recovery . . . which was not sanctioned by the law as it existed at the time the contract was made [i.e., before 1901 when the statute was adopted].”<sup>12</sup>

In upholding the statute, neither the state nor the federal Supreme Court describes the statute as an “exclusive remedy” that benefits insurance companies by limiting their potential liability. To the contrary, the U.S. Supreme Court states that the “additional liability” is imposed in an “effort to give indemnity for the injuries which would be sustained through perverse methods and through an abuse of the privileges accorded to honest litigants.”<sup>13</sup> The Tennessee

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(1854)).

<sup>11</sup>Continental Fire, 112 Tenn. at 169.

<sup>12</sup>Supreme Ruling of the Fraternal Mystic Circle v. Snyder, 227 U.S. 497, 502 (1913).

<sup>13</sup>Id. at 503.

Supreme Court states that the statute is justified by “heartbreaking delays induced by the attempt of the companies to enforce upon [policy holders] through litigation the technical defenses crouched in the jungle of fine print with which these policies are overgrown.”<sup>14</sup> The only benefit to the insurance industry the Court is able to discern is the companion section:

Evenhanded justice is dispensed to the companies in the second section, [Tenn. Code Ann. § 56-7-106,] which provides for a similar recovery of expenses in [insurance companies’] favor against the policy holder if it shall appear that he has not brought suit in good faith.<sup>15</sup>

The statute’s legislative history, sparse though it is, confirms that the legislature intended to impose additional liability upon insurance companies, not to limit recovery otherwise available. The statute’s earliest drafts are captioned “An act to impose penalties for failure to promptly pay insurance losses.”<sup>16</sup> The final version of the statute is captioned “An act to impose additional liability upon insurance companies and other corporations, firms or persons, for failure to promptly pay insurance losses, and a liability upon policy holders where suits are not brought in good faith.”<sup>17</sup> As these captions indicate, the statute was not meant to limit remedies available to policy holders -- it was intended to provide additional remedies not previously available.

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<sup>14</sup>Continental Fire, 112 Tenn. at 171.

<sup>15</sup>Id.

<sup>16</sup>S. Bill No. 117, Order for Passage with Amendments, March 11, 1901 (emphasis added) (Appendix A).

<sup>17</sup>S. Bill No. 117, adopted April 16, 1901 (emphasis added) (Appendix B).

- B. The phrase “in all cases” does not indicate that the bad faith statute was intended to be exclusive of other remedies.

In Chandler v. Prudential Insurance Co.,<sup>18</sup> the Tennessee Court of Appeals develops a unique interpretation of the phrase “in all cases”:

The similarity between the [Workers’ Compensation Act and the bad faith statute] is striking. Section 50-6-108 states in substance that the rights and remedies granted to an employee covered by the Workers’ Compensation Act for personal injury or death by an accident excludes all other rights or remedies of such employee, common law or otherwise. By the same token § 56-8-105 provides that in all cases, when a loss occurs and demand is properly made by the policyholder, if an insurance company refuses to pay, it shall be liable not only for the amount of the loss, but also for a sum not exceeding twenty-five percent thereof. In our opinion, the phrase “in all cases” and “exclusive remedy” denote the same degree of exclusiveness.<sup>19</sup>

This holding is unsupported and unsupportable.

The Workers’ Compensation Act bears no resemblance to the bad faith statute. Most importantly, the Workers’ Compensation Act was intended to, and did, displace other existing remedies. The statute explicitly states that “[t]he rights and remedies herein granted . . . shall exclude all other rights and remedies.”<sup>20</sup> As discussed above, when the bad faith statute was adopted it was not intended to, and did not, displace any available legislative or common law remedy. And, unlike the Workers’ Compensation Act, there is no explicit statement that the bad faith statute is intended to be an exclusive remedy.

The phrase “in all cases when” does not even *imply* that the statute provides an exclusive remedy. The phrase “in [] cases when” is simply a somewhat wordy equivalent of “when.” In

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<sup>18</sup>715 S.W.2d 615 (Tenn. Ct. App. 1986).

<sup>19</sup>Id. at 621 (emphasis added).

<sup>20</sup>Tenn. Code Ann. § 50-6-108(a).

the context of the bad faith statute, it means that “when” the required facts are established, liability attaches. The word “all” only emphasizes that liability attaches without exception. Thus, the phrase “in all cases when” describes the relationship between the required facts and the 25% liability; it tells us nothing about the relationship between the required facts and other available remedies.

If this Court were to approve Chandler’s holding that “the phrase ‘in all cases’ and ‘exclusive remedy’ denote the same degree of exclusiveness” there would be widespread unintended consequences. The phrase “in all cases” appears more than 600 times in the Tennessee Constitution and the Tennessee Code Annotated, yet there is not a single decision outside of the Chandler line of cases holding that the phrase indicates an exclusive remedy. In fact, the State has found no decision from any jurisdiction suggesting that the phrase “in all cases” indicates an exclusive remedy.

Ultimately, the proper interpretation of a statute is governed by its plain meaning,<sup>21</sup> and the plain meaning of “in all cases” does not denote the same degree of exclusiveness as “exclusive remedy.” Consider the following hypothetical statute:

- (a) in all cases of failure to appear in court, a fine of up to \$500 shall be imposed; and
- (b) in all cases of failure to appear in court, a term of imprisonment of not more than 48 hours shall be imposed.

There is no contradiction between section (a) and section (b) because a penalty can be imposed “in all cases” without excluding other penalties. But consider a different version of the statute:

- (a) if a party fails to appear in court, the exclusive penalty shall be a fine of up to \$500;  
and
- (b) if a party fails to appear in court, the exclusive penalty shall be a term of imprisonment of not more than 48 hours.

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<sup>21</sup>Atchley v. Life Care Ctr., 906 S.W.2d 428 (Tenn. 1995)

This statute is contradictory, because there cannot be two exclusive penalties for the same offense. The phrase “in all cases” in the bad faith statute does not exclude other remedies -- it indicates that when the conditions are met liability attaches without exception.

- C. Cases holding that courts should be reluctant to recognize a new common law cause of action when a statutory remedy already exists do not support the proposition that courts should refuse to apply a new statutory remedy when an older statutory remedy already exists.

The Court of Appeals below relies upon Chandler, and two other decisions that rely in turn upon Chandler, for the proposition that the bad faith statute provides the exclusive remedy for the bad faith refusal to pay an insurance claim.<sup>22</sup> Chandler is either mistaken in its use of the term “exclusive remedy,” or subsequent courts have misinterpreted the decision.

The primary issue in Chandler was whether the court should recognize a common law tort of bad faith failure to pay an insurance claim.<sup>23</sup> The court held that the existence of a statutory remedy precluded recognition of a new common law cause of action.<sup>24</sup> In support of its ruling, the court cited two decisions holding that an existing statutory remedy precluded recognition of related common law claims.<sup>25</sup> The court also quoted with approval an Illinois

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<sup>22</sup>Opinion, at 8 (citing Persian Galleries, Inc. v. Transcontinental Ins. Co., 38 F.3d 253, 258-59 (6th Cir. 1994) and Berry v. Home Beneficial Life Ins. Co., No. 1150 (Tenn. Ct. App., Aug. 19, 1988)).

<sup>23</sup>See Chandler, 715 S.W.2d at 619 (noting that plaintiff devoted 35 pages of her brief to the issue).

<sup>24</sup>Id.

<sup>25</sup>King v. Mutual Life Insurance Co., 114 F. Supp. 700 (E.D. Tenn. 1953) (rejecting three equitable claims because “a statute provides the remedy”); Tate v. Aetna Casualty & Surety Co., 253 S.E.2d 775 (Ga. App. 1978) (rejecting a negligence claim because “the damages sought to be recovered by the plaintiff are limited to the ‘bad faith’ provisions”).

case holding that “[w]here the legislature has provided a remedy on a subject matter we are not only loath but in addition harbor serious doubts as to the desirability and wisdom of implementing or expanding the legislative remedy by a judicial decree.”<sup>26</sup>

This analysis does not, of course, apply when the legislature itself expands existing legislative remedies. Nevertheless, in Chandler the insurance company argued that Tenn. Code Ann. § 56-8-101, et seq., and the bad faith statute “provide[] the sole statutory remedies.”<sup>27</sup> The court held that “we are not prepared to go that far, and while Prudential may be correct in its contention that § 56-8-101 provides an exclusive remedy, we are of the opinion that plaintiff has failed to state a cause of action bringing her within the purview of the Tennessee Consumer Protection Act.”<sup>28</sup>

The only statement in Chandler that could be read to support the proposition that the bad faith statute precludes application of the Consumer Protection Act (aside from the questionable interpretation of the phrase “in all cases” discussed above) is the following sentence:

Furthermore, the record is silent, and we have no way of knowing whether the state of Washington has a bad-faith penalty statute such as ours, which we have already considered and construed as being the exclusive remedy in cases such as this.<sup>29</sup>

This sentence is ambiguous at best. In light of the court’s earlier ruling that the plaintiff had failed to state a claim, it is not clear that the court intends to rely upon the characterization of the

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<sup>26</sup>Debolt v. Mutual of Omaha, 371 N.E.2d 373, 377 (Ill. Ct. App. 1978) (emphasis added); see also Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 899 (Tenn. 1993) (holding that when a statute creates a new right its remedy is exclusive of new, but not existing, common law remedies).

<sup>27</sup>Chandler, 715 S.W.2d at 624.

<sup>28</sup>Id.

<sup>29</sup>Id. at 625.

bad faith statute as an “exclusive remedy.” If, however, the court did intend to rely upon its earlier analysis, application of that analysis to the Consumer Protection Act is erroneous. As discussed above, the court’s earlier analysis of the bad faith statute was in the context of deciding whether to recognize a new common law remedy for bad faith failure to pay an insurance claim. This analysis does not support, nor does any other authority support, the proposition that courts should hesitate to apply a new statutory remedy because an older statutory remedy already exists.

- II. The Consumer Protection Act is intended to supplement existing statutory remedies. Conduct regulated by the bad faith statute is not exempted from the Act, nor does the bad faith statute conflict with the Act. Therefore, the Consumer Protection Act prohibits unfair and deceptive conduct even if that conduct also violates the bad faith statute.

  - A. Remedies provided by the Consumer Protection Act are cumulative and supplemental to all other remedies, and the Act is intended to apply to all unfair acts and practices not specifically exempted.

The Consumer Protection Act states that the “powers and remedies provided in this part shall be cumulative and supplementary to all other powers and remedies otherwise provided by law.”<sup>30</sup> Acts, practices and businesses exempted from the Act are set out in Tenn. Code Ann. § 47-18-111; none of the exemptions apply to unfair or deceptive insurance claims practices. If there were any remaining doubt whether the Consumer Protection Act is intended to supplement statutes such as the bad faith statute, the Act provides that it “shall be liberally construed” to

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<sup>30</sup>Tenn. Code Ann. § 47-18-112.

promote various consumer protection policies, including modernization of state consumer protection law.<sup>31</sup>

In Morris v. Mack's Used Cars,<sup>32</sup> this Court considered whether a disclaimer of warranty authorized by the Uniform Commercial Code prevented application of the Consumer Protection Act. The Court noted the “supplementary nature” of the Act,<sup>33</sup> and cited with approval the ruling in Skinner v. Steele that the “mere existence of one regulatory statute does not affect the applicability of a broader, non-conflicting statute.”<sup>34</sup> As is discussed in the next section, the Consumer Protection Act does not conflict with the bad faith statute.

The Skinner court addressed the question whether the Tennessee Insurance Code, Title 56, exempts insurance transactions from the coverage of the Consumer Protection Act. The court concluded that extensive regulation of an industry does not exempt it from the provisions of the Consumer Protection Act unless those regulations require or specifically authorize actions that would otherwise violate the Act.<sup>35</sup> There is no claim in this case that the bad faith statute specifically authorizes unfair or deceptive practices in the processing of an insurance claim.

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<sup>31</sup> Tenn. Code Ann. § 47-18-102. See also Tenn. Code Ann. § 47-18-115 (“This part, being deemed remedial legislation necessary for the protection of consumers . . . shall be construed to effectuate the purposes and intent thereof.”); Morris v. Mack's Used Cars, 824 S.W.2d 538, 540 (Tenn. 1992) (holding that the Consumer Protection Act is to be “liberally construed to protect consumers and others from those who engage in deceptive acts or practices”).

<sup>32</sup>824 S.W.2d 538 (Tenn. 1992).

<sup>33</sup>Id. at 539.

<sup>34</sup>Id. at 539-40 (citing Skinner v. Steele, 730 S.W.2d 335, 338 (Tenn. Ct. App. 1987)).

<sup>35</sup>Skinner, 730 S.W.2d at 338.

- B. The bad faith statute and the Consumer Protection Act are distinct causes of action, which do not conflict. The statutes have different purposes, different standards of liability, and different remedies.

The bad faith statute and the Consumer Protection Act are distinct causes of action with different standards of liability and different remedies.<sup>36</sup> The bad faith statute is intended to encourage prompt and fair settlement of insurance claims and to indemnify policy holders against losses caused by insurance companies' bad faith.<sup>37</sup> The Consumer Protection Act is intended in part to "simplify, clarify, and modernize the state law governing the protection of the consuming public"; to protect consumers and legitimate businesses from deceptive and unfair business practices; and to provide civil legal means for maintaining ethical standards of dealing.<sup>38</sup> Although these purposes can overlap when an insurance company fails to pay a valid claim, the statutes are complementary, not conflicting.

The bad faith statute is not simply a "lesser included" version of the Consumer Protection Act -- the two statutes have entirely different standards of liability. The bad faith statute applies only to bad faith breaches of insurance contracts. But bad faith is not an element of a Consumer Protection Act claim.<sup>39</sup> Thus, if a company refused to pay a claim in good faith, but engaged in

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<sup>36</sup>Cf. Mack's Used Cars, 824 S.W.2d at 539 ("Claims under the UCC and the Consumer Protection Act are distinct causes of action, with different components and defenses. The Consumer Protection Act is applicable to consumer transactions, also regulated by the UCC.").

<sup>37</sup>St. Paul Fire & Marine Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 72-73 (1913).

<sup>38</sup>Tenn. Code Ann. § 47-18-102.

<sup>39</sup>E.g., Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921 (6th Cir. 1968) (applying the Federal Trade Commission Act, with which the Tennessee Consumer Protection Act is to be construed consistently under Tenn. Code Ann. § 47-18-115); FTC v. U.S. Sales Corp., 785 F. Supp. 737 (N.D. Ill. 1992) (same).

an unfair or deceptive practice, the company would violate the Consumer Protection Act but not the bad faith statute.

Similarly, an insurance company's refusal to pay a claim may violate the bad faith statute without violating the Consumer Protection Act. Mere breach of contract, even if it is intentional, is not necessarily an unfair or deceptive practice.<sup>40</sup> But intentional breach of an insurance contract does violate the bad faith statute.<sup>41</sup>

The statutes also provide different remedies -- in part because the Consumer Protection Act places greater emphasis upon the public interest than does the bad faith statute. If this Court were to hold that the bad faith statute preempts the Consumer Protection Act, the intent of the Tennessee Legislature would be frustrated in four important respects. Consumer protection law would (1) provide insufficient recovery to policy holders damaged by unfair or deceptive claims practices; (2) provide insufficient power to the courts to prevent unfair and deceptive claims practices; (3) provide insufficient authority to state officials to enforce consumer protection laws; and (4) provide insufficient deterrence to prevent insurance companies from engaging in unfair and deceptive claims practices.

First, if the Court of Appeals decision were upheld, consumers would not be fully compensated for unfair or deceptive insurance claims practices. When consumers are harmed by unfair or deceptive practices undertaken in good faith, the Consumer Protection Act allocates

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<sup>40</sup>E.g., Duro-Wood Treating Co. v. Century Forest Industries, 675 F.2d 745 (5th Cir. 1982); Madan v. Royal Indemnity Co., 532 N.E.2d 1214 (Mass. Ct. App. 1989); Columbia East Assoc. v. Bi-Lo, Inc., 386 S.E.2d 259 (S.C. Ct. App. 1989).

<sup>41</sup>See Daugherty v. Stuyvesant Ins. Co., 86 S.W.2d 1095 (Tenn. 1935) (holding insurer liable where insurer did not have a colorable defense to the claim); Independent Life Ins. Co. v. Knight, 2 Tenn. App. 259 (1926) (holding insurer liable where insurer admitted liability and then refused to pay the claim).

responsibility to the business to compensate consumers for damages actually sustained. If the bad faith statute were the exclusive remedy, consumers unable to establish bad faith would have no remedy for damages sustained because of unfair or deceptive insurance claims practices. The bad faith statute's limit on consequential damages, which include attorneys' fees, could also leave some consumers without an effective remedy. For example, 25% of damages sustained might not be enough to cover attorneys' fees in a dispute over a \$1000 automobile insurance claim. The Consumer Protection Act provides for full recovery of attorneys' fees,<sup>42</sup> because if a consumer cannot get into court, the consumer does not have an effective remedy.

Second, if the Court of Appeals decision were upheld, courts would have insufficient power to prevent unfair or deceptive practices. Under the Consumer Protection Act, the State or a private party may seek an injunction to prevent future violations of the Act.<sup>43</sup> The Act also gives courts the power to approve and enforce Assurances of Voluntary Compliance entered into between the State and businesses allegedly engaged in unfair or deceptive practices.<sup>44</sup> If the bad faith statute were the exclusive remedy, injunctive relief would not be as readily available.

Third, if the Court of Appeals decision were upheld, the State's ability to take enforcement action against insurance companies engaged in unfair or deceptive claims procedures would be limited. The Consumer Protection Act gives the Division of Consumer Affairs and the Attorney General the power to investigate businesses engaged in unfair or

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<sup>42</sup>Tenn. Code Ann. § 47-18-109(e)(1) (private action); Tenn. Code Ann. § 47-18-108(b)(4) (state action).

<sup>43</sup>Tenn. Code Ann. § 47-18-109(b) (private action); Tenn. Code Ann. § 47-18-108(a)(1) & (a)(4) (state action).

<sup>44</sup>Tenn. Code Ann. § 47-18-107.

deceptive practices<sup>45</sup> and, if necessary, to file suit to enforce the Act.<sup>46</sup> The Consumer Protection Act also provides the State with remedies not available to private parties, such as civil penalties and the Assurance of Voluntary Compliance.<sup>47</sup> The State has no enforcement authority under the bad faith statute.

Finally, the limitations cited above demonstrate that if the Consumer Protection Act were not available to the State and private parties, insurance companies would not be effectively deterred from engaging in unfair and deceptive claims practices. For example, an unscrupulous insurance company might see no economic deterrent to adopting claims procedures that unfairly limit policy holders' ability to collect relatively small claims. With attorneys' fees limited to 25% of the loss, private litigants would have difficulty asserting small claims in court; and the Division of Consumer Affairs and the Attorney General would not be able to take enforcement action. If an occasional lawsuit were to go to court, and the policy holder were to prevail, there would be nothing to prevent the insurance company from continuing its practices, because injunctive relief is not available under the bad faith statute. Even the economic deterrent provided by a single lawsuit under the Consumer Protection Act would be absent: civil penalties in a state action,<sup>48</sup> or treble damages for a knowing or wilful violation in a private action.<sup>49</sup>

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<sup>45</sup>Tenn. Code Ann. § 47-18-106.

<sup>46</sup>Tenn. Code Ann. § 47-18-108(a)(1); Tenn. Code Ann. § 47-18-114.

<sup>47</sup>Tenn. Code Ann. § 47-18-108(b)(3); Tenn. Code Ann. § 47-18-107.

<sup>48</sup>Tenn. Code Ann. § 47-18-108(b)(3).

<sup>49</sup>Tenn. Code Ann. § 47-18-109(a)(3).

## CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the ruling of the Court of Appeals that the Consumer Protection Act does not apply to unfair or deceptive insurance claims practices if those practices also violate the bad faith insurance statute.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid, to Joseph H. Johnston, Esq., P.O. Box 120874, Nashville, Tennessee 37212; and to John Schwalb, Esq., 26th Floor, The Tower, 611 Commerce Street, Nashville, Tennessee, 37203 on this \_\_\_\_\_ day of October, 1996.

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