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Home Warranty Regulation Through the Lens of Florida's Home Warranty Statute: Claims, Issues and Remedies

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I. Introduction

The purchase of a home is often viewed as one of the most significant financial decisions in a person’s lifetime. Amidst the home buying process and finding the right home, a home buyer typically has to navigate decisions such as choosing a realtor or broker to assist with the home buying process, trying to obtain the most competitive lender financing, and navigate through other issues such as private mortgage insurance, title insurance, seller disclosures, and all the assorted forms as part of a closing, including closing disclosure forms.

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To Laura Elizabeth Grice – yours always.

2 See Ranjeet S. Mudholkar, Buying a house? Here’s how to make the right decision, FIRST POST (Aug. 9, 2013), http://www.firstpost.com/investing/buying-a-house-heres-how-to-make-the-right-decision-1019501.html


4 See Alison Paoli, Don’t Fall for these 10 Mortgage Misconceptions, FOX BUSINESS (May 21, 2013), http://www.foxbusiness.com/features/2013/05/21/dont-fall-for-these-10-mortgage-misconceptions.html


One of the parts of the real estate transaction for the purchase of a home that receives consideration in many cases is the seller of the home contributing to the buyer either a home warranty coverage plan or to the cost for a buyer to purchase a home warranty. The National Home Service Contract Association (“NHSCA”), an industry group representing the interests of home warranty providers, contends that “prompt attention, qualified service providers and peace of mind, and protection from unexpected, and often-expensive repair bills” are the main benefits of home warranty contracts. Despite these lauded benefits, some commentators have argued generally that home warranties are not worth the investment and even a 2014 article in Consumer Reports magazine has recommended avoiding home warranty plans.

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9 See Steve Middendorp, Why You Should Offer a Home Warranty When Selling a House, ANGIE’S LIST (May 24, 2016), https://www.angieslist.com/articles/why-you-should-offer-home-warranty-when-selling-house.htm (noting that the inclusion of a home warranty by the seller may make it easier for a seller to sell a home, especially to a first-time homebuyer).


11 See, e.g., Marilyn Lewis, Home Warranties Often Aren’t Worth It: How to Judge for Yourself, MONEYTALKS NEWS (May 5, 2016), http://www.moneytalksnews.com/are-home-warranties-worth-the-money/ (noting that “home warranties top the list of complaints received by Angie’s List. One reason, the site says, is the difference between customers’ expectations and what the plans actually deliver. Homeowners also complain about the quality of service from warranty companies.”); Zaneta Lowe, Home warranty worth it or waste? WREG investigates complaints against American Home Shield, WREG (Feb. 22, 2016), http://wreg.com/2016/02/22/home-warranty-worth-it-or-waste-wreg-investigates-complaints-against-american-home-shield/ (stating that “From Tennessee to Texas, California to Connecticut, customers not only complain about “catch alls” for claim denials but things like bad customer service and multiple delays” concerning one home warranty provider); & Lew Sichelman, Are home warranties worth the cost?, LOS ANGELES TIMES (May 11, 2014), http://www.latimes.com/business/real estate/la-fi-lew-20140511-story.html

The state of Florida is often viewed as a leader in the national economy, along with its sometimes vibrant housing market. Approximately a decade ago, Florida was among the states hardest hit by the real estate bubble. Now, Florida is a leader in the housing recovery and some commentators have already suggested the possibility of another possible bubble in the real estate market in Florida.

Florida’s leadership is widely recognized among the states in the United States in the areas of industry growth, agriculture, and tourism. In addition to Florida’s economic leadership, Florida is a national and international leader in insurance regulation.

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19 See William K. Crispin, Michael T. Olexa & R. Benjamin Lingle, Florida Agriculture: Still in the Crosshairs, 85-MAR FLA B.J. 45 (2011) (“Agriculture is a thriving and essential component of the Florida economy with its $87.6 billion impact topped only by that of the state tourism industry”).

20 Id.


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where Florida is a pioneer in the development of insurance law is the unique Florida bad faith statute.\textsuperscript{22} While many jurisdictions that have adopted a cause of action for first party bad faith have adopted a common law tort type of action,\textsuperscript{23} Florida is unique in having a statutory system which requires the filing of a Civil Remedy Notice ("CRN") with the Department of Financial Services of the state of Florida as a condition precedent to the filing of a bad faith claim.\textsuperscript{24}

There is a larger debate on the question of whether a home warranty contract is considered merely just a service contract or whether it constitutes insurance.\textsuperscript{25} Similar to insurance bad faith, the state of Florida has unique legal rules concerning home warranty contracts. This Article examines claims, issues and remedies concerning the home warranty industry with a focus on the state of Florida. Florida’s unique example provides insight nationally into varied questions faced by many jurisdictions regarding regulation of home warranty contracts, such as whether a home warranty contract is considered insurance, the effect of arbitral agreements in home warranty contracts and the question of whether a home warranty company can be held liable for bad faith. Part II of the Article analyzes Florida’s statutory regulation of home warranty contracts. Part III evaluates several legal questions which have arisen in cases involving the home warranty statute to date. Finally, Part IV examines the


\textsuperscript{24} See FLA. STAT. § 624.155(3)(a) (2016). The statute states the following: “As a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given 60 days’ written notice of the violation”.

\textsuperscript{25} Although this question is beyond the specific focus of this Article, it is a larger question in insurance. See Kenneth E. Spahn, Service Warranty Associations: Regulating Service Contracts as “Insurance” Under Florida’s Chapter 634, 25 STETSON L. REV. 597 (1996); see also Michele Bertolini & Sharon S. Lassar, Service-Warranty Companies – the Hybrid of the Insurance Industry, THE TAX ADVISER (July 1, 2007), http://www.thetaxadviser.com/issues/2007/jul/service-warrantycompanies%E2%80%94thehybridoftheinsuranceindustry.html
question of whether a home warranty company can be held liable for bad faith. In conclusion, for the benefit of consumers who choose to obtain a home warranty, states should recognize bad faith liability for home warranty companies and provide increased protections for consumers from discriminatory, reckless, intentional, and/or malicious denials of valid home warranty claims.

II. Florida’s Regulation of the Home Warranty Industry

   A. Introduction

   Home warranty contracts are governed by the provisions of Chapter 634 of the Florida Insurance Code.26 As one commentator notes, the Florida Legislature has made statutory distinctions between Motor Vehicle Service Agreement Companies, Home Warranty Associations, and Service Warranty Associations.27 This Article focuses on home warranty contracts, which are defined as “any contract or agreement whereby a person undertakes to indemnify the warranty holder against the cost of repair or replacement, or actually furnishes repair or replacement, of any structural component or appliance of a home, necessitated by wear and tear or an inherent defect of any such structural component or appliance or necessitated by the failure of an inspection to detect the likelihood of any such loss.”28 The definition of a “home warranty” also excludes contracts or agreements which relate only to the systems and appliances of a covered residential property and do “not cover any structural component of the residential property.”29 It is generally understood that if the home warranty contract covers an item included

26 See generally FLA. STAT. §§ 634.301 to §§ 634.348 et. seq. (2016).
27 See Spahn, supra note 25 at 602.
28 See FLA. STAT. § 634.301(2) (2016).
29 Id.
with the sale of a home, it is generally considered a home warranty association, but if the contract covers items which are independent of the sale of a home, it is considered a “Service Warranty Association.”

B. Licensing, Financial and Reporting Requirements

Home warranty companies must obtain an annual license from the Florida Department of Insurance to provide home warranties in the state of Florida. To obtain the annual license, the home warranty company must pay a license tax for each license year, be a solvent corporation formed under Florida law or the law of any other state or U.S. territory, and meet deposit requirements.

Prior to obtaining a license, the home warranty association must deposit securities valuing at least $100,000 with the Department of Insurance to ensure performance of contractual obligations in the event of insolvency. The statute permits a home warranty company to meet the deposit requirement in one other way – deposit securities totaling at least $25,000 and file a $75,000 surety bond with the Department of Insurance. Irrespective of how a home warranty

30 See Spahn, supra note 25 at 604.
31 See FLA. STAT. § 634.303(1) (2016).
32 Id.
33 See FLA. STAT. § 634.304(1) (2016).
34 See FLA. STAT. § 634.304(4) (2016).
35 See FLA. STAT. § 634.305(1) (2016).
36 See Edward G. Gallagher & Mark H. McCallum, The Importance of Surety Bond Verification, 39 PUB. CONT. L.J. 269 (2010) (“A surety bond is a contract involving three parties in which the surety promises to answer for the debt or default of another. The party primarily liable is called the principal, and the party protected by the bond is called the obligee”).
37 See FLA. STAT. § 634.305(2)(a) & (b) (2016).
company decides to meet the deposit requirement, at all times while it conducts business it must keep the deposit or bond maintained and unimpaired.38

In addition to the deposit requirements for licensure, a home warranty company must also meet several financial requirements to conduct business in the state. A home warranty company is required to maintain minimum assets of at least 1/6 of the written premiums it receives from home warranty policies.39 In the alternative, a home warranty company is not required to keep minimum assets of 1/6 of the written premiums it receives if it has net assets of at least $500,000 and maintains a funded, unearned premium reserve account of at least 40 percent of the gross written premiums it receives.40 A home warranty company also is required to maintain a funded, unearned premium reserve account of at least 25 percent of the gross written premiums it receives in the state.41 However, a home warranty company is exempted from the unearned premium reserve account requirement if it maintains contractual liability insurance from an insurer which is authorized to do business in the state and which covers 100 percent of its claims exposure.42

A home warranty company may have their license in the state suspended or revoked for a variety of reasons. A license may be suspended or revoked for financial reasons, such as the home warranty company not maintaining a funded, unearned premium reserve account,43 failing

38 See FLA. STAT. § 634.305(6) (2016).
39 See FLA. STAT. § 634.3077(2) (2016).
40 Id.
41 See FLA. STAT. § 634.3077(1) (2016).
42 See FLA. STAT. § 634.3077(3) (2016).
43 See FLA. STAT. § 634.308(1)(b) (2016).
to maintain minimum net assets as required by statute, if the company is in receivership, conservatorship or rehabilitation in any state, if the company is insolvent or impaired, or generally if “the financial condition or business practices of the association otherwise pose an imminent threat to the public health, safety, or welfare of the residents” of the state.

Along with financial reasons for a suspension or revocation of a license, a home warranty company can lose its license due to its own conduct. A home warranty company can lose its license if it utilizes business practices which cause its further transaction of business “hazardous or injurious to its warranty holders or to the public,” refuses to produce accounts, records or files for inspection by the Department of Insurance, fails to pay a judgment entered against it in the state within 60 days after the judgment becomes final, or without just cause refuses to pay claims under its warranties.

Finally, home warranty companies also must furnish an annual statement to the Department of Insurance. The annual statement must report the total amount of premiums received by the company in the prior year and must also contain a balance sheet listing all assets and liabilities, a statement of operations and retained earnings, as well as information on

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44 See FLA. STAT. § 634.308(1)(c) (2016).
45 See FLA. STAT. § 634.308(3)(c) (2016).
46 See FLA. STAT. § 634.308(3)(a) (2016).
47 See FLA. STAT. § 634.308(3)(d) (2016).
48 See FLA. STAT. § 634.308(2)(a) (2016).
49 See FLA. STAT. § 634.308(2)(b) (2016).
50 See FLA. STAT. § 634.308(2)(c) (2016).
51 See FLA. STAT. § 634.308(2)(d) (2016).
52 See FLA. STAT. § 634.313(1) (2016).
53 Id.
claims statistics. In addition, home warranty companies are required to maintain certain records, including a complete set of accounting records, a detailed warranty register, as well as a detailed claims register.

C. Required Provisions in Home Warranty Contracts

In Florida, home warranty contracts are assignable and require a provision informing a purchaser of the right to assign it. A right of customers in a number of consumer transactions generally is a right to cancel the transaction within a certain timeframe, usually three days (a “cooling off” period). Florida’s home warranty statute gives consumers more than the traditional three days as a cooling off period for a home warranty purchase. Under the statute, customers have the right to cancel home warranty contracts within 10 days after purchase. Home warranty contracts are also required to be either mailed, delivered, or electronically transmitted to the consumer within 45 days upon coverage becoming effective.

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54 Id.

55 See FLA. STAT. § 634.3135(1) (2016).

56 See FLA. STAT. § 634.3135(2) (2016).

57 See FLA. STAT. § 634.3135(3) (2016).

58 See FLA. STAT. § 634.312(1) (2016).

59 See Jeff Sovern, Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Procedures, 75 U. PITT. L. REV. 333 (2014) (“For more than forty years, a standard tool in the consumer protection toolbox has been the cooling-off period. Federal statutes, state statutes, and federal regulations all oblige merchants to give consumers three days to rescind certain contracts”).

60 See FLA. STAT. § 634.312(5) (2016).

61 See FLA. STAT. § 634.312(2) (2016).
A common criticism of home warranty contracts is that many contracts contain exclusions or limitations of liability.\textsuperscript{62} The statute provides that any exclusions, restrictions or limitations of liability must be provided in boldfaced type and the following statement is required on the front page of the contract: “Certain items and events are not covered by this contract. Please refer to the exclusions listed on page \textit{of this document}.”\textsuperscript{63}

\textit{D. Prohibited Practices}

In the area of consumer law generally, many states have statutes which prohibit unfair methods of competition and/or unfair or deceptive acts or practices.\textsuperscript{64} The Florida home warranty statute prohibits unfair methods of competition and unfair or deceptive acts or practices, such as misrepresentation and false advertising, which “misrepresents the benefits, advantages, conditions, or terms of any home warranty contract.”\textsuperscript{65} Significantly, the statute also prohibits unfair claim settlement practices.\textsuperscript{66} The statute prohibits home warranty companies from settling claims on the basis of altering a document without the knowledge or consent of the warranty holder,\textsuperscript{67} making material misrepresentations to effect coverage in terms less favorable to the warranty holder,\textsuperscript{68} failing to properly investigate claims,\textsuperscript{69} failing to acknowledge and act


\textsuperscript{63} See FLA. STAT. § 634.312(4) (2016).


\textsuperscript{65} See FLA. STAT. § 634.336(1)(a) (2016).

\textsuperscript{66} See FLA. STAT. § 634.336(5) (2016).

\textsuperscript{67} See FLA. STAT. § 634.336(5)(a) (2016).

\textsuperscript{68} See FLA. STAT. § 634.336(5)(b) (2016).

\textsuperscript{69} See FLA. STAT. § 634.336(5)(c)(1) (2016).
promptly concerning claims communications,\textsuperscript{70} denying claims without conducting reasonable investigations,\textsuperscript{71} failing to promptly provide a reasonable explanation to the warranty holder for a claim denial,\textsuperscript{72} and failing to maintain a complete record of each written complaint received for a 3-year period upon receipt of the complaint.\textsuperscript{73} In addition, it is also unlawful for a home warranty company to refuse to issue a contract solely based upon an individual’s race, color, creed, marital status, sex, or national origin.\textsuperscript{74}

For violations of the statute, there is a civil remedy provision which allows a consumer to file suit against the home warranty company in Florida circuit court.\textsuperscript{75} If the consumer prevails in litigation, the home warranty company is liable for the greater of $500 or actual damages, as well as court costs and reasonable attorney’s fees.\textsuperscript{76} Punitive damages are also available in cases where a home warranty company engages in a “general business practice” of “willful, wanton, and malicious” actions or acts with “reckless disregard for the rights of any insured.”\textsuperscript{77}

As a prerequisite to filing a claim, a consumer must give the Department of Financial Service as well as the home warranty company written notice of the violation and state with specificity the law and facts that the consumer is relying upon.\textsuperscript{78} The home warranty company is

\textsuperscript{70} See FLA. STAT. § 634.336(5)(c)(3) (2016).
\textsuperscript{71} See FLA. STAT. § 634.336(5)(c)(4) (2016).
\textsuperscript{72} See FLA. STAT. § 634.336(5)(c)(6) (2016).
\textsuperscript{73} See FLA. STAT. § 634.336(6) (2016).
\textsuperscript{74} See FLA. STAT. § 634.336(7) (2016).
\textsuperscript{75} See FLA. STAT. § 634.3284(1) (2016).
\textsuperscript{76} Id.
\textsuperscript{77} See FLA. STAT. § 634.3284(2)(a) & (b) (2016).
\textsuperscript{78} See FLA. STAT. § 634.3284(3) (2016).
then given 30 days to resolve the claim.\textsuperscript{79} If the home warranty company pays the alleged damages, no cause of action accrues; however, if the claim is not resolved after 30 days, then the consumer has the right to file the lawsuit in circuit court.\textsuperscript{80}

In recent years, the practice of “fronting” in the insurance industry generally is one that is receiving increased regulatory and judicial attention.\textsuperscript{81} The Florida home warranty statute prohibits a home warranty company from acting as a fronting company for an unauthorized insurer or unlicensed home warranty company.\textsuperscript{82} The statute defines a fronting company as “an authorized insurer or licensed home warranty association which, by reinsurance or otherwise, generally transfers to one or more unauthorized insurers or unlicensed home warranty associations the risk of loss under warranties written by it in this state.”\textsuperscript{83}

Finally, the statute also makes it unlawful for any entity to require that a home warranty be purchased by the purchaser of a home as a condition precedent to the lending of money or extension of credit.\textsuperscript{84}

\textit{E. The Home Warranty Contract as Insurance}

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} See Esteban Carranza-Kopper, Note, \textit{Fronting Arrangements: Industry Practices and Regulatory Concerns}, 17 CONN. INS. L.J. 227, 228 (2010) (“The practice of fronting involves an insurance company that issues a policy, which is then completely reinsured with a reinsurance carrier. The reinsurance carrier is usually unlicensed in the jurisdiction of interest”).

\textsuperscript{82} \textit{See FLA. STAT. § 634.326 (2016).}

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{See FLA. STAT. § 634.344 (2016).}
As previously noted, there is a divide in opinion as to whether a home warranty contract constitutes “insurance.”85 The NHSCA, the primary industry association for the home warranty industry, has taken the firm position that a home warranty contract does not constitute insurance.86 Although not in the area of home warranty contracts specifically, there are reported cases on whether a “service contract” constitutes insurance. On the one hand, the Court of Civil Appeals of Alabama in Coates v. MS Dealer Service Corporation held that a company which sold automobile service contracts in Alabama was not required to obtain a certificate of authority to sell insurance in the state of Alabama.87 On the other, courts such as the Oklahoma Supreme Court in McMullan v. Enterprise Financial Group, Inc. have held that vehicle service contracts constitute insurance.88

While a comprehensive analysis of the question of whether a home warranty contract constitutes insurance is beyond the scope of this particular Article, Florida’s regulation of home warranty contracts through the Department of Insurance takes more of an approach that home warranty contracts are insurance. It should be noted that Florida’s home warranty statute exempts

86 See Frequently Asked Questions (FAQ), National Home Service Contract Association, http://homeservicecontract.org/resource-center/faqs/ (last visited June 5, 2015) (“Insurance policies undertake to indemnify or pay economic dollar loss for damage or liability from unknown or fortuitous events. Insurance pays when appliances or homes are damaged from perils such as fire, water, flood, windstorm, collision or outside forces causing breakage from an accident, such as a tree falling on your house. Insurance covers your dollar liability to others when you are accused or found liable for an accident, negligence or damage to others or others property. Insurance never pays for breakdown of goods or property from normal wear and tear. In this sense, home service contracts are the exact opposite of insurance. Home service contracts compliment an insurance plan, they do not substitute for one”).
88 See McMullan v. Enterprise Financial Group, Inc., 247 P.3d 1173, 1180 (Okla. 2011) (“Although vehicle service providers may not be subject to the exact same requirements and regulations as insurance providers, vehicle service contracts meet the definition of and are designed to function and perform as “insurance.” The consumer pays for indemnity and pays to shift the risk of paying for high repair costs to the vehicle service provider in exchange for a prepaid premium. Because these contracts function like insurance, their providers should be subject to the same covenants of good faith that insurers must meet”).
home warranty contracts from regulation outside of the provisions of the statute, such as other provisions of the Florida Insurance Code which apply to traditional insurers.\textsuperscript{89} Despite this exemption, for purposes of service of process home warranty companies are subject to service of process in the same manner and to the same terms, conditions, and fees as traditional insurers in Florida.\textsuperscript{90} In Florida, the sole and exclusive method of serving an insurer is serving the insurer through the Chief Financial Officer.\textsuperscript{91} Furthermore, the civil remedy provision of the home warranty statute utilizes the term “insurer” twice within the statute.\textsuperscript{92} The treatment of home warranty companies the same as insurers for purpose of service of process as well as the inclusion of the term “insurer” twice within the civil remedy provision of the home warranty statute is indicative of the Florida Legislature’s intention to treat a home warranty company as an insurer under Florida law.

\textbf{III. Florida Cases Involving Home Warranty Statute}

Despite a detailed system of home warranty regulation, relatively few Florida appellate cases have cited provisions of the home warranty statute. One reason for the relative paucity of appellate cases may be that many home appliances which may be covered by a home warranty contract may only cost several hundred or several thousand dollars to replace, such as a

\textsuperscript{89}See FLA. STAT. § 634.3025(1) (2016).

\textsuperscript{90}See FLA. STAT. § 634.315 (2016).

\textsuperscript{91}See FLA. STAT. § 624.422(3) (2016).

\textsuperscript{92}See FLA. STAT. § 634.3284(2) (2016) (“Any person who pursues a claim under this subsection shall post in advance the costs of discovery. Such costs shall be awarded to the insurer if no punitive damages are awarded to the plaintiff”); & See FLA. STAT. § 634.3284(3) (2016) (“As a condition precedent to bringing an action under this section, the department and the insurer shall be given written notice of the violation”).
refrigerator, range/oven, washer/dryer, and dishwasher.93 Of the major systems/appliances in a home, an air conditioning system may be among the most costly to replace, with cost in the thousands to over $10,000 depending on the quality and efficiency of the system.94 In a breach of contract case with a home warranty company that may ultimately only result in damages of few hundred or few thousand dollars, it may be strategically worthwhile for a potential plaintiff to file the case in Florida Small Claims Court.95 While recovery for damages is limited to $5,000 per claim, exclusive of costs, interest, and attorney’s fees,96 it is an advantage for the plaintiff in that the case is sent first to mediation before trial (with mediation generally occurring at the pretrial conference).97 Furthermore, attorneys may not have a significant economic incentive to take on smaller value claims, particularly only where a breach of contract may be involved.98 Even with these limitations, several court decisions in Florida have cited the home warranty statute.

A. Metropolitan Casualty Ins. Co. v. Tepper


96 See FLA. SM. CL. R. 7.010(b) (2016).

97 See FLA. SM. CL. R. 7.090(f) (2016).

98 See Teri J. Dobbins, The Hidden Costs of Contracting: Barriers to Justice in the Law of Contracts, 7 J.L. SOCIETY 116 (2005) (“Unfortunately, many people cannot afford to hire a lawyer to assist with their legal problems, particularly in disputes that have a low dollar value, or those in which the remedy sought is not monetary”).
In *Metropolitan Casualty Ins. Co. v. Tepper*, the Florida Supreme Court addressed a question of interpretation of the Florida underinsured motorist’s statute. The statutory provision in question stated the following:

If an underinsured motorist insurer chooses to preserve its subrogation rights by refusing permission to settle, the underinsured motorist insurer must, within 30 days after receipt of the notice of the proposed settlement, pay to the injured party the amount of the written offer from the underinsured motorist’s liability insurer. Thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation against the underinsured motorist and the liability insurer for the amounts paid to the injured party.

Essentially, the question faced by the Florida Supreme Court was the issue of when a statute of limitations for an underinsured motorist claim begins to run. In one interpretation, the provision cited above is only *permissive* and does not require the statute of limitations to run once an underlying claim is resolved. In the other interpretation, the provision is *mandatory* and a cause of action for an underinsured motorist claim does not toll until an underlying claim is resolved.

The Florida Supreme Court held the provision is *mandatory* and that an underinsured motorist’s subrogation claim cannot be brought until the final resolution of the underlying claim. In an opinion concurring in part and dissenting in part, Justice Polston of the Florida Supreme Court reasoned that the Florida Legislature did not intend the resolution of an uninsured

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99 See Metropolitan Ins. Co. v. Tepper, 2 So.3d 209, 210 (Fla. 2009).

100 See FLA. STAT. § 627.727(6)(b) (2004); see also Metropolitan Ins. Co., 2 So.3d at 211.

101 See Metropolitan Ins. Co., 2 So.3d at 213.

102 Id.

103 Id.

104 Id. at 215.
motorist claim to be a substantive condition precedent to the filing of an underinsured motorist’s
subrogation claim. Justice Polston noted that “even without using the exact phrase “condition
precedent,” the statute does not state that the subrogation claim can be brought “only” upon final
resolution of the UM claim.” Significantly, Justice Polston examined other areas of the
Insurance Code where “condition precedent” language is utilized. One of the areas in the
Insurance Code he cited was the civil remedy provision of the Florida home warranty statute at
Fla. Stat. § 634.3284(3), which states “As a condition precedent to bringing an action under this
section, the department and the insurer shall be given written notice of the violation.”

B. Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc. and the
Economic Loss Rule

The Florida home warranty statute also found a citation in the 1993 Florida Supreme
Court case of Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc. In
the Casa Clara case, a condominium association and other plaintiff sued a contractor which
supplied concrete for various construction projects. Allegedly, concrete supplied by the
contractor caused rusting of reinforced steel within the concrete due to a high salt content.
Instead of pursuing a breach of contract theory, the plaintiffs proffered allegations of breach of
common law implied warranty, products liability, negligence, and violation of the building

105 Id. at 220 (Polston, J., concurring in part and dissenting in part).
106 Id.
107 Id.
108 Id.
109 Casa Clara Condominium Association, Inc. v. Charley Toppino and Sons, Inc., 620 So.2d at 1247 (Fla. 1993).
110 Id. at 1245.
111 Id.
The application of the economic loss rule, the rule that “prohibits tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any property other than itself” and a rule which is the subject of much academic commentary, was presented in the case.

In upholding a trial court decision applying the economic loss rule to dismiss the plaintiffs’ complaint, the Court in Casa Clara rejected the contention that homebuyers should be exempted from the economic loss rule. The Casa Clara Court emphasized that if a house did not meet the expectations of a homebuyer, then the failure of the benefit of the bargain is a concern of contract rather than tort law. In its reasoning, the Court also emphasized that in the home purchase transaction, a buyer is not left without protection, as the buyer has the ability to bargain with the seller concerning the purchase price as well as to inspect the house for defects. In addition, the purchaser also is protected by the general warranty of habitability as well as the legal duty of a seller to disclose known defects. Finally, the Court also noted a home purchaser

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112 Id.

113 Id. at 1246.


115 Casa Clara Condominium Association, Inc., 620 So.2d at 1246.

116 Id. at 1247.

117 Id.
can be protected by statutory warranties (the Florida home warranty statute and its protections with a home warranty contract).\textsuperscript{118}

Two decades after 	extit{Casa Clara}, the Florida Supreme Court retreated from its prior decision concerning the applicability of the economic loss rule in the 2013 case of \textit{Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc.}\textsuperscript{119} In the \textit{Tiara Condominium} case, the Florida Supreme Court examined the historical origins of the economic loss rule and held that future application of the rule should be limited only to product liability cases.\textsuperscript{120} Although the \textit{Tiara Condominium} case did not cite the home warranty statute, in the three years following the decision it has already spurned academic discussion.\textsuperscript{121}

\textit{C. Avatar Properties, Inc. v. Greetham: Arbitration Provisions in Home Warranty Agreements}

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} See \textit{Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc.}, 110 So.3d 399 (Fla. 2013).

\textsuperscript{120} \textit{Id.} at 407. The Florida Supreme Court stated: “Having reviewed the origin and original purpose of the economic loss rule, and what has been described as the unprincipled extension of the rule, we now take this final step and hold that the economic loss rule applies only in the products liability context. We thus recede from our prior rulings to the extent that they have applied the economic loss rule to cases other than products liability ….. Our experience with the economic loss rule over time, which led to the creation of the exceptions to the rule, now demonstrates that expansion of the rule beyond its origins was unwise and unworkable in practice. Thus, today we return the economic loss rule to its origin in products liability.”

\textsuperscript{121} See e.g., Anisha Patel, Note, Goodbye Economic Loss Rule, Hello Damages: Did the Florida Supreme Court’s Tiara Decision Clear the Path from Contract to Tort Claims?, 44 STETSON L. REV. 523 (2015) (examining the possible effects of the application of the economic loss rule to tort claims in the wake of the \textit{Tiara Condominium} decision).
Arbitration clauses are a standard feature of many commercial contracts today.\textsuperscript{122} Despite many concerns that arbitration clauses are unfair,\textsuperscript{123} unconscionable,\textsuperscript{124} and contracts of adhesion,\textsuperscript{125} recent United States Supreme Court cases such as \textit{AT & T Mobility v. Concepcion}\textsuperscript{126} and \textit{DirecTV v. Imburgia}\textsuperscript{127} have generally upheld the policies and purposes of arbitration. Arbitration clauses can also typically be found in home warranty contracts.\textsuperscript{128}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{122} See Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, & Yuxiang Liu, “Whimsy Little Contracts” With Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1, 3-4 (2015) (“Many companies include arbitration clauses in their consumer contracts. Consumers who agree to these contracts waive their rights to proceed in court, to a jury trial, and to appeal. Often, these arbitration agreements also provide that the parties waive their right to participate in class actions, either in court or in arbitration. The contracts themselves can be quite lengthy”).
\item\textsuperscript{123} See David S. Schwartz, Mandatory Arbitration and Fairness, 84 NOTRE DAME L. REV. 1247, 1340-1341 (2009) (“But whatever else mandatory arbitration may be, there is no evidence that it is fair. Real world actors who impose or resist mandatory arbitration clauses uniformly behave as though mandatory arbitration is not fair. Empirical researchers who say otherwise have not met their burden of proving that the widespread belief is a misconception. The pseudo-populist argument that mandatory arbitration creates a more egalitarian system of dispute resolution than the default system – litigation, administrative, and small claims tribunals – is at best poorly reasoned and empirically unfounded. At worst, that argument is a ploy”).
\item\textsuperscript{124} See Jeffrey W. Stempel, Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism, 19 OHIO ST. J. ON DISP. RESOL. 757, 859-860 (2004) (“After nearly twenty years of aggressive pro-arbitration jurisprudence from the Supreme Court, it appears that lower courts have gradually reacted in a manner designed to achieve greater equilibrium between drafters and nondrafters of arbitration terms. The vehicle for pursuing this equilibrium has been unconscionability analysis, albeit in restrained fashion, giving specific focus on particularly problematic traits of some arbitration agreements rather than emphasizing any general judicial power to police contract terms”).
\item\textsuperscript{125} See Anjanette H. Raymond, It is Time the Law Begins to Protect Consumers From Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion, 91 NEB. L. REV. 666, 666-667 (2013) (“Pretending that the FAA provides adequate protections for parties in a significantly weaker bargaining position when faced with a contract of adhesion that contains a mandatory arbitration clause is to demonstrate a lack of understanding of the realities these situations present. Businesses are accused of using arbitration as a private dispute resolution system that shields their transgressions from public scrutiny, uses arbitrators and institutions that are perceived as biased, and prevents any real means of justice to the consumer. Something must be done to ensure that consumers facing mandatory arbitration clauses within contracts of adhesion are protected from businesses that seek to use arbitration as an advantageous means to resolve disputes”).
\item\textsuperscript{126} See AT & T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (U.S. 2011) (holding that the Federal Arbitration Act prohibits states from conditioning the enforceability of arbitration agreements on the availability of classwide arbitration procedures).
\item\textsuperscript{127} See DirecTV v. Imburgia, 136 S.Ct. 463 (U.S. 2015) (upholding arbitration provision in case involving customers of a cable company that challenged the company’s early termination fees).
\item\textsuperscript{128} See e.g., Sample Contract Terms, Home Warranty of America, Inc., \url{https://secure.hwahomewarranty.com/pdfs/DTC_NA_Sample_Coverage_Terms.pdf} (last visited June 8, 2016).
\end{enumerate}
\end{footnotesize}
In the state of Florida, arbitration is generally favored by the courts, and in examining issues concerning the enforceability of an arbitration agreement, the courts resolve any doubts as to the validity of the agreement in favor of validity. Despite the tendency of courts to favor arbitration agreements, an agreement to arbitrate in Florida may not be enforced if it is held to be unconscionable or if it is violative of public policy.

Florida appellate courts have had varying rulings concerning arbitration provisions in home warranty contracts. In Grosseibl v. J. Chris Howard Builders, Inc., a homeowner brought forth allegations for breach of contract, rescission of the contract, and damages for fraudulent misrepresentations concerning the property on which his home was built. The homeowner alleged that the house was not built to satisfactory building standards, was built upon improper and insufficient soil, and also was built with substandard materials and contained numerous construction defects.

The builder of the home included a home warranty which included an arbitration provision. In analyzing the effect of the arbitration provision, the Court noted that the warranty did not warrant that the home would be built in compliance with applicable governmental codes, did not provide coverage for failure of the builder to construct the home in accordance with construction plans, and the warranty specifically stated that “Contract disputes

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129 See Gainesville Health Care Center, Inc. v. Weston, 857 So.2d 278, 289 (Fla. 1st Dist. Ct. App. 2003) (“Arbitration agreements are a favored means of dispute resolution, and doubts concerning their scope should generally be resolved in favor of arbitration”).


131 Id. at 43.


133 Id. at 1256.

134 Id.
which are not disputes as covered under this warranty are not eligible for dispute settlement hereunder.”\textsuperscript{135}

The Court concluded that the fraud and rescission counts were not encompassed within the arbitration provision, and thus the arbitration provision in the warranty did not require arbitration of those claims.\textsuperscript{136}

However, some Florida appellate courts have upheld arbitration provisions in home warranty agreements. In the underlying facts of \textit{Mercedes Homes, Inc. v. Rosario}, the windows in a newly constructed home began to leak, causing mold growth.\textsuperscript{137} The homeowners alleged that the leaking was due to improper construction of the newly built home, and sued the home builder for fraudulent concealment, breach of contract, breach of building codes, and violations of Florida’s Deceptive and Unfair Trade Practices statute.\textsuperscript{138} Despite arguments from the homeowners that the warranty’s arbitration provision did not apply to claims involving building code violations, personal injury, and damages due to mold, the Court held that the clause was enforceable and thus the scope of the agreement should have been left to the arbitrator to determine.\textsuperscript{139}

Most recently, the Second District Court of Appeal of Florida examined home warranties in \textit{Avatar Properties, Inc. v. Greetham}.\textsuperscript{140} In the \textit{Avatar Properties} case, the homeowners sued a

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\textsuperscript{135} \textit{Id.} at 1256-1257.
\textsuperscript{136} \textit{Id.} at 1257.
\textsuperscript{137} \textit{Mercedes Home, Inc. v. Rosario}, 920 So.2d 1254, 1256 (Fla. 2nd Dist. Ct. App. 2006).
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Avatar Properties, Inc. v. Greetham}, 27 So.3d 764 (Fla. 2nd Dist. Ct. App. 2010).
\end{flushright}
builder for breach of a purchase and sale agreement. The homeowners allegedly sustained roof
damage following two hurricanes due to a defective design and installation of their roof. The
builder furnished a home warranty that was incorporated into the purchase and sale agreement.

The homeowners argued that the arbitration provision in the home warranty agreement
did not apply since the purchase and sale agreement did not include the word “arbitration” and
that the warranty was not specifically attached to the purchase and sale agreement at the time of
signing.

The Second District Court of Appeal held that the trial court erred in declining to enforce
the arbitration agreement. In its reasoning, the Court remarked that the purchase and sale
agreement “unambiguously” incorporated the home warranty contract by reference and that the
plaintiffs also initialed the specific provision which incorporated the home warranty. Furthermore, the Court also noted that the provision permitted the homeowners to examine the
 provision at the builder’s office and also gave the homeowners the right to have a copy of the
home warranty attached to the purchase and sale agreement. The Court stated, “Any failure on
their part to avail themselves of either opportunity is not a basis to find that no agreement
existed.”

141 Id. at 766.
142 Id.
143 Id.
144 Id.
145 Id. at 767.
146 Id. at 766.
147 Id.
148 Id. at 766-767.
In a concurrence, Judge Altenbernd focused on the observation that the home warranty was “actually a contract of insurance issued by a home warranty association” regulated under the Florida home warranty statute. Judge Altenbernd took the position that the dispute rather should have been pursued against the warranty provider as a warranty claim rather than against the builder for breach of the purchase and sale agreement. Ultimately, the Court enforced the arbitration agreement.

The Grosseibl, Mercedes Homes, and Avatar Properties cases all indicate the courts in Florida may come to varying conclusions concerning arbitration provisions in home warranty contracts. In future cases, any consumer wishing to challenge the enforceability of an arbitration clause will likely wish to focus on two particular arguments: unconscionability and violation of public policy.

As for unconscionability, there are two general types of unconscionability: procedural and substantive. The focus of the inquiry on procedural unconscionability concerns the circumstances of the agreement being entered into, the bargaining power of the parties, and the ability of all the parties to understand and comprehend the terms of the agreement. Substantive

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149 Id. at 767 (Altenbernd, J., specially concurring).

150 Id.

151 Id. at 767.

152 See Melissa T. Lonegrass, Finding Room for Fairness in Formalism – The Sliding Scale Approach to Unconscionability, 44 LOY. U. CHI. L.J. 1, 10 (2012) (“Whereas procedural unconscionability targets the quality of the consumer’s assent to the contract, substantive unconscionability targets the content of the terms themselves by looking for unfairness in the contract’s substantive provisions”).

153 See Powertel, Inc. v. Bexley, 743 So.2d 570, 574 (Fla. 1st Dist. Ct. App. 1999) (“The procedural component of unconscionability relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms”).
unconscionability refers to an analysis of the actual terms themselves.\textsuperscript{154} To invalidate an arbitration agreement in a home warranty contract due to unconscionability, a court would need to find an establishment of elements of both procedural and substantive unconscionability.\textsuperscript{155} However, evidence of both need not both be substantial – the more substantively unconscionable an agreement is, the less evidence of procedural unconscionability is required; the more procedurally unconscionable an agreement is, the less evidence of substantive unconscionability is required.\textsuperscript{156}

Concerning home warranty contracts, one of the arguments to be made against a home warranty arbitration provision in the procedural unconscionability context is that an arbitration provision in a home warranty contract is not the subject of arms-length bargaining between the parties. As the Florida Supreme Court noted in the \textit{Basulto} case, “where there is virtually no bargaining between the parties, the commercial enterprise or business responsible for drafting the contract is in a position to unilaterally create one-sided terms that are oppressive to the consumer, the party lacking bargaining power.”\textsuperscript{157} The lack of arms-length bargaining may be particularly pronounced in a situation where a home seller has an active home warranty with several months remaining. As part of the purchase transaction, the seller may transfer to the buyer of the home the warranty contract. In such a situation, the buyer is left without an incentive to pursue other home warranty options at the time of the transfer of the warranty and thus may have even less of a footing to bargain at all.

\textsuperscript{154} See Basulto v. Hialeah Automotive, 141 So.3d 1145, 1157-1158 (Fla. 2014).

\textsuperscript{155} \textit{Id.} at 1159. (“We agree with our district courts of appeal that procedural and substantive unconscionability must be established to avoid enforcement of the terms within an arbitration agreement”).

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} See \textit{Basulto}, 141 So.3d at 1160-1161.
In addition, as an argument of substantive unconscionability, if the arbitration were to take place in a state outside of the state where the home warranty contract was entered into, it divests the state where a home warranty contract is regulated of jurisdiction concerning the very contract which is subject to that state’s regulation.

Furthermore, substantive unconscionability may merge with public policy concerns in one significant respect. In *Powertel, Inc. v. Bexley*, the Florida First District Court of Appeal found an arbitration clause in a cellular service contract to be both procedurally and substantively unconscionable.\(^{158}\) The plaintiff, who alleged wrongful billing by the defendant of local cellular telephone charges, filed a class action lawsuit alleging several causes of action, including violations of Florida’s Deceptive and Unfair Trade Practices Act.\(^{159}\)

In examining the issue of substantive unconscionability, the Court remarked that “one indicator of substantive unconscionability is that the agreement requires the customers to give up other legal remedies.”\(^{160}\) In its reasoning which upheld a finding of substantive unconscionability, the Court especially noted that the arbitration agreement at issue would force the waiver of statutory remedies under the Florida Deceptive and Unfair Trade Practices Act and that it also effectively insulated the defendant from liability under state consumer laws.\(^{161}\)

Arbitration agreements in home warranty contracts in Florida and other states with unfair and deceptive acts and practices statutes will likely face similar scrutiny on the substantive unconscionability issue. In Florida, an arbitration agreement in a home warranty contract is especially suspect as it would essentially waive the Civil Remedy provision of Fla. Stat. §

\(^{158}\) See *Powertel*, 743 So.2d at 575-576.

\(^{159}\) Id. at 571.

\(^{160}\) Id. at 576.

\(^{161}\) Id. at 576-577.
632.3284 which allows a consumer a statutory remedy in cases where a home warranty company violates claim settlement practices with the home warranty statute.

The issue with substantive unconscionability in home warranty contract arbitration provisions is also intertwined with public policy violation concerns. Florida courts have found in some cases that an arbitration provision violates public policy. For instance, in *Shotts v. OP Winter Haven, Inc.*, the Florida Supreme Court held that an arbitration provision in a nursing home provision violates public policy since a limitation of remedies provision directly undermines “specific statutory remedies created by the Legislature.” Similarly, a home warranty arbitration provision that limited remedies may also be found to be in public policy if the provision has the effect of waiving the statutory civil remedy found in Fla. Stat. § 632.3284.

### IV. Home Warranty Companies and Bad Faith Liability

#### A. Introduction

Consider this following hypothetical situation: imagine a homeowner who has just become married and has spent a substantial amount of money to place the family into a new dream home. Within months, winter arrives, along with its cold weather. The new homeowner has purchased a home warranty plan which covers repair or replacement of a furnace in the event it breaks down. Unfortunately, after significant foundation repairs on the home after particularly difficult fall weather, the furnace stops working right before a major winter storm hits.

The homeowner calls the home warranty company, which sends a technician out to inspect the furnace. The prognosis turns out not so good – the furnace has broken down. The technician forwards pictures of the furnace to the home warranty claims representatives at the

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162 *Shotts v. OP Winter Haven, Inc.*, 86 So.3d 456, 474 (Fla. 2011).
warranty company’s home office, which then denies the claim for replacement due to “improper maintenance.” The homeowner requests reconsideration for the claim, but receives continued denials. The homeowner then produces to the home warranty company a report of an independent technician who notes that maintenance has been proper, but the company continues to deny. The home warranty company then requests the homeowner to produce maintenance records, but since the homeowner is relatively new to the home, has no maintenance records yet. In fact, the prior owner has maintained the furnace well up to the point of failure (as indicated by the independent technician report) but the prior owner did not keep records of all the maintenance. With the claim denials, it costs the homeowner thousands of dollars to replace the furnace during a cold winter. The question arises – is there a remedy beyond breach of contract for the homeowner, and can the homeowner sue for bad faith?

B. Florida’s Bad Faith Statute

Jurisdictions around the country vary on remedies for bad faith, and also on the question of whether first-party insurance bad faith is even recognized. A number of articles have examined Florida’s unique bad faith statute. Florida’s statute is unique among jurisdictions. In Florida, a person may bring forward a bad faith action against an insurer when the insurer acts in a manner as “Not attempting in good faith to settle claims when, under all the

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circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests." As a condition precedent to filing an action for bad faith, an insured must obtain a favorable breach of contract determination first. In addition, per the requirements of the statute, an insured must file a 60 day Civil Remedy Notice of violations with the Department of Financial Services and also forward the notice to the insurer. Essentially, the insurer is permitted a right to cure the alleged violations and no cause of action for bad faith arises if the alleged violations are corrected. The failure of an insurer to respond within 60 days itself raises a presumption of bad faith conduct. A “totality of the circumstances” approach is utilized by courts to evaluate the factual basis of a bad faith claim.

C. Home Warranty Bad Faith

Within the past decade, home warranty companies have been subject to litigation for a variety of alleged practices, including denials for “lack of maintenance” or “preexisting conditions,” that company employees are trained to deny legitimate claims and delay the

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165 See FLA. STAT. § 624.155(b)(1) (2016).
167 See FLA. STAT. § 624.155(3)(a) (2016).
171 See Home Warranty Lawsuits (Extended Warranty Contracts), LawyersandSettlements.com, https://www.lawyersandsettlements.com/lawsuit/home-warranty-insurance-lawsuit.html (last visited June 12, 2016) ("In June 2011, a lawsuit was filed against American Home Shield by a couple who alleged the company improperly denied claims on the grounds of “lack of maintenance” or “preexisting condition,” even though no inspection of the appliances in question was carried out at the time the policy was issued. The lawsuit, which seeks class-action status, further alleges that contractors were paid a bonus for denying claims").
claims process, and also refuse to authorize replacement of appliances. Although the primary purpose of tort law is generally to compensate injured plaintiffs, one of the significant policy rationales for imposing bad faith liability is to deter insurer misconduct with the handling of claims.

For cases where home warranty companies improperly deny claims on invalid exclusions, refuse to acknowledge denial of claims in writing, improperly delay the processing of claims, or otherwise commit intentional, malicious, egregious or reckless misconduct handling a claim, the imposition of bad faith liability stands as a deterrent measure to prevent misconduct with home warranty claims. While there are no reported cases involving the Civil Remedy provision of Florida’s home warranty statute, it stands as a model for other jurisdictions to adopt a cause of action for home warranty bad faith.

In comparing the Civil Remedy provisions of both Fla. Stat. § 624.155 and Fla. Stat. § 634.3284, one finds many similarities in claims practices which are actionable under both statutes. The unfair claims settlement practices covered by both statutes include the following:

172 Id. (“In 2009, a lawsuit was filed against First American Home Buyers Protection, alleging the company employs third-party contractors – some without licenses – to service customers’ claims. Because the company pays its contractors so poorly, according to the lawsuit, the only way the contractors can make money is to cause a denial on the claims, refuse expensive claims or perform cheap fixes. The lawsuit further alleges that First American trains its employees to deny legitimate claims, refuse to authorize necessary repairs and replacements, and delay the claims process for so long that the customer gives up and pays out of pocket to cover repairs that should have been covered by their extended warranty”).

173 Id. (“In 2010, a lawsuit was filed against Fidelity National Home Warranty Company, alleging the company improperly rejected claims made by customers. Furthermore, the lawsuit alleges that the company denies legitimate claims and trains its service providers to do so while refusing to authorize replacement of appliances”).

174 See Jill Wieber Lens, Honest Confusion: The Purpose of Compensatory Damages in Tort and Fraudulent Misrepresentation, 59 U. Kan. L. Rev. 231 (2011) (“In tort law, the purpose of compensatory damages is to make the plaintiff whole by putting him in the same position as if the tort had not occurred”).

1. Attempting to settle claims on the basis of an application or other material document which as altered without notice to, or knowledge or consent of, the customer;\(^{176}\)

2. Making a material misrepresentation to the customer for the purpose and with the intent of effecting settlement of such claims, loss, or damage under such contract on less favorable terms than those provided in, and contemplated by, such contract;\(^{177}\)

3. Failing properly to investigate claims with home warranties,\(^{178}\) and failing to adopt and implement standards for the proper investigation of claims with insurance policies;\(^{179}\)

4. Misrepresenting pertinent facts or contract provisions relating to coverages at issue;\(^{180}\)

5. Failing to acknowledge and act promptly upon communications with respect to claims;\(^{181}\) and

6. Denying claims without conducting reasonable investigations based upon available information.\(^{182}\)

In addition, both statutes also provide that it is an unfair claims settlement practice for both home warranty companies and insurance companies for failing to promptly provide a


reasonable explanation of the basis in the contract in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.\(^\text{183}\) With regard to insurance policies, the reasonable explanation must be provided specifically in writing.\(^\text{184}\)

There are several other comparable provisions in the home warranty statute which indicate that home warranty companies can be subject to bad faith liability. As discussed above, one of the key provisions in the Florida insurance bad faith statute is that there is a 60 day civil remedy notice provision that is a condition precedent to filing a bad faith action.\(^\text{185}\) Similar to the insurance bad faith statute, the home warranty statute includes a civil remedy provision, but in the case of home warranties, it is even more stringent since it is a 30 day provision.\(^\text{186}\) In addition, both the home warranty statute and the insurance bad faith statute provide a remedy of punitive damages for the consumer if the acts which give rise to a violation occur with such frequency as to indicate a “general business practice” of the company and that the acts are “willful, wanton and malicious” and are committed “in reckless disregard for the rights of any insured.”\(^\text{187}\) Both statutes provide that persons wishing to pursue a punitive damages claim are required to post the costs of discovery in advance and that the costs are awarded to the insurer if the plaintiff is not awarded punitive damages.\(^\text{188}\) Finally, as previously noted the home warranty statute includes the words “insurer” twice.\(^\text{189}\) All of these provisions, read together, clearly


\(^\text{184}\) See FLA. STAT. § 626.9541(i)(3)(f) (2016).

\(^\text{185}\) See FLA. STAT. § 624.155(3)(a) (2016).

\(^\text{186}\) See FLA. STAT. § 634.3284(3) (2016).


\(^\text{188}\) Id.

\(^\text{189}\) See supra, Part II, p. 14.
indicate that home warranty companies can be subject to bad faith liability. Florida’s home warranty statute provides a model for other states to take a solid approach to deter home warranty company misconduct.

V. Conclusion

The example of Florida’s regulation of home warranty contracts provides a number of lessons to other states analyzing the relationship between home warranty contracts and insurance. Despite all of the legal issues relating to home warranty contracts, the future of the home warranty industry ultimately lies with the consumer. As financial experts debate whether home warranty contracts are “worth it” for the average consumer, the choice of obtaining a home warranty plan remains with the consumer. For the benefit of consumers who choose to obtain a home warranty, states should recognize bad faith liability for home warranty companies and provide increased protections for consumers from discriminatory, reckless, intentional, and/or malicious denials of valid home warranty claims.