

Abbreviated Guide to State Insurance Related Laws

Prepared by the Harmonie Group Next Generation Committee

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NOTE: This abbreviated guide is not intended to be an exhaustive review of insurance laws but is provided as a quick resource to highlight certain issues. Also, please note that from the time of publication, laws, statutes, rules, and case law may in fact change. Your only safe course is to consult an attorney before making decisions on these issues. Harmonie firm lawyers in the location you are involved with can help. Please see the directory for contact information.
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Topics covered in this abbreviated guide.

1. **Comparative Fault**
2. **Insurance Minimum Limits**
3. **Statute of Limitations**
   - **Negligence:**
   - **Negligent Construction: Product Liability:**
   - **Wrongful Death:**
   - **Breach of Contract:**
   - **Unlawful Trade Practices:**
4. **Punitive Damages and Damages Caps**
   - **Punitive Damages:**
   - **Non-Economic Damages Cap:**
5. **Collateral Source Rules**
6. **Expert Admissibility Standard – Daubert v. Frye**
7. **First Party Notice Requirements**
8. **Insurer Duty to Defend**
9. **Bad Faith Claims against Insurers**
10. **Mandatory Arbitration Rules**

United States and Canada
United States:
District of Columbia

States

1. **Alabama**
2. **Alaska**
3. **Arizona**
4. **Arkansas**
5. **California**
6. **Colorado**
7. **Connecticut**
8. **Delaware**
9. **Florida**
10. **Georgia**
11. **Idaho**
12. **Illinois**
13. **Indiana**
14. **Iowa**
15. **Kansas**
16. **Kentucky**
17. **Louisiana**
18. **Maine**
19. **Maryland**
20. **Massachusetts**
21. **Michigan**
22. **Minnesota**
23. **Mississippi**
24. **Missouri**
25. **Montana**
26. **Nebraska**
27. **Nevada**
28. **New Hampshire**
29. **New Jersey**
30. **New Mexico**
31. **New York**
32. **North Carolina**
33. **North Dakota**
34. **Ohio**
35. **Oklahoma**
36. **Oregon**
37. **Pennsylvania**
38. **Rhode Island**
39. **South Carolina**
40. **South Dakota**
41. **Tennessee**
42. **Texas**
43. **Utah**
44. **Vermont**
45. **Virginia**
46. **Washington**
47. **West Virginia**
48. **Wisconsin**
49. **Wyoming**

United States
District of Columbia

1. Comparative Fault

While many states have adopted the doctrine of comparative fault, the District of Columbia remains a pure contributory negligence jurisdiction. Put simply, if the Plaintiff is at all at fault for his injuries, even 0.01%, he cannot recover from the tortfeasor. *See e.g., Wingfield v. People's Drug Store,* 379 A.2d 685 (D.C. 1994). However, there is a limited exception to this rule for employees of common carriers. D.C. Code § 35-302.

2. Insurance Minimum Limits

D.C. Code § 31-2406 sets forth the minimum liability limits required for a personal auto policy:

- Bodily Injury: $25,000 per person for bodily injury or death; $50,000 per accident for bodily injury or death; $10,000 per accident for destruction of property.

D.C. Code § 31-2406(c-1) requires that optional underinsured coverage must be offered in the same amount as uninsured insurance. That optional underinsured coverage may be waived by the insured. However, uninsured coverage is mandatory pursuant to D.C. Code § 31-2406(f):

- Bodily Injury: $25,000 per person for bodily injury or death; $50,000 per accident for UM/UIM bodily injury or death; $5,000 per accident for property damage (subject to a $200 deductible)

3. Statute of Limitations

Negligence: In general, personal injury actions are subject to a three-year statute of limitations. D.C. Code § 12-301(8). Suits for property damage must be brought within three years. D.C. Code § 12-301(3). The statute of limitations can be tolled in certain circumstances, such as during periods of incapacity or infancy D.C. Code § 12-302.

Negligent Construction: In actions arising from defective or unsafe improvements to real property, the injury or death must have occurred within the 10-year period beginning when the construction was substantially completed. D.C. Code § 12-310. However, the limitations period in D.C. Code § 12-310 does not apply to actions based on contract, actions brought against the owner of the property, actions brought against an equipment owner or manufacturer, or any action brought by the D.C. government.

Product Liability: The statute of limitations for injury or damage from a defective product is governed by the general limitations periods contained in D.C. Code § 12-301.

Wrongful Death: A wrongful death action must be commenced by the personal representative of the decedent within two years of the date of death. D.C. Code § 16-2702 (revised in 2012 to increase from 1 year to 2 years).

Breach of Contract: The statute of limitations for a "simple" contract, whether express or implied is 3 years. D.C. Code § 12-301(7). However, in contracts for sale, the statute of limitations is 4 years. D.C. Code § 28.2-725.

Unlawful Trade Practices: The D.C. Consumer Protection Act does not specify a limitations period. Therefore, the 3-year statute of limitations contained in D.C. Code § 12-301(8) applies. A cause of action is tolled, however, if an action is initially filed with the D.C. Department of Consumer and Regulatory Affairs. D.C. Code § 28-3905(a).

4. Punitive Damages and Damages Caps

Punitive Damages

To obtain an award of punitive damages in tort cases in the District of Columbia, the plaintiff must prove, by a preponderance of the evidence, that the defendant committed a tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of

mind evincing malice or its equivalent. *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938 (D.C.1995). The Standardized Civil Jury Instructions for the District of Columbia, No. 16.01[1], provides that the jury "may award punitive damages only if the plaintiff has proved with clear and convincing evidence:(1) that the defendant acted with evil motive, actual malice, deliberate violence or oppression, or with intent to injure, or in willful disregard for the rights of the plaintiff; and (2) that the defendant's conduct itself was outrageous, grossly fraudulent, or reckless toward the safety of the plaintiff." *Croley v. Republican Nat'l Comm*., 759 A.2d 682, 695 (D.C.2000); *see also United Mine Workers of Am., Int'l v. Moore*, 717 A.2d 332, 341 (D.C.1998); *Vassiliades v. Garfinckel's, Brooks Brothers, Miller & Rhoades, Inc.,* 492 A.2d 580, 593 (D.C.1985) ("outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights"); *Harris v. Wagshal*, 343 A.2d 283, 288 (D.C.1975) ("willful and outrageous conduct").

In general, the requisite state of mind "need not (and usually cannot) be proven by direct evidence, but may be inferred from all the facts and circumstances of the case . . . Once the necessary malice is established, the amount of punitive damages is left to the jury's discretion." *Robinson v. Sarisky*, 535 A.2d 901, 906 (D.C.1988). Once punitive damages are awarded, the reasonableness of the punitive damages award is determined by three "guideposts": (1) the reprehensibility of the defendant's conduct; (2) the difference between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages and any potential civil or criminal penalties. *Chatman v. Lawlor*, 831 A.2d 395 (D.C. 2003).

In the District of Columbia, punitive damages are not available for a breach of contract, even if "the breach is willful, wanton or malicious." *Choharis v. State Farm Fire & Cas. Co*., 961 A.2d 1080, 1090 n.15 (D.C. 2008). However, where "[t]he defendant's tortious conduct [has] been outrageous, characterized by malice, wantonness, gross fraud, recklessness, or willful disregard of the plaintiff's rights . . . [and] the alleged breach of contract 'merges with, and assumes the character of, a willful tort' . . . punitive damages [will] be available." *Choharis*, 961 A.2d at 1090; see also N*kpado v. Standard Fire Ins. Co*., 697 F. Supp. 2d 94, 100 (D.D.C. 2010); *Fireman's Fund Ins. Co. v. CTIA-The Wireless Ass'n,* 480 F. Supp. 2d 7, 12-15 (D.D.C. 2007). In *Choharis*, the court did not rule out the possibility that punitive damages may be available in a wrongful failure to settle action. 961 A.2d at 1090 n.15.

The District of Columbia does not have a statutory cap on punitive damages.

Non-Economic Damages Cap

The District of Columbia does not have a statutory cap on non-economic damages.

5. Collateral Source Rules

The District of Columbia recognizes the rule barring evidence of payment from a collateral source. *District of Columbia v. Jackson*, 451 A.2d 867 (D.C. 1982). "[A] plaintiff may invoke the collateral source rule ... either (1) when the payment in question came from a source wholly independent of the liable party or (2) when the plaintiff may be said to have contracted for the prospect of a 'double recovery.'" *Id.*

6. Expert Admissibility Standard

Until October 20, 2016, the District of Columbia followed the case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) to address questions of admissibility. However, recently, in the case of *Motorola, Inc. v. Murray,* No. 14-CV-1350 (D.C. Ct. App. 2016), the D. C. Court of Appeals overruled

the prior *Frye* evidentiary test and in its place adopted the federal rule 702 evidentiary standard as interpreted by *Daubert v. Merrell Dow Pharmaceutical, Inc.,* 509 U.S. 579 (1993).

The Court noted that under Rule 702, as interpreted by *Daubert* and its progeny, the trial judge performs an initial gatekeeper function: "[W]hen a party proffers expert scientific testimony, the trial court must make 'a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.'" *Motorola* at p. 7-8 (citing *Daubert*, 509 U.S. at 592-93). Citing the checklist developed by the U.S. Supreme Court, the D.C. Court observed that several factors to be considered include: "whether the theory or technique has been tested, whether it 'has been subjected to peer review and publication,' 'the known or potential rate of error,' and 'the existence and maintenance of standards controlling the technique's operation.' . . . 'Finally, 'general acceptance' can yet have a bearing on the inquiry.'" *Motorola* at p. 8. (quoting *Daubert*, 509. U.S. at 594). The inquiry is "a flexible one." *Id.* "The focus . . . must be solely on principles and methodology, not on the conclusions that they generate." *Id.*

7. First Party Notice Requirements

Under District of Columbia law, where compliance with notice provisions is a contractual precondition to coverage, a failure timely to notify releases the insurer from liability. *Greycoat Hanover F Street, Ltd.Partnership v. Liberty Mut. Ins. Co., 657 A.2d 764* (D.C. 1995); *Diamond Service Co. v. Utica Mutual Insurance Co.,* 476 A.2d 648, 652–54 (D.C.1984). The D.C. Court of Appeals has held that insurance policies with such notice provisions require notice "within a reasonable time in view of all the facts and circumstances of each particular case." *Greenway v. Selected Risks Insurance Co.,* 307 A.2d 753, 755–56 (D.C.1973). Some of the identified factors that determine whether delay in notice was reasonable include: (1) what the insured could have believed were its obligations under the policy, (2) what the insured could have believed about its likely liability in the underlying action, and (3) what the insured could have believed was the likelihood of being sued. *See Diamond Service*, 476 A.2d at 653.

Prejudice to the insurer due to insured's failure to comply with the notice provision of the policy is not required to defend based on breach of the notice requirement. *Greenway v. Selected Risks Insurance Co.,* 307 A.2d 753, (D.C.1973).

8. Insurer Duty to Defend

Under District of Columbia law, an insurer's duty to defend arises where the "pleading 'alleges facts and circumstances, some of which, if proved, fall within the risk covered by the policy.'" *Stevens v. United General Title Ins. Co.*, 801 A.2d 61, 66 n.5 (D.C. 2002) (duty to defend is determined by comparing language of policy to the allegations of the complaint). Where the underlying complaint alleges facts covered by the policy, the insurer owes a duty to defend the underlying action in its entirety. *See, e.g.*, *Washington Sports & Entertainment, Inc. v. United Coastal Ins. Co.*, 7 F.Supp.2d 1, 7 (D.D.C. 1998). By contrast, if it is clear from the pleading that the insurer would not be liable under the policy, the insurer is not obligated to defend. *See S. Freedman & Sons, Inc. v. Hartford Fire Ins. Co.*, 396 A.2d 195, 197 (D.C. 1978); *Stevens*, 801 A.2d at 66 n.5.

Thus, under D.C. law, the duty to defend inquiry is typically limited to the four corners of the complaint and the four corners of the insurance contract. *See, e.g., Am. Registry of Pathology v. Ohio Cas. Ins. Co.*, 461 F.Supp.2d 61, 66 (D.D.C.2006). Importantly, however, if it is not clear from the allegations whether the insurer owes a duty to defend, the insurer's refusal to defend is at its own

risk; the insurer will be deemed to have breached its duty to defend if the subsequent development of facts bring the claim within the coverage afforded under the policy. *Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 189, 397 S.E.2d 100, 102 (1990).

9. Bad Faith Claims Against Insurers

There is no statutory basis for a bad faith claim under District of Columbia law. *Washington v. Gov't Emps. Ins. Co.*, 769 F. Supp. 383, 386 (D.D.C. 1991); *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1087, 1090-91 (D.C. 2008). Although not bad faith, D.C. Code § 31-2410 authorizes the recovery of attorneys' fees for advising and representing a claimant for payment of overdue personal injury protection benefits under the no-fault statute. The statute also authorizes interest from the date the payment first became due.

The tort of bad faith refusal to provide insurance coverage has not been recognized in the District of Columbia in either the first or third-party context. However, every contract contains an implied covenant to act in good faith and damages may be recovered for its breach as part of a contract action. *Nugent v. Unum Life Ins. Co. of Am.*, 752 F. Supp. 2d 46, 56-57 (D.D.C. 2010); *Nkpado v. Standard Fire Ins. Co.*, 697 F. Supp. 2d 94, 98 (D.D.C. 2010); *Thorpe v. Banner Life Ins. Co.,* 632 F. Supp. 2d 8, 19 (D.D.C. 2009); *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1087-88 (D.C. 2008). *Choharis* resolved a split among federal courts concerning whether the District of Columbia would recognize a bad faith tort for the refusal to provide insurance coverage. *Compare Fireman's Fund Ins. Co. v. CTIA-The Wireless Ass'n*, 480 F. Supp. 2d 7, 9 (D.D.C. 2007); *Brand v. Gov't Emps. Ins. Co.*, No. Civ.A. 04-01133, 2005 WL 3201322, * 5 (D.D.C. Nov. 29, 2005); *Am. Registry of Pathology v. Ohio Cas. Ins. Co.*, 401 F. Supp. 2d 75, 79 (D.D.C. 2005); *Am. Nat'l Red Cross v. Travelers Indem. Co. of R.I.*, 896 F. Supp. 8, 12 n.4 (D.D.C. 1995); *Washington v. Gov't Emps. Ins. Co.*, 769 F. Supp. 383, 386 (D.D.C. 1991); *with Washington v. Group Hospitalization, Inc.*, 585 F. Supp. 517, 520 (D.D.C. 1984). The District of Columbia Court of Appeals has not addressed bad faith in the "wrongful failure to settle within policy limits" context. However, in *Choharis*, the court suggested that fiduciary principles may come into play in the settlement of a third-party claim and the course of defending the insured. 961 A.2d at 1090 n.15; *see also Wender v. United Servs. Auto. Ass'n*, 434 A.2d 1372, 1374-75 (D.C. 1981) (addressing attorney-client privilege issue in a bad faith refusal to settle case).

10. Mandatory Arbitration Rules

While arbitration is not mandatory, the judge may assign a case to arbitration at any time. However, a party may motion for removal from the program for good cause shown. The District of Columbia has established a system of arbitration under which all cases are eligible for arbitration with the exception of (1) actions in the Small Claims and Conciliation Branch, (2) actions in the Landlord and Tenant Branch, (3) actions seeking only equitable or declaratory relief, (4) class actions and (5) cases in which one of the parties is incarcerated. D.C. Super. Ct. Civil Arb. Prog. Rules, Rule I *et seq*. (2016).

The arbitration is nonbinding unless otherwise agreed to in writing by the parties. *See* Rule I. If the parties agree to a binding arbitration, the arbitrator's award may be entered in court and has the same force and effect as a final judgment. *See* Rule X. Following arbitration, every party is afforded the right to a subsequent civil trial, and while evidence admitted during the arbitration is admissible in the subsequent court proceeding, it cannot be identified as such and the arbitration cannot be mentioned. *Id.*

Alabama

1. Comparative Fault - Alabama follows the rule of contributory negligence. Any negligence by the plaintiff is a complete bar to recovery.

2. Insurance Minimum Limits – Liability insurance policies must be issued by insurers licensed to do business in Alabama for no less than:

$25,000 for death or bodily injury to one person
$50,000 for death or bodily injury to two or more persons; and
$25,000 for damage or destruction of property.

Minimum liability insurance is required on all self-propelled motor vehicles. Some vehicles that are exempt from the law include trailers, government-owned vehicles and vehicles covered under a commercial automobile liability insurance policy. Section 32-7A-5, Code of Alabama 1975, provides a list of other vehicles that are specifically exempt from the law.

3. Statute of Limitations

Negligence: Two years from date of occurrence.

Negligent Construction: Construction defect statute of limitations is 2 years from the date of discovery

Product Liability: Two years from injury or date injury should have been discovered

Wrongful Death: Two years from date of death.

Breach of Contract: Four years.

Unlawful Trade Practices: The Alabama Deceptive Trade Practices Act (ADTPA) has a 15 day written demand requirement before filing an action. The statute of limitations under the ADTPA is one year from discovery but no more than four years from the date of the transaction, unless there is a relevant contract or warranty of more than three years.

4. Punitive Damages and Damages Caps

Punitive Damages: The purpose of awarding punitive damages is to punish the defendant and to deter the defendant and others from doing such wrong in the future. The amount of the award is based upon the character and degree of the wrong and the necessity of preventing similar wrongs. The plaintiff must prove his entitlement to punitive damages by "clear and convincing evidence." ALA. CODE § 6-11-20 (1975).

Alabama's Uninsured Motorist Statute, as written, permits the recovery of punitive damages, and an exclusion purporting to exclude coverage for punitive damages violates the Uninsured Motorist Act. Omni Ins. Co. v. Foreman, 802 So. 2d 195 (Ala. 2001).

Non-Economic Damages Cap: In 1999, Alabama enacted certain statutory caps on punitive damage awards. (Earlier enacted caps were invalidated on constitutional grounds. See Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993). The caps do not apply to actions for wrongful death or intentional infliction of physical injury, or in class actions. ALA. CODE § 6-11 21(h) - (j) (1975 and 2000 Supp). In cases involving small business defendants (defined as a business with a net worth of $2 million or less at the time of the occurrence made the basis of the suit), punitive

damages may not exceed $50,000 or 10 percent of the business's net worth, whichever is greater. ALA. CODE § 6-11-21(c) (1975 and 2000 Supp.).

In cases involving other defendants, punitive damages may not exceed three times compensatory damages or $500,000, whichever is greater ALA. CODE § 6-11-21(a) (1975 and 2000 Supp) except in cases of physical injury, where the caps are three times compensatory damages or $1.5 million, whichever is greater. ALA. CODE § 6-11-21(d) (1975 and 2000 Supp.). For purposes of the statutory cap, physical injury does not include mental anguish or emotional distress. ALA. CODE § 6-11-21(k) (1975 and 2000 Supp.).

Note these caps have been overruled and held unconstitutional. See Smith v. Schulte, 671 So. 2d 1334, 1337 (Ala. 1995) (abrogated on other grounds by, Ex parte Apicella, 809 So. 2d 865 (Ala. 2001)).

5. Collateral Source Rules -), Alabama law provides that in all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiffs medical or hospital expenses have been or will be paid or reimbursed shall be admissible. Upon admission of evidence respecting reimbursement or payment of medical or hospital expenses, the plaintiff shall be entitled to introduce "evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses ALA. CODE § 12-21-45(c) (1975). This has been solidified in the case of Crocker v. Grammer, 87 So. 2d 1190 (Ala. Civ. App. 2011).

"Upon proof ... that the plaintiff is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed, evidence relating to such reimbursement or payment shall be admissible." Plaintiff may also introduce into evidence the cost of purchasing the insurance which provided the medical benefit. ALA. CODE § 12-21-45(c) (1975).

The proper position to take in negotiation is that the collateral source payment is the true evidence of medical expenses and that the Supreme Court has not ruled otherwise.

6. Expert Admissibility Standard – Daubert v. Frye – Alabama has recently shifted from one of the few remaining jurisdictions to follow Frye, and now employs the widely recognized Daubert rule regarding expert witness testimony.

7. First Party Notice Requirements – Prejudice to the insurer is not required for a late notice defense. The only factors considered are the length of the delay and the reason for the delay. When an insured fails to comply with a notice requirement, the insurer has a defense to coverage. In defense of a denial of coverage, an insured may show the reasons for the delay to support the argument that the delay was reasonable under the circumstances. When excess policies are at issue, an insurer must show the delay caused prejudice.

8. Insurer Duty to Defend – In Alabama the duty to defend determined by the policy, but is broader than the duty to indemnify. Under Alabama law, an insurer "owes no duty to defend only if neither does the complaint against the insured allege a covered accident or occurrence nor does the evidence in the litigation between insurer an insured prove a covered accident or occurrence." The court will look to "both the allegations of the underlying complaint and additional record facts outside the complaint to determine whether a covered occurrence has been alleged or proved." Alabama employs a unique rule regarding the tripartite relationship between the insured, the insurer, and defense counsel.

9. Bad Faith Claims against Insurers – To prove bad faith under Alabama law the plaintiff has the burden of proving:(a) an insurance contract between the parties and a breach thereof by the defendant; (b) an intentional refusal to pay the insured's claim; (c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason); (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason; (e) if intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim. National Security Fire & Casualty Co. v. Bowen, 417 So. 2d 179 (Ala. 1982). The plaintiff must go beyond a mere showing of nonpayment and prove bad faith nonpayment, which requires nonpayment without any reasonable ground for dispute. In other words, the plaintiff must show that the insurance company had no legal or factual defense to the insurance claim. Thomas v. Principal Financial Group, 566 So. 2d 735 (Ala. 1990).

A liability insurer can be liable to its insured for the negligent or wanton failure to pay up to policy limits to meet a settlement demand in a lawsuit pending against an insured. In such instances, the insured's damages could be compensatory or punitive in nature. Alabama law also recognizes the tort of bad faith in the first party context. An insurer may be liable for bad faith by denying a claim without a legitimate, arguable basis in law or fact for the denial. The insurer may also be liable for bad faith if it willfully or intentionally fails to determine whether a lawful arguable basis for denying the claim exists. If an insurer unreasonably delays the processing of a claim, the claim may be considered constructively denied for bad faith purposes. An uninsured motorist insurer may also be liable for bad faith refusal to pay uninsured motorists' benefits if the denial or delay in paying benefits was motivated by an intent to injure the insured or where, under the circumstances of the case, the delay was unreasonable.

An insurer owes a duty to marshal all pertinent facts before denying the claim if the insurer wishes to rely upon these facts as a defense to bad faith. Aetna Life Insurance Co. v. Lavoie*,* 505 So. 2d 1050, 1052-53 (Ala. 1987). Under a theory of an abnormal bad-faith failure to investigate an insurance claim, the insured must show (1) that the insurer failed to properly investigate the claim or to subject the results of the investigation to a cognitive evaluation and review and (2) that the insurer breached the contract for insurance coverage with the insured when it refused to pay the insured's claim. State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293 (Ala. 1999). However, courts have held that an insured need not prove a breach of contract before recovering for bad faith failure to investigate, if the insured does not sue for breach of contract and the case proceeds to the jury on a claim of bad faith alone. National Insurance Assoc. v. Sockwell, 829 So. 2d 111 (Ala. 2002).

10. Mandatory Arbitration Rules – Alabama prohibits any enforcement of arbitration clauses by its anti-arbitration statute at Ala. Code § 8-4-41 (1975). However, this is pre-empted in cases involving interstate commerce by the Federal Arbitration Act.

Alaska

1. <u>Comparative Fault</u>

Alaska is a pure comparative fault state. Alaska Statute ("AS") 09.17.060. Thus, the negligence of a plaintiff reduces his or her recovery but does not completely bar recovery. For example, if a plaintiff

is found to have been 45% negligent, then he or she can recover damages, but the recovery is reduced by 45%.

"Fault" is defined to include negligent, reckless or intentional misconduct, breach of warranty, misuse of a product, unreasonable failure to avoid an injury, or failure to mitigate damages. AS 09.17.900.

Alaska abolished its system of "joint and several liability" in 1989. AS 09.17.080. Alaska has now adopted a scheme of pure several liability whereby a plaintiff "[can] only recover from each tortfeasor in the proportion that his or her fault played to the total fault of all the persons and entities at fault including the plaintiff herself." *Robinson v. Alaska Properties and Inv., Inc.,* 878 F.Supp. 1318, 1321 (D.Alaska 1989).

2. Insurance Minimum Limits

A vehicle driven, moved, or parked upon a highway or other public parking place in Alaska must be registered. AS 28.10.011. Registered vehicles must be insured under a motor vehicle liability policy or a certificate of self-insurance. AS 28.22.011. The required minimum limits under a motor vehicle liability policy are:

1. $50,000 because of bodily injury to or death of one person in one accident;
2. $100,000 because of bodily injury to or death of two or more persons in one accident; and
3. $25,000 because of injury to or destruction of the property of others in one accident.

AS 28.22.101 (d).

Insurance companies must offer uninsured or underinsured motorist coverage at the minimum limits listed above under AS 28.22.101 (d) (motor vehicle liability coverage). AS 21.96.020 (d). Policyholders may waive in writing uninsured or underinsured motorist coverage. AS 21.96.020 (e).

3. Statute of Limitations

Negligence: 2 years. *See* AS 09.10.070(a), with a 10-year statute of repose in most instances. *See* AS 09.10.055.

Negligent Construction: Product Liability: 1 year after discovery of defect, with a 10-year statute of repose. *See* AS 09.10.54.

Wrongful Death: 2 years. *See* AS 09.10.070(a), with a 10-year statute of repose in most instances. *See* AS 09.10.055.

Breach of Contract: 3 years, unless altered by contract. *See* AS 09.10.053.

Unlawful Trade Practices: 2 years. *See* AS 45.50.531(f).

4. Punitive Damages and Damages Caps

Punitive Damages: In general, punitive damages are governed by AS 09.17.020 and are available if the defendant's conduct was outrageous, including acts done with malice or bad motives, or evidenced reckless indifference to the interest of another person. The amount of the punitive damages is determined at a separate proceeding after consideration of several factors.

In most cases, punitive damages cannot exceed the greater of (1) three times the amount of compensatory damages awarded, or (2) $500,000. However, where the defendant was motivated by financial gain and the consequences were known at the time, the cap on punitive damages is the greater of (1) four times the compensatory damages, (2) four times the aggregate financial gain that

the defendant received as a result of the misconduct, or (3) $7,000,000. And, in actions for unlawful employment practices against an employer, punitive damages may not exceed varying amounts depending on the number of employees but not ever more than $500,000.
For Unfair Trade Practices & Consumer Protection Act cases, recovery can include "for each unlawful act or practice three times the actual damages or $500, whichever is greater." AS 45.50.531(a).

Non-Economic Damages Cap: In general, non-economic damages are governed by AS 09.17.010, which puts on caps depending on the type of case. In general, non-economic damages may not exceed $400,000 or the injured person's life expectancy in years multiplied by $8,000, whichever is greater. When the damages are awarded for severe permanent physical impairment or severe disfigurement, non-economic damages may not exceed $1,000,000 or the person's life expectancy in years multiplied by $25,000, whichever is greater.

5. Collateral Source Rules

In non-medical-malpractice cases, a statute applies. AS 09.17.070. It provides that after an award has been made to a claimant, the defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from certain collateral sources that do not have a right of subrogation by law or contract. The court will then deduct that amount from the total award, minus any actual attorney fees not already awarded in the underlying action and any premiums paid for insurance benefits.

6. Expert Admissibility Standard – Daubert v. Frye

In *State v. Coon,* 974 P.2d 386 (Alaska 1999), Alaska adopted the *Daubert* standard for the admissibility of expert testimony. However, the *Daubert* standard does not apply to non-scientific expert testimony. *Marron v. Stromstad,* 123 P.3d 992 (Alaska 2005).

7. First Party Notice Requirements

In a case of untimely notice to an insurer, the insurer must prove that it has actually been prejudiced by the delay before its liability is extinguished. *Weaver Bros., Inc. v. Chappel*, 684 P.2d 123, 126 (Alaska 1984). The "notice requirement is designed to protect the insurer from prejudice. In the absence of prejudice, regardless of the reasons for the delayed notice, there is no justification for excusing the insurer from its obligations under the policy." *Id.* at 125. The rationale for placing the burden on insurer is that information regarding prejudice is "generally more readily available to the insurer than the insured. The insurer is in a better position to demonstrate that its ability to investigate, defend or settle a claim has been impaired." *Id.* Examples of prejudice may include lost opportunities to investigate or lost opportunities to settle a matter for less than what was ultimately recovered. *Tush v. Pharr*, 68 P.3d 1239, 1250-1251 (Alaska 2003)

8. Insurer Duty to Defend

An insurer's duty to defend and indemnify are separate and different obligations, and the duty to defend is broader than the duty to indemnify. *Fejes v. Alaska Ins. Co., Inc.*, 984 P.2d 519, 522 (Alaska 1999). The duty to defend may exist even if there is no duty to indemnify. *Id.* The duty to defend exists if the "'vagaries of law and fact' are sufficient to create the potential that an insured will incur

covered liability." *Williams v. GEICO Cas. Co.*, 301 P.3d 1220, 1225 (Alaska 2013). The "potential for coverage" can be shown either by the complaint or by extrinsic evidence showing covered facts, which the insurer knows or could easily find out. *Id.* But the insurance company may not rely on extrinsic evidence to deny its duty to defend. *State of Alaska Dep't of Transp. and Pub. Facilities v. State Farm Fire and Cas. Co.*, 939 P.2d 788, 792 n. 1 (Alaska 1997).

The duty to defend exists if at least one cause of action could be covered even if the complaint alleges other causes of action that are not covered. *Id.* at 792. But a duty to defend does not arise merely because an insurer disputes if allegations are covered. *MASarka ex rel. MASarka v. Great Am. Ins. Co.*, 14 P.3d 964, 969 (Alaska 2000).

Alaska recognizes coverage by estoppel: if an insurer breaches its duty to defend, it cannot deny coverage. *Lloyd's & Inst. of London Underwriting Cos. v. Fulton*, 2 P.3d 1199, 1209 (Alaska 1999). There is some indication, however, that an insurer will not lose its coverage defenses –even if it incorrectly denies the duty to defend – if the insurer timely explains why the claim is not covered, and the insured settles the claim rather than having a judgment enforced against it. *Sauer v. Home Indem. Co.*, 841 P.2d 176, 183 (Alaska 1992); *Afcan v. Mut. Fire, Marine and Inland Ins. Co.*, 595 P.2d 638, 647 (Alaska 1979).

An insurance company must provide the policyholder with prompt notice that it may deny coverage so that the policyholder has a reasonable time to protect its interests. *Sauer*, 841 P.2d at 182. Coverage by estoppel may apply if – before issuing a reservation of rights – the insurance company continues obtaining facts from the insured without telling the insured about the coverage defenses. *Lloyd's & Inst. of London Underwriting Co. v. Fulton*, 2 P.3d 1199, 1207 (Alaska 2000). If an insurer believes a coverage issue may exist, it must:

1. Either suspend its investigation and then deny coverage, or
2. Waive the coverage issue, or
3. Issue/seek a reservation of rights.

Id. at 1204. But the Alaska Supreme Court held in a later case that if the carrier denied coverage for reasons other than those obtained in the improper coverage investigation, coverage by estoppel may not be imposed. *Progressive Cas. Ins. Co. v. Skin*, 211 P.3d 1093, 1103 (Alaska 2009).

The insurance company must appoint independent counsel when: there is a duty to defend, and a conflict of interest exists between the insured and insurer. AS § 21.96.100 (a). A conflict of interest does not exist, and independent counsel does not have to be appointed under the following:

1. There is a claim for punitive damages;
2. There is a claim for damages exceeding the policy limits; or
3. There are "claims or facts in a civil action for which the insurer denies coverage."

AS 21.96.100(b) (1)–(3). Even if the grounds listed in AS 21.96.100(b) (1)–(3) exist, independent counsel must be appointed if the insurer reserves its rights on an issue for which coverage is ultimately denied. AS 21.96.100(c). The policyholder may waive its right to independent counsel if it signs a statement consistent with AS 21.96.100(f).

Alaska will not enforce provisions allowing reimbursement of fees insurance companies incurred to retain independent counsel even if the claim is not covered. *Attorneys Liab. Protection Soc'y, Inc., v. Ingaldson Fitzgerald, P.C.*, 370 P.3d 1101, 1112 (Alaska 2016).

9. Bad Faith Claims against Insurers

To prevail in a tort action of bad faith against an insurance company, the policyholder must show the company's conduct was "objectively unreasonable under the circumstances." *Lockwood v. Geico Gen. Ins. Co.*, 323 P.3d 691, 697 (Alaska 2014).

An insurer protects itself against coverage by estoppel by defending the insured under a reservation of rights. *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993).

Bad faith may be found for failure to settle within policy limits if there is a covered claim, a demand within policy limits, and "a substantial likelihood of an excess judgment." *Hinkle v. Crum & Forster Holding, Inc.*, 746 F.Supp.2d 1047, 1052 (D. Alaska 2010). An unreasonable failure to accept a policy limits settlement offer may expose the insurer to liability in excess of the policy limit. *Jackson v. Am. Equity Ins. Co.*, 90 P.3d 136, 142 (Alaska 2004).

If bad faith is found, an insured may be able to recover damages such as: "(1) mental and emotional anxiety; (2) impairment of credit rating; (3) impairment of reputation; (4) impairment of ability to obtain insurance and bonding; and (5) loss of earnings." *Alaska Pacific Assur. Co. v. Collins*, 794 P.2d 936, 949 (Alaska 1990); *see also Ennen v. Inegon Indem. Corp.*, 268 P.3d 277, 291 (Alaska) (trial court wrong not to award damages for financial and emotional hardship resulting from denial of UIM benefits).

An insured may be able to recover punitive damages if the insurer commits the tort of bad faith. *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1157 (Alaska 1989). To recover punitive damages, the wrongdoer's conduct to be: "outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another." *Id.* at 1158; AS § 9.17.020.

Under a statutory formula, the prevailing party in a civil suit may recover attorney fees. Civil Rule 82. Attorney fees may be awarded under this statute without a finding of bad faith against the insurer. *Hillman v. Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1327 (Alaska 1993).

10. Mandatory Arbitration Rules

While a statute provides that the supreme court may provide by rule for compulsory arbitration of cases that demand only a money judgment of $3,000 or less, no such rule is in effect. AS 09.43.190.

Arizona

1. COMPARATIVE FAULT

Arizona is a pure comparative fault state. A.R.S. 12-2506. A plaintiff's negligence will not bar recovery, but her damages will be reduced in proportion to the fault allocated to her. Id.

Liability is allocated to each defendant only in direct proportion to its share of fault. Defendants are permitted to name "non-parties at fault" to which the jury can assign fault. A.R.S. 12-2506(B); Ariz. R. Civ. P 26(b)(5). The distribution of fault among the parties and non-parties at fault must add up to 100%. A.R.S. 12-2506(A)-(C). By statute, fault is defined as,

"Fault" means an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modifications or abuse of a product. A.R.S. 2506(F)(2).

Generally, each tortfeasor is responsible for paying for only its share of fault and nothing more. A.R.S. 12-2506(A). The exceptions are set forth in A.R.S. 12-2506(D). A defendant who is found

jointly and severally liable has a right of contribution. The contribution action is to be adjudicated and determined by the same trier of fact that adjudicates plaintiff's action for injury or death, and it is to be adjudicated after the court enters judgment for the plaintiff's injury or death. Id.

2. INSURANCE MINIMUM LIMITS

Arizona's minimum mandatory insurance requirements are set forth in A.R.S. 28-4009. The minimum requirements are as follows:

a. Liability/Property

- $15,000 – bodily injury to or death of one person in any one accident.
- $30,000 – bodily injury to or death of two or more persons in any one accident.
- $10,000 – injury to or destruction of property of others in any one accident.

b. Uninsured/Underinsured

The carrier must offer UM/UIM coverage in the same limits as liability insurance. A failure to offer coverage results in an imputation of UM/UIM coverage to the policy as a matter of law. The insured can waive this coverage. A.R.S. 20-259.01; Tallent v. National Gen. Ins., 185 Ariz. 266 (1996).

c. Medical Payments (Medpay)/PIP

Medical payments coverage is available but not required in Arizona.

3. STATUTE OF LIMITATIONS

Negligence: 2 years (bodily injury and death actions). A.R.S. 12-542.

Negligent Construction: 8 years, or 9 years if the injury occurred during the 8th year after substantial completion or latent defect not discovered until the 8th year after substantial completion. A.R.S. 12-552.

Medical malpractice: 2 years. A.R.S. 12-542.

Product Liability: 2 years, except no action may be commenced if the cause of action accrues more than 12 years after the product was first used or sold for consumption, unless the cause of action is based on the negligence of the manufacturer or seller or a breach of an express warranty provided by the manufacturer or seller. A.R.S. 12-542, 551.

Wrongful Death: 2 years. A.R.S. 12-542.

Breach of Contract: Oral contract – 3 years. A.R.S. 12-543. Written contract – 6 years. A.R.S. 12-548.

4. PUNITIVE DAMAGES AND DAMAGES CAPS

a. Punitive Damages

Arizona permits an action for punitive damages, but not as a standalone claim. It is a measure of damage permitted in connection with a cause of action recognized in Arizona. Sisemore v. Farmers Ins. Co. of Ariz., 161 Ariz. 564, 566 (App. 1989). The focus is on the wrongdoer's mental state. The claimant must show that defendant acted with an evil hand that was guided by an evil mind. Rawlings v. Apodaca, 151 Ariz. 149 (1986). This "evil mind" is manifest by a showing that defendant either intended to injure claimant or engaged in a course of conduct that created a substantial risk of harm to others. Gurule v. Illinois Mutual Life and Cas. Co., 152 Ariz. 600, 602 (1987). Further, it must be shown that the defendant's conduct actually caused claimant's injuries. Jacobson v. Superior Court, 154 Ariz. 430, 432 (App. 1987). Punitive damages must be proven by clear and convincing evidence. Linthicum v. Nationwide Life Ins.Co., 150 Ariz. 331 (1986).

Punitive damages are payable to the claimant and assessed against the actual wrongdoer and, as conditions warrant, the wrongdoer's principal. Jacobson v. Superior Court In and For Maricopa County, 154 Ariz. 430 (App. 1987). Generally, punitive damages are not assessable against a child's parents when the action against the parents is based on the family purpose doctrine. Id. Public entities and their employees acting in the course and scope of their employment are exempt from punitive damages. A.R.S. 12-820.04.

Arizona does not have any statutory caps to punitive damages in general negligence cases. However, the courts review the reasonableness of the award, including the ratio between the compensatory and punitive damages awards. Considerations on review include the proportionality of the award to the defendant's financial position; the nature of defendant's conduct in relation to the harm caused; and the profitability to the defendant of the wrongful conduct. See Rhue v. Dawson, 173 Ariz. 220, 234 (App. 1992); Olson v. Walker, 162 Ariz. 180 (App. Div. 1 1989); Hawkins v. Allstate, 152 Ariz. 490, 497-502 (1987). The punitive damages action and award is also subject to review under the Due Process Clause of the Fourteenth Amendment.

The reasonableness of the ratio between compensatory and punitive damages has come under increased scrutiny in recent years. Although Arizona courts have consistently rejected a precise mathematical formula, the accepted ratio between compensatory and punitive damages in many scenarios appears to be something close to 1:1. Nardelli v. Metropolitan Group Prop. & Cas. Ins. Co., 230 Ariz.592 (App. Div. 1 2012). A major consideration is whether the compensatory damages were adequate. If they are, Arizona courts are more likely to find that a 1:1 ratio is reasonable. Hudgins v. Southwest Airlines, Co., 221 Ariz. 472 (App. Div. 2009).

a. Non-Economic Damages Cap

None. Arizona's Constitution expressly forbids the enactment of any law that limits the amount of damages a claimant can recover.

5. COLLATERAL SOURCE RULES

The collateral source rule applies in Arizona in all negligence cases, except medical malpractice actions. The rules states that payments from collateral sources (i.e. sources independent of the tortfeasor) cannot be used to reduce the damages recoverable from the tortfeasor. Riexinger v. Ashton Co., 9 Ariz. App. 406, 408 (1969). The rule does not apply to actions brought under the Arizona Medical Malpractice Act. In med mal actions, the defendant can offer evidence of any benefit that was or will be paid to claimant as a result of the injury. A.R.S. 12-565(A). If the defendant introduces such evidence, the claimant can choose to introduce into evidence the amount that he or she paid to secure this benefit. Id. And he or she can choose to introduce into evidence any liens or rights of recovery against the amount he or she recovers. Id. The fact finder can choose to ignore evidence of collateral sources.

6. EXPERT ADMISSIBILITY STANDARD – DAUBERT V. FRYE

In 2012, the Arizona legislature amended Arizona Rule of Evidence 702 to bring it in line with the so called Daubert rule. The new rule 702 reads as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods;
(d) the expert has reliably applied the principles and methods to the facts of the case.

7. FIRST PARTY NOTICE REQUIREMENTS

In the seminal case of Lindus v. N. Ins. Co. of New York, the Arizona Supreme Court held that an insurance company is not relieved of its contractual obligations if the insured failed to give notice unless it could show that it had been prejudiced thereby. 103 Ariz. 160 (Ariz. 1968). This is true even when notice is made an express condition precedent in the policy. Id. The burden of proving prejudice is on carrier, which must show actual prejudice. Id.

Arizona courts have further held that the mere showing of delay is not sufficient to show prejudice against the carrier. See Globe Indem. Co. v. Blomfield, 115 Ariz. 5 (App. Div. 2 1977).

In Lindis, the insured did not notify one of the carriers of the event until about two years after it occurred. The court found that the carrier had not proved prejudice by the delay, in part because it had access to investigative reports and because the insured would have been willing to aid the carrier in any additional investigation it wished to pursue. In reaching its holding, the court observed that,

Although it may be difficult for an insurer to prove prejudice in some situations, it ordinarily would be at least as difficult for the injured person to prove a lack of prejudice, which involves proof of a negative. The presumption would not be in keeping with the public policy of this state to provide compensation for those negligently injured in automobile accidents through no fault of their own (citations omitted), and we are of the view that a judicially created presumption of prejudice, whether conclusive or rebuttable, is unwarranted.

438 P.2d at 315 (Ariz. 1968).

8. INSURER DUTY TO DEFEND

The duty to defend is broader than the duty to indemnify. The general rule regarding the duty to defend was summarized succinctly in Salvatierra v. Nat'l Indemnity Co., as follows:

If on its face the complaint in the action brought against the insured alleges facts which come within the coverage of the liability policy, the insurer is obligated to assume the defense of the action, but if the alleged facts fail to bring the case within the policy coverage, the insurer is free of such obligation. 133 Ariz. 16, 19 (App. 1982).

The insurer must exercise caution in over simplifying the analysis. For example, Arizona law is clear that if the third party's allegations include a potentially covered claim, then the carrier must defend the insured. See Kepner v. Western Fire Ins., 109 Ariz. 329 (1973). Further, if the face of the complaint does not allege facts that would be covered but the insured believes that the actual (unalleged) facts would be covered, the carrier has a duty to investigate those additional facts. See United States Fidelity Guarantee Corp. v. Advance Roofing & Supply Co., Inc., 163 Ariz. 476 (App. 1989).

Once the carrier determines that it has a duty to defend, that duty continues throughout the course of the litigation against the insured. The exception is if the defense is offered under a reservation of rights and the facts of the case eventually reveal that a withdrawal of the defense is appropriate.

The breach of the duty to defend by the insurer permits the insured to settle directly with the claimant without breaching the cooperation clause of the policy. Damron v. Sledge, 105 Ariz. 151 (1969). A Damron agreement is a form of a stipulated judgment wherein the insured agrees to allow a judgment to be taken against her and to assign to claimant her bad faith claim against the insurer based on its failure to defend her under the terms of the contract. In return, the claimant agrees not to execute the judgment against her. Id.; Safeway Ins. Co. v. Guerro, 210 Ariz. 5 (2005). The parties may not be required to give notice to the insurer of their intent to enter into a Damron agreement. Further, the insurer may not be given the opportunity to challenge the reasonableness of the amount of the stipulated judgment. See Parking Concepts, Inc. v. Tenney, 207 Ariz. 19 (Ariz. 2004).

In the case of an insured being defended under a reservation of rights issued by the insurer, the insured, upon giving notice to the insurer, may enter into a stipulated judgment with claimant. United Service v. Morris, 154 Ariz. 113 (1987). This so called Morris agreement is similar to a Damron agreement, except the insurer must be given notice of the pending agreement, and the insurer has the opportunity to challenge the reasonableness of the stipulated judgment amount. In evaluating the reasonableness of a Morris agreement, the insured has the burden of proving reasonableness, and the court should not consider the insured's ability to pay the judgment (except with regard to punitive damages claims). See Parking Concepts, Inc. v. Tenney, 207 Ariz. 19 (2004).
In either a Damron or Morris agreement, if the assignee does not establish bad faith, the insurer will not have to pay the stipulated amount, even if it was otherwise determined to be reasonable. Himes v. Safeway, 205 Ariz. 31 (App. 2003).

9. BAD FAITH CLAIMS AGAINST INSURERS

a. First party bad faith

Arizona recognizes the independent tort of bad faith. Generally, a first party bad faith action refers to a cause of action by the insured against the insurer based on the carrier's handling of a claim. In the seminal case of Noble v. National American Life Insurance Company, the Arizona Supreme Court held that the insurer has an implied duty to act in good faith when handling claims of its insured. 128 Ariz. 188 (1981). Because bad faith is a tort action, the insured is not limited to compensatory and consequential damages as they would be in a contract action. Rawlings v. Apodaca, 151 Ariz. 149 (1986); Linthicum v. Nationwide Life, 150 Ariz. 354 (App. 1985). In a first party action, the insured can recover unpaid benefits still owed under the policy; actual damages for loss or injury to credit; emotional distress, anxiety, humiliation, and inconvenience suffered; and attorney's fees incurred to obtain payment under the contract. Id.at 161.

In Noble, the court set forth the elements of a first party bad faith claim as follows,
To show a claim for bad faith the plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent that the tort of bad faith is an intentional one.

The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e. would a reasonable insurer under the circumstances have denied or delayed payment of the claim. Id.

Under the standard set forth in Noble, the insured must show a lack of reasonable basis for the denial and the insurer's knowledge or reckless disregard for the lack of a reasonable basis for claim denial. Other courts have added that the appropriate inquiry is whether there is sufficient evidence from which reasonable jurors could conclude that the insured acted reasonably in investigating, evaluating and processing the claim and whether it knew, or should have known, that its claims handling was unreasonable. Zilisch v. State Farm Mut. Auto Ins. Co., 196 Ariz. 234 (2000); Twin City Fire Ins. v. Burke, 204 Ariz. 251 (2003).

Breach of the insurance contract is not a prerequisite for the finding of bad faith. Deese v. State Farm, 172 Ariz. 504 (1992).

Negligence or inadvertence alone is insufficient to establish bad faith. Rawlings, 151 Ariz. 149.
An insurer's defense often focuses on the "fairly debatable" standard. That is, after an adequate investigation, the reasonable insurer would conclude that the claim's validity is reasonably debatable. It must be noted, however, that the Arizona Supreme Court has expressly held that the reasonably debatable standard applies to first party bad faith action and does not apply to third party claims. Clearwater v. State Farm Mutual Automobile Ins. Co. And, even in first party actions, the fairly debatable standard cannot be raised where the insurer fails to make an adequate investigation or where the debatable issue is based on the insurer's reliance on ambiguity in the policy.
Once an insurer commits bad faith, subsequent payment or other performance under the policy does not release it from liability for bad faith.

b. Third party bad faith

First and third party bad faith claims arise out of the same implied duty of good faith and fair dealing but involve different considerations for the insurer. Clearwater, 164 Ariz. at 258. In the third party context, an insurer commits bad faith when it fails to give equal consideration to the interests of the insured when deciding whether to accept or reject offers. Id. at 259. The duty to give equal consideration arises when there is a conflict of interest between the insurer and its insured. Most often, this conflict arises in the context of a policy limit settlement demand and threat of excess judgment.

The test Arizona courts apply for determining whether an insurer has acted in bad faith in refusing to settle a claim is whether a prudent insurer would have settled the claim if it alone would be responsible for the judgment and if policy limits were not a consideration. Clearwater, at 260. The courts have considered such factors as the strength of plaintiff's liability and damages claim; attempts by the insurer to get the insured to contribute to the settlement; the reasonableness of the insurer's investigation into the evidence against the insured; the insurer's rejection of counsel's advice; and the potential and amount of an excess judgment. Id.

Like first party bad faith claims, the fairly debatable standard applies to third party claims. Tobel v. Travelers Ins. Co., 195 Ariz. 363 (App. 1999). Indeed, there is no cause of action for bad faith if the claim is fairly debatable. Id.

10. MANDATORY ARBITRATION RULES

Arizona's compulsory arbitration laws and associated rules are set for in A.R.S. 12-133 and Ariz. R. Civ. P. 76 et. seq. By rule, each county can determine whether it will require arbitration and establish its own jurisdictional limits (not to exceed $50,000). A case is subject to arbitration if no party seeks affirmative relief other than a money judgment. In Arizona's two largest counties (Maricopa and Pima), the jurisdictional limit is $50,000. Some of the smaller counties do not require arbitration.

The court randomly assigns a member of the bar from the county to act as arbitrator. The only requirement is that the arbitrator has been an active member of the bar for at least four years. The arbitrator need not, and often does not, have any experience on the subject matter he or she is assigned to adjudicate. Each party has the right to one preemptory strike and can move the court to strike the arbitrator for cause.

The arbitrator assigns a time for hearing, which is to commence no later than 120 days after the appointment of the arbitrator. The parties are permitted to engage in full discovery during that period. The rules of evidence apply to the arbitration herein, albeit in a relaxed form.

Either side has the right to appeal from the arbitrator's decision. The appeal is made de novo to the Superior Court (trial court). If the judgment on appeal is not more favorable by at least 23% than the monetary relief granted by the arbitration award, the appellant must pay the appellee's taxable costs and attorney's fees necessitated by the appeal, as well as the reasonable expert witness fees incurred by appellee in connection with the appeal.

Arkansas

1. Comparative Fault

Arkansas is a modified comparative fault jurisdiction. A.C.A. § 16-64-122. When a plaintiff's fault meets or exceeds the defendant's fault, the plaintiff will be barred from recovery. However, if the plaintiff's fault is 49% or less, the amount of damages will be diminished in proportion to the plaintiff's fault.

In actions for personal injury, medical injury, property damage, or wrongful death, liability among multiple defendants will be several rather than joint and several. A.C.A. § 16-55-201. Defendants have a statutory right to an of allocation of fault. A.C.A. § 16-61-202(c). A defending party seeking to allocate fault to a nonparty pursuant to A.C.A. § 16-61-202(c) must provide notice in the initial responsive pleading or in an amended or supplemented pleading if that fact is later discovered. Ark. R. Civ. P. Rule 9. The responsive pleading must identify the nonparty and state sufficient facts showing that the nonparty is at fault. *Id.* A finding of fault for all tortfeasors (both parties and nonparties) may be determined by either a jury or, if there is no jury, by the court. Ark. R. Civ. P. Rules 49 & 52.

2. Insurance Minimums

Arkansas law requires motorists to carry liability insurance with the following coverage:

(1) Not less than twenty-five thousand dollars ($25,000) for bodily injury or death of one person in any one accident;

(2) Not less than fifty thousand dollars ($50,000) for bodily injury or death of two or more persons in any one accident; and;
(3) If the accident results in damage to or destruction of property, not less than twenty-five thousand dollars ($25,000) for the damage to or destruction of property of others in any one accident.

3. Statute of Limitations

Negligence: A three-year statute of limitations applies to all tort actions not otherwise limited by law. *O'Mara v. Dykema*, 328 Ark. 310, 317, 942 S.W.2d 854, 858 (1997) (citing *Burton v. Tribble,* 189 Ark. 58, 70 S.W.2d 503 (1934); A.C.A. § § 16–56–104—105).

Negligent Construction: Actions on contract alleging deficiencies in construction or design must be brought within five (5) years of substantial completion of the improvement. A.C.A. § 16-56-112(a). Actions in tort or contract based on a claim for wrongful death or injury caused by deficient construction or design must be brought within four (4) years of substantial completion of the improvement. A.C.A. § 16-56-112(b).

Product Liability: Any action on product liability must be brought within three years of the date in which the injury occurs. A.C.A. § 16–116–103.

Wrongful Death: A wrongful death action must be brought within three years after the death of the person alleged to be wrongfully killed. A.C.A. § 16-62-102(c)(1).

Breach of Contract: The Arkansas Code provides a statutory three-year statute of limitations for all actions based on breach of contract not under a writing or seal, actions on founded on any contract or liability (express or implied), and for all actions founded upon the taking or injuring of goods or chattels. A.C.A. § 16–56–105. For written contracts, the statute of limitations is five (5) years from the date of the breach. A.C.A. § 16–56–115.

Deceptive Trade Practices: Any action brought to enforce the provisions of Arkansas' Deceptive Trade Practices Act must be brought within five (5) years of the occurrence of the violation or the date in which the cause of action arises. A.C.A. § 4-88-115.

4. Punitive Damages and Caps

Arkansas allows juries to award punitive damages. In order to recover punitive damages, plaintiffs have the burden of proving that a defendant is liable for compensatory damages and that the defendant: (1) knew or ought to have known, in light of the surrounding circumstances, that his or her conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences, from which malice may be inferred; or (2) the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage. A.C.A. § 16-55-206. The burden must be satisfied by clear and convincing evidence. A.C.A. § 16-55-207. Either party may move for a bifurcated proceeding at least ten days prior to trial, to determine the award of compensator and punitive damages. A.C.A. § 16-55-211.

Arkansas had a statutory cap on punitive damages, but the Arkansas Supreme Court ruled the provision was unconstitutional. A.C.A. § 16-55-208, *invalidated by Bayer CropScience LP v. Schafer*,

2011 Ark. 518, 9, 385 S.W.3d 822, 829 (2011). Although there is no statutory cap on punitive damages, awards are subject to review for excessiveness under Fourteenth Amendment's Due Process Clause. *See Bronakowski v. Lindhurst*, 2009 Ark. App. 513, 14, 324 S.W.3d 719, 727 (2009).

5. Collateral Source:

Under Arkansas' collateral source rule, a plaintiff's damages cannot be reduced by the receiving of any benefits from a source that is independent of and collateral to the defendant. *Younts v. Baldor Elec. Co., Inc.*, 310 Ark. 86, 832 S.W.2d 832 (1992). In fact, the Arkansas Supreme Court has held that "[a] trial court must exclude evidence of payments received by an injured party from sources collateral to . . . the wrongdoer, such as private insurance or government benefits." *Montgomery Ward & Co. v. Anderson*, 334 Ark. 561, 564, 976 S.W.2d 382, 383-84 (1998) (internal quotations omitted). There are, however, limited exceptions to this rule--Arkansas courts have held that evidence of a collateral source may be admissible if the evidence is relevant for a purpose other than the mitigation of damages. *Id.* For example, evidence of a collateral source may become relevant to impeach a claimant. *See, e.g.*, *York v. Young*, 271 Ark. 266, 608 S.W.2d 20 (1980).

6. Expert Admissibility Standard

Arkansas courts will permit a qualified expert witness to testify in the form of an opinion or otherwise if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. ARK. R. EVID. Rule 702. Arkansas follows the *Daubert* approach to admissibility. *Farm Bureau Mutual Insurance Co. v. Foote,* 341 Ark. 105, 14 S.W.3d 512 (2000). A key consideration is whether the scientific theory or technique can be or has been tested. Other considerations include whether the theory or technique has been subjected to peer review and publication, the potential rate of error, and the existence and maintenance of standards controlling the technique's operation. Additionally, Arkansas courts recognize that general acceptance in the scientific community can have a bearing on the inquiry. *Green v. Alpharma, Inc.*, 373 Ark. 378, 398, 284 S.W.3d 29, 44 (2008) (quoting *Foote,* supra).

7. First Party Notice Requirements

If a first party insured fails to give proper notice as required by a condition precedent to a policy, the insured will no longer be entitled to recover under said policy--regardless of whether such failure to provide proper notice prejudiced the insurer. *Fireman's Fund Ins. Co. v. Care Mgmt., Inc.*, 2010 Ark. 110, 7, 361 S.W.3d 800, 804 (2010), *opinion after certified question answered*, No. 1:08-CV-00056 JLH, 2010 WL 1417932 (E.D. Ark. Apr. 6, 2010). The Arkansas Supreme Court has held, however, that where a policy requires notice but does not make such notice a condition precedent to recovery, an insurer will be obligated to honor the policy if it cannot show that it was prejudiced by the insured's failure to comply with the notice requirements. *Id*; *See also Southern Farm Bureau Casualty Insurance Co. v. Robinson,* 236 Ark. 268, 365 S.W.2d 454 (1963).

8. Insurer's Duty to Defend

In Arkansas, an insurer's duty to defend is greater than its duty to indemnify. *Commercial Union Ins. Co. of America v. Henshall,* 262 Ark. 117, 553 S.W.2d 274 (1977). The duty to defend arises when there is a possibility that the injury or damage may fall within the insured's policy coverage. *Murphy Oil USA, Inc. v. Unigard Sec. Ins. Co.*, 347 Ark. 167, 176, 61 S.W.3d 807, 813 (2001). The

general rule is that the allegations in the pleadings against the insured determine the insurer's duty to defend. *See Mattson v. St. Paul Title Co. of the South,* 277 Ark. 290, 641 S.W.2d 16 (1982).

9. Bad Faith Claims

Arkansas recognizes the tort of bad faith. *Aetna Cas. & Sur. Co. v. Broadway Arms Corp*., 281 Ark. 128, 133, 664 S.W.2d 463, 465 (1984). The tort of bad faith, however, does not arise from a mere denial of a claim; there must be affirmative misconduct without a good faith defense, and that the misconduct must be dishonest, malicious, or oppressive in an attempt to avoid its liability under an insurance policy. *See id.*; *Unum Life Ins. Co. of Am. v. Edwards*, 362 Ark. 624, 628, 210 S.W.3d 84, 88 (2005).

Examples of where courts have found substantial evidence of bad faith include where an insurance agent lied by stating there was no insurance coverage; aggressive, abusive, and coercive conduct by a claims representative, which included conversion of the insured's wrecked car; and where a carrier intentionally altered insurance records to avoid a bad risk. *State Auto Prop. & Cas. Ins. Co. v. Swaim,* 338 Ark. 49, 991 S.W.2d 555 (1999).

10. Mandatory Arbitration

Arkansas law does not require arbitration in any context. Instead, Arkansas has, however, adopted the Uniform Arbitration Act. A.C.A. § 16-108-101 *et seq*. Arbitration under the Uniform Arbitration Act is by agreement or by court order. The Arkansas Supreme Court has held that parties must share a mutuality of obligation in an agreement to arbitrate. *Regional Care of Jacksonville, LLC v. Henry*, 2014 Ark. 361, 444 S.W.3d 356. In *Regional Care of Jacksonville*, the contract between the parties required arbitration for disputes, but excluded from that requirement "dispute[s] over billing or collecting for services." *Id.* at 5, 444 S.W.3d at 359. The court ultimately held that "[t]here is no mutuality of obligation where one party uses an arbitration agreement to shield itself from litigation, while reserving to itself the ability to pursue relief through the court system." *Id.* at 7, 444 S.W.3d at 360.

California

1. Comparative Fault – Any negligence by the plaintiff will offset defendant's liability. California's comparative negligence rule: a plaintiff's negligence reduces his recovery but will never bar recovery. *Li v. Yellow Cab Company*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). The plaintiff's negligence is compared to the combined negligence of plaintiff and of all tortfeasors, whether or not joined as parties, to determine the amount of the reduction. *American Motorcycle Ass'n v. Superior Court of Los Angeles County*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

2. Insurance Minimum Limits – Liability insurance compensates a person other than the policy holder for personal injury or property damage. Minimum liability insurance is required on all self-propelled motor vehicles.

$15,000 for death or bodily injury to one person
$30,000 for death or bodily injury to two or more persons; and

$5,000 for damage or destruction of property.

3. Statute of Limitations

Negligence: Two years from date of injury. (CA Code of Civil Procedure section 335.1).

Negligent Construction: The shorter period of: (1). Three years from when Plaintiff knew or should have known of damage to the real property; (2). Four years from the date of substantial completion for known or apparent problems ("patent defects") in real property improvement, design, survey, construction, etc. and resulting in injury to property or person. (CA Code of Civil Procedure section 337.1); (3).Ten years from the date of substantial completion for unknown or not apparent problems ("latent defects") in real property improvement, design, survey, construction, which cause damage to real estate or personal property. (CA Code of Civil Procedure section 337.15).

Product Liability: Two years from injury or date injury should have been discovered (CA Code of Civil Procedure section 335.1).

Wrongful Death: Two years (CA Code of Civil Procedure section 335.1).

Breach of Contract: Written, four years (CA Code of Civil Procedure section 337); Oral, two years (CA Code of Civil Procedure section 339).

Unlawful Trade Practices: The that suit must be filed "within four years after the cause of action accrued." (Cal. Bus. & Prof. Code § 17208).

4. Punitive Damages and Damages Caps

Punitive Damages: The purpose of awarding punitive damages is to punish the defendant and to deter the defendant and others from doing such wrong in the future. The amount of the award is based upon the character and degree of the wrong and the necessity of preventing similar wrongs. Standard of conduct: oppressive conduct, fraud or malice towards the plaintiff. The plaintiff must prove his entitlement to punitive damages by "clear and convincing evidence." Cal. Civ. Code § 3294(a)

The public policy of California, as codified in Section 533 of the Insurance Code, bars coverage for punitive damages. PPG Industries, Inc. v. Transamerica Ins. Co., 20 Cal. 4th 310, 975 P.2d 652 (1999) See also Certain Underwriters at Lloyds v. Pacific Southwest Airlines, 786 F.Supp. 867 (C.D. Cal. 1992)(rejecting insured's contention that coverage should be permitted where damages are based on vicarious liability for acts of predecessor). See also City Products Corp. v. Globe Indemnity Co., 88 Cal. App.3d 31, 42 (1979). In PPG, the California Supreme Court declared that "an insured may not shift to its insurance company, and ultimately to the public, the payment of punitive damages awarded in the third party lawsuit against the insured as a result of the insured's intentional, morally blameworthy behavior against the third party. To allow such recovery would (1) violate the public policy against permitting liability for intentional wrongdoing to be offset or reduced by the negligence of another; (2) defeat the purpose of punitive damages which are to punish and deter the wrongdoer; and (3) violate the public policy against indemnification for punitive damages."

5. Non-Economic Damages Cap:
California places a cap on non-economic damages for medical malpractice cases. Cal. Civ. Code § 3333.2. Non-economic damages, defined as compensation for pain, suffering, inconvenience, physical impairment, disfigurement, and other non-pecuniary injury.

6. Expert Admissibility Standard –California trial judges are "gatekeepers" of expert opinion testimony, and that such expert testimony should be reviewed by the trial court initially for purposes of foundation, i.e. ensuring that the materials used by the expert in expressing the opinion are of the type reasonably relied upon by experts in the field, Evidence Code §801(b), and that the methodology used by the expert in reaching the opinion avoids conjecture, speculation, or use of information not contained in the record, Evidence Code §802.

7. First Party Notice Requirements – Ca. Ins. Section 2695.4 Every insurer shall disclose to a first party claimant or beneficiary, all benefits, coverage, time limits or other provisions of any insurance policy issued by that insurer that may apply to the claim presented by the claimant. When additional benefits might reasonably be payable under an insured's policy upon receipt of additional proofs of claim, the insurer shall immediately communicate this fact to the insured and cooperate with and assist the insured in determining the extent of the insurer's additional liability.

8. Insurer Duty to Defend – An insurer's duty to defend is broader than its duty to indemnify. Gray v. Zurich Ins. Co., 65 Cal.2d 263, 275, 419 P.2d 168, 177 (1966). California takes an expansive view of the duty to defend, requiring that an insurer take into account facts known or readily available to it as well as the allegations contained in the suit against the insured. Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 846 P.2d 792 (1993). However, there is no duty to defend if there is no possibility of any duty to indemnify. Fire Ins. Exchange v. Abbott, 294 Cal. App.3d 1012, 1026, 251 Cal. Rptr. 620, 629 (1988), rev. den. (Cal. 1988).

9. Bad Faith Claims against Insurers – California limited insurers' exposure to bad faith claims by holding that carriers are not required to proactively settle a claim just because it's clear that the stakes are higher than what their policy offers in coverage.

In Reid v. Mercury Insurance Company, 220 Cal. App.4th 262, 272 (2013) the California Court of Appeals, Second Appellate District, held that, under California law, an insurer has no duty to initiate settlement negotiations or offer policy limits in the absence of a settlement demand from a third party plaintiff or some other evidence showing "an opportunity to settle" that the insurer ignored – even where the insured's liability is clear.

10. Mandatory Arbitration Rules – Parties may stipulate to binding or non-binding judicial arbitration or the judge may order the matter to arbitration at the case management conference if a case is valued at under $50,000 and is "at issue." The court maintains a panel of approved judicial arbitrators who have practiced law for a minimum of five years and who have a certain amount of trial and/or arbitration experience. Superior Court Local Rules Division 2 Chapter 3 and the California Code of Civil Procedure, sections 1141 et seq. address this program specifically.

Colorado

1. **Comparative Fault**

Colorado is a modified comparative fault state. Under C.R.S. § 13-21-111, a plaintiff is barred from recovery if his or her fault is equal to or exceeds 50 percent. If the trier of fact determines that plaintiff's fault is 49.9 percent or lower, the plaintiff is entitled to recover damages, but the recovery will reduced in proportion to the plaintiff's percentage of fault. If the plaintiff's percentage of fault is 50 percent or greater, the court shall enter judgment for the defendant(s).

In a case where comparative fault of the plaintiff is at issue, the jury is required to return a special verdict form indicating the degree of negligence of each party expressed as a percentage. *Id.* Where there are multiple defendants, the combined negligence of all defendants is compared to the negligence of the plaintiff. If the negligence of the plaintiff is greater than the negligence of all defendants combined, the plaintiff cannot recover. *Mountain Mobile Mix, Inc. v. Gifford*, 660 P.2d 883 (Colo. 1983). The negligence of any non-parties who have been properly designated pursuant to C.R.S. § 13-21-111.5 is also calculated along with the negligence of the party defendants in performing this assessment. *Painter v. Inland/Riggle Oil Co.*, 911 P.2d 716 (Colo. App. 1995).

Absent a showing that one or more defendants "consciously conspire[d] and deliberately pursue[d] a common plan or design to commit a tortious act . . ." no defendant can be held liable for more than its proportionate share of fault with respect to the plaintiff's overall claimed damages. C.R.S. § 13-21-111.5. Costs, on the other hand, are generally awarded jointly and severally to the prevailing party, so if there is an insolvent party against whom costs are awarded, any other parties against whom costs are awarded will likely have to bear the insolvent party's share of the cost award.

2. **Insurance Minimum Limits**

Under Colorado's Motor Vehicle Financial Responsibility Act, C.R.S. § 10-4-601, *et seq.*, "every owner of a motor vehicle who operates the motor vehicle on the public highways of this state or who knowingly permits the operation of the motor vehicle on the public highways of this state" must have an insurance policy in force covering the vehicle which provides minimum limits of $25,000 per person, $50,000 per accident for bodily injury, and $15,000 per accident for property damage. C.R.S. §§ 10-4-619, 620. In turn, every policy providing liability coverage must also offer coverage protecting against bodily injury caused by uninsured/underinsured motorists in amounts equal to the bodily injury liability limits, although such coverage may be rejected in writing by the named insured. C.R.S. § 10-4-609. Presently in Colorado, although a named insured may reject UM/UIM coverage for other individuals who qualify as additional insureds under the policy, a named insured may not reject such coverage for other named insureds, absent a showing of express or implied authority to do so. *Johnson v. State Farm Mut. Auto. Ins. Co.*, 2014 COA 135 (Colo. App. Oct. 9, 2014); *cert. granted State Farm v. Johnson*, 2014 SC 890. Insurers are not required to offer UM/UIM coverage for property damage unless the insured requests such coverage in writing. Such coverage if requested must cover the actual cash value of the vehicle or the cost of repair or replacement, whichever is less. C.R.S. § 10-4-610.

3. Statute of Limitations

Negligence: Negligence claims are governed by a two-year statute of limitations. C.R.S. § 13-80-102(1)(a). The limitations period does not begin to run, however, until the claim "accrues." A claim for negligence accrues "on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." C.R.S. § 13-80-108(1).

Negligent Construction: Negligent construction claims are generally governed by a two-year statute of limitations. C.R.S. § 13-80-104(1)(a). However, a cause of action for negligent construction does not accrue until "the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement which ultimately causes the injury." *Id.* § 13-80-104(1)(b)(I). Because the physical manifestation of a construction defect can be delayed for a period of time after construction has been completed, causes of action for negligent construction are also governed by a six-year limitations period following substantial completion of the improvements to the real property. *Id.* § 13-80-104(1)(a). In other words, any claim against an architect, contractor, builder or builder vendor, engineer, or inspector who is involved in any aspect of construction must be brought within six years of the date of substantial completion of the work. *Id.* If the physical manifestation of a defect is discovered or should have been discovered during years five or six following substantial completion of the work, then the claimant will have an additional two years in which to bring a claim, thereby potentially extending the limitations period to a total of eight years following substantial completion of the work. *Id.* § 13-80-104(2).

Product Liability: Product liability actions, including actions for strict liability, absolute liability and failure to instruct or warn, are governed by a two-year statute of limitations. C.R.S. § 13-80-102(1)(b). Additionally for product liability actions, unless the manufacturer, seller, or lessor has intentionally misrepresented or fraudulently concealed a material fact concerning the product or equipment, or there is a hidden defect or the claim arises from prolonged exposure, no cause of action against a manufacturer, seller, or lessor of equipment may be brought more than seven years after the equipment was first used for its intended purpose by someone who is not a manufacturer, seller, or lessor of the equipment. C.R.S. § 13-80-107(1)(b).

Wrongful Death: A wrongful death claim must be brought within two years of the date of death. C.R.S. § 13-80-102(1)(d); § 13-80-108(2). In the anomalous situation where tortious conduct occurs which later results in death, however, the cause of action may accrue prior to the date of death. This can arise in the context of medical negligence. *See Crownover v. Gleichman*, 554 P.2d 313 (Colo. App. 1976). Also, a wrongful death claim against a defendant who committed vehicular homicide, and then proceeded to leave the scene of the accident, is governed by a four-year statute of limitations, commencing on the date of the accident. C.R.S. § 13-80-102(2).

Breach of Contract: An action for breach of warranty or contract is governed by a three-year statute of limitations. C.R.S. § 13-80-101(1)(a). The cause of action accrues on the date that the breach is discovered or should have been discovered by the exercise of reasonable diligence. C.R.S. § 13-80-108(6).

Unlawful Trade Practices: Actions for unlawful trade practices under the Colorado Consumer Protection Act must be brought within three years "after the date on which the false, misleading, or deceptive act or practice occurred or the date on which the last in a series of such acts or practices occurred or within three years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice. The period of limitation provided in this section may be extended for a period of one year if the plaintiff proves that failure to timely commence the action was caused by the defendant engaging in conduct calculated to induce the plaintiff to refrain from or postpone the commencement of the action." C.R.S. § 6-1-115.

4. Punitive Damages and Damages Caps

Punitive Damages: Colorado does allow recovery for punitive, or exemplary damages. C.R.S. § 13-21-102. A claim for exemplary damages may not be included in the initial complaint. Rather, the claiming party must seek leave to amend the complaint after the parties have exchanged their mandatory initial disclosures in order to add a claim for exemplary damages, and the claiming party must demonstrate prima facie proof of a triable issue on exemplary damages before the court may consider allowing them into the case. *Id.* § 13-21-102(1.5)(a).

The jury must find that the defendant engaged in fraud, malice, or willful and wanton conduct in order to award exemplary damages, and this conduct must be proven beyond a reasonable doubt. *Id.* § 13-21-102(1)(a); § 13-25-127(2). The jury may only award exemplary damages up to the amount of actual damages awarded. *Id.* § 13-21-102(1)(a). However, the court may increase the amount awarded by the jury to a sum not to exceed three times the amount of the actual damages if the court finds that the defendant's bad conduct has continued during the pendency of the case, or the defendant committed another action during the pendency of the case in a manner which further aggravated the plaintiff's damages when the defendant knew or should have known that its actions would produce the aggravation. *Id.* § 13-21-102(3). On the other hand, the court may also reduce or disallow an award of exemplary damages if it finds that the deterrent effect of the damages has been accomplished or the conduct resulting in the award has ceased or the purpose of awarding exemplary damages has otherwise been served. *Id.* § 13-21-102(2).

Non-Economic Damages Cap:

Colorado has a cap on non-economic damages which is periodically adjusted by the legislature. The cap provisions are found at C.R.S. § 13-21-102.5. Currently, non-economic damages are capped at $468,010, which may be adjusted by the court up to $936,030 upon a finding of clear and convincing evidence. Non-economic damages covered by this statute include damages for pain and suffering, inconvenience, emotional stress, and impairment of the quality of life. *Id.* § 13-21-102.5(2)(b). Non-economic damages awarded to a spouse or other individual claiming derivative non-economic injury are also capped at $468,010, and these damages may not be adjusted upwards by the court. *See Id.* § 13-21-102.5(3)(b).

5. Collateral Source Rules

In Colorado, following the jury verdict in a personal injury, wrongful death or destruction of property case, the court is required to reduce from the award any amount(s) that the plaintiff has

been or will be wholly or partially indemnified or compensated by a collateral source. C.R.S. § 13-21-111.6. These collateral sources can include payments from other people, corporations, insurance companies, or other funds which are directly related to the injury, damage or death sustained by the plaintiff. *Id.*

However, there is an exception for benefits which are "paid as a result of a contract entered into and paid for by or on behalf of the plaintiff." *Id.* This "contract exception" to the collateral source rule prevents the court from reducing the jury award for payments made from common sources of benefits like health insurance policies, employment-related policies covered by worker's compensation laws, state and federal disability payments, and fire, police and other forms of pensions.

Notably, because the insurance that an individual either purchases or procures through their employer is covered by the contract exception, the ancillary benefits that flow through the insurance arrangement likewise cannot be used to reduce or offset a plaintiff's jury award. For example, if, by virtue of the agreement between the insurance carrier and the care providers, the care providers are actually paid a discounted rate for their services by the insurance carrier, such discounted rate is not admissible even to establish the reasonable value of the services provided. *See Crossgrove v. Wal-Mart Stores, Inc.*, 280 P.3d 29 (Colo. App. 2010); *aff'd* 276 P.3d 562 (Colo. 2012). Rather, the plaintiff is entitled to recover the full amount of the medical expenses as billed, without any offset for the amounts that were actually paid by the insurance carrier(s) for such services. *See Volunteers of Am. v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010).

Jury verdicts can be reduced by amounts paid by settling parties who are later designated as nonparties at fault under C.R.S. § 13-21-111.5. *Smith v. Zufelt*, 880 P.2d 1178 (Colo. 1994).

6. Expert Admissibility Standard – ***Daubert v. Frye***

Admissibility of expert testimony in Colorado is governed by Colorado Rule of Evidence 702 and *People v. Shreck*, 22 P.3d 68 (Colo. 2001). C.R.E. 702 provides that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In turn, *Shreck* provides courts further guidance for considerations to determine whether or not the proffered expert testimony will "assist" the jury. Threshold considerations examine whether or not the expert's opinions are relevant and reliable, and any party challenging an expert's opinions or qualifications may request a *Shreck* or 702 hearing with the court. The courts are to view the proffered expert testimony under the "totality of the circumstances", and no one factor in an analysis is dispositive. *Shreck* at 77-78. Particular factors courts can examine to determine whether or not the evidence is reliable include:

(1) Whether the technique can and has been tested;
(2) Whether the theory or technique has been subjected to peer review and publication;

(3) The scientific technique's known or potential rate of error, and the existence and maintenance
of standards controlling the technique's operation;
(4) Whether the technique has been generally accepted;
(5) The relationship of the proffered technique to more established modes of scientific analysis; (6) The existence of specialized literature dealing with the technique;
(7) The non-judicial uses to which the technique are put;
(8) The frequency and type of error generated by the technique; and
(9) Whether such evidence has been offered in previous cases to support or dispute the merits of
a particular scientific procedure.

Id. p. 77.

7. First Party Notice Requirements

In Colorado, under the notice-prejudice rule, an insured who gives late notice of a claim their insurer does not lose coverage benefits unless the insurer proves by a preponderance of the evidence that the late notice prejudiced its interests. *Craft v. Philadelphia Indem. Ins. Co.*, 343 P.3d 951, 952 (Colo. 2015). Courts will employ a two-part test to determine if the notice-prejudice rule applies:

First, the court should determine whether an insured's notice was timely. Such a determination should include an evaluation of the timing of the notice and the reasonableness of any delay.

Once a court has determined that an insured's notice was untimely and that the delay was unreasonable, it should then turn to the issue of whether the insurer was prejudiced by such untimely notice. The insurer must show prejudice to a significant interest, which can include such issues as the opportunity to investigate or defend the insured's claim and to receive the insured's cooperation in the process of gathering information, negotiating settlements, securing and giving evidence, attending hearings and trials, and assisting witnesses to attend hearings and trials. *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 643-44 (Colo. 2005).

The notice-prejudice rule is applicable only to occurrence based policies. Since claims made policies by definition require that a claim be made within the applicable policy period, an insured cannot avoid losing coverage under a claims made policy by arguing that the insurer was not prejudiced by a failure to report a claim within the applicable policy period. *Craft v. Philadelphia Indem. Ins. Co.* at 953.

8. Insurer Duty to Defend

The duty to defend is ordinarily triggered by notice of a complaint filed against the insured. *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328, 334 (Colo. App. 2012). This is because most policies do not begin to provide any coverages unless and until a "suit" is brought. However, depending on the language of the policy, an insurer's duty to defend may be triggered by a demand to engage in another form of alternative dispute resolution. *Id.* This can include a request for mediation, or a

notice of claim under the Colorado Defect Action Reform Act, again depending on the language in the policy.

Whether or not the insurer has a duty to defend is analyzed by examining the four corners of the complaint and the relevant policy language. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1089-90 (Colo. 1991). An insurer seeking to avoid the duty to defend bears a heavy burden. *Id.* at 1089. The duty to defend arises if the complaint alleges any facts that might fall within the coverages under the policy. *Id.* If the duty to defend is not apparent from the pleadings, but the allegations do state a claim which is potentially or arguably within the policy coverage, the insurer must accept the defense of the claim. *Id.*

In order to avoid providing a defense, the insurer must show that exclusion(s) in the policy apply to bar any and all coverage, and that the exclusion(s) are not subject to any other reasonable interpretations. *Id.* at 1090. The insurer is not excused from its duty to defend unless there is no factual or legal basis under which the insurer may ultimately owe indemnification to the insured. *Id.* Even if an insurer believes that it has no duty to defend the insured, our courts caution that the better course of action for the insurer is to defend under a reservation of rights to seek reimbursement should the facts at trial prove that the conduct at issue is not covered under the policy. *Id.* at 1089. Carriers are strongly discouraged from filing declaratory judgment actions after they have been notified of a complaint against the insured, and ordinarily must wait until after the underlying case has been adjudicated in order to bring a declaratory judgment action. *Id.*

If there are multiple claims alleged in a complaint, the insurer must provide a complete defense even if some potentially uncovered claims are alleged. *Mgmt. Specialists, Inc. v. Northfield Ins. Co.*, 117 P.3d 32, 37 (Colo. App. 2004. However, if the underlying facts reveal that all of the claims are based on common activity which is plainly excluded from the policy, there is no duty to defend even if the complaint alleges uncovered claims, like intentional acts, and potentially covered claims, such as ordinary negligence. *Id.*; *see also Colo. Farm Bureau Mut. Ins Co. v. Snowbarger*, 934 P.2d 909, 911 (Colo. App. 1997) (no duty to defend where policy contained intentional acts exclusion and underlying claim against insured was for sexual misconduct; intent to harm is inferred as a matter of law in such a case, and fact that negligence was alleged did not defeat operation of intentional acts exclusion.).

Excess clauses in policies are valid and enforceable in Colorado. *Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 659-60 (Colo. 2011). If a policy provides that there is no obligation to defend an insured if another carrier also has a duty to defend, such a provision will likely be upheld, provided that both policies do not contain similar clauses. If both policies contain excess clauses which effectively result in the insured not being provided a defense or indemnification, both clauses will be struck as mutually-repugnant, and the policies will each owe a defense on a pro rata basis. *Id.* at 660.

An insurer may withdraw a defense after it has been undertaken and before termination of the litigation. *Mgmt. Specialists, Inc. v. Northfield Ins. Co.* at 37-39. However, if the insurer, with knowledge of a ground to disclaim coverage under the policy, assumes the defense of the insured without disclaiming liability and giving notice of a reservation of rights, the insurer may be barred from later claiming noncoverage and withdrawing from the case if its conduct has prejudiced the insured. *Id.* at 37. However, prejudice will not be presumed simply because the insurer withdraws its defense prior to trial. *Id.* at 38.

9. Bad Faith Claims Against Insurers

Colorado only recognizes first-party bad faith claims against insurers. Absent an assignment of rights by the first-party insured, a third-party claimant may not bring a claim for bad faith directly against an insurer. *See Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 414 (Colo. 2004.

Insureds are permitted to assign their bad faith rights to the third-party claimant. This may take place by way of an assignment made prior to trial, often coupled with either a stipulated judgment amount or by way of a damages award determined through arbitration, or may take place after a trial which results in an excess verdict. *See Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 119-120 (Colo. 2010).

There are two types of bad faith in Colorado: common law and statutory. Common law bad faith claims require the insured to prove that: (1) the insurer's conduct was unreasonable; and (2) the insurer either had knowledge of or reckless disregard for the fact that its conduct was unreasonable. *Travelers Insurance Co. v. Savio*, 706 P.2d 1258, 1275 (Colo.1985). In 1987, the Colorado General Assembly enacted a statute expressing the *Savio* common law standard for the unreasonable delay or denial of claims. *See* C.R.S. § 10-3-1113. The statute provides as follows:

> (1) In any civil action for damages founded upon contract, or tort, or both against an insurance company, the trier of fact may be instructed that the insurer owes its insured the duty of good faith and fair dealing, which duty is breached if the insurer delays or denies payment without a reasonable basis for its delay or denial.
>
> (2) Under a policy of liability insurance, the determination of whether the insurer's delay or denial was reasonable shall be based on whether the insurer's delay or denial was negligent.
>
> (3) Under a policy of first-party insurance, the determination of whether the insurer's delay or denial was reasonable shall be based on whether the insurer knew that its delay or denial was unreasonable or whether the insurer recklessly disregarded the fact that its delay or denial was unreasonable.
>
> (4) In determining whether an insurer's delay or denial was reasonable, the jury may be instructed that willful conduct of the kind set forth in section 10-3-1104(1)(h)(I) to (1)(h)(XIV) is prohibited and may be considered if the delay or denial and the claimed injury, damage, or loss was caused by or contributed to by such prohibited conduct.

The provisions of section (2) apply where an insurer has delayed or denied coverage for benefits owed to the insured under the liability portion of the policy, i.e., for defense and indemnification for a claim brought by a third-party. The provisions of section (3) apply where the insurer has delayed or denied first-party benefits to the insured for indemnification.

As per section (4) of this statute, the jury may consider the following exhaustive list of practices to be unreasonable:

(I) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(II) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(III) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(IV) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

(V) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(VI) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;

(VII) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

(VIII) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

(IX) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;

(X) Making claims payments to insureds or beneficiaries not accompanied by statement setting forth the coverage under which the payments are being made;

(XI) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(XII) Delaying the investigation or payment of claims by requiring an insured or claimant, or the physician of either of them, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(XIII) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

> (XIV) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

C.R.S. § 10-3-1104(1)(h)(I) to (1)(h)(XIV).

Under common law bad faith claims, an insured can recover damages based on traditional tort principles. Compensatory damages for economic and non-economic losses are available to make the insured whole and, where appropriate, punitive damages are available to punish the insurer and deter wrongful conduct by other insurers. Non-economic losses recognized under the rubric of compensatory damages include emotional distress; pain and suffering; inconvenience; fear and anxiety; and impairment of the quality of life. *Goodson v. Am. Standard Ins. Co.* at 415 (internal citations omitted). The basis for tort liability is the insurer's conduct in unreasonably refusing to pay a claim and failing to act in good faith, not the insured's ultimate financial liability. Therefore, the fact that an insurer eventually pays an insured's claims will not prevent the insured from filing suit against the insurer based on its conduct prior to the time of payment. *Id.* at 414.

A common law tort claim of bad faith includes the entire course of the insurer's conduct until the time of trial. Evidence of bad faith conduct that occurs after the filing of the initial complaint is admissible because the evidence is a continuation of the same difficulties that preceded the filing of the complaint, and is relevant as evidence of a pattern of an insurer's bad faith dealings with an insured. Therefore, because bad faith breach of insurance contract encompasses an entire course of conduct, an insurer's ongoing bad faith conduct is relevant to a common law bad faith claim, but does not result in any additional bad faith claims. *Kisselman v. Am. Family Mut. Ins. Co.*, 292 P.3d 964, 970 (Colo. App. 2011) (internal citations omitted).

Where an insured has assigned his or her common law bad faith claims to a third-party claimant, the third-party claimant likely cannot recover exemplary damages absent the insured bringing the claim directly. In other words, if the third-party claimant takes an assignment of the insured's rights, but then fails to also have the insured directly bring the suit against the insurer, with the third-party claimant as an additional plaintiff, exemplary damages are likely not available to the third-party claimant. This is because exemplary damages constitute a penalty, and claims to recover penalties are not assignable under Colorado law. *See Hernandez v. Am. Standard Ins. Co.*, 11-CV-03076-RBJ (D. Colo. Dec. 16, 2013); *see also Kruse v. McKenna*, 178 P.3d 1198, 1201 (Colo. 2008).

Regarding the second class of bad faith claims, those brought directly pursuant to statutes enacted in 2008, insureds may bring claims against an insurer if the insurer unreasonably delays or denies payment for benefits owed to or on behalf of any first-party claimant. C.R.S. § 10-3-1115(1)(a). The insurer's conduct will be considered unreasonable under this statute if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis. *Id.* § 10-3-1115(2).

Available penalties for violating § 10-3-1115 include attorney's fees, costs, and two times the covered benefit. C.R.S. § 10-3-1116(1). As a practical matter, if the insured prevails on a statutory claim, they will be awarded the covered benefit, i.e. the wrongfully withheld contractual benefit, plus

two times that amount and their costs and attorney's fees. An insured may bring both common law and statutory bad faith claims in the same action, although the insured will be prohibited from double recovery under the statutory and common law claims. *See* § 10-3-1116(4).

Section 10-3-1115 specifically provides that it is only available to first-party claimants. *Id.* § 10-3-1115(1)(b)(I). Because of this, statutory bad faith claims under § 10-3-1115 and 1116 are in all likelihood not assignable to third-party claimants. See Erin Robson Kristofco, *CRS §§ 10-3-1115 and -1116; Providing Remedies to First-Party Claimants*, 39 Colo. Law. 69, 70 (July 2010):

> It is unclear whether § 1115(1)(b)(II) applies to an insured seeking coverage for defense and indemnity obligations from the insured's own liability insurance carrier. In *New Salida Ditch Co., Inc. v. United Fire & Cas. Ins. Co.*, New Salida's §§ 1115 and 1116 claims were dismissed because, among other reasons, the court found that the claims were third-party claims based on the insurer's failure to provide coverage under a general liability policy; therefore, they were excluded by § 1115(1)(b)(II). This decision currently is on appeal to the Tenth Circuit.
>
> On appeal, the appellant New Salida referred to an affidavit from Daniel W. Patterson, who was involved in the drafting of CRS § 10-3-1115. He stated that the intent of subsection II "was to preclude claims by individuals who were assignees under *Bashor* agreements."

A statutory bad faith claim under §§ 10-3-1115 and 1115 likely also constitutes a "penalty" under Colorado law, and would therefore not be assignable.

10. Mandatory Arbitration Rules

Absent a contractual provision to the contrary, there is no mandatory arbitration in Colorado. The statutes which formerly set forth the requirements for mandatory arbitration were repealed effective July 1, 1991. *See* C.R.S. §§ 13-22-401 to 13-22-411 (Repealed).

Connecticut

1. Comparative Fault – Connecticut Contributory negligence has been replaced by comparative negligence in causes of action based on negligence, with recovery diminished by a plaintiff's percentage of negligence. Recovery is barred if plaintiff's proportionate share of negligence is greater than combined negligence of all persons and parties to whom negligence is apportioned. Conn. Gen. Stat. §52-572h(b)..

2. Insurance Minimum Limits – Owners or operators of a private passenger vehicle must insure liability for personal injury or death at a minimum of $20,000 per person/$40,000 per accident/$10,000 for property damage. Conn. Gen. Stat. §14-112(a). Owners or operators of motorcycles are subject to the same minimum limits, but policy may include an exclusion for personal injury coverage for passengers. Conn. Gen. Stat. §14-289f. Amounts vary for buses, taxicabs, student transportation vehicles, and livery vehicles based upon seating capacity. Conn. Gen. Stat. §14-29.

3. Statute of Limitations

Negligence: 2 years from date when injury is first sustained or discovered or in exercise of reasonable care should have been discovered, except that no such action may be brought more than 3 years from date of act or omission complained of. Conn. Gen. Stat. §52-577, 584.

Negligent Construction: Same as general negligence.

Product Liability: A product liability action must be brought within 3 years from date when injury, death or property damage is first sustained or discovered or in exercise of reasonable care should have been discovered, except that no action may be brought against any party more than 10 years from date that such party last parted with possession or control of product. Conn. Gen. Stat. §52-577a(a). There are, however, exceptions to this 10-year limitation. Pursuant to Conn. Gen. Stat. §52-577a(c), a plaintiff who is not entitled to workers' compensation benefits may bring an action if alleged harm occurred within the "useful safe life" of product, which is a question of fact. Additionally, pursuant to Conn. Gen. Stat. §52-577a(d), 10-year limitations period is extended pursuant to terms of any written warranties and does not preclude an action against a product seller who intentionally misrepresents or fraudulently conceals information about product (provided that misrepresentation or fraudulent concealment proximately caused harm to plaintiff). Lastly, pursuant to Conn. Gen. Stat. §52-577a(e), 10-year limitation is inapplicable to asbestos claims.

Wrongful Death: 2 years from date of death and no more than 5 years from date of act or omission complained of. Conn. Gen. Stat. §52-555.

Breach of Contract: Written, Simple or Implied Contracts (exclusive of any contract governed by UCC): 6 years, although any person legally incapable of bringing such action when right of action accrues may sue within 3 years of becoming legally capable. Conn. Gen. Stat. §52-576.
Oral Contract (exclusive of any contract governed by UCC): 3 years. Conn. Gen. Stat. §52-581.

Unlawful Trade Practices: Connecticut Unfair Trade Practices Act: 3 years: Conn. Gen. Stat. §42-110g(f).

4. Punitive Damages and Damages Caps

Punitive Damages: Under Connecticut law, common law punitive damages are limited to amount of plaintiff's actual litigation expenses, including attorneys' fees. Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co., 193 Conn. 208, 477 A.2d 988 (1984). In tort actions, punitive damages may be awarded when evidence shows a reckless indifference to rights of others or an intentional and wanton violation of those rights. Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825 (1967). Actual intention to do harm need not be proven for a punitive damage award to be upheld. Id.

Double or treble damages may be awarded in automobile accident cases under statutorily defined circumstances involving specific statutory vehicle violations. Conn. Gen. Stat. §14-295.

No statutory limit for punitive damages available for violations of Connecticut Unfair Trade Practices Act. Conn. Gen. Stat. §42-110g.

Non-Economic Damages Cap: In Connecticut, there are no non-economic damages caps.

5. Collateral Source Rules - In a personal injury or wrongful death action, there may be a reduction in economic damages for collateral source payments received by claimant. Conn. Gen. Stat. §52-225a. To extent that plaintiff's recovery of economic damages is reduced due to comparative negligence, collateral source reduction may be lessened or nullified.

In addition, any amounts paid by or on behalf of plaintiff to secure collateral source benefits are deducted from amount by which award is reduced. Types of payments which typically come within collateral source rule include insurance proceeds, medical benefits and payments made pursuant to any contract or agreement of any group or corporation, which provide, pay for or reimburse cost of hospital, medical, dental or other health care services. Conn. Gen. Stat. §52-225b.

Excluded as collateral sources are life insurance benefits, whether purchased by claimant or provided by others. Conn. Gen. Stat. §52-225b. Also, there shall be no collateral source reduction where a right of subrogation exists. Conn. Gen. Stat. §52-225a(a); In addition, amounts received from settlements with other entities are not considered collateral sources. Conn. Gen. Stat. §52-225b.

6. Expert Admissibility Standard – Connecticut has adopted the Daubert test for determining admissibility of scientific evidence and abandons Frye test. Prentice v. Dalco Electric, Inc., 280 Conn. 336, 907 A.2d 1204 (2006); State v. Porter, 241 Conn. 57, 698 A.2d 739 (1997) (relying on Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993)). Under Daubert test, if methodology underlying a scientific opinion has requisite validity, testimony derived from that methodology meets threshold for admissibility. However, scientific opinion may still be excluded under other evidentiary grounds.
The trial court judges are vested with responsibility of ensuring that expert testimony is both reliable and relevant. In Daubert, the United States Supreme Court offers four non-exclusive factors to consider in determining threshold admissibility of scientific opinion: 1) whether theory or technique has been tested; 2) whether theory or technique has been subjected to peer review and publication; 3) known potential rate of error; and 4) whether theory or technique has gained a general acceptance within scientific or relevant community.

In Connecticut, in addition to Daubert factors, trial court may also consider following non-exclusive factors: 1) prestige and background of expert; 2) extent to which scientific theory or technique depends on subjective interpretation by ex-pert; 3) whether expert can explain data and methodology in a manner in which trier of fact can reasonably reach his own conclusion; and 4) whether theory or technique is developed solely for in-court use. State v. Porter, supra.

7. First Party Notice Requirements – In the context of notice provisions, "as soon as practicable" means "as soon as can reasonably be expected under the circumstances." The duty to give notice does not arise unless and until facts de-velop which would suggest to a person of ordinary and reasonable prudence that liability may have been incurred, and is complied with if notice is given within a reasonable time after the situation so assumes an aspect suggestive of a possible claim for damages. Arrowood Indem. Co. v. King, 304 Conn. 179, 199 (Conn. 2012). If notice is untimely, the insurer has the burden of proving that it has been prejudiced by the untimely notice. Id.

8. Insurer Duty to Defend – Duty to defend is broader than duty to indemnify and rests solely on whether allegations of complaint bring claim within scope of policy. Insurer may not refuse to defend unless a comparison of policy with complaint shows on its face that there is no potential for coverage. Moreover, in determining duty to defend, insurer may not look beyond four-corners of complaint to underlying facts. Rule applies even where suit is meritless or lacks factual basis. Imperial Cas. & Indem. Co. v. State, 246 Conn. 313, 714 A.2d 1230 (1998). However, the four-corners rule does not apply to insurer's determination that defendant is insured under its liability policy. In that context, the insurer is required to provide a defense where it has actual knowledge of

facts establishing a reasonable possibility of coverage. Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co., 274 Conn. 457, 876 A.2d 1139 (2005). If complaint alleges liability which policy does not cover, insurer is not required to defend. QSP, Inc. v. Aetna Cas. & Surety Co., 256 Conn. 343, 773 A.2d 906 (2001). If insurer breaches duty to defend, insurer will be liable for total amount of any judgment rendered, up to limits of policy, in addition to costs reasonably incurred in defense of action. R.T. Vanderbilt Co. v. Continental Casualty Co., 273 Conn. 448, 870 A.2d 1048 (2005). The breach will be considered a waiver of the insurer's right to defend under a reservation of rights, and, thus, a waiver of the insurer's opportunity to lodge a post-verdict challenge to the duty to indemnify. Missionaries of the Company of Mary, Inc. v. Aetna Cas. & Sur. Co., 155 Conn. 104, 230 A.2d 21 (1967).

9. Bad Faith Claims against Insurers

Bad Faith

An insurer has a duty to act in good faith and fairly in handling an insured's claim and further has a duty not to unreasonably withhold payments due under a policy. Bad faith implies a design to mislead or to deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake as to the insurer's rights or duties. Violations of express duties under an insurance policy, i.e. a failure to pay benefits, appoint counsel, or indemnify the insured for covered liability losses, are necessary to maintain a bad faith cause of action. Capstone Bldg. Corp. v. Am. Motorists Ins. Co., 308 Conn. 760 (Conn. 2013). Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. It contemplates a state of mind affirmatively operating with furtive design or ill will. Buckman v. People Express, 205 Conn. 166, (1987).

A failure to investigate a claim alone will not constitute bad faith. A discretionary investigation is often necessary to assess the duty to defend or indemnify under the policy, however a bad faith action looks to the insurer's conduct depriving the insured of contractual benefits, rather than the investigatory step. Capstone Bldg. Corp. v. Am. Motorists Ins. Co., 308 Conn. 760 (Conn. 2013).

Importantly, there is no claim in Connecticut for bad faith to third parties. A third party claimant is owned no particular duty in this context and cannot maintain an action against the insurer. Macomber v. Travelers Prop. & Cas. Corp., 261 Conn. 620, 642 (2002). As explained by the Supreme Court, "such a duty would interfere with the insurer's ability to act primarily for the benefit of its insured[.]" The Connecticut courts that have considered the issue of whether a third party can assert a cause of action for a breach of the covenant of good faith and fair dealing have concluded that Connecticut does not recognize such a cause of action. See, e.g., Chapell v. Larosa, Superior Court, judicial district of New London, Docket No. CV-99-0552801 (January 5, 2001) (2001 Conn. Super. LEXIS 60, *7-13) (the court struck the plaintiff's claims for breach of covenant of good faith and fair dealing reasoning that an insurer does not owe a duty to a third party unless language to that affect is included in the policy); Chieffo v. Yannielli, Superior Court, judicial district of Waterbury, Docket No. CV 00 0159940 (July 10, 2001, Doherty, J.). ("An insurance company does not have a duty to settle fairly with third-party claimants . . . nor does a claimant have a direct cause of action against an insurance company of the tortfeasor." (Internal quotation marks omitted.)).

Negligent Failure to Settle

In Connecticut, the failure to settle by an insurer is not subjected to the bad faith standard discussed above. Instead, Connecticut courts apply a negligence standard. Connecticut has long recognized a cause of action for negligent failure to settle a claim. "In situations analogous to that presented by this case courts have applied varying standards by which to determine whether or not an insurer is liable to an insured for failing to settle a claim. These may be generally summarized as a requirement of good faith and honest judgment on the part of the insurer or one that the insurer should use that care and diligence which a person of ordinary prudence would exercise in the management of his own business." Hoyt v. Factory Mutual Liability Ins. Co., 120 Conn. 156 (1935).

The basis for judicial imposition on liability insurers of a duty to exercise due care with respect to opportunities to settle within the policy limits is that the company has exclusive control over the decision concerning settlement within policy coverage, and company and insured often have conflicting interests as to whether settlement should be made. What gives rise to the duty and measures its extent is the conflict between the insurer's interest to pay less than the policy limits and the insured's interest not to suffer liability for any judgment exceeding them. Bourget v. Government Employees Ins. Co., 456 F.2d 282, 285 (2d Cir. Conn. 1972).

It is not necessary that the insurer only consider the insured's interests, rather the insurer is obligated to fairly and timely consider both interests. United Services Automotive Ass'n v. Glens Falls Ins. Co., 350 F.Sup. 869, 871 (D.Conn. 1972) ("[i]n determining whether to accept or reject an offer of compromise, the insurer not only may consider its own interests but also must equally respect the insured's interests. If it fails to exercise good faith or due care in its consideration of an offer of settlement, the insurer may be held liable under causes of action which sound in tort or contract, or both"). "The mere fact that the case could have been, but was not, settled within policy limits would not impose liability on the defendant." Knudsen v. Hartford Acci. & Indem. Co. 26 Conn. Supp. 325, 327, 222 A.2d 811 (1966).

10. Mandatory Arbitration Rules – Connecticut will enforce mandatory arbitration provisions in insurance policies. This occurs most frequently in the context of Uninsured/Underinsured Motorist cases. The Uninsured/Underinsured motorist statute (Conn. Gen. Stat. §38a-336) mandates that automobile liability policies which provide for arbitration must also provide for arbitration of coverage disputes, a different standard of judicial review applies in such cases. In context of such compulsory arbitrations, reviewing court must conduct a de novo review of arbitrators' interpretation and application of law. American Universal Ins. Co. v. DelGreco, 205 Conn. 178, 530 A.2d 171 (1987). Supreme Court has defined de novo review standard to be "substantial evidence" test utilized by courts in review of factual determinations by administrative agencies. Chmielewski v. Aetna Cas. & Sur. Co., 218 Conn. 646, 591 A.2d 101 (1991). While parties to an arbitration may agree to limit authority of arbitrators, courts will subject such restrictions to close scrutiny. See e.g. Bodner v. USAA, 222 Conn. 480, 610 A.2d 1212 (1992).

Connecticut also has compulsory arbitration in certain automobile property damage cases. Conn. Gen. Stat. § 38a-9(b)(1) provides that "[t]he Division of Consumer Affairs shall provide an independent arbitration procedure for the settlement of disputes between claimants and insurance companies concerning automobile physical damage and automobile property damage liability claims in which liability and coverage are not in dispute." Following the statutes language, the Insurance Department's Regulation § 38a-10-1 states that "[t]his regulation shall apply to any person engaged

in the settlement of claims with respect to first party motor vehicle physical damage claims and third party property damage liability claims of residents of this state arising under an insurance policy insuring a private passenger motor vehicle when coverage and liability are not in dispute." These provisions allow a third party claimant to force an insurer to arbitrate a property damage dispute.

Finally, Connecticut has a mandatory arbitration procedure in civil cases where the value is less than $50,000. While participation in the process is mandatory, the award may be vacated by either the plaintiff or the defendant.

Delaware

1. **Comparative Fault**

   Delaware is a modified comparative negligence state. A plaintiff may recover damages if not more than 50% at fault. 10 *Del. C.* § 8132. Furthermore, a plaintiff's recovery will be reduced by the percentage of plaintiff's negligence. 10 *Del. C.* § 6301 et seq.

2. **Insurance Minimum Limits –**
   a. Liability/Property (21 *Del. C.* § 2118)
      i. $15,000 – bodily injury to or death of one person in any one accident
      ii. $30,000 – bodily injury to or death of two or more persons in any one accident
      iii. $10,000 – injury to or destruction of property of others in any one accident
   b. Uninsured/Underinsured

   UM is not mandatory but must be offered to the policyholder. Policyholder does not have to accept but must reject in writing. The Insurance Company must also offer the policyholder the option to purchase additional UM coverage up to $100,000/$300,000 or $300,000 single limit but not to exceed the limits for bodily injury liability coverage set forth in the basic policy. 18 *Del. C.* § 3902.

3. **Statute of Limitations**
   a. Personal Injury (including wrongful death)
      i. Two years from the date of the occurrence. 10 *Del. C.* §§ 8107; 8119
   b. Negligent Construction
      i. Six years from whichever of the following dates is earliest (10 *Del. C.* § 8127):
         1. Completion date in contract
         2. Specific contractual completion date of a phase or segment of work
         3. Statute of limitations commencement date provided for in the contract
         4. Payment in full is received for either completion of a phase of construction or construction as a whole
         5. Date when completion of an improvement has been substantially completed
         6. Date when improvement has been accepted as provided in the contract
   c. Product Liability

      Two years from the date of the occurrence. 10 *Del. C.* § 8107

d. Wrongful Death

Two years from the date of the occurrence. 10 *Del. C.* § 8107

e. Breach of Contract
   i. Three years. 10 *Del. C.* § 8106
   ii. Four years for contracts under Article 2 of the UCC. 6 *Del. C.* § 2-725
   iii. Up to 20 years for contracts involving at least $100,000 so long as such a period is specified in the written contract. 10 *Del. C.* § 8106(c)

f. Unlawful Trade Practices

A private action may be brought no more than three years after the cause of action accrues. 10 *Del. C.* § 8106(a).

4. Punitive Damages and Damages Caps

a. Punitive Damages

Delaware law allows for the awarding of punitive damages. *Jardel Co., Inc. v. Hughes*, 523 A.2d 518 (Del. 1987). The amount of punitive damages awarded must be reasonably proportionate to the amount of compensatory damages awarded. *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174 (Del. 2000). Punitive damages may not be levied unless the plaintiff has also been awarded some kind of compensatory damages, even if those damages are nominal. *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069 (Del. 1983). Punitive damages are only appropriate where the trier of fact has found by clear and convincing evidence that the defendant's behavior or conduct was outrageous, intentional, due to evil motive or exhibited reckless indifference to the rights of others. *Jardel*, 523 A.2d at 530. However, in a breach of contract suit, punitive damages will not be allowed absent a showing of willful or malicious conduct. *E.I. du Pont de Nemours and Co. v. Pressman*, 679 A.2d 436 (Del. 1996).

b. Damages Cap

Delaware has no cap on punitive damages so long as the punitive damages are proportionate to the award of compensatory damages. *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174 (Del. 2000). In addition, without express statutory authorization, the Court of Chancery may not award punitive damages. *Kaye v. Pantone, Inc.*, 395 A.2d 369 (Del. Ch. 1978).

5. Collateral Source Rules

The collateral source rule provides that a tortfeasor has no right to a credit or reduction of damages because of payments received by an injured party from an independent source. Delaware has adopted, and rigorously applies, the collateral source rule. *Yarrington v. Thornburg*, 205 A.2d 1 (Del. Supr. 1964). The rule is based upon the theory that a tortfeasor has no right to benefit from money received from independent sources and it is better for an innocent plaintiff to receive a windfall through double recovery than for a tortfeasor to receive a windfall by escaping the full cost of his or her tortious act. *See, e.g., Campbell v. Brandenburger*, 162 A. 354 (Del. Supr. 1932).

There are two requirements in order to apply the collateral source rule. First, the source of funds must be unrelated to the tortfeasor, meaning the tortfeasor is allowed to present any evidence of a collateral source to which the tortfeasor had contributed. *Yarrington*, 205 A.2d 1. Second, the plaintiff must have paid some amount of consideration for the collateral source, even if the amount was very small. *Kerr v. Onusko*, 2004 WL 2735456 at *1 (Del. Super. 2004); *but see State Farm Mut. Auto. Ins. Co. v. Nalbone*, 569 A.2d 71 (Del. 1989) (payments from an employer's sick leave policy that employee did not pay any consideration for barred recovery for lost work time). One prominent exception to the consideration requirement is Medicaid payments, where the lack of consideration does not bar application of the collateral source rule. *Pardee v. Suburban Propane, L.P.,* 2003 WL 21213413 (Del. Super. 2003); *but see Stayton v. Delaware Health Corp.*, 117 A.3d 521 (Del. 2015) (collateral source rule does not apply to Medicare write-offs). There are two other exceptions to the collateral source rule. The first is that medical malpractice plaintiffs may not receive a double recovery from Social Security or Medicare. 18 *Del. C.* §6862. Second, a plaintiff may not present evidence of lost earnings or medical expenses in an auto insurance context if those costs are covered by the collateral source of PIP coverage. 21 *Del. C.* § 2118(h).

6. Expert Admissibility Standard

Delaware has adopted the *Daubert* standard and the Delaware Supreme Court has confirmed that Delaware Rule of Evidence 702 is based on its federal counterpart. Not only is the language of D.R.E. 702 materially similar to the language of Rule 702 of the Federal Rules of Evidence, but the Delaware Supreme Court has adopted relevant federal precedent concerning expert evidence. *Bowen v. E.I. Dupont De Nemours & Co.*, 906 A.2d 787 (Del. 2006) (adopting *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)).

7. First Party Notice Requirements

The Delaware Supreme Court has held that even if an insurance policy requires notice 'as soon as practicable', a court will use a two-part test to find if the insurer escapes liability based upon late notice. *Falcon Steel Co. v. Maryland Cas. Co.*, 366 A.2d 512, 514 (Del. Super. 1976). The first part of the test is whether "notice was given within a reasonable time in view of the facts and circumstances of the particular case." *Id.* Even if the court finds that the notice was not given within a reasonable time, the insurer must also prove that prejudice has resulted to the insurer from the delay in reporting. *Id.* Therefore, under Delaware precedent the existence or lack of a notice requirement in an insurance policy does not matter when determining if the insurer escapes liability unless the insurer can prove both parts of the test.

8. Insurer's Duty to Defend

In Delaware, the insurer's duty to defend arises where the facts alleged in the underlying complaint potentially support a covered claim. *Virtual Business Enterprises, LLC v. Maryland Cas. Co.*, 2010 WL 1427409, at *4 (Del. Super.). If an insured can

show that the complaint "read as a whole, alleges a risk potentially within the coverage of the policy" the duty to defend will arise. *Cont'l Cas. Co. v. Alexis I. DuPont Sch. Dist.*, 317 A.2d 101 (Del. 1974). When deciding if the duty to defend arises, a court is not constrained by the language in the underlying complaint. In addition, the court may consider all reasonable inferences that can be drawn from the complaint. *Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246 (Del. 2008). A Delaware court will follow three principles when determining if an insurer is bound to defend an action: (1) where this is doubt as to whether the complaint alleges a risk insured against, that doubt should be resolved in favor of the insured; (2) any ambiguity in the pleadings should be resolved against the carrier: and (3) if even one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises. *Id.*

9. Bad Faith Claims against Insurers

Delaware law recognizes a cause of action for bad faith against a first-party insurer. *See e.g. Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254 (Del. 1995). In order to establish a bad faith claim the insured must show (1) that the insurer denied insurance benefits to the insured; and (2) the denial of insurance benefits was clearly without any reasonable justification. *Id.* at 264. These claims can be predicated on an insurer's failure to investigate, process, or pay an insurance claim. *Id.*

Under Delaware law, a bad faith action against the insurer is considered a breach of contract claim and therefore damages are normally confined to the actual amount owed, plus interest. *Maccari v. Bituminous Cas. Corp.*, 447 F. App'x 340 (3d Cir. 2011). However, punitive damages are available if the insured can show the denial of benefits was "particularly egregious." *Tackett*, 635 A.2d 254 at 265. In addition, attorney's fees are recoverable. *Casson v. Nationwide Ins. Co.*, 455 A.2d 361 (Del. Super. Ct. 1982). Finally, the statute of limitations for bringing a bad faith claim is three years. 10 *Del. C.* § 8106.

10. Mandatory Arbitration Rules

10 *Del. C.* § 5701, *et seq.* is Delaware's version of the Uniform Arbitration Act. § 5701 states that "a written agreement to submit to arbitration any controversy existing at or arising after the effective date of the agreement is valid, enforceable and irrevocable."

In 2015, the Delaware General Assembly passed The Delaware Rapid Arbitration Act ("DRAA"). The DRAA applies when an arbitration agreement is signed by both parties and at least one of the parties is a business either organized under Delaware law or has its principal place of business in Delaware. 10 *Del. C.* § 5803(a). No party can be a consumer and the arbitration agreement must include an express reference to the DRAA. *Id.* The arbitration is then administered by the Delaware Court of Chancery and the arbitrator must issue a final award within 180 days after appointment. 10 *Del. C.* § 5803(b). Various other clauses are designed to streamline

the arbitration process. *See e.g.* 10 *Del. C.* § 5803(c)(3) (stating a party has deemed to have waived the right to appeal or challenge an interim ruling or order of an arbitrator).

Florida

1. Comparative Fault

Florida is a pure comparative fault state. It is possible for a plaintiff to be found 99 percent at fault for his or her damages and still recover for a defendant's 1 percent of contributory negligence. Total damages awarded are reduced proportionally to the percentage of fault that is assessed to the plaintiff. Fla. Stat. § 768.81(2).

In a case with multiple defendants, the default rule is to apportion liability according to the judge or jury's determination of each defendant's negligence. Fla. Stat. § 768.81(3). The doctrine of joint and several liability has been almost entirely abolished, but remains in a few statutory exceptions such as: section 403.141, Florida Statutes, which creates joint and several liability for pollution of air or water; or section 517.211, Florida Statutes, providing joint and several liability for those who engage in unlawful sales of securities. Similarly, a defendant who is liable based on vicarious liability is responsible for the full liability of the actively negligent defendant. *Grobman v. Posey*, 863 So. 2d 1230, 1235 (Fla. 4th DCA 2003).

Another important feature of Florida torts is a defendant's right to allocate fault to a nonparty. Fla. Stat. § 768.81(3)(a). The defendant must plead the fault of the nonparty before trial, and the defendant bears the burden to prove the nonparty's fault by a preponderance of the evidence. *Id.* "It is accepted practice to include all tortfeasors in the apportionment question. This includes nonparties who may be unknown tortfeasors, phantom drivers, and persons alleged to be negligent, but not liable in damages to the injured party such as in the third party cases arising in the workmen's compensation area." *Fabre v. Marin*, 623 So. 2d 1182, 1187 (Fla. 1993) (receded from in part by *Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 249 (Fla. 1995)).

2. Insurance Minimum Limits

The only insurance minimum requirements in Florida exist in the context of motor vehicles. Section 324.021 and Chapter 627, Florida Statutes, set forth Florida's mandatory insurance requirements for motor vehicles. Florida's minimum motor vehicle liability insurance requirements are as follows:

- Bodily Injury and Property Damage: $10,000 per person; $20,000 per accident for bodily injury to others; and $10,000 per accident for damage to property of others. Fla. Stat. § 342.021.

- Personal Injury Protection: $10,000 in medical and disability and $5,000 in death benefits. Fla. Stat. § 627.736.

- Uninsured and underinsured (UM/UIM): Uninsured and underinsured motorist coverage must be provided with every primary motor vehicle liability policy, unless the insured explicitly rejects to purchase such coverage in writing. Fla. Stat. § 627.727(1). "The limits of uninsured motorist coverage shall be not less than the limits of bodily injury liability insurance purchased by the named insured, or such lower limit complying with the rating plan of the company as may be selected by the named insured." Fla. Stat. § 627.727(2). *See also Kimbrell v. Great Am. Ins. Co.*, 420 So. 2d 1086 (Fla. 1982).

Section 627.7415, Florida Statutes, sets forth the minimum insurance requirements for commercial vehicles. Combined bodily liability and property damage coverage must be at least:

- $50,000 per occurrence for a vehicle with a gross weight between 26,000 and 35,000 pounds

- $100,000 per occurrence for a vehicle with a gross weight between 35,000 and 44,000 pounds

- $300,000 per occurrence for a vehicle with a gross weight greater than 44,000 pounds.

3. Statute of Limitations

Unless changed by statute, a limitation period runs from the time the cause of action accrues. A cause of action accrues when the last element constituting the cause of action occurs. Fla. Stat. § 95.031.

Negligence: An action founded on negligence shall be brought within four years. Fla. Stat. § 95.11(3)(a).

Negligent Construction: For a patent defect, which can be discovered using reasonable care, an action must be commenced within four years from the date of actual possession by the owner, the date of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the construction contract, whichever is latest. Fla. Stat. § 95.11(3)(c). For a latent defect, the action must commence within four years of the time the defect is discovered or should have been discovered by due diligence. *Id.* In no event can an action to recover for a latent defect commence more than ten years after the latest of the dates listed above. *Id.*

Breach of Contract: A breach of a written contract claim must be brought in five years. Fla. Stat. § 95.11(2)(b). A claim for breach of an oral contract must be brought within four years. Fla. Stat. § 95.11(3)(k).

Professional Malpractice: Malpractice actions, besides medical, must be commenced within two years. The period of limitations runs from the time the cause of action is discovered or should have been discovered, and claims are limited to persons in privity with the professional. Fla. Stat. § 95.11(4)(a). In the context of legal malpractice, a malpractice claim is hypothetical and damages are speculative until the underlying action is concluded with an adverse outcome to the client. *Silverstone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998). Redressable harm is not established until final judgment is rendered. *Chapman v. Garcia*, 463 So. 2d 528, 529 (Fla. 3d DCA 1985). Thus, a legal malpractice

cause of action does not accrue until the conclusion of the underlying judicial proceeding. *Blumberg v. USAA Casualty Insurance Company*, 790 So. 2d 1061, 1065-66 (Fla. 2001). Conclusion of a judicial proceeding includes exhaustion of appellate rights.

Medical malpractice claims must be commenced within two years of the date of the incident or date the incident should have been discovered. In no case is the limitation period to exceed four years unless fraud, concealment, or misrepresentation of fact prevented discovery of the injury. If discovery of the injury was prevented, seven years from the date of the incident is the maximum time within which a claim can be filed. Fla. Stat. § 95.11(4)(b).

Products Liability: The statute of limitations for a product liability claim is four years from the date the last element of the cause of action was discovered or should have been discovered. Fla. Stat. § 95.11(3)(e). If a product has an expected useful life of ten years or less, no claim can be brought more than 12 years after the product was first purchased. There is a presumption that most products have an expected useful life of ten years or less absent contrary statements by the manufacturer. Fla. Stat. § 95.031(b).

Wrongful Death: An action for wrongful death must be commenced within two years. Fla. Stat. § 95.11(4)(d).

Unfair Trade Practices: Actions brought by consumers under the Florida Deceptive and Unfair Trade Practices Act must be commenced within four years. Fla. Stat. § 95.11(3)(f). *See Yusof Mohamad Excavation, Inc. v. Ringhaver Equip., Co.*, 793 So. 2d 1127 (Fla. 5th DCA 2001). Enforcement actions brought by a state agency must be brought within four years of the occurrence or two years after the last payment in a transaction. Fla Stat. § 501.207(5).

4. Punitive Damages and Damages Caps

Punitive Damages: Punitive damages are available if a plaintiff proves by clear and convincing evidence entitlement to punitive damages, and the punitive damage amount is established by the greater weight of the evidence. Fla. Stat. § 768.725. To prove entitlement to punitive damages, a plaintiff must show intentional misconduct or gross negligence. Fla. Stat. § 768.72. A plaintiff cannot assert a claim for punitive damages until proffering evidence in the record to support a reasonable basis for recovery of such damages. *Reinoso v. Fuentes*, 932 So. 2d 536, 536 (Fla. 3d DCA 2006).

Punitive damages are limited to three times the compensatory damage award or $500,000, whichever is greater, with exceptions. Fla. Stat. § 768.73(1)(a). If the conduct was motivated solely by financial gain, of an unreasonably dangerous nature, and had a high likelihood of causing injury, punitive damages are limited to four times the compensatory award or $2 million, whichever is greater. Fla. Stat. § 768.73(1)(b). There is no punitive damage cap if a jury finds a defendant had a specific intent to harm. Fla. Stat. § 768.73(1)(c).

Nursing homes and assisted living communities may be assessed punitive damages up to the greater of three times compensatory damages or $1 million. Fla. Stat. § 400.0238(1)(a); § 429.298(1)(a). However, similar to punitive damages caps in other cases, if the conduct was motivated solely by financial gain, of an unreasonably dangerous nature, and had a high likelihood of causing injury (all of which was actually known by the facility's managing agent, director, officer, or person responsible

for making policy decisions for the facility), the punitive damages cap is raised to four times the compensatory award or $4 million, whichever is greater. Fla. Stat. § 400.0238(1)(b). There is no cap for punitive damages where the fact finder determines that defendant had a specific intent to harm the plaintiff and actually harmed the plaintiff. Fla. Stat. § 400.0238(1)(c).

Other Damages Caps: In the motor vehicle context, one who leases a vehicle for less than one year may liable for the vehicle's operation only up to $100,000 per person, $300,000 per incident, and $50,000 for property damage. Fla. Stat. § 324.021(9)(b)(2). A vehicle owner who is a natural person and loans the vehicle to another may be liable for its operation only up to the same limits described above. Fla. Stat. § 324.021(9)(b)(3). These limits do not apply to vehicles in commercial use. Fla. Stat. § 324.021(9)(c).

Noneconomic damages for medical malpractice leading to personal injury and wrongful death are capped by section 766.118, Florida Statutes. The limit is set at $500,000 per each claimant and $500,000 per negligent practitioner, regardless of the number of claimants. Fla. Stat. § 766.118(2). However, Florida courts have held that the damages caps found in section 766.118, Florida Statutes, are unconstitutional because the aggregate limits, regardless of the number of claimants, violate the Equal Protection Clause of the Florida Constitution. *Estate of McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014) (holding that the medical malpractice caps on noneconomic damages for wrongful death are unconstitutional); *North Broward Hosp. Dist. v. Kalitan*, 174 So. 3d 403 (Fla. 4th DCA 2015) (holding that the medical malpractice caps on noneconomic damages for personal injury are unconstitutional).

Florida has a limited waiver of sovereign immunity which caps the liability of all Florida state government entities at $200,000 per claimant and a total cap on all damages arising out of the same transaction or occurrence of $300,000. Fla. Stat. § 768.28(5).

Noneconomic damages for personal injury or wrongful death against a designated public addiction treatment facility is capped at $200,000 per claim. Fla. Stat. § 394.9085(1)(b).

5. Collateral Source Rules

Florida's collateral source rule acts as both a rule of evidence and a rule of damages. *See Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1250 (Fla. 2015), *Gormley v. GTE Products Corp.*, 587 So. 2d 455 (Fla. 1991). For trial purposes, payments from collateral source benefits are not admissible because such evidence may confuse the jury with respect to both liability and damages. *Id.* Instead, setoffs for collateral sources are addressed post-verdict by the trial court.

Where liability is determined by the trier of fact and damages are awarded to compensate the claimant for losses sustained, Florida courts make post-trial reductions to the amount of the verdict by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources. § 768.76, Fla Stat. Collateral sources include payments made to the claimant, or made on the claimant's behalf, by or pursuant to Social Security, disability acts, various forms of insurance, as specified, contracts to provide or reimburse the costs of certain medical care, and employers' wage continuation plans. § 768.76, Fla Stat. Contractual discounts of medical bills negotiated by an insurer also fall within the definition of

collateral sources and are therefore subject to setoff. *See Goble v. Frohman*, 901 So. 2d 830 (Fla. 2005); *Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So. 3d 1084 (Fla. 1st DCA 2010).

Benefits received under Medicare or any other federal program providing for a Federal Government lien on, or right of reimbursement from, the plaintiff's recovery, the workers' compensation law, Medicaid, or from certain medical services programs are not considered collateral sources. § 768.76, Fla Stat. *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1250 (Fla. 2015). Moreover, a reduction is required only if the collateral source benefits have been paid or if they are otherwise available to the injured party. *See Rollins v. Pizzarelli*, 761 So. 2d 294 (Fla. 2000); *Allstate Ins. Co. v. Rudnick*, 761 So. 2d 289 (Fla. 2000); *McKenna v. Carlson*, 771 So. 2d 555 (Fla. 5th DCA 2000). Future collateral source benefits are not deductible. *Id.*

6. Expert Admissibility Standard – ***Daubert v. Frye***

Effective July 1, 2013, the Florida Legislature amended section 90.702, Florida Statutes, in order to adopt the standards originally set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for evaluating the admissibility of expert witness testimony. This amendment superseded Florida's long-standing application of the *Frye* standard, which provided that expert testimony based on new or novel scientific principles or methodology was admissible only when the underlying principles are generally accepted in the relevant scientific community.

Section 90.702 provides that expert testimony is admissible if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the expert has applied the principles and methods reliably to the facts of the case. Under section 90.105(1), Florida Statutes, the trial court must make a determination that each of these provisions has been demonstrated by a preponderance of the evidence. This finding is in addition to the traditional requirements that the expert is qualified to express the opinion being offered, and that the testimony will assist the tier of fact in determining a relevant fact or issue in the case.

Significantly, the Florida Legislature also specifically prohibited the introduction of "pure opinion testimony." *See* Ch. 2013-107, Laws of Fla. (citing *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007)); *see also, Perez v. Bell South Telecommunications, Inc.*, 138 So.3d 492 (Fla. 3d DCA 2014) (The "legislative purpose of the new law is clear: to tighten the rules for admissibility of expert testimony in the courts of this state."). *Id.* at 497.

HOWEVER: The change to the evidentiary standard has been a subject of controversy in Florida. On December 4, 2015, the Florida Bar Board of Governors approved a recommendation by the Code and Rules of Evidence Committee that the Florida Supreme Court should not adopt section 90.702, Florida Statutes into the state's evidence rules. ***The Florida Supreme Court will likely address this issue in the very near future.***

7. First Party Notice Requirements

The Florida Insurance Code provides that upon written request, insurers must furnish any person claiming a loss under an insurance contract with a form of proof of loss for completion by the person claiming loss. § 627.425, Fla. Stat. An insured's failure to comply with an insurance policy's

mandatory provision requiring the insured to provide written notice to the insurer of a claim "as soon as practicable" may negate the insurer's coverage obligation. The failure creates a rebuttable presumption of prejudice in favor of the insurer. The insured may recover only on a showing that improper notice did not prejudice the insurer. If the insured cannot make such a showing, the insurer is relieved of any obligation under the policy. *See, e.g., Bankers Ins. Co. v. Macias,* 475 So. 2d 1216, 1218 (Fla. 1985).

Where a policy contains a provision specifying a time period within which notice or proof of loss must be furnished, the time begins to run from the date of the occurrence of the event insured against or from the date the insured acquires knowledge of the event. The term "as soon as practicable" as used in a notice provision of an insurance policy means that notice is to be given within a reasonable time in view of all the facts and circumstances of each particular case. Notice is necessary when there has been an occurrence that should lead a reasonable and prudent person to believe that a claim for damages would arise. *Ideal Mut. Ins. Co. v. Waldrep*, 400 So. 2d 782, 785 (Fla. 3d DCA 1981). What is a reasonable time depends on the surrounding circumstances and is ordinarily a question of fact for a jury. *Deese v. Hartford Acc. & Indem. Co.*, 205 So. 2d 328 (Fla. 1st DCA 1967).

8. Insurer Duty to Defend

If a lawsuit is filed, a liability insurance company's duty to defend is based on the allegations of the complaint. *Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc.*, 358 So. 2d 533, 536 (Fla. 1977). If, upon its face, a complaint states facts which bring the case within coverage under the policy, then the insurer has a duty to defend the insured. *Id.* "[I]f the complaint alleges facts showing two or more grounds for liability, one being within the insurance coverage and the other not, the insurer is obligated to defend the entire suit." *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810, 813-14 (Fla. 1st DCA 1985). If there is any doubt regarding the duty to defend based on the allegations of the complaint, then the doubt must be resolved in the insured's favor requiring the insurer to defend. *Id.*

> The rule is well established that where the complaint alleges facts that clearly do not fall within the policy liability coverage provisions and the insurer nevertheless assumes the defense of the action, the insurer may conduct an investigation and, upon determining the true facts and concluding no coverage exists, may withdraw its defense of the action against the insured without having waived its rights and defenses as to coverage. Similarly, where the original complaint fails to allege facts within the policy coverage, if it later becomes apparent from an amended pleading that claims not originally within the scope of the pleadings are being made which are within the insurance coverage, the insurance carrier, upon notification, would become obligated to defend.

Id. (internal citations omitted). A duty to defend continues through the entirety of the litigation unless pleadings are amended which eliminate the claims that previously gave rise to coverage. *Id.*

If no litigation has been filed or it is unclear whether an insurer has a duty to defend, then the insurer can file a declaratory judgment action seeking a court determination regarding the obligation to defend. *Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5 (Fla. 2004). If a claim for declaratory relief is pending at the same time as an underlying action between the claimant and the insured, a trial court has discretion to determine whether to stay the underlying action pending resolution of the coverage action. *Id.*

9. Bad Faith Claims against Insurers

In Florida, insurers have a duty to deal in good faith with its insureds in connection with the settlement of a disputed claim brought by its insured or by a third-party. Florida recognizes two types of bad faith claims against insurers: (1) common law bad faith in the context of third-party actions; and (2) statutory bad faith actions available in first-party or third-party actions. "Florida common law recognized third-party bad-faith actions involving insurance as early as 1938." *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541, 545 (Fla. 2012). However, first-party bad faith actions did not arise until the enactment of section 624.155, Florida Statutes, in 1982. *Id.*

Third-party bad faith actions arise where "an insured sues his liability insurance company for bad faith in failing to settle a claim which ultimately results in a third-party judgment against him in excess of the policy limits." *Time Ins. Co. v. Burger*, 712 So. 2d 389, 391 (Fla. 1998). There is no right to recovery of attorney's fees in third-party common law bad faith actions.

Florida's statutory bad faith claims are governed by section 624.155, Florida Statutes, or the "Bad Faith Statute." In order for an insured to maintain a first-party bad faith action against an insurer under the Bad Faith Statute, the insured must satisfy two conditions precedent: (1) the filing of a Civil Remedy Notice in accordance with the Bad Faith Statute; and (2) a determination of liability/damages under the insurance contract. *See Vest v. Travelers Insurance Co.,* 753 So. 2d 1270 (Fla. 2000); *Lane v. Provident Life and Accident Ins. Co.,* 71 F. Supp. 2d 1255 (S.D. Fla. 1999); *see also, Blanchard v. State Farm Mutual Automobile Insurance Co.,* 575 So. 2d 1289 (Fla. 1991). A determination of liability/damages under the insurance contract may be obtained either through a lawsuit or an appraisal award. *See Hunt,* 2013 WL 1352471, at *1. The Bad Faith Statute is in derogation of common law and therefore must be strictly construed. *Talat Enterprises, Inc. v. Aetna Cas. & Surety Co.,* 753 So. 2d 1278, 1283 (Fla. 2000). If an insured or third-party claimant prevails on a statutory bad faith claim, they can recover damages, court costs, and attorney's fees. Fla. Stat. § 624.155(4). Punitive damages may be awarded if the violations "occur with such frequency as to indicate a general business practice and these acts are: (a) willful, wanton, and malicious; (b) in reckless disregard for the rights of any insured; or (c) in reckless disregard for the rights of a beneficiary under a life insurance contract." Fla. Stat. § 624.155(5).

As noted above, the first condition precedent to the filing of a statutory bad faith action is the filing of a Civil Remedy Notice with the Florida Department of Insurance and the insurer. Fla. Stat. § 624.155; *Rousso v. Liberty Surplus Ins. Corp.*, 2010 WL 7367059, at *3 (S. D. Fla. 2010) ("[A] claimant that fails to adhere to the notice requirements of Fla. Stat. § 624.155 cannot state a claim for relief under that statute."); *Allstate Ins. Co. v. Clohessy*, 32 F. Supp. 2d 1328, 1333 (M.D. Fla. 1998) (stating that the filing of a Civil Remedy Notice "is, without a doubt, a condition that must be satisfied in order for one to perfect the right to sue under the statute"). The Civil Remedy Notice provides an insurer a sixty-day "cure period" to pay the damages or correct the violations giving rise to the Notice to avoid the filing of a statutory bad faith action. Fla. Stat. § 624.155(3)(d). Case law also

provides that "insurers are not required to pay any amount demanded by their insureds to avoid a bad-faith claim." *Rousso*, 2010 WL 7367059, at *5 (citing *316, Inc. v. Maryland Co.,* 625 F. Supp. 2d 1187, 1194 (N.D. Fla. 2008)).

Pursuant to the Bad Faith Statute, the Notice must state with specificity the following information:

1. The statutory provision, including the specific language, which the authorized insurer allegedly violated;
2. The facts and circumstances giving rise to the violation;
3. The name of any individual involved in the violation;
4. Reference to specific policy language that is relevant to the violation, if any . . .; and
5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

See Fla. Stat. § 624.155(3)(b). The Florida Department of Insurance maintains a website and online form that claimants can complete, which may satisfy the Notice requirement. The insurer can respond to the Notice by asserting that the claimant has not complied with the specificity and notice requirements.

Under the Bad Faith Statute, a party may allege that an insurer violated the following statutory provisions:

1. Section 626.9541(1)(i) - Unfair claim settlement practices;
2. Section 626.9541(1)(o) - Illegal dealings in premiums; excess or reduced charges for insurance;
3. Section 626.9541(1) (x) - Refusal to insure;
4. Section 626.9551 - Favored agent or insurer; coercion of debtors;
5. Section 626.9705 - Life or disability insurance; illegal dealings;
6. Section 626.9706 - Life insurance; discrimination on basis of sickle-cell trait prohibited;
7. Section 626.9707 - Disability insurance; discrimination on basis of sickle-cell trait prohibited;
8. Section 627.7283 - Cancellation; return of premium; and
9. Section 624.155(b)(1)-(3), which states:

> (1) Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests;
> (2) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
> (3) Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

An insurance company should respond to the Notice within the sixty-day period, even if the carrier does not correct or cure the purported violations. "An insurer's failure to respond within the sixty-day period will create a presumption of bad faith sufficient to shift the burden to the insurer to show why it did not respond." *Imhof v. Nationwide Mut. Ins. Co.,* 643 So. 2d 617, 619 (Fla. 1994). Notably, any response to the Civil Remedy Notice may be admitted into evidence at the time of any bad faith trial and is also a matter of public record.

10. Mandatory Arbitration Rules

There is no mandatory arbitration rule in Florida.
However, with respect to property insurance claims, there is a mediation program administered by the Florida Department of Financial Services as set forth in section 627.7015, Florida Statutes, coupled with section 69J-166.031, Florida Administrative Code. A property insurer is required to advise the insured of the mediation program. Fla. Stat. § 627.7015(2). The following property insurance claims are not eligible for mediation under this mediation program: (1) claims where less than $500 are in dispute; (2) the carrier did not have a policy in effect insuring the alleged damaged property on the alleged date of loss; (3) there is no coverage based on the *agreed* facts as to the cause of the loss; and (4) the carrier considers the claim to be fraudulent based on a special investigative unit investigation.
In addition, most Uniform Trial Orders issued throughout the State of Florida will require the parties to participate in mediation before the action can proceed to trial.

Georgia

1. Comparative Fault - Georgia has a modified comparative/contributory negligence rule. If the plaintiff is 50% or more at fault, the plaintiff cannot recover. After accounting for the fault, if any, of the plaintiff, the fact finder shall apportion liability as between those parties and non-parties who contributed to the alleged injury or damages of the plaintiff. See O.C.G.A. §51-12-33. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

2. Insurance Minimum Limits – Liability insurance policies must be issued by insurers licensed to do business in Georgia for no less than:

$25,000 for death or bodily injury to one person
$50,000 for death or bodily injury to two or more persons in one accident; and
$25,000 for damage or destruction of property in a single accident. See O.C.G.A. §33-7-11(a)(1)(A).

Unless an insured rejects uninsured/underinsured motorist coverage in writing, every policy must provide, at the option of the insured, uninsured/underinsured motorist coverage equal to the statutory minimum above, or equal to the limits of liability coverage under the insured's liability coverage in the policy. However, the insured may affirmatively choose uninsured motorist limits in an amount less than the limits of liability insurance down to the minimum limits required by law. See O.C.G.A. §33-7-11.

In addition, an insurer must offer the insured the option of either "excess" or "reduction" uninsured/underinsured motorist coverage. "Excess" coverage makes the full policy limits available to the insured after exhaustion of any available liability coverage. "Reduction" coverage reduces the amount available to an insured by the amount of available liability coverage such that if the limits of liability coverage exceed the amount of an insured's uninsured/underinsured motorist coverage, the insured may not be entitled to any uninsured/underinsured motorist benefits.

3. Statute of Limitations

Injuries to the person: Two years after the right of action accrues.

Loss of consortium: Four years after the right of action accrues.

Injuries to Personalty: Four years after the right of action accrues.

Injuries to Real Property: Four years after the right of action accrues.

Breach of Contract: Six years for written contracts not made under UCC; Four years for all other contracts.

Unlawful Trade Practices: Two years from the date of occurrence or two years after the termination of any action by the State to enforce the Fair Business Practices Act.

4. Punitive Damages and Damages Caps

Punitive Damages: Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. O.C.G.A §51-12-5.1. Punitive damages must be specifically prayed for in a complaint.

In cases involving products liability there is no cap on punitive damages. Likewise, punitive damages are not capped in cases where the evidence demonstrates a defendant acted, or failed to act, with the specific intent to cause harm, or that the defendant acted or failed to act while under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired. O.C.G.A. §51-12-5.1(f).

In all other cases, punitive damages are capped at $250,000. O.C.G.A. §51-12-5.1(g).

5. Collateral Source: The receipt of benefits or mitigation of loss from sources other than the defendant will not operate to diminish the plaintiff's recovery of damages. *Polito v. Holland*, 258 Ga. 54, 55 (1988). Since collateral benefits may not be set off against damages, evidence of collateral benefits is immaterial in a damage case. *Id.* at 56. In addition, the existence of liability insurance is generally inadmissible against a defendant in a liability action. See O.C.G.A. §24-4-411.

6. Expert Admissibility Standard – Daubert v. Frye – Georgia employs the widely recognized *Daubert* rule regarding expert witness testimony. While not binding precedent, federal court decisions interpreting Fed. R. Evid. 702 are considered by Georgia state courts in evaluating the admissibility of expert testimony.

7. First Party Notice Requirements – Prejudice to the insurer is not required for a late notice defense if such a notice provision is made a condition precedent to coverage under the policy. However, if a notice requirement is not a condition precedent, then an insurer must show prejudice to avoid coverage by reason of late notice of the occurrence.

8. Insurer Duty to Defend – Under Georgia law, the insurance contract obligates the insurer to defend claims asserting liability under the policy. *Penn-America Ins. Co. v. Disabled American Veterans*, *Inc.*, 490 S.E.2d at 376. Even if groundless, the allegations of the complaint against the insured are looked to in order to determine whether a liability covered by the policy is asserted. *Id.* Under Georgia law, the insurer's responsibility to defend is not determined solely and exclusively by looking to the complaint. *Great American Ins. Co. v. McKemie*, 259 S.E.2d at 41. An insurer's duty to defend and its duty to indemnify are separate and independent In Georgia, an insurer's duty to defend and its duty to indemnify are separate obligations. *Penn-America Ins. Co. v. Disabled American Veterans, Inc.*, 268 Ga. 564 (1997). The duty to defend is determined by the insurance contract. *Id.*, *citing Great America Ins. Co. v. McKemie*, 244 Ga. 84 (1979). The insurance contract obligates the insurer to defend claims asserting liability under the policy. *Penn-America Ins. Co. v. Disabled American Veterans*, *Inc.*, 268 Ga. at 567. Even if groundless, the allegations in a complaint against the insured are looked to in order to determine whether a liability covered by the policy is asserted. *Id.* In determining whether an insurer must defend its insured, Georgia law directs the court to compare the allegations, as well as the facts supporting those allegations, against the provisions of the insurance contract. *Elan Pharmaceutical Research Corp. v. Employers Ins. of Wausau*, 144 F.3d 1372, 1375 (11th Cir. 1998). An insurer is justified in refusing to defend an insured only if the complaint against the insured does not assert any claim upon which there would be insurance coverage. *City of Atlanta v. St. Paul Fire & Marine Ins. Co.*, 231 Ga. App. 206, 207 (1998).

Under Georgia law, the insurer's responsibility to defend is not determined solely and exclusively by looking to the allegations in the complaint. *McKemie v. Great American Ins. Co.*, 259 S.E.2d at 401. The facts of a case may be such as to require the insurer to defend even though a complaint states facts or claims which seem to place the incident within an exception to or outside the coverage of the insurance contract. *Id., citing State Farm Mut. Automobile Ins. Co. v. Keene*, 111 Ga. App. 480 (1965); *see also Colonial Oil Industries v. Underwriting Subscribing*, 268 Ga. 561 (1977); *Penn-America Ins. Co. v. Disabled American Veterans, Inc.*, 268 Ga. at 567; *Loftin v. U.S. Fire Ins. Co.*, 106 Ga. App. 287 (1962).

9. Bad Faith Claims against Insurers – An insurer that denies coverage or refuses to defend an action against its insured, "waives the provision of the policy against a settlement by the insured and becomes bound to pay the amount of any settlement [within a policy's limits] made in good faith, plus expenses and attorney's fees." *Motors Ins. Co. v. Auto Owners Ins. Co.,* 251 Ga. App. 661, 555 S.E.2d 37 (2001). *Aetna Casualty & Surety Co. v. Empire Fire & Marine Ins. Co.,* 212 Ga. App. 642, 442 S.E.2d 778 (1994); *Georgia Southern Railway Co. v. United States Casualty Co.,* 97 Ga. App. 242, 102 S.E.2d 500 (1958); see also 22 Holmes Appleman on Insurance 2d § 137.10[C](1), p. 194.

Generally, the wrongful refusal to defend a case results in contract damages. *Southern Guar. Ins. Co. v. Dowse*, 278 Ga. 674 (2004) ("In Georgia, an insurer that denies coverage and refuses to defend an action against its insured, when it could have done so with a reservation of its rights as to coverage, 'waives the provisions of the policy against a settlement by the insured and becomes bound to pay the amount of any settlement [within a policy's limits] made in good faith[,] plus expenses and attorneys' fees.'").

In order to establish the amount of contract damages, Georgia courts look to all damages that flow from the insurer's refusal to defend the action including any bad faith conduct on the part of the insurer. *See Argonaut Ins. Co. v. Atlantic Wood*, 187 Ga. App. 471 (1988), *rev'd on other grounds,* 258 Ga. 800, 375 S.E.2d 221 (1989)(The measure of compensatory damages for the insurer's

wrongful refusal to defend includes the following: (a) The policy limits as per the contract, and (b) damages directly caused by the failure to defend, such as, attorney fees and other costs of defense incurred by the insured, and that portion of the judgment exceeding the policy limits which, but for the failure to defend, would not have been awarded in the underlying action.); *see also Thomas v. Atlanta Cas. Co.*, 253 Ga. App. 199 (2001) (Where an insurance company fails to offer a defense, it may be liable to its insured beyond the policy limits to the full amount of the judgment.); *Atlanta Cas. Co. v. Gardenhire*, 248 Ga. App. 42 (2001); *Leader Nat. Ins. Co. v. Kemp & Son, Inc.*, 259 Ga. 329 (1989).

In cases involving personal injury, bodily injury or death arising out of the use of a motor vehicle, a pre-suit demand for an insurer's policy limits made by or with the assistance of an attorney must: (1) be in writing; (2) provide the insurer with at least 30 days from receipt of the offer to respond; (3) state the amount of monetary payment; (4) identify the party or parties to be released if such offer is accepted; (4) identify the type of release, if any, the claimant or claimants will provide to each releasee; and (5) state the claims to be released. O.C.G.A §9-11-67.1.

If an insurer refuses to settle a policy limits demand with knowledge of of clear liability and special damages exceeding the policy limits, an insurer can be liable to its insured for any excess judgment and bad faith penalties. *S. Gen. Ins. Co. v. Holt,* 262 Ga. 267, 269 (1992).

An improper refusal to defend can also trigger "bad faith" penalties under O.C.G.A. § 33-4-6, which includes exposure not only for the policy holder's defense costs and attorney's fees, but also a penalty up to 50% of the insurer's liability for the loss. Bad faith for purposes of O.C.G.A. § 33-4-6 is any frivolous and unfounded refusal in law or in fact to pay according to the terms of the policy. *See King v. Atlanta Casualty Ins. Co.*, 279 Ga. App. 554 (2006); *see also Fortson v. Cotton States Mut. Ins. Co.*, 168 Ga. App. 155 (1983).

Where there has been an entire want of care amounting to a conscious indifference to the consequences, this may constitute tortious conduct making punitive damages authorized in any action for negligence or intentional tort of bad faith. *See* O.C.G.A. § 51-12-5.1*; Thomas v. Atlanta Cas. Co.*, 253 Ga. App. 199 (2001). If a plaintiff recovers some type of compensatory damages caused by either the negligence or bad faith of the insurer, then the plaintiff may be entitled to punitive damages. *Thomas, supra; Southern Gen. Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992). A verdict in excess of the policy limits has been held by Georgia courts to constitute pecuniary damages necessary to support an award of punitive damages. *Thomas, supra; Southern Gen., supra.*

With respect to first-party property damage claims, an insurer can be liable for bad-faith penalties if the insurer does not pay, within 60 days, a demand by an insured for payment under a policy of a loss covered by the policy. See O.C.G.A. §33-4-6. To support a cause of action under O.C.G.A. § 33-4-6, the insured bears the burden of proving that the refusal to pay the claim was made in bad faith. *Moon v. Mercury Ins. Co. of Georgia*, 253 Ga. App. 506, 507 (2002). A defense going far enough to show reasonable and probable cause for denying the claim would vindicate the good faith of the company as effectually as would a complete defense to the action. *Id.* Penalties for bad faith are not authorized where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact. *Id.*

Bad faith actions are generally only available to insureds against insurers with which the insured has a contractual agreement. However, third-parties may have limited actions for bad-faith penalties against insurers under O.C.G.A. §33-4-7 in cases involving property damage covered by a motor vehicle liability policy. In the event of such a loss, the insurer issuing the policy has an affirmative duty: (1) to adjust that loss fairly and promptly; (2) to make a reasonable effort to investigate and evaluate the claim; and (3) to make a good faith effort to settle with the claimant

potentially entitled to recover against the insured under such policy when liability is reasonably clear. O.C.G.A. §33-4-7(a). Any insurer who breaches this duty may be liable to pay the third-party claimant, in addition to the loss, not more than 50% of the liability of the insured for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action. *Id.*

A third-party claimant may bring an action under O.C.G.A. §33-4-7 if the claimant has delivered to the insurer a demand letter offering to settle for an amount certain, and the insurer has refused or declined to do pay the demand within 60 days of receipt of such demand. Bad faith penalties are then available in a suit against the insurer to recover the amount of the loss if the claimant ultimately recovers an amount equal to or in excess of the claimant's demand. O.C.G.A. §33-4-7(c).

Within 20 days of bringing such action, the claimant shall mail to the Commissioner of Insurance a copy of the demand and complaint by first-class mail.

10. Mandatory Arbitration Rules – Georgia law generally enforces arbitration clauses in agreements, but there are several exceptions, including but not limited to: (1) agreements between insurers and insureds; (2) medical malpractice claims; (3) contracts for the purchase of goods under Georgia's UCC; (4) consumer actions and transactions within the definition of the Fair Business Practices Act; and (5) agreements to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort. See O.C.G.A. §9-9-2.

Idaho

1. Comparative Fault – Idaho follows a modified comparative fault rule. A plaintiff may not recover if he or she is 50% or more at fault. Idaho Code § 6-801.

2. Insurance Minimum Limits – Liability insurance policies must be issued by insurers licensed to do business in the state of Idaho for no less than:

$25,000 for death or bodily injury to one person in any one accident
$50,000 for death or bodily injury to two or more persons in any one accident; and
$15,000 for damage or destruction of property in any one accident.

Idaho Code 49-117(18). UM and UIM coverage must be offered but is not mandatory.

3. Statute of Limitations

Personal Injury (including wrongful death): Two years from the date of occurrence. Idaho Code § 5-219(4).

Construction:

Real property: Six years from the final completion of improvement to the real property. Idaho Code § 5-241.

Products: Ten years or after the product's "useful safe life." Idaho Code § 6-1403. "Useful safe life" is the time from "the delivery of the product and extends for the time during which the produce would normally be likely to perform or be stored in a safe manner." Idaho Code § 6-1403(a). In claims that involve harm caused more than ten years after the delivery, there is a rebuttable presumption that the harm occurred after the products "useful safe life." Idaho Code § 6-1403(a)(2).

Product Liability: Two years from date of the occurrence. Idaho Code § 5-219(4).

Property Damage: Three years. Idaho Code 5-218(3).

Breach of Contract: Four years (oral contract not in writing); five years (in writing).

Unlawful Trade Practices: The Idaho Consumer Protection Act provides that no private action may brought more than two years after the cause of action accrues. Idaho Code § 48-619.

4. Punitive Damages and Damages Caps

Punitive Damages: In Idaho, punitive damages must be proven by clear and convincing evidence and can only be sought pursuant to a pre-trial motion seeking to amend the pleadings. Idaho Code § 6-1604(1)-(2). Judgments for punitive damages shall not exceed the greater of $250,000 or three times the compensatory damages. Idaho Code § 6-1604(3).

Non-Economic Damages Cap: In 1987, Idaho enacted a statute limiting non-economic damages to $250,000 or less. Idaho Code § 6-1603. In 2003, the statute was amended to adjust the non-economic damages cap based on information from the Idaho industrial commission. Since the amendment, the non-economic damages cap has increased as follows:

2004:	$253,320.68	2010:	$305,028.46
2005:	$257,590.13	2011:	$306,451.61
2006:	$268,026.57	2012:	$313,567.36
2007:	$277,039.85	2013:	$319,734.34
2008:	$293,168.88	2014:	$324,478.18
2009:	$301,707.78	2015:	$326,850.09

5. Collateral Source Rule –

In a personal injury action, "a judgment may be entered for the claimant only for the damages which exceed amounts received by the claimant from collateral sources as compensation for the personal injury…" Idaho Code § 6-1606. Evidence of any payments received is admissible "to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent the award includes compensation for damages which have been compensated independently from collateral sources." Idaho Code § 6-1606.

Idaho appellate courts have not determined whether contractual adjustments to medical bills constitute a collateral source. However, Idaho's trial courts have routinely held that contractual adjustments to medical expenses are not a collateral source. Accordingly, trial courts have prohibited plaintiffs from introducing evidence of unadjusted medical expenses to the trier of fact because the plaintiff never incurred those expenses.

6. Expert Admissibility Standard: *Daubert* and *Frye* –

Idaho does not follow the *Frye* standard.

The Idaho Supreme Court has not adopted the *Daubert* standard for admissibility of an expert's testimony but has used some of *Daubert's* standards in assessing whether the basis of an expert's opinion is scientifically valid. *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 838, 153 P.3d 1180, 1184 (2007). The *Daubert* standards of whether the theory can be tested and whether it has been subjected to peer-review and publication have been applied, but the Court has not adopted the standard that a theory must be commonly agreed upon or generally accepted. *Id.*

Idaho Rule of Evidence 702 governs the admissibility of expert witnesses and provides that a person through knowledge, skill, experience, training, or education may testify as an expert to assist the trier of fact. *See* I.R.E. 702.

7. First Party Notice Requirements –

Idaho does enforce first party notice requirements. In *Viani v. Aetna Ins. Co.*, 95 Idaho 22, 501 P.2d 706 (1972), *overruled on other grounds*, *Sloviaczek v. Estate of Puckett*, 98 Idaho 371, 565 P.2d 564 (1977), the Idaho Supreme Court held that a showing of prejudice is not required where an insured breaches a notice provision of the policy. *See id.* at 29, 501 P.2d at 713.

However, if some form of notice is given in a timely manner, failure to comply with the exact method of notification dictated by the policy may be excused. *See Bantz v. Bongard*, 124 Idaho 780, 786, 864 P.2d 618, 624 (1993) (finding substantial compliance where the insurer received prompt constructive notice of a claim, even though formal notice was not given for six years); *County of Kootenai v. Western Cas. & Sur. Co.*, 113 Idaho 908, 913, 750 P.2d 87, 92 (1988) (finding it "clear that there was substantial performance . . ." where timely notice was given to an authorized agent of the insurer who then mistakenly failed to inform the insurer of the claim); *March v. Snake River Mut. Fire Ins. Co.*, 89 Idaho 275, 281, 404 P.2d 614, 620 (1965) (holding that the receipt of timely notice, even from a party other than the insured, constituted substantial compliance); *Leach v. Farmer's Auto. Interins. Exch.*, 70 Idaho 156, 160, 213 P.2d 920, 923 (1950) (holding that oral, as opposed to written, notice substantially complied with the policy requirements because the insured "gave oral notice immediately upon learning of the claim . . .").

8. Insurer Duty to Defend –

Under Idaho law, and consistent with other states, an insurer's duties to defend and indemnify are separate duties. *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 608, 888 P.2d 383, 387 (1995). The duty to defend is broader than the duty to indemnify. *Black v. Fireman's Fund Am. Ins.*, 115 Idaho 449, 455, 767 P.2d 824, 830 (Ct. App. 1988). The duty to defend is triggered if the third-party's complaint reveals a potential for liability that would be covered by the insured's policy. *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 375, 48 P.3d 1256, 1264 (2002).

9. Bad Faith Claims against Insurers –

"Insurance companies have a duty to act in good faith with their insureds, and that this duty exists independent of the insurance contract and independent of statute. *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 730 P.2d 1014 (1986). "Such a duty is beyond that which the policy imposes by itself-the duty to defend, settle, and pay-but is a duty imposed by law on an insurer to act fairly and in good faith in discharging its contractual responsibilities." *Id.*

To prove insurance bad faith the plaintiff must show: 1) the insurer intentionally and unreasonably denied or withheld payment; 2) the claim was not fairly debatable; 3) the denial or failure to pay was not the result of a good faith mistake; and 4) the resulting harm is not fully compensable by contract damages. *Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 176, 45 P.3d 829, 832 (2002).

10. Mandatory Arbitration Rules –

Idaho does not have any statute or regulation in force prohibiting or restricting the use of arbitration in insurance contracts.

Illinois

1. Comparative Fault

In actions for bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, the plaintiff shall be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought. 735 ILCS 5/2-1116. The plaintiff shall not be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is not more than 50% of the proximate cause of the injury or damage for which recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of fault attributable to the plaintiff. *Id.*

2. Insurance Minimum Limits

For policies issued or renewed on or after January 1, 2015, the minimum motor vehicle liability insurance requirements (625 ILCS 5/7-203) and uninsured/underinsured motorist coverage requirements (215 ILCS 5/143a-2) are as follows:

- $25,000 for bodily injury or death of one person
- $50,000 for bodily injury or death of two or more persons in any one accident
- $20,000 for property damage resulting from any one accident

3. Statute of Limitations

Personal injury: Actions for damages for an injury to the person shall be commenced within two years. 735 ILCS 5/13-202.

Defamation: Actions for slander, libel, or for publication of matter violating the right of privacy shall be commenced within one year. 735 ILCS 5/13-201.

Property damage: Actions to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof shall be commenced within five years. 735 ILCS 5/13-205.

Medical malpractice: No action for damages for injury or death against any physician, dentist, registered nurse or hospital, arising out of patient care shall be brought more than two years after the date on which the claimant knew, or should have known, or received notice in writing of the existence of the injury or death for which damages are sought, but in no event shall such action be brought more than four years after the date on which the act or omission, alleged to have been the cause of such injury or death, occurred. 735 ILCS 5/13-212.

Legal malpractice: An action for damages based on tort, contract, or otherwise against an attorney or a non-attorney employee of an attorney arising out of an act or omission in the performance of professional services must be commenced within two years, from the time the person knew or should have known of the injury, but an action shall not be brought more than six years after the date on which the act or omission occurred. 735 ILCS 5/13-214.3.

Written contract: Actions on written contracts or other evidences of indebtedness in writing shall be commenced within 10 years after the cause of action accrued. 735 ILCS 5/13-206.

Oral contract: Actions on unwritten contracts, expressed or implied, shall be commenced within 5 years. 735 ILCS 5/13-205.

4. Punitive Damages and Damages Caps

Punitive Damages

In all cases of bodily injury, or physical damage to property based on negligence, or product liability based on any theory or doctrine, other than healing art or legal malpractice cases, punitive damages may be awarded only if actual damages are awarded. 735 ILCS 5/2-1115.05. The amount of punitive damages that may be awarded for a claim in any civil action shall not exceed three times the amount awarded to the claimant for the economic damages on which such claim is based. *Id.* The plaintiff must show by clear and convincing evidence that the defendant's conduct was with evil motive or with a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others. *Id.*

Damages Caps

The Illinois Supreme Court previously held that limitations on non-economic damages in medical malpractice actions violated the separation of powers clause of the Illinois Constitution. *See Lebron v. Gottlieb Mem. Hosp.*, 237 Ill. 2d 217 (2010).

5. Collateral Source Rules

Under the collateral source rule, benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor. *Wills v. Foster*, 229 Ill. 2d 393, 399 (2008). Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable. *Id.* (quoting Restatement (Second) of Torts §920A(2)).

6. Expert Admissibility

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Ill. R. Evid. 702. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs. *Id.* The admission of expert testimony is governed by the standard first expressed in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *People v. Simons (In re Simons)*, 213 Ill. 2d 523, 529 (2004). It is sufficient that the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field. *Id.* at 530.

7. First Party Notice Requirements

A provision in an insurance liability policy requiring an insured to give the insurer notice of an accident is a reasonable policy requirement. *Kenworthy v. Bituminous Casualty Corp.*, 28 Ill. App. 3d 546, 548 (4th Dist. App. 1975). If the notice requirement says an insured must notify the insurer "immediately," "immediate" is interpreted to mean within a reasonable time, taking into consideration all the facts and circumstances shown by the evidence. *Id.* Prejudice to the insurer is one of the facts which determines what is a reasonable time in which to give notice. *Id.* at 549.

8. Insurer Duty to Defend

The duty to defend is broader than the duty to indemnify. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 125 (1992). To determine whether the insurer has a duty to defend the insured, the court must look to the allegations in the underlying complaint and compare these allegations to

the relevant provisions of the insurance policy. *Id.* at 107-08. If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer's duty to defend arises. *Id.* at 108. Refusal to defend is unjustifiable unless it is clear from the face of the underlying complaint that the facts alleged do not potentially fall within the policy's coverage. *Id.*

9. Bad Faith Claims Against Insurers

A defendant may engage in conduct that both breaches a contract and constitutes a separate and independent tort. *Cramer v. Insurance Exch. Agency*, 174 Ill. 2d 513, 524 (1996). Mere allegations of bad faith or unreasonable and vexatious conduct, without more, do not constitute such a tort. *Id.* at 528. Where a plaintiff actually alleges and proves the elements of a separate tort, a plaintiff may bring an independent tort action, such as common law fraud, for insurer misconduct. *Id.*

To state a cause of action for bad faith, the plaintiffs must allege that the duty to settle arose, the insurer breached the duty, and the breach caused injury to the insured. *Haddick v. Valor Ins.*, 198 Ill. 2d 409, 416 (2001). The plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith. *Id.*

10. Mandatory Arbitration Rules

Mandatory arbitration proceedings shall be undertaken and conducted in judicial circuits which elect to utilize the procedure with the approval of the Illinois Supreme Court and in other circuits as directed by the Illinois Supreme Court. Ill. Sup. Ct. R. 86. A civil action shall be subject to mandatory arbitration if each claim is exclusively for money in an amount or of a value not in excess of the monetary limit authorized by the Illinois Supreme Court for that circuit or county within that circuit. *Id.* Each judicial circuit may adopt rules for the conduct of arbitration proceedings consistent with the Illinois Supreme Court Rules. *Id.*

Indiana

1. **Comparative Fault**

Indiana's Comparative Fault Statute governs any action based on fault that is brought to recover damages for injury or death to a person or harm to property. I.C. § 34-51-2-1. Any contributory fault on Plaintiff's end diminishes the amount awarded in compensatory damages but does not generally bar recovery. I.C. § 34-51-2-5. However, the claimant is barred from recovery if the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages. I.C. § 34-51-2-6.

When a case is tried by a Court or in front of a jury the fact finder must determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty. I.C. § 34-51-2-7; *See also* I.C. § 34-51-2-9. If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved the Court shall return a verdict for the defendant. Id. If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury shall determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded. Id. Judgment is then to be entered against each defendant to the extent of its percentage of fault.

There is no right of contribution among tortfeasors; however, this section does not affect any rights of indemnity. I.C. § 34-51-2-12. If a subrogation claim or other lien exists in respect to a claim for personal injuries or death and the claimant's recovery is diminished by comparative fault or by reason of the uncollectibility of the full value of the claim; the lien or claim shall be diminished in the same proportion as the claimant's recovery is diminished. I.C. § 34-51-2-19. The party holding the lien or claim shall bear a pro rata share of the claimant's attorney's fees and litigation expenses. Id.

2. Insurance Minimum Limits

I.C. § 9-25-4-5 sets forth Indiana's mandatory insurance requirements. Indiana's minimum liability insurance requirements are as follows:

- Bodily Injury and Property Damage: $25,000 per person; $50,000 per accident for bodily injury to others; and $25,000 per accident for damage to property. I.C. § 9-25-4-5.

- Personal Injury Protection (PIP): N/A

- Uninsured and Underinsured (UM/UIM): For UM coverage, $25,000 per person and $50,000 per accident for bodily injury. I.C. § 27-7-5-2. For UIM coverage, $50,000 per person and $50,000 per accident. I.C. § 27-7-5-2.

3. Statute of Limitations

Negligence: Negligence is governed under the catch-all of provision of injury to person or character. This action must be commenced within two years after the cause of action accrues. I.C. § 34-11-2-4.

Negligent Construction: An action to recover damages based upon contract, tort, nuisance, or another legal remedy, for: (1) a deficiency or an alleged deficiency in the design, planning, supervision, construction, or observation of construction of an improvement to real property; (2) an injury to real or personal property arising out of a deficiency; or (3) an injury or wrongful death of a person arising out of a deficiency; must be commenced within 10 years after the date of substantial completion of the improvement or 12 years after the completion and submission of plans and specifications to the owner (whichever is earlier) if the action is for a deficiency in the design of the improvement. I.C. § 32-30-1-5.

Product Liability: A product liability action must be commenced within two years after the cause of action accrues or within 10 years after the delivery of the product to the initial user or consumer. I.C. § 34-20-3-1. However, if the cause of action accrues at least eight years but less than 10 years after that initial delivery, the action may be commenced at any time within two years after the cause of action accrues. Id.

Wrongful Death: When the death of one is caused by the wrongful act or omission of another, the action shall be commenced by the personal representative of the decedent within two years. I.C. § 34-23-1-1.

Medical Malpractice: An action for medical malpractice must be commenced within two years after the date of the alleged act, omission, or neglect should have reasonably been discovered,

except a minor less than six (6) years of age has until the minor's eighth birthday to file. I.C. § 34-18-7-1.

Breach of Contract: An action on oral contracts must be commenced within six years. I.C. § 34-11-2-7. An action upon promissory notes, bills of exchange, or other written contracts for the payment of money must be commenced within six years after the cause of action accrues. I.C. § 34-11-2-9. Actions upon all other written contracts must be commenced within 10 years I.C. §34-11-2-11.

Unlawful Trade Practices: A consumer bringing an action must give notice in writing to the supplier either (1) six months after the initial discovery of the deceptive act, (2) one year following the consumer transaction, or (3) any time, not less than 30 days, of any period of warranty applicable to the transaction, whichever is sooner. I.C. § 24-5-0.5-5. The notice shall state fully the nature of the alleged deceptive act and the actual damage suffered therefrom, unless such deceptive act shall have become an uncured deceptive act. Id.

4. Punitive Damages and Damages Caps

Punitive Damages: In Indiana, An insurer's misconduct must be proved by clear and convincing evidence in order to warrant an award of punitive damages. I.C. § 34-51-3-2; see also Travelers Indemnity Company v. Armstrong, 442 N.E.2d 349 (Ind. 1982). A punitive damage award may not be more than the greater of three times the amount of compensatory damages awarded in the action or $50,000. IC § 34-51-3-4. When a punitive damage award is paid, the party against whom the judgment was entered shall pay the punitive damage award to the clerk of the court where the action is pending. I.C. § 34-51-3-6. The clerk of the court pays the person to whom punitive damages were awarded 25% and the remaining 75% of the award goes to the treasurer of state. Id.

A jury may not be advised of the limitation on the amount of a punitive damage award or the requirement concerning allocation of money received in payment of a punitive damage award. I.C. § 34-51-3-3. If a trier of fact awards punitive damages that exceed the limitation of this chapter, the court shall reduce the punitive damage award to not more than the greater of three times the amount of compensatory damages awarded in the action or $50,000. I.C. § 34-51-3-5.

Damages Cap: As of 2017, Indiana capped damages in medical malpractice cases at $1,650,000 and damages paid by the government at $700,000 per person. and $5,000,000 per accident. However, the Indiana Supreme Court scheduled cases to consider the constitutionality of these caps for late 2012. If the court finds the caps unconstitutional, they may no longer apply, so stay tuned.

5. Collateral Source Rules

Indiana's collateral source statute provides for the admissibility of collateral source payments, except for the following: (A) payments of life insurance or other death benefits; (B) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; (C) or payments made by:

(i) the state or the United States;

(ii) or any agency, instrumentality, or subdivision of the state or the United States. Ind. Code § 34-44-1-2 (1999).

The purpose of Indiana's collateral source statute is to determine the actual amount of a plaintiff's monetary loss and to prevent a plaintiff from recovering more than once from all non-exempt sources for each item of loss sustained in a personal injury or wrongful death action. Stanley v. Walker, 906 N.E.2d 852 (Ind. 2009). Indiana retains the common law principle that collateral source payments should not reduce a damage award if the payment resulted from the plaintiff's own forethought, such as insurance purchased by the plaintiff or government benefits that the plaintiff has paid for through taxes. Id.

6. Expert Admissibility Standard – *Daubert v. Frye*

Expert evidence must be sufficiently valid or trustworthy to assist the trier of fact to understand the evidence or to determine a fact in issue. Evidence Rule 702(a); Lohrmiller v. State, 884 N.E.2d 903 (Ind. 2008). Formal education in a certain field is not a prerequisite, so long as the expert can demonstrate, through experience and training, an expertise to give the opinion. Two-types of expert evidence are recognized: (1) scientific evidence (governed by Rule 702(b), and (2) non-scientific evidence that is based on an expert's "specialized knowledge or experience." No specific tests or factors are mandated in making an analysis under Evidence Rule 702(b).

In ruling on the admissibility of scientific evidence Indiana courts apply the *Daubert* standard. In *Daubert* the U.S. Supreme Court identified several factors that should guide a court in assessing whether an expert opinion is reliable: empirical testing, peer review and publication, potential rate of error, and standards imposed by the industry or community. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 37 Fed. R. Evid. Serv. 1 (1993). The Daubert factors are routinely used by Indiana courts to determine whether an expert opinion has a reliable foundation, although these factors are not exclusive or controlling on the question of reliability and the court's inquiry must be flexible and liberal.

7. First Party Notice Requirements

The obligation to give prompt notice under an insurance contract is a condition precedent to coverage. Shelter Mutual Insurance Company v. Barron, 615 N.E.2d 503, 507 (Ind. Ct. App. 1993). "If the delay in giving the required notice is unreasonable, the injured party or the insured has the burden to produce evidence that prejudice did not actually occur in the particular situation." Miller v. Dilts, 463 N.E.2d 257, 265 (Ind. 1984). Delay creates a presumption of prejudice that the insured must overcome. Indiana Ins. Co. v. Williams, 463 N.E.2d 257 (Ind. 1984). A six month delay in giving notice of an "occurrence" was held to defeat coverage in Askren Hub States Pest Control Services, Inc. v. Zurich Insurance Company, No. 49A02-9902-CV-133 (Ind. App. December 21, 1999).

8. Insurer Duty to Defend

In Indiana, a duty to defend arises in cases where there is a factual dispute unless the insurer's investigation resolves the factual dispute against coverage. Kopko in Monroe Guaranty Ins. Co. v. Warner Monroe, 1997 WL 129030 (Ind. App. March 24, 1997). The duty to defend does not arise until the insurer is notified of the litigation. Eastman v. United States, 257 F.Supp. 315, 319 (S.D. Ind. 1966). The Court of Appeals has ruled that an insurer's duty to defend must be

determined based upon the allegations of the complaint and from the facts known or ascertainable by the insurer after an investigation has been made. Trisler v. Indiana Ins. Co., 575 N.E.2d 1021, 1023 (Ind. Ct. App. 1991). The court may properly consider the evidentiary materials offered by the parties to show coverage or exclusion. See also Allstate Ins. Co. v. Herman, 551 N.E.2d 844 (Ind. App. 1990).

Under Indiana law, the insured is required to establish a claim within the grant of insurance. Mutual Hospital Ins., Inc. v. Hagner, 475 N.E.2d 32 (Ind. App. 1984). By contrast, the insurer bears the burden of proving the applicability of a policy exclusion. State Farm v. Miles, 730 F.Supp. 1462 (S.D. Ind. 1990). Whether a term is considered part of the grant of coverage or an exclusion depends on its placement in the policy rather than whether it has an exclusionary or coverage-limiting effect. Erie Ins. Group v. Sears Corp., 102 F.3d 889 (7th Cir. 1996).

9. Bad Faith Claims Against Insurers

Indiana law has long recognized that there is a legal duty implied in all insurance contracts that the insurer deals in good faith with its insured. Erie Ins. Co. v. Hickman, 622 N.E.2d 515, 518 (Ind. 1993). A claim for "bad faith" is an intentional tort and the policyholder must establish a "state of mind reflecting dishonest purpose, moral obliquity, furtive design or ill will. Patel v. United Fire & Cas. Co., 80 F.Supp.2d 948, 958 (N.D. Ind. 2000). Indiana courts require a jury to find that the insurer acted with a state of mind evidencing conscious wrongdoing before it may conclude that the insurer breached its duty to act in good faith. Id. An insurer will be considered to have acted in bad faith only where it "denies liability knowing that there is no rational principled basis for doing so." Country Mutual Insurance Co. v. Hunter, 472 N.E.2d 1265, 1268 (Ind. Ct. App. 1985).

In Erie, the Indiana Supreme Court ruled that punitive damages may only be awarded if there is "clear and convincing evidence" that the insurer acted with "malice, fraud, gross negligence or oppressiveness which was not the result of a mistake or fact or law, honest error or judgment, over-zealousness, mere negligence or other human failing..." 622 N.E.2d at 520. A federal district court has ruled that where an insurer has acted in bad faith, the insured may recover damages for emotional distress. 80 F.Supp.2d 948 (N.D. Ind. 2000). A third party claimant cannot sue an insured for bad faith. Eichler v. Scott Pools, Inc., 513 N.E.2d 665, 667 (Ind. App. 1987).

Unfair claims handling by insurers is regulated under IC § 27-4-1-4.5. Unfair or deceptive consumer practices are proscribed by Ind. Code Ann. IC § 24-5-0.5-1.

10. Mandatory Arbitration Rules

In Indiana, any controversy existing between two or more parties which might be the subject of a suit at law and arbitration under IC 36-4-3-21.1, concerning services provided by a municipal utility to properties located outside the corporate boundaries of the municipality, is subject to arbitration. IC § 34-
57-1-1.

Iowa

1. **Comparative Fault**

Negligence/Comparative Fault

Under Iowa Civil Jury Instruction 700.2, "negligence" means failure to use ordinary care. "Ordinary care" is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

With respect to Plaintiff's fault, Iowa has adopted a modified comparative fault tort scheme by statute. Contributory fault will not bar recovery in an action by a Plaintiff to recover damages unless the Plaintiff bears a greater percentage of fault than the combined percentage of fault attributable to all Defendants. But any damages allowed will be diminished in a proportion equal to the amount of the fault attributable to the Plaintiff. A Plaintiff bearing 51% or more of the fault cannot recover at all.

The jury will be asked to allocate a percentage of fault against all parties. The rule of joint and severe liability does not apply to Defendants who are found to bear less than 50% of the total fault assigned to all parties. However, a Defendant found to bear 50% or more of fault shall only be jointly and severely liable for economic damages and not for any non-economic damage awards. See Iowa Code §668.4.

2. **Insurance Minimum Limits**

Coverage/Bodily Injury/Property Damage

$20,000/$40,000/$15,000. The minimum mandatory limits are established under Iowa Code § 321A.5 of not less than $20,000 because of bodily injury or death to one person in any one accident and, subject to the limit for one person, to a limit of not less than $40,000 because of bodily injury or death of two or more persons in any one accident. If the accident has resulted in injury to or destruction of property, to a limit of not less than $15,000 because of the injury to or destruction of property of others in any one accident.

Under Iowa Code § 325A.6, motor carriers must have the minimum insurance coverage which meets the limits established in the Federal Motor Carrier Safety Regulations 49 C.F.R. Chapter 387.

3. **Statute of Limitations**

Injuries to the person or reputation must be brought within two years, including wrongful death claims. Those centered on unwritten contracts, injuries to property or relief on the ground of fraud within five years. Those centered on written contracts, or on judgments of any court, within ten years. With respect to minors, the time limits are extended in favor of

minors so that they shall one year from and after attaining majority within which to commence an action. Under Iowa law, the age of majority of minors is 18 years. Iowa Code § 599.1.

4. Punitive Damages and Damages Caps

The standard for punitive damages is statutory in Iowa: "Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted **willful and wanton disregard** for the rights or safety of another." Iowa Code § 668A.1 (*a*) (emphasis added).

Under Iowa law, "[p]punitive damages are not awarded as a matter of right but only as a form of punishment and to deter others from conduct which is sufficiently egregious to call for the remedy." *Larson v. Great West Cas. Co.*, 482 N.W.2d 170, 175 (Iowa Ct. App. 1992). Accordingly, pursuant to Iowa Code § 668A.1, punitive damages may be awarded only upon a showing that the conduct of the defendant "constituted willful and wanton disregard for the rights or safety of another." Conduct is willful and wanton when the "actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Kiesau v. Bantz*, 686 N.W.2d 164, 173 (Iowa 2004). Wantonness requires proof that the defendant "knew or should have known that his conduct placed the plaintiff in a zone of imminent danger." *Alden v. Genie Indus.*, 475 N.W.2d 1, 2 (Iowa 1991). Moreover, "[t]he willful and wanton disregard necessary to support an award of punitive damages must be established by clear, convincing, and satisfactory evidence, a statutorily imposed burden of proof greater than a mere preponderance of evidence." *Id.* (citing Iowa Code § 668A.1(1)(a)).

In 2004, the Iowa State Bar Association incorporated the United States Supreme Court's holding in *State Farm Mut'l Auto. Ins. Co. v. Campbell,* 538 US 408 (2003), in the State's pattern Jury Instructions. In Campbell, the Supreme Court held a jury award of $145 million in punitive damages, in a case involving damages of $1 million, was "grossly excessive" and violated the Fourteenth Amendment. *State Farm Mut'l Auto. Ins. Co. v. Campbell*, 538 US 408, 416-17 (2003). The Court provided the following guidelines to be evaluated:

1. The nature of defendant's conduct that harmed the plaintiff.
2. The amount of punitive damages which will punish and discourage like conduct by the defendant. You may consider the defendant's financial condition or ability to pay. You may not, however, award punitive damages solely because of the defendant's wealth or ability to pay.
3. The plaintiff's actual damages. The amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to the plaintiff.
4. The existence and frequency of prior similar conduct. If applicable add: You may not, however, award punitive damages to punish the defendant for out-of-state conduct that was lawful where it occurred, or any conduct by the defendant that is not similar to the conduct which caused the harm to the plaintiff in this case.

For purposes of determining if an award of punitive damages is excessive, the Court suggested that an award which exceeds a single digit ratio between punitive and compensatory damages may comport with due process

where a particularly egregious act has resulted in only a small amount of economic damages. Campbell, 538 US at 425.
There are no statutory damage caps in Iowa.

5. Collateral Source Rules

Iowa does follow a collateral source rule in medical malpractice cases. Any damages for medical care and expense and/or loss of earned income incurred in the past or to be incurred in the future will be reduced by the Court to the extent any losses have been or will be paid by insurance or other benefit programs, other than except for the assets of the Plaintiff or Plaintiff's immediate family. Defendant has the burden of proof on these issues.

6. Expert Admissibility Standard – Daubert v. Frye

Expert Testimony
Even though Iowa has a liberal rule on the admission of expert testimony, the evidence has to be reliable. *Williams v. Hedican*, 561 N.W.2d 817, 823 (Iowa 1997). A threshold finding of reliability is, therefore, necessary because unreliable evidence cannot assist a trier of fact. *Id.* The amount of foundation necessary to establish reliability depends on the complexity of the evidence and the likely impact of the evidence on the fact-finding process. *Id.*

Under Iowa Rule of Evidence 5.703 (formerly rule 703) an expert may base an opinion on facts or data made known to him before trial, even if the facts or data would be inadmissible in evidence. However, if the facts or data would be inadmissible, in evidence, they have to be of Aa type reasonably relied upon by experts in the particular field.@ Whether the underlying evidence is reasonably relied on for purposes of rule 5.703 is an issue for the trial judge. *Brunner v. Brown*, 480 N.W.2d 33, 35 (Iowa 1992). If the underlying evidence is furnished by a biased witness, it probably will be excluded. *Id.*

In *State v. Hall*, 297 N.W.2d 80, 85 (Iowa 1980), the Iowa Supreme Court expressly overruled the test put forth in *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), which held that for expert testimony to be admissible, it must be "generally accepted" in the particular field of which it belongs. Instead, Iowa law uses a two pronged approach to determine the admissibility of evidence: the court must (1) determine ad hoc if *the testimony* will help the trier of fact in understanding the evidence and in making a factual determination (in contradiction to *Frye*), and (2) determine if *the witness* is qualified to testify as an expert. *Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677 (Iowa 2010). The proponent of the evidence has the burden of demonstrating to the court that the proffered witness's testimony is reliable and the witness is qualified. *Id.* at 685.

When, and only when, the *scientific evidence* is particularly novel or complex, the Iowa Supreme Court suggests a consideration of the factors put forth in the landmark opinion of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993). *Ranes*, 778 N.W.2d at 686 (overruling *Frye*).

7. First Party Notice Requirements

Notice:

Compliance with policy conditions requiring notice is a condition precedent to coverage. Met-Coil Systems Corp. v. Columbia Cas. Co., 524 N.W.2d 650, 655 (Iowa 1994). Accordingly, an insured must show substantial compliance with notice requirements. Fireman's Fund Ins. Co. v. ACC Chemical Co., 538 N.W.2d 259 (Iowa 1995)(five year delay in notifying insurers of underlying pollution claim barred coverage).

8. Insurer Duty to Defend

Under Iowa law, an insurer has a duty to defend whenever there is a potential or possible liability to indemnify the insured based upon the facts appearing at the outset of the case. First Newton National Bank v. General Casualty Co. of Wisconsin, 426 N.W.2d 618, 622 (1988) and McAndrews v. Farm Bureau Mutual Ins. Co., 349 N.W.2d 117, 119 (Iowa 1984). In considering whether it has a duty to defend, an insurer should consider both the allegations in the underlying complaint and those facts that are known to it concerning the claim. First Newton Nat'l Bank v. General Cas. Co. of Wis., 426 N.W.2d 618 (Iowa 1988). Extrinsic facts may also be relied on to defeat coverage.

Whether a duty to defend exists depends of the substance of the underlying allegations, rather than any specific theory of liability expressed. As stated by the Iowa Supreme Court in Employers Mutual Casualty Co. v. Cedar Rapids Television Co., 552 N.W.2d 639 (Iowa 1996):

9. Bad Faith Claims against Insurers

An insurance company must act in good faith in making decisions about claims made against its insured. The company must give equal consideration to its own interests and to the interests of the insured. The insurance company must view the situation as if there were no policy limits applicable to the claim. Bad faith arises when the insurance company, by its misconduct, serves its own interest and irresponsibly exposes the insurance to an unreasonable risk of liability. In order to recover, the plaintiff must prove all of the following propositions:

1. A specific demand for settlement was made by (name of claimant).
2. The defendant rejected the proposed settlement in bad faith.
3. The bad faith was a proximate cause of plaintiff's damages.
4. The nature and extent of the damage.

10. Mandatory Arbitration Rules

Iowa does not have any statute or regulation in force prohibiting or restricting the use of arbitration in insurance contracts.

Kansas

1. Comparative Negligence

Under *Kan. Stat. Ann. § 60-258a*, the contributory negligence of a party in a civil action does not bar that party from recovering damages for negligence, as long as that party's negligence was less than the negligence of the defendant. The award of damages to that party must be reduced in proportion to the amount of negligence attributed to them.

The concept of joint and several liability between joint tort-feasors that previously existed no longer applies in comparative negligence actions. Currently, individual liability of each defendant for payment of damages will be based on proportion of fault, and contribution among joint judgment debtors is no longer required in such cases.

2. *Insurance Minimum Limits*

Under *Kan. Stat. Ann. § 40-3107*, the uninsured/underinsured motorist coverage requires a minimum of $25,000 for a single personal injury or property damage, $50,000 for injury to two or more persons, and $10,000 for harm to property of others in any one accident.

Under *Kan. Stat. Ann. § 40-3402*, a resident health care provider must maintain a medical malpractice policy with a minimum of $200,000 per claim, subject to not less than a $600,000 annual aggregate for all claims made during the policy period, unless the provider is a self-insurer. The provision does not apply to optometrists and pharmacists on or after July 1, 1991 nor to physical therapists on and after July 1, 1995 nor to health maintenance organizations on or after July 1, 1997.

3. *Statute of Limitations*

Actions for libel, slander assault, battery, and false imprisonment must be brought within one year of when the action accrued. *Kan. Stat. Ann. § 60-514.*

Actions for negligence, most every other tort action, fraud, professional negligence or malpractice, and products liability must be brought within 2 years from when the action accrued. *Kan. Stat. Ann. § 60-513.*

Actions for contracts, obligations, or liabilities not in writing must be brought within 3 years of when the action accrued. *Kan. Stat. Ann. § 60-512.*

Actions brought on any written contract or future covenants in real property must be brought within 5 years of when the action accrued. *Kan. Stat. Ann. § 60-511.*

4. *Punitive Damages and Damages Caps*

Kansas law does allow for the recovery of punitive damages in situations determined by statute. They are awarded to punish the wrongdoer of his malicious, vindictive, or willful and wanton invasion of another's rights, with the ultimate purpose being to restrain and deter others from similar acts. The award should not exceed 1 year of the defendant's gross income or $5 Million, whichever is less.

5. *Collateral Source Rules*

The collateral source rule prevents the fact-finder from learning about collateral source payments, even when offered supposedly to assist the jury in determining the reasonable value of the medical treatment rendered, so that the existence of collateral source payments will not influence the fact finder. *Martinez v. Milburn Enterprises, Inc.,* 290 Kan. 572, 605, 233 P.3d 205, 225 (2010)

6. *Expert Admissibility Standard*

Kansas has upheld the *Frye* standard and rejected the *Daubert* standard. *See, Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 757, 907 P.2d 923, 929 (1995).

A witness is qualified as an expert by knowledge, skill, experience, training or education. They may testify as to their opinion if the testimony is based on sufficient data, the testimony is the product of reliable principles and methods, and the witness has reliability applied those principles to the case. The testimony can be admitted if it will help the judge or jury understand the evidence.

7. *Insurer Duty to Defend*

If facts brought to the liability insurer's attention or reasonably discoverable by it give rise to a potential of liability under the policy, the insurer bears a duty to defend.

8. Bad Faith Claims Against Insurers

To show a bad faith claim, the plaintiff must show that the insurer denied the claim without any just cause or excuse before they completed a good faith investigation of facts surrounding the claim.

9. *Mandatory Arbitration Rules*

Kansas law prohibits mandatory arbitration clauses in insurance contracts, except for contracts between insurance companies, including reinsurance contracts. *Kan. Stat. Ann. § 5-401*

Kentucky

1. Comparative Fault

Kentucky is a pure comparative fault state. The plaintiff's share of the fault will reduce the defendant's liability. Ky. Rev. Stat. Ann. § 411.182. The statute on apportionment of liability among parties in tort actions does not supplant the body of law of comparative fault, but is simply a codification of common law evolution of the procedure for determining the respective liabilities of joint tortfeasors, whether joined in the original complaint or by third-party complaint. *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 802 (Ky. 2005).

2. Minimum Insurance Limits

Ky. Rev. Stat. Ann. § 304.39-110 sets forth the required minimum limits for tort liability insurance. Kentucky's minimum liability insurance requirements are as follows:

- Bodily Injury and Property Damage:
    - Split limits liability coverage of $25,000 per person, $50,000 for bodily injury sustained by all persons as a result of one accident and $10,000 for property damage per accident; or
    - Single limits liability coverage of not less than $60,000 for all damages per accident for bodily injury or property damage.
    - Personal Injury Protection (PIP), also known as Basic Reparation Benefits: $10,000 (Ky. Rev. Stat. Ann 304.39-020)
    - Uninsured/Underinsured (UM/UIM): Kentucky has no requirement for UM/UIM coverage.

3. Statute of Limitations

Negligence: Negligence falls within the one year statute of limitations period under Ky. Rev. Stat. Ann. § 413.140. The statute provides that "The following actions shall be commenced within one (1) year after the cause of action accrued: … (b) An action for injures to persons."

Negligent Construction: An action arising in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services is subject to a one-year statute of limitations period. Ky. Rev. Stat. Ann. § 413.245. "Professional services means any service rendered in profession required to be licensed, administered and regulated as professions in the Commonwealth of Kentucky." Ky. Rev. Stat. Ann. § 413.243. This one year statute of limitations is tolled when the claimant serves written notice of the claim on the construction professional. This notice is required in order to give the professional an opportunity to cure. Ky. Rev. Stat. Ann. § 411.258.

Product Liability: The statute of limitations is one year for personal injury actions, including products liability. Ky. Rev. Stat. Ann. § 413.140.

Wrongful Death: A wrongful death action is also subject to the one year statute of limitations, which runs from the date of death. Ky. Rev. Stat. Ann. § 413.140.

Breach of Contract: A written contract executed before July 15, 2014, is subject to a 15 year statute of limitations. Ky. Rev. Stat. Ann. § 413.090(2). A written contracted executed after July 15, 2014, is subject to a 10 year statute of limitations. Ky. Rev. Stat. Ann. § 413.160. The statute of limitations for a breach of a contract for sale governed by the UCC must be commenced within four years after the cause of action has accrued. Ky. Rev. Stat. Ann. § 355.2-725. By the original agreement the parties may reduce the statute of limitations to no less than one year, but cannot extend it. An action based on an oral contract, express or implied, must be commenced within five years after the cause of action accrued. Ky. Rev. Stat. Ann. § 413.120(1).

Unlawful/Unfair Trade Practices: According to Ky. Rev. Stat. Ann. § 367.190, an Attorney General can bring an action to recover damages for violations of the provisions of the Kentucky Consumer Protection Act. "Any person bringing an action under that section must bring the action within one year after any action of the Attorney General has been terminated or within two years after the violation of KRS 367.170, whichever is later." Ky. Rev. Stat. Ann. § 367.220(5).

4. Punitive Damages and Damages Cap

Pursuant to Ky. Const. § 54, "[t]he General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property".

There is no statutory limit on punitive damages in Kentucky. The standard of proof for punitive damages has recently been discussed in *Nissan Motor Co., Ltd. v. Maddox*, 486 S.W.3d 838 (Ky. 2015), *as modified on denial of reh'g* (May 5, 2016). "In order to justify punitive damages there must

be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by wanton or reckless disregard for the lives, safety, or property of others." *Id.*

5. Collateral Source Rule

Under Kentucky's collateral source rule, the party causing the injury must bear the full cost of the injury, regardless of any compensation received by the injured party from an independent or collateral source. *Baptist Healthcare Sys. Inc. v. Miller*, 177 S.W.3d 676, 683 (Ky. 2005). The plaintiff's receipt of collateral source payments cannot result in denying the plaintiff's tort remedy when the plaintiff had the foresight to obtain insurance coverage. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995). Evidence of collateral source payments or contractual allowance is inadmissible. *O'Bryan*, 892 S.W.2d at 578 (declaring KRS 411.188, which allowed for the admissibility of evidence of collateral source payments, other than life insurance at trial, unconstitutional); *Baptist Healthcare*, 177 S.W.3d at 683-684 (holding exclusion of evidence of contractual allowance between Medicare and health care provider was
proper).

6. Expert Admissibility Standard: *Daubert or Frye?*

Kentucky courts have adopted the *Daubert* analysis when interpreting and applying KRE 702, which is identical to FRE 702. *See Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000); *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995).

7. First Party Notice Requirements

An insured's failure to provide prompt notice of an occurrence does not automatically defeat liability insurance coverage. *Jones v. Bituminous Cas. Corp*., 821 S.W.2d 798, 801 (Ky. 1991). To escape liability, the insurer must prove probable prejudice from delay in notification. *Id.* The *Jones* decision overruled precedent stating that failure to furnish the insurer with written notice and proof of loss within contractual time frame precluded recovery. *See, e.g., Aetna Cas. & Sur. Co. of Hartford, Conn. v. Martin*, 377 S.W.2d 583 (Ky. 1963).

8. Insurer Duty to Defend

Under Kentucky law, an insurer has a duty to defend if there is an allegation that potentially, possible or might come within the coverage terms of the policy. *Aetna Cas. & Sur. Co. v. Com.*, 179 S.W.3d 830, 841 (Ky. 2005), *as modified on reh'g* (Jan. 19, 2006). The duty to defend is separate and distinct from an obligation to pay a claim. *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co*., 814 S.W.2d 273, 280 (Ky. 1991). The determination whether a defense is required must be made at the outset of litigation by reference to the complaint and known facts. *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001) (applying Kentucky law) (citing *Brown Found., Inc. v. St. Paul & Marine Ins. Co.*, 814 S.W.2d 273, 279 (Ky. 1991)).

9. Bad Faith Claims Against Insurer

Kentucky law permits a bad faith claim predicated on an insurer's failure to defend and deal with its insured in good faith. *Grimes v. Nationwide Mut. Ins. Co.*, 705 S.W.2d 926, 932 (Ky. Ct. App. 1985). Kentucky uses a three-part test for claims that an insurer refused to pay a claim in bad faith: (1) proof of insurer's obligation to pay a claim; (2) lack of a reasonable basis to deny the claim; and (3) knowledge or reckless disregard that there was no reasonable basis for denying the claim. *Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993). This test applies to a claim of bad faith made by an insured against its own insurer as well as to third-party's claim of bad faith against an insurance company. *Id.* "An insurer is entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts." *Id.* (internal citations omitted.)

10. Mandatory Arbitration Rules

Certain judicial districts in Kentucky have the authority to mandate arbitration according to their local rules, though there is no uniform mandatory arbitration rule for all counties or judicial districts. Kentucky does have a Uniform Arbitration Act, which provides for the procedure and enforcement of agreements to arbitrate disputes, but does not provide any statutory requirement to arbitrate any particular type of case. *See* Ky. Rev. Stat. Ann. § 417.045, *et seq.*

Louisiana

1. Comparative Fault

Except for intentional torts, Louisiana is a pure comparative fault state. Louisiana Civil Code art. 2323.

2. Insurance Minimum Limits

Louisiana law sets forth the following amounts as the minimum allowed for auto insurance liability coverage:

$15,000 coverage for bodily injury to any one person

$30,000 coverage for total bodily injury for all people per accident

$25,000 coverage for property damage (i.e. damage to a vehicle)

In Louisiana, the "No-Pay, No Play" law bars uninsured and underinsured drivers from collecting the first $15,000 of bodily injury damages and the first $25,000 of property damages. This means that even if the other driver is at fault, an uninsured driver will have to cover medical costs up to $15,000, and car repairs up to $25,000. Louisiana R.S. 32:866.

3. Statute of Limitations

Negligence: One year for all tort claims for bodily injury, wrongful death, property damage and bad faith. La. Civil Code article 3492. Any claim for damages under the uninsured or underinsured motorist provisions of a liability policy can be filed up to two (2) years from the date of the accident. LSA-R.S. 9:5629. The time periods begin to run from the date of the event giving rise to the claim.

Negligent Construction: Ten years for actions against architects and contractors for defects in construction, renovation or repair. Louisiana Civil Code art. 3500. Five year preemptive period, in cases of fraud against engineers, surveyors, architects, designers, real estate developer. Louisiana R.S. 9:5607. Note that architects are covered by both statutes and the conflict has not been resolved.

Products Liability: One-year prescriptive period for delictual actions applies to actions brought under the Louisiana Products Liability Act. *Am. Zurich Ins. Co. v. Caterpillar, Inc.*, 2012-270 (La. App. 3 Cir. 10/3/12), 99 So. 3d 739, 741. Redhibition claims: When seller did not know of defect: 4 years from delivery or 1 year from discovery. When defect in residential or commercial immovable property and seller did not know of defect: 1 year from delivery. When defect is residential or commercial immovable property and seller knew of the defect: 1 year from discovery. La. Civil Code article 2534.

Wrongful Death: One year from date of death. Louisiana Civil Code art. 2315.2.

Breach of Contract: Ten years unless a specific provision applies. La. Civil Code art. 3499. For example, an action on an open account must be brought in 3 years. La. Civil Code art. 3494(4). Ten years has been held to be applicable to "bad faith" claims asserted by an insured against his own insurer for breach of their insurance contract and the insurer's statutorily imposed claims handling duties. La. Civ. Code art. 3499; *Cantrelle Fence, Inc. v. Allstate Ins. Co.,* 550 So.2d 1306.

Unlawful Trade Practices: One year from time of transaction that gave rise to the right of action. La. R.S. 51:1409 E.

4. Punitive Damages and Damage Caps

Punitive Damages:

In Louisiana, there is a general public policy against punitive damages; thus a fundamental tenet of our law is that punitive or other penalty damages are not allowable unless expressly authorized by statute." *Romero v. Clarendon America Ins. Co.,* 45 So.3d 789, 791 (La. Ct. App. 3d Cir. 2010). Among the other Louisiana statutes that allow for punitive damages are Louisiana Civil Code article 2315.3 provided for punitive damages against a defendant who causes injury through an act of pornography involving a juvenile. Article 2315.4 provides for punitive damages "upon proof that the injuries upon which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries." Article 2315.7 provides for punitive damages against a perpetrator of criminal sexual activity with a person 17 years old or younger. Other Louisiana statutes that allow for punitive damages in the form of a fine or penalty are La. R.S. 3:4278.1 (destruction of trees);

LSA-R.S. 22:1220 (insurer arbitrarily or capriciously fails to pay an insured's claim); *Edmonds v. Boh Bros. Construction Co.*, 522 So.2d 1166 (La. App. 4 Cir. 1988). Louisiana's choice-of-law provisions on punitive damages do allow for punitive damages against **non-residents** under certain conditions. LSA-C.C. Art. 3546; Louisiana Civil Code articles Arts. 3518 to 3548).

Non-Economic Damages Cap

There is no cap on compensatory punitive damages, except for a $500,000 cap in medical malpractice (La. R.S. 40:1299.42) and claims against public entities in Louisiana. An injured person may recover all special and general damages (including physical and mental pain and suffering) which are proximately caused by the accident. La. Civ. Code art. 2315.

5. Collateral Source

In Louisiana, the collateral source rule is a substantive rule of law that bars a tortfeasor from reducing quantum of damages owed to a plaintiff by the amount of recovery the plaintiff received from other sources of compensation that are independent of (or collateral to) the tortfeasor. Thus, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution. *Bellard v. American Central Ins. Co.*, 980 So.2d 654, 663-71 (La. 2008).

6. Expert Admissibility Standard – Daubert v. Frye

The analysis established by Daubert is to be applied to determine the admissibility of expert testimony. *Cheairs v. State ex rel. Department of Transp. And Development,* 2003-0680, p. 7 (La. 12/3/03), 861 So.2d 536, 541. Experts may sit in during testimony and are allowed to express opinions of matters within their areas of expertise. The defense is normally allowed at least one IME in a civil personal injury suit. *See* LSA-C.E. art. 702.

7. First Party Notice Requirements.

8. Insurer's Duty to Defend

An insurer's duty to defend its insured is broader than its liability for damage claims. The insurer's duty to defend suits brought against its insured is determined by the allegations of the injured plaintiff's petition, with the insurer being obligated to furnish a defense unless the petition unambiguously excludes coverage. *American Home Assurance Co. v. Czarniecki*, 230 So.2d 253 (La.1970). Once a petition states one claim within the policy's coverage, the insurer has a duty to accept defense of the entire lawsuit, even though other claims in the petition fall outside the policy's coverage. *Ellis v. Transcontinental Ins. Co.*, 619 So.2d 1130 (La. App. 4th Cir.), writ denied, 625 So.2d 1043 (La.1993).

If the insurer chooses to represent the insured but deny coverage, it must employ separate counsel. If it fails to do so, the insurer is liable for attorney's fees and costs the insured may incur in defending the suit. *Dugas Pets Control of Baton Rouge v. Mutual Fire, Marine and Inland Ins. Co.*, 504 So.2d 1051 (La. App. 1st Cir. 1987).

When an insurer, with knowledge of facts indicating noncoverage under the insurance policy, assumes or continues the insured's defense without obtaining a nonwaiver agreement to reserve its coverage defense and without providing separate counsel, the insurer waives such policy defense. *Steptoe v. Masco Construction Co.,* 643 So.2d 1213 (La. 1994).

The duty to defend has been held to extend to an obligation to appeal where reasonable grounds for an appeal exist. *Reichert v. Continental Ins. Co.*, 290 So.2d 730, 734 (La. Ct. App. 1974).

9. Bad Faith Claims against Insurers

Under La. R.S. 22:1892 and 22:1973, insurance companies owe their policyholders a duty of good faith and fair dealing. Among other things, these statutes require insurers to:

(1) Pay the amount the claim within 30 days of satisfactory proof of loss;

(2) Initiate adjustment of the claim within 14 days of notice;

(3) Pay all settlement agreements in a timely fashion;

(4) Not misrepresent pertinent facts or insurance policy provisions; and

(5) Adjust the insurance claim fairly and promptly.

The failure to comply with these requirements means the insurer runs the risk of being found to be "arbitrary, capricious or without probable case" and be liable for a penalty of up to fifty percent of the amount that the insurer owes its insured, plus reasonable attorney fees.

Third-party claimants usually have no cause of action against a tortfeasor's liability insurer for failure to settle or attempt settlement of the third-party's claims, unless the insurer has breached a specific duty that has been created by statute in favor of the third-party claimant. The most pertinent statutory duties in favor of third-party claimants and against liability insurers include misrepresenting insurance policy provisions or facts relevant to any coverage at issue; failing to pay a settlement within 30 days after the agreement is reduced to writing; misleading a claimant as to the applicable statute of limitations; failing to initiate loss adjustment of property damage and medpay claims within 14 days of notification of the claim; and failing to make a written offer to settle a PD claim within 30 days of receiving satisfactory proof of loss. If an insurer knowingly or arbitrarily breaches these duties, the claimant can recover from the insurer certain penalties, the specifics of which vary depending upon the particular duty breached but which typically include the greater of "$5,000.00 or double the amount of any damages that are directly caused by the insurer's breach," or the greater of "$1,000.00 or 50% of the amount due from the insurer," plus reasonable attorney fees for some (but not all) breaches by the insurer of its statutory duties mentioned herein-above. *See* La. R.S. 22:1892 and 1973 (Louisiana's primary insurance penalty statutes); Theriot v. Midland Ins. Co., 694 So.2d 184 (La. 1997); Stanley v. Trinchard, 500 F.3d 411, 427 (5th Cir. 2007). See also Reed v. State Farm Mut. Auto. Ins. Co., 857 So.2d 1012, 1021 (La. 2003) and Buffman, Inc. v. Lafayette Co., 36 So.3d 1004, 1024 (La. App. 4 Cir. 2010) writ granted in part, 78 So.3d 130 (La. 2012) (Defining "arbitrary and capricious").

10. Mandatory Arbitration Rules

Louisiana does not require arbitration in any context.

Maine

1 COMPARATIVE FAULT

Maine has adopted a form of the doctrine of modified comparative negligence. Me. Rev. Stat. Ann. tit. 14, § 156 (West 1980). Under this doctrine, a claimant's action is barred if the jury finds him to be "equally at fault." Id.

2 INSURANCE MINIMUM LIMITS

Liability/Property

- $50,000 – bodily injury to or death of one person in any one accident.
- $100,000 – bodily injury to or death of two or more persons in any one accident.
- $25,000 – injury to or destruction of property of others in any one accident.

3 STATUTE OF LIMITATIONS

Negligence: 6 years 14 Me. Rev. Stat §752
Negligent Construction: 6 years 14 Me. Rev. Stat §752
Medical malpractice: 3 years. 24 Me. Rev. Stat §2901
Product Liability: 6 years 14 Me. Rev. Stat §752
Wrongful Death: 2 years. 18 Me. Rev. Stat §2-804(B)
Breach of Contract: 6 Years 14 Me. Rev. Stat. 752

4 PUNITIVE DAMAGES AND DAMAGES CAPS

a. Punitive Damages

Punitive or exemplary damages are allowable only where there is clear and convincing evidence of express malice, misconduct motivated by ill will, or actual malice, outrageous conduct such as to show a conscious disregard of the rights of others. Tuttle, supra; and Chiappetta v. Le Blond, 544 A.2d 759 (Me.1988).

Punitive damages are awarded over and above compensatory damages, so as to warn others and punish the wrongdoer. See Hanover Ins. Co. v. Hayward, 464 A.2d 156 (Me.1983) (overruled on other grounds by Pattershall v. Jenness, 485 A.2d 980 (Me.1984)). As a general rule, punitive damages are recoverable only in tort cases, and are not permitted for breach of contract even though the action is *ex delicto*, that is, even though styled a tort action rather than a contract action. Forbes v. Wells Beach Casino, Inc., 409 A.2d 646 (Me.1979); Reid v. Key Bank of Southern Maine, Inc., 821 F.2d 9 (1st Cir.1987); and Pombriant v. Blue Cross/Blue Shield of Maine, 562 A.2d 656 (Me.1989).

Punitive damages are capped in wrongful death cases at $250,000.

b. Non-Economic Damages Cap

Non-economic damages for wrongful death actions are limited to $500,000 in wrongful death cases. The cap does not apply on other Maine personal injury cases.

5 COLLATERAL SOURCE RULES

Damages recovered for personal injuries or death caused by the negligence of another cannot be reduced by reason of the fact that the injured party or his or her estate has been partly compensated for the loss by proceeds of an insurance policy.

The reason for the rule is that one who by his or her negligence has injured another owes to the latter full compensation for the injury inflicted by him or her; and payment for such injury from a collateral source in no way relieves the wrongdoer of his or her obligation. Werner v. Lane, 393 A.2d 1329 (Me.1978).

Evidence of collateral source payments is inadmissible. Werner, supra. A plaintiff is entitled to a jury instruction that payment from a collateral source is not to be considered, unless the plaintiff himself volunteers this irrelevant evidence.

6 EXPERT ADMISSIBILITY STANDARD – DAUBERT V. FRYE

Expert testimony in civil cases is governed by Rules 702 to 705 M.R.Evid., which provide as follows:

> Rule 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise".
>
> Rule 703: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence".
>
> Rule 704: "(a) Except as provided in sub-division (b) testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embrasses an ultimate issue to be decided by the trier of fact.
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issue or issues are matters for the trier fact alone".
>
> Rule 705: "The expert may testify in terms of opinion or inference and gives (sic) reasons therefore without prior disclosure of the underlying facts or data unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination".

7 FIRST PARTY NOTICE REQUIREMENTS

Insurer must show breach of notice provision and that it was prejudiced by the delay. Proof of prejudice is a question of fact. Lanzo v. State Farm Mut. Auto. Ins. Co., 524 A.2d 47 (Me. 1987); Ouellette v. Maine Bonding & Cas. Co., 495 A.2d 1232 (Me. 1985); Gates Formed Fibre Prods., Inc. v. Imperial Cas. & Indem. Co., 702 F. Supp. 343, 348 (D. Me. 1988); Acadia Ins. Co. v. Keiser Indus., Inc., 793 A.2d 495 (Me. 2002); Franco v. Selective Ins. Co., 184 F.3d 4, 7 (1st Cir. 1999); Jackson v. N. E. Ins. Co., Case No. CV-07-178, 2009 Me.

8 INSURER DUTY TO DEFEND

Maine requires that an insurer defend any suit that alleges a potential occurrence within the scope of its coverage. Merrimack Mutual Fire Ins. Co. v. Brennan, 534 A.2d 353 (Me. 1987) and Travelers v. Dingwell, 414 A.2d 220, 226 (1980); Union Mutual Fire Ins. Co. v. Town of Topsham, 441 A.2d 1012, 1015 (Me. 1982). This question is resolved by comparing the allegations of the complaint with the provisions of the policy. Baywood Corp. v. Maine Bonding & Casualty Co., 628 A.2d 1029, 1030 (Me. 1993).

A duty to defend is still required even if the actual facts are contrary to what is alleged against the insured. J.A.J., Inc. v. Aetna Casualty & Surety Co., 529 A.2d 806, 808 (Me. 1987). In general, an insurer's duty to defend extends to all counts of the complaint, including non-covered theories of liability, where the counts arise out of a common set of facts. Gibson v. Farm Family Mutual Ins. Co., 673 A.2d 1350 (Me.1996). See also Travelers Indemnity Co. v. Dingwell, 414 A.2d 220, 226 (Me. 1980) and J.A.J., Inc. v. Aetna Casualty & Surety Co., 529 A.2d at 808. In

9 BAD FAITH CLAIMS AGAINST INSURERS

Pursuant to 24-A M.R.S.A. §2436-A, a person injured by any of the following actions taken by that person's own insurer may bring a civil action and recover damages, together with costs and disbursements, reasonable attorney's fees and interest on damages at the rate of 1 1/2% per month:

A. Knowingly misrepresenting to an insured pertinent facts or policy provisions relating to coverage at issue;

B. Failing to acknowledge and review claims, which may include payment or denial of a claim, within a reasonable time following receipt of written notice by the insurer of a claim by an insured arising under a policy;

C. Threatening to appeal from an arbitration award in favor of an insured for the sole purpose of compelling the insured to accept a settlement less than the arbitration award;

D. Failing to affirm or deny coverage, reserving any appropriate defenses, within a reasonable time after having completed its investigation related to a claim; or

E. Without just cause, failing to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear.

10 MANDATORY ARBITRATION RULES

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. 14 M.R.S.A. § 5927. But parties need not arbitrate their dispute unless they have agreed to do so in writing. Patrick v. Moran, 764 A.2d 256 (2001).

Maryland

1. Comparative Fault

Maryland is not a comparative fault state, but does recognize the defense of contributory negligence.

2. Insurance Minimum Limits

Maryland requires minimum liability coverage in the Maryland Annotated Code Insurance Article § 19-504. Minimum liability coverage required, states that each motor vehicle liability insurance policy issued, sold, or delivered in the State shall provide the minimum liability coverage specified in Title 17 of the Transportation Article.

Maryland's minimum liability insurance requirements are as follows:

- **Bodily Injury**: $30,000 per person; $60,000 for any two or more persons, in addition to interests and costs. Md. Code Ann., Transp. § 17-103(b)(1) (Repl. Vol. 2012).
- **Property Damage**: $15,000, in addition to interest and costs Md. Code Ann., Transp. § 17-103(b)(2) (Repl. Vol. 2012).
- **Personal Injury Protection (PIP):** Unless waived, $2,500 per person. Md. Code Ann., Ins. § 19-505(b)(2) (Repl. Vol. 2011).
- **Uninsured and Underinsured (UM/UIM):** Set forth in Md. Code Ann., Ins. § 19-509(e) (Repl. Vol. 2011).
    - *Bodily Injury*: $30,000 per person; $60,000 for any two or more persons, in addition to interests and costs. Md. Code Ann., Transp. § 17-103(b)(1) (Repl. Vol. 2012).
    - *Property Damage*: $15,000, in addition to interest and costs Md. Code Ann., Transp. § 17-103(b)(2) (Repl. Vol. 2012).
    - UM limits generally required to equal liability limits.
    -

2. Statute of Limitations

Negligence: Generally, negligence actions are governed by Maryland's default three-year statute of limitations, Md. Code Ann. Cts. & Jud. Proc. § 5-101 (Repl. Vol. 2013). However, medical negligence claims against statutorily defined health care providers are governed by Md. Code Ann. Cts. & Jud. Proc. § 5-109 (Repl. Vol. 2013). That section dictates that Medical Malpractice claims must be filed within the earlier of: (1) five years of the time the injury was committed; or (2) three years of the date the injury was discovered. The discovery rule dictates that the statute of limitations period tolls "until the time the plaintiff discovers, or through the exercise of due diligence, should have discovered, the injury." *Windesheim v. Larocca*, 443 Md. 312, 328 (2015).

Negligent Construction: For construction claims involving breach of contract or negligence, the Maryland Courts apply a three year statute of limitations from the time the cause of action accrues. *See* Md. Code Ann. Cts. & Jud. Proc. § 5-101 (Repl. Vol. 2013). The accrual of a cause of action is generally subject to the "discovery rule," whereby the accrual of the limitations period is tolled "until the time the plaintiff discovers, or through the exercise of due diligence, should have discovered, the injury." *Windesheim v. Larocca*, 443 Md. 312, 328 (2015).

Maryland also has statute of repose which provides "a cause of action for damages does not accrue and a person may not seek contribution or indemnity from any architect, professional engineer, or contractor for damages incurred when wrongful death, personal injury, or injury to real or personal property, resulting from the defective and unsafe condition of an improvement to real property, occurs more than 10 years after the date the entire improvement first became available for its intended use." Md. Code Ann. Cts. & Jud. Proc. § 5-108(b) (Repl. Vol. 2013). There is a similar twenty-year repose for other claims for "wrongful death, personal injury, or injury to real or personal

property resulting from the defective and unsafe condition of an improvement to real property . . . ." *Id.*; § 5-108(a).

Maryland will also recognize limitations contained within a party's contractual agreements unless contrary to public policy.

Product Liability: Generally speaking, product liability actions in Maryland must be commenced within three years. Md. Code Ann., Cts. & Jud. Proc. § 5-101 (Repl. Vol. 2013). However, "the statute of limitations should not begin to run until the plaintiff knows or through the exercise of due diligence should know of injury, its probable cause, and either manufacturer wrongdoing or product defect." *Pennwalt Corp. v. Nasios*, 314 Md. 433, 452 (1988). Moreover, "[i]f knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, of in the exercise of ordinary diligence should have discovered the fraud." Md. Code Ann., Cts. & Jud. Proc. § 5-203 (Repl. Vol. 2013).

Wrongful Death: A claim for wrongful death must be filed within three years of the date of death. Md. Code Ann., Cts. & Jud. Proc. § 3-904(g)(1) (Repl. Vol. 2013). Maryland's traditional discovery rule does not apply to wrongful death actions with the exception of death caused by an "occupational disease," for which a claim must be filed within 10 years of the time of death or three years of the date when the cause of death was discovered, whichever is shorter.

Breach of Contract: Maryland's three-year statute of limitations applies generally to actions for breach of contract. Md. Code Ann., Cts. & Jud. Proc., § 5-101 (Repl. Vol. 2013). However, where the contract or promissory note is under seal (*e.g.*, deed of trust), the statute of limitations is 12 years. *Id.* § 5-102(a) (Repl. Vol. 2013).

Unlawful Trade Practices: Unlawful trade practices are regulated by the Insurance Article of the Maryland Annotated Code. Claims handling is regulated by Title 27 of the Insurance Article. Section 27-303 deals with Unfair Claims Settlement Practices. The Maryland Insurance Administration has the authority to require an insurer to pay a claim if it was denied for an arbitrary or capricious reason. Laches, rather than a statute of limitations, applies to such claims; courts, however, will look at Maryland's three year statute of limitations when considering the applicability of laches.

Section 3-1701 of the Courts & Judicial Proceedings Article allows an insured to bring a lack of good faith claim against an insurer that denies a claim with a lack of good faith. Md. Code Ann., Cts. & Jud. Proc. § 3-1701 (Repl. Vol. 2013). For much such claims, the complaint must initially be brought before the Maryland Insurance Administration.

4. Punitive Damages and Damage Caps

Punitive Damages: To recover punitive damages in Maryland, a plaintiff must plead facts sufficient to show actual malice and must explicitly and directly request such relief. *Scott v. Jenkins,* 345 Md. 21, 34-35 (1997). Maryland courts require "actual malice," not simply "malice" or "implied malice." *Owens-Illinois v. Zenobia,* 325 Md. 420 (1992). A finding of "actual malice" requires a plaintiff prove by clear and convincing evidence that the defendant acted "for the sole purpose of wrongfully injuring the plaintiff" and that "that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud." *Id.* at 463. Further, "actual malice" requires substantially more than an unlawful or injurious act and more than even the grossest negligence. *Scott*, 345 Md. at 29. A

plaintiff may not recover punitive damages unless there has also been an award of compensatory damages. *Caldor v. Bowden,* 330 Md. 632 (1993). Punitive damages are available only in tort actions – not breach of contract actions. *Middle States v. Thomas,* 340 Md. 699 (1995). There is no statutory cap on an award of punitive damages. *Bowden v. Caldor,* 350 Md. 4 (1998). Although Maryland Rule 2-503(b) permits a trial court to exercise its discretion in bifurcating compensatory and punitive damages claims, mandatory bifurcation of such claims has been rejected by the Court of Appeals of Maryland. Procedurally, the Court of Appeals suggests that Maryland trial courts first instruct the jury on compensatory claims and on the defendant's potential liability for punitive damages. Then, once the jury has made a finding of liability on the underlying claims and has determined that punitive damages are appropriate, the trial court will further instruct the jury concerning the calculation of a punitive damages award. *Owens-Illinois,* at n. 29. Once the jury finds that punitive damages are supportable, they may then consider a defendant's financial means in making such an award. Md. Code Ann., Cts. & Jud. Proc. § 10-913 (Repl. Vol. 2013).

Non-Economic Damages Cap: Maryland has two separate non-economic damages caps; medical malpractice claims are treated differently and impose a lower cap. Non-economic damages do not include punitive damages. Juries cannot be informed of the non-economic damages cap, and any award exceeding the cap must be reduced by the court to conform to the applicable limitation.

The cap for personal injury claims other than medical malpractice claims is set forth in Md. Code Ann., Cts & Jud. Proc. § 11-108 (Repl. Vol. 2013). Since October 1, 1994, the cap has increased by $15,000 each year. The cap for claims arising on or after October 1, 1994 is $500,000, and the cap for claims arising on or after October 1, 2015 is $815,000. The non-economic damages for wrongful death claims with two or more beneficiaries is also capped at 150% of the general limitation for claims arising from the same act or omission. Accordingly, the combined limit for a wrongful death and survival action arising on or after October 1, 1994 is $1,250,000 and the cap for claims arising on or after October 1, 2015 is $2,037,500.

The lower cap for medical malpractice claims applies to claims arising on or after January 1, 2005. See Md. Code Ann., Cts. & Jud. Proc. § 3-2A-09 (Repl. Vol. 2013). In medical malpractice claims, an awards by the health claims arbitration panel or by a court are limited to $650,000 for a claim on or after January 1, 2005 through December 31, 2008. Thereafter, like other personal injury claims, the cap increases by $15,000 per year such that the January 1, 2016 cap is $770,000. The cap for claims involving two or more beneficiaries is 125% of the general limitation, such that the combined limit for actions arising on or after January 1, 2005 is $812,500 and the cap on or after January 1, 2016 is $962,500.

5. Collateral Source Rule

The collateral source rule has been applied in Maryland since 1899. *City Pass. Ry. Co. v. Baer*, 90 Md. 97, 44 A. 992 (1899). The rule generally provides that payment by a collateral source to a plaintiff for items of damage cannot be set up by the tortfeasor as mitigation or as a reduction of damages. The rule permits an injured person to recover the full amount of his or her provable damages, "regardless of the amount of compensation which the person has received for his [or her] injuries from sources unrelated to the tortfeasor," and generally prohibits presentation to a jury of evidence of the amount of medical expenses that have been or will be paid by health insurance. *Haischer v. CSX Transportation, Inc.*, 381 Md. 119, 132 (2004) (quoting *Motor Vehicle Admin. v. Seidel*, 326 Md. 237,

253 (1992)("[p]ayments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant.").

There are, however, a number of potential exceptions to the rule. In medical malpractice cases, the collateral source rule has been statutorily modified to permit the reduction of a malpractice award for amounts paid through insurance benefits. The statutory scheme requires that "damages be reduced to the extent that the claimant has been or will be paid, reimbursed, or indemnified under statute, insurance, or contract for all or part of the damages assessed." Md. Code Ann., Cts. & Jud. Proc. § 3-2A-05(h) (Repl. Vol. 2013).

Evidence of payments by a collateral source may be admitted where there is evidence of malingering or exaggeration on the part of a plaintiff. For example, evidence of payment of worker's compensation benefits may be admissible as a reason a plaintiff has failed to return to work. Thus, where there is a reasonable suggestion of malingering or exaggeration on the part of a plaintiff, "the evidence of collateral payments is admissible . . . but evidence as to collateral payments is inadmissible in the absence of evidence of malingering or exaggeration or where the real purpose of the evidence offered as to collateral sources is the mitigation of liability for damages of the defendant." *Kelch v. Mass Transit Admin.*, 42 Md. App. 291, 296 (1979), *aff'd*, 287 Md. 223 (1980).

6. Expert Admissibility Standard – *Daubert v. Frye*

In Maryland (state court actions), admissibility of expert testimony is soundly within the trial court's discretion. *See, e.g., Carter v. Shoppers Food Warehouse Md. Corp.*, 126 Md. App. 147, 154 (1999). Under Maryland Rule 5-702, a court may admit expert testimony if it "determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training or education; (2) the appropriateness of the expert testimony on the particular subject; and (3) whether a sufficient factual basis exists to support the expert testimony." *See* Md. Rule 5-702 (2016).

A Maryland court's admission of expert evidence is subject to the *Frye-Reed* standard for determining the reliability of the evidence. Maryland's Court of Appeals adopted this standard in *Reed v. State*, 283 Md. 374 (1978). In so doing, the Court of Appeals adopted the "general acceptance" test for determining the reliability of the expert's method used in forming his or her opinion, citing *Frye v. United States*, 293 F. 1013, 1014 (1923). *See Reed,* 283 Md. at 381 (court stating that "before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field"). This means that an expert's opinions and testimony must be "sufficiently established to have gained general acceptance in the particular field in which it belongs." *See Reed*, 283 Md. at 381 (quoting *Frye*, 293 F. at 1014).

The focus of the *Frye-Reed* test is upon the underlying scientific principles upon which an expert bases his or her conclusion. Stated differently, in arriving at his or her opinion, the expert must rely upon reliable scientific methods. *See id.* at 418; *see also Wood v. Toyota Motor Corp.*, 134 Md. App. 512, 513 (2000) ("it is well established that expert testimony must reflect the use of reliable principles and methodology in support of the expert's conclusions"). An expert's opinion cannot amount to conjecture, speculation or incompetent evidence. *See Giant Foods, Inc. v. Booker*, 152 Md. App. 166, 182-83 (2003).

A trial judge may conduct a hearing where the admissibility of a particular type of scientific evidence is challenged as unreliable or irrelevant to the issues in the case. In *Clemons v. State*, 392 Md. 339 (2006), the Court found that judges have discretion to defer a pre-trial ruling on a motion *in limine* and ordinarily do so where the issue can be better developed or achieve a better context based on what occurs at trial. Where evidence is subject to challenge under *Frye-Reed*, however, the issue should, whenever possible, be dealt with prior to trial. *See Clemons*, 392 Md. at 347, n. 6.

7. First Party Notice Requirements

Under Md. Code Ann., Ins. § 19-110 (Repl. Vol. 2011), an insurer may only disclaim coverage under a liability policy for lack of notice "if the insurer establishes by a preponderance of the evidence that the lack of cooperation or notice has resulted in actual prejudice to the insurer." Further, "[t]he insurer bears the burden of proof to show prejudice." *Prince George's County v. Local Government Ins. Trust*, 388 Md. 162, 187 (2005).

However, that statute only applies to liability insurance policies and has been held not to apply when there is no third party claim involved (i.e. when the insured is making a simple property loss claim). *See Allstate Ins. Co. v. State Farm Mut. Auto Ins. Co.,* 363 Md. 106, 122 (2001) (stating "[b]y its plain language, Ins. 19-110 applies to a 'liability insurance policy.'" A liability insurance policy is "generally issued for the benefit of third parties who are injured and have a claim against a tortfeasor.").

8. Insurer Duty to Defend

In Maryland, an insurer has a duty to defend an Insured against a potentially covered claim(s). *See Brohawn v. Transamerica Insurance Company*, 276 Md. 396, 407-408 (1975) (holding that the insurer has a duty to defend any claims alleged against its policyholder that are "potentially covered" by the policy); *see Zurich Ins. Co. v. Principal Mut. Ins. Co.*, 134 Md. App. 643, 650 (2000) (holding that "if any of multiple claims are potentially covered, the insurer is obligated to defend all claims, until such time as the claims at issue have been limited to those outside of coverage."); *but see Maryland Cas. Co. v. Blackstone Int'l Ltd.*, 442 Md. 685, 688 (2015), *reconsideration denied* (June 17, 2015) ("Thus, a duty to defend may extend even beyond instances in which an insured is liable and the insurer must indemnify.").

In the *Blackstone Int'l Ltd.* case, the "two-party inquiry" for ascertaining whether an insurer has a duty to defend was stated as follows:

> In determining whether a liability insurer has a duty to provide its insured with a defense in a tort suit, two types of questions ordinarily must be answered: (1) what is the coverage and what are the defenses under the terms and requirements of the insurance policy? (2) do the allegations in the tort action potentially bring the tort claim within the policy's coverage? The first question focuses upon the language and requirements of the policy, and the second question focuses upon the allegations of the tort suit.

Id. at 696, 114 A.3d 676, 682 (2015) (quoting *St. Paul Fire & Marine Ins. Co. v. Pryseski,* 292 Md. 187, 193, (1981)).

Courts have construed the "potentiality" rule broadly, finding that an insurer must defend a cause of action potentially covered by a policy, no matter how "attenuated, frivolous or illogical that allegation may be." *Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634, 643 (1996); *Mutual Benefit Insurance Company v. Jordan*, 11 Fed. Appx. 79, 81 (4th Cir. 2001) (insurer's duty to defend policyholder arises as long as the tort plaintiff alleges a "potentially covered" action, no matter how attenuated, frivolous or illogical the allegation may be). If a potentiality for coverage exists, the insurer is obligated to defend its policyholder even if there is no chance the underlying cause of action could succeed, in law or fact. *Northern Insurance Company of New York v. Baltimore Business Communications, Inc.*, 68 Fed.Appx. 414, 417 (4th Cir. 2003).

A potentiality of coverage is typically established by the allegations in the tort plaintiff's complaint. *Litz v. State Farm Fire and Casualty Co.*, 346 Md. 217 (1997). The insured can use extrinsic evidence, outside of the complaint, to establish a potentiality of coverage. *Id.* An insurer however, is bound by the "4-corners" of the complaint and the policy and may not use extrinsic evidence to contest coverage. *Aetna Cas. & Sur. Co. v. Cochran,* 337 Md. 98, 107 (1995) ("Although we have held that an insurer may not use extrinsic evidence to contest coverage under an insurance policy.").

Further, under Maryland law, "[d]oubts as to whether an allegation indicates the possibility of coverage should be resolved in the insured's favor." *Utica Mut. Ins. Co. v. Miller*, 130 Md. App. 373, 383 (2000); *accord U.S.F. & G. v. Nat. Pav. Co.,* 228 Md. 40 (1962) (holding that "in case of doubt as to whether or not the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in insured's favor.").

An insurer "is obligated to defend all claims, notwithstanding alternative allegations outside the policy's coverage, until all potentially covered claims are resolved." *Id.* at 383.

9. Bad Faith Claims against Insurers

A. First-Party Common Law Bad Faith Not Recognized in Maryland

It is the black-letter law of Maryland that a first-party bad faith claim is not recognized in this State:

> [U]nder Maryland law, an insured seeking the payment of first-party benefits cannot pursue a tort claim for bad faith based on an insurer's failure to pay a claim. *See, e.g., Snyder v. Chester Cnty. Mut. Ins. Co.,* 264 F.Supp.2d 332, 340 (D.Md.2003); *McCauley v. Suls,* 123 Md.App. 179, 189, 716 A.2d 1129, 1134 (1998); *Johnson v. Fed. Kemper Ins. Co.,* 74 Md.App. 243, 247–48, 536 A.2d 1211, 1213 (1988). Instead, an insured claiming that an insurer has failed to pay first-party benefits may pursue contract remedies. *See Jones v. Hyatt Ins. Agency, Inc.,* 356 Md. 639, 655, 741 A.2d 1099, 1107–08 (1999) (stating that the duty owed by an insurer who "mistakenly denies coverage ... to the insured" is "entirely contractual").

Harris v. Keystone Ins. Co., No. CIV. CCB-13-2839, 2013 WL 6198160, at 2 (D. Md. Nov. 26, 2013). *See also Yuen v. Am. Republic Ins. Co.,* 786 F. Supp. 531, 533 (D.Md.1992) (internal citation omitted) ("[I]t is well-settled that there is no first party bad faith claim maintainable against an insurer under Maryland law. The purpose of this rule is to confine actions between an insured and his ... insurer to the realm of contract law, rather than letting such actions expand to tort proportions"). As indicated

below, a first party insured can bring, under some circumstance, a statutory claim for lack of good faith.

B. Third-Party Common Law Bad Faith Refusal to Settle Within Policy Limits Recognized in Maryland

While a first-party common law bad faith claim brought by an insured against an insurer is not recognized in Maryland, a third-party common law bad faith refusal to settle within policy limits claim may be brought by an insured against an insurer. In Maryland:

> It is generally held that if a liability insurer acts improperly in defending the insured it may become liable to the insured for the amount of judgment obtained against the insured which is in excess of the policy limits. *See* Annotation, *Insurer's Bad Defense-Liability,* 34 A.L.R.3d 533, § 2(a) at 537. Thus, if the insurer, in bad faith, fails to negotiate and bring about a settlement, the damage to the insured generally will be any excess judgment. 7C J.A. Appleman, *Insurance Law and Practice,* § 4711 at 414 (Berdal ed., 1979). *See also Sobus v. Lumbermens Mutual Casualty Company,* 393 F.Supp. 661 (D.Md.1975), *aff'd,* 532 F.2d 751 (4th Cir.1976) (an insurer has a duty to conduct the insured's defense with reasonable care and it will be liable for an excess verdict caused by its negligence). It is also universally held that the insurer will be liable for expenses, including attorney fees, incurred by the insured in defending a suit after the insurer breaches the insurance contract by wrongfully refusing to provide a defense. *See* Robert E. Keeton & Alan I. Widiss, *Insurance Law,* § 9.5 at 1044-45 (1988).

Allstate Ins. Co. v. Campbell, 334 Md. 381, 393-94 (1994). An insurer's offer of policy limits generally inoculates them against an insured's bad faith refusal to settle within policy limits claim. *See Hughes v. Progressive Direct Ins. Co.*, No. CIV. CCB-12-1555, 2012 WL 4480726, at 3 (D. Md. Sept. 27, 2012)("No Maryland case has been cited to this court in which the Court of Appeals held that an insurer that offered its policy limits in settlement of a claim prior to trial could be held liable in tort for bad faith.").

C. Maryland's Legislature has Established a Statutory Lack of Good Faith Remedy

In 2007, the General Assembly amended Title 27 of the Insurance Article, adding various provisions regarding first party "good faith." 2007 Md. Laws Ch. 150 (S.B. 389) (eff. Oct. 1, 2007). "Good faith" means "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim." Md. Code, Ins. § 27-1001(a) (Repl. Vol. 2011). The statute offered a policyholder two distinct means of complaining to the Maryland Insurance Administration ("MIA"). First, the statute added the "fail[ure] to act in good faith" to the list of "unfair claim settlement practice[s]," for which a policyholder could file a traditional administrative complaint under § 27-303. Second, the statute added a new § 27-1001, allowing the policyholder to file with the MIA a complaint seeking common law breach-of-contract damages and statutory damages, as a prerequisite to filing a good-faith action under Section 3-1701 of the Courts Article.

Pursuant to Md. Insurance Code Ann. § 27-1001(d)(1) (Repl. Vol. 2011), "[a] complaint stating a cause of action under § 3-1701 of the Courts Article shall first be filed with the [MIA]". Conversely,

§ 3-1701(c)(1) provides that "[e]xcept as provided in paragraph (2) of this subsection, a party may not file an action under this subtitle before the date of a final decision under § 27-1001 of the Insurance Article." Therefore, unless an exception provided under § 3-1701(c)(2) applies, all bad faith claims in Maryland must first be presented to the MIA. Pursuant to § 3-1701(c)(2), "[p]aragraph (1) of this subsection does not apply to an action: (i) Within the small claim jurisdiction of the District Court under § 4-405 of this article; (ii) If the insured and the insurer agree to waive the requirement under paragraph (1) of this subsection; or (iii) under a commercial insurance policy on a claim with respect to which the applicable limit of liability exceeds $ 1,000,000." However, it should be noted that the statute focuses on the process used by the insurer to reach its determination, not on the determination itself.

In Maryland, "good faith", for purposes of a statutory bad faith claim under Md. Code Ann., Cts. & Jud. Proc. § 3-1701 (Repl. Vol. 2013), refers to the "process" by which an insurer makes a decision, not the "determination" itself. An insured may not pursue a statutory bad faith claim merely upon the basis that the insurer's "determination" was erroneous (as such a complaint is the proper subject of a breach of contract action):

> The Maryland good faith statute provides that a plaintiff can recover expenses and litigation costs, including reasonable attorneys' fees, as well as interest on those costs, in an action seeking "to determine coverage that exists under [an] insurance policy," if the plaintiff can show that "the insurer failed to act in good faith" with respect to the insurance claim. Md. Code Ann., Ins. § 27-1001(e)(2)(ii) (Repl. Vol. 2011); Md. Code Ann., Cts. & Jud. Proc. § 3-1701(d)(1)-(2) (Repl. Vol. 2013). The statute defines good faith as making "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim." n.3 Md. Code Ann., Cts. & Jud. Proc. § 3-1701(a)(4) (Repl. Vol. 2013). The only other guidance as to the meaning of failure to act in good faith is provided in subsection (f) of the statute: ***An insurer may not be found to have failed to act in good faith under this section solely on the basis of*** delay in determining coverage or ***the extent of payment to which the insured is entitled*** if the insurer acted within the time period specified by statute or regulation for investigation of a claim by an insurer. *Id.* § 3-1701(f).

Cecilia Schwaber Trust Two v. Hartford Accident & Indem., Co., 636 F. Supp. 2d 481, 484-485 (D. Md. 2009)(emphasis added). As was explained in *Schwaber, supra*, "[a]n evaluation of whether an insurer made an 'informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time' of its coverage decision requires, for example, an evaluation of the insurer's efforts to obtain information related to the loss, accurately and honestly assess this information, and support its conclusion regarding coverage with evidence obtained or reasonably available." *Id.* at 487. Thus, an insured alleging a statutory bad faith claim must do more than complain that the insurer's "determination" was erroneous. The insured must allege that the "process" the insured used to reach that "determination" involved unreasonable acts or omissions. The *Schwaber* court also noted that: "[A] jury could not find that [an insurer] failed to act in good faith unless i*t* finds that [the insurer] breached the insurance contract…The statute provides that the remedies available (actual damages, attorneys' fees, and other costs) can be recovered only 'if the trier of fact . . . finds in favor of the insured and finds that the insurer failed to act in good faith . . . .' *Id.* § 3-1701(e) (emphasis added)." *Cecilia Schwaber Trust Two*, 636 F. Supp. 2d at 488 n. 6. *See also 2315*

St. Paul St., LLC v. Hartford Fire Ins. Co., 2012 U.S. Dist. LEXIS 88341, 20 (D. Md. June 25, 2012)("A good faith determination under this statute requires the court to review the totality of the circumstances, which includes efforts of the insurer to resolve the dispute promptly and 'the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage.' However, the court cannot find that the insured failed to act in good faith without a finding that the insured breached the contract in question.")(citations omitted).

10. Mandatory Arbitration of Medical Malpractice Cases:

The Maryland Health Care Malpractice Claims Act, (Md. Code Ann., Cts. & Jud. Proc., § 3-2A-01, *et seq*. (Repl. Vol. 2013)), subjects all medical malpractice claims in excess of $30,000 to mandatory arbitration in the Health Care Alternative Dispute Resolution Office. Arbitration may be waived if all parties agree in writing, or unilaterally by either party after the plaintiff certifies his or her claim against the defendant health care provider as required by § 3-2A-04(b) of the Act. *See* §§ 3-2A-06A; 3-2A-06B (Repl. Vol. 2013).

Massachusetts

1. Comparative Fault

Massachusetts follows modified comparative negligence. Under the rule, Plaintiffs can only recover if their share of the blame was less than 51%. If plaintiffs are 51% or more at fault, then they cannot recover at all, with only a few exceptions. Additionally, Plaintiff's damages are reduced by their share of blame.

2. Insurance Minimum Limits

$20,000 for death or bodily injury to one person; $40,000 per accident
$8,000 Personal Injury Protection
$5,000 for damage to someone else's property

Massachusetts is a "no-fault" state when it comes to auto insurance. This means that when an accident causes injuries, each person files a claim with his or her own insurance company for personal injury protection (PIP) and other benefits.

3. Statute of Limitations

Negligence: Three years after cause of action accrues MGL 260 §2A, but tolled for minors until 3 years after 18th birthday;

Negligent Construction: Within three years after the cause of action accrues, but no more than six years after the earlier of (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by owner. MGL ch. 260 §2B

Medical Negligence: 3 years but a 7 year statute of repose MGL ch. 260 §4

Product Liability: Three years MGL ch. 260 §2A

Wrongful Death: Three years from date of death. MGL ch. 299 §2

Breach of Contract: Six years MGL ch. 260 §2 except 3 years for contracts with the Commonwealth of Massachusetts or its corporations

Unlawful Trade Practices: Four Years MGL ch. 93A, MGL 260 §5A

4. Punitive Damages and Damages Caps

Punitive Damages:

Massachusetts, punitive damages are only available if granted by statute. (See *International Fid. Ins. Co. v. Wilson*, 443 N.E.2d 1308 (1983)) Examples of actions that allow punitive damages are wrongful death actions under Chapter 229, Section 2 and employee discrimination actions under Chapter 151B. Punitive damages are available for medical malpractice suits, but those have a cap of $500,000 unless the injury is catastrophic. Massachusetts case law has established that punitive damages are only available for conduct that is outrageous due to the defendant's evil motive or reckless indifference to the rights of others. Punitive damages can only be awarded in addition to compensatory damages.

Punitive damages are not insurable insofar as they are not compensatory in nature. While leaving open the issue of whether coverage might be required under conventional policies, the SJC ruled in Santos v. Lumbermens Mutual Cas. Co., 408 Mass. 70 (1990) that punitive damages recoverable in a wrongful death action were not insurable under a policy as such awards are not compensatory. Further, the court found that requiring coverage for such awards would not serve the purpose of punitive awards, since the deterrent function would be eliminated.

Non-Economic Damages Cap In Medical Negligence Actions Only: Massachusetts limits non-economic damages to $500,000 in only medical negligence actions, unless the claimant can show "a substantial or permanent loss or impairment of a bodily function or substantial disfigurement, or other special circumstances in the case which warrant a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained." MGL ch. 231 §60-H

5. Collateral Source Rules

Massachusetts courts follow the traditional collateral source rule – that a defendant may not show that the plaintiff has received other compensation for his injury. For example the following amount will usually be excluded from evidence (a) what the plaintiff receives from an accident insurance policy; (b) what an employee receives from his employer while he is recovering or (c) worker's compensation benefits. The purpose of the rule is to prevent jurors from finding that the Plaintiff's claims are unimportant and to prevent jurors from reducing an award for fear of a double recovery. See Corsetti v. The Stone Company, 483 Mass 1, 16-17 (1985).

However, a judge may admit collateral source evidence if it is "probative of a relevant position . Goldstein v. Gontarz, 364 Mass. 800, 809-10 (1974). For example, collateral source evidence may be allowed to impeach the plaintiff's credibitlity or to show a reason other than the injury why the

plaintiff had a prolonged absence from work. Corsetti, 483 Mass at 17-18. Additionally, Mass. Gen. Laws. Ch. 231, § 60G contains a statutory exemption to the traditional rule that by stating that the collateral source rule does not apply to special damages awarded against health care providers in medical malpractice cases.

6. Expert Admissibility Standard – Daubert v. Frye

Massachusetts accepted the Daubert standard in Canavan's Case, 432 Mass. 304, 314.

7. First Party Notice Requirements –

Written notice of claim must be given to the insurer within twenty days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible. Notice given by or on behalf of the insured or the beneficiary to the insurer at or to any authorized agent of the insurer, with information sufficient to identify the insured shall be deemed notice to the insured. MGL ch. 185 §108

Even if an insured does not satisfy the notice condition, it does not automatically mean the insurer has no duty to defend. Under Massachusetts law, an insurer is not excused from its duty to defend unless the lack of notice caused it to suffer actual prejudice. Boyle v. Zurich American Ins. Co., 472 Mass 649 (2015)

8. Insurer Duty to Defend

In Massachusetts the duty to defend is determined by the policy. The duty to defend arises if, in comparing the policy terms with the third-party complaint, "the allegations of the complaint are 'reasonably susceptible' of an interpretation that they state or adumbrate a claim covered by the policy terms . . . Otherwise stated, the process is one of envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy." *Id.* (quoting *Vappi & Co., Inc. v. Aetna Cas. & Sur. Co.*, 348 Mass. 427, 431, 204 N.E.2d 273 (1965)) (citations omitted); see also *Simplex Techs., Inc. v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 197-98, 706 N.E.2d 1135 (1999) (quoting same). The insured bears the initial burden of proving that a claim falls within the grant of coverage. See *Camp Dresser & McKee, Inc. v. Home Ins. Co.,* 30 Mass. App. Ct. 318, 321, 568 N.E.2d 631 (1991). "It is well settled in [Massachusetts] that a liability insurer owes a broad duty to defend its insured against any claims that create a potential for liability." *Simplex*, 429 Mass. at 199 (quoting *Doe v. Liberty Mut. Ins. Co.*, 423 Mass. 366, 368, 667 N.E.2d 1149 (1996)) (emphasis supplied by *Simplex* court). The cause of action stated in the complaint need only give rise to a possibility of recovery, "there need not be a probability of recovery." *Id.* (citation omitted) (emphasis added). Indeed, a duty to defend may arise "even if the claim is baseless." *Mt. Airy Ins. Co. v. Greenbaum*, 127 F.3d 15, 19 (1st Cir. 1997) (applying Massachusetts law); see also *Sterilite*, 17 Mass. App. Ct. at 324 ("the insurer stands in breach of its duty even if the third party fails in the end to support any such claim of liability by adequate proof.").

An insurer that wrongfully refuses to defend a suit against its insured is liable to the insured for the natural consequences of the breach, including sums expended in payment or settlement of the claim, defense costs (including attorneys' fees and expenses), court costs, and any other costs incurred because of the refusal of the insurer to defend. Premier Homes, Inc. v. Lawyers Title Ins. Corp., 76 F.Supp.2d 110, 119 (D. Mass. 1999) and Jefferson Ins. Co. of New York v. Nat'l Union

Fire Ins. Co. of Pittsburgh, Pa., 677 N.E.2d 225, 231 (Mass. App. Ct. 1997). Compare Polaroid Corp. v. The Travelers Indemnity Company, 610 N.E.2d 912, 919-923 (Mass. 1993)(refusing to adopt a rule that insurer is automatically liable for amount of settlement if it fails to defend; policyholder must show that failure by insurer to defend caused it to settle the case on terms to which it would not otherwise have agreed).

In general, there is no duty to defend mere claims. Brown Daltas & Assoc. v. General Accident Ins. Co., 844 F.Supp. 58 (D. Mass. 1994), rev'd on other grounds (1st Cir. 1995) and Marvel Heat Corp. v. Travelers Ind. Co., 325 Mass. 682, 685, 92 N.E.2d 233, 234 (1950). Where the claim has independent legal consequences, such that it is the formal equivalent of a law suit, however, a defense obligation may arise if it sets forth covered claims. Hazen Paper v. USF&G, 407 Mass. 687 (1990)(EPA "PRP" letter). But see Zecco, Inc. v. Travelers Ind. Co., 938 F. Supp. 65 (D. Mass. 1996)(private "PRP" claim was not a "suit"). Otherwise, pre-suits defense costs will only be covered where litigation is inevitable and early legal work is necessary to preserve evidence or otherwise secure an advantage that would be lost if the party waited for the commencement of the formal law suit. Liberty Mutual Ins. Co. v. Continental Cas. Co., 771 F.2d 579 (1st Cir. 1985).

9. Bad Faith Claims against Insurers

Claims for unfair or deceptive practices against insurers are guided by M.G.L. c.176D, whereas the remedy for unfair or deceptive consumer practices are set forth in M.G.L. ch. 93A (West 1984). Section 9(i) of Ch. 93A provides that "any person whose rights are affected by another person violating the provisions of M.G.L. c. 176D may bring an action." Whereas a private individual may seek under Section 9, businesses may only recover under Section 11 of Chapter 93A. The Supreme Judicial Court has ruled that a 176D claim may not be brought under §11. Jet Line Servs., Inc. v. American Employers Ins. Co., 404 Mass. 706, 717 (1989); Transamerica Ins. Group v. Turner Construction Co., 33 Mass. App. Ct. Ct. 446 (1992) and Spencer Press, Inc. v. Utica Mutual Ins. Co., No. 95-P-2017 (Mass. App. Ct. May 16, 1997).

Section 9 damages under Chapter 93A may be trebled for a knowing or willful violation. In 1989, the legislature amended Section 9 to specify that the amount trebled would encompass the entire underlying judgment, not just the damages directly attributable to the insured's conduct. However, the Supreme Judicial Court has more recently ruled that this only applies in cases where the claims against the insured go to a verdict; it does not apply where they are settled. Clegg v. Butler, 07216 (Mass. March 12, 1997).

10. Mandatory Arbitration Rules

The Massachusetts Arbitration Act, St. 1960, c. 374, § 1, codified, as amended, at G. L. c. 251 (Massachusetts Act), is this Commonwealth's version of the Uniform Arbitration Act. The Massachusetts Act "expresses a strong public policy favoring arbitration as an expeditious alternative to litigation for settling commercial disputes." Home Gas Corp. of Mass., Inc. v. Walter's of Hadley, Inc., 403 Mass. 772 , 774 (1989). It provides in part: "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." Id.

Michigan

1. Comparative Fault

Michigan allows a claimant to collect certain damages in most tort actions, even in situations where the claimant's fault exceeds 50 percent. If claimant's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court will reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based, and noneconomic damages will not be awarded. Mich. Comp. Laws §§ 600.2958; 600.2959. There are some specific instances in which the comparative fault statutes are inapplicable, such as absolute liability statutes and conversion. *See* Mich. Comp. Laws § 600. 6098(1); *Shivers v. Schmiege*, 285 Mich. App. 636, 776 N.W.2d 669 (2009).

2. Insurance Minimum Limits

Mich. Comp. Laws § 500.3009 establishes Michigan's mandatory requirements for insurance. The minimums are:

- Bodily Injury/ Death and Property Damage: $20,000 per person, $10,000 for injury to property of others, $40,000 because of bodily injury to or death of two or more persons in any one accident.
- Uninsured and Underinsured (UM/UIM): Discretionary, no required minimums. *See Citizens Ins. Co. of America v. Buck*, 216 Mich. App. 217, 548 N.W.2d 680 (1996); *Rohlman v. Hawkeye-Security Ins.*, 442 Mich. 520, 502 N.W.2d 310 (1993).
- Coverage may be excluded for a named person.

3. Statute of Limitations

Negligence:

Mich. Comp. Laws § 600.5805(10) provides for a three year statute of limitations period for negligence claims.

Negligent Construction:

Mich. Comp. Laws § 600.5839(1) provides that a cause of action must be brought within six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or one year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than ten years after the time of occupancy of the completed improvement, use, or acceptance of the improvement. *See also Citizens Ins. Co. v. Scholz*, 268 Mich. App. 659, 666, 709 N.W.2d 164, 168 (2005).

Product Liability:

Mich. Comp. Laws § 600.5805(13) establishes that the period of limitation is three years in products liability cases.

Wrongful Death:

The applicable statute of limitations in a wrongful death case is Mich. Comp. Laws § 600.5805(10), which states: "The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property."

Breach of Contract:

If an action is founded on a "consensual" duty or obligation or the breach of an "express promise," the action is not for personal injury. It is an action to recover damages for breach of contract and is governed by the six-year statute of limitations in Mich. Comp. Laws § 600.5807. By contrast, when an action is founded on a "non-consensual" duty or one "imposed by law," the action is generally governed by the three-year statute of limitations in Mich. Comp. Laws § 600.5805.

Unlawful Trade Practices:

An action under this section shall not be brought more than six years after the occurrence of the method, act, or practice which is the subject of the action nor more than one year after the last payment in a transaction involving the method, act, or practice which is the subject of the action, whichever period of time ends at a later date. However, when a person commences an action against another person, the defendant may assert, as a defense or counterclaim, any claim under this act arising out of the transaction on which the action is brought. Mich. Comp. Laws § 445.911

4. **Punitive Damages and Damages Caps**

Punitive Damages:

Punitive damages are generally not recoverable, except if they are expressly authorized by statute. *Casey v. Auto Owners Ins. Co.*, 273 Mich. App. 388, 729 N.W.2d 277 (2006).

Non-Economic Damages Cap:

Mich. Comp. Laws § 600.1483 governs non-economic damages in medical malpractice situations, limiting damages to $280,000 or $500,000, dependent on specific conditions. As noted in Mich. Comp. Laws § 600.2959, in comparative fault situations where the plaintiff's fault exceeds that of the defendants, noneconomic damages will not be allowed.

5. **Collateral Source Rules**

Mich. Comp. Laws § 600.6303 reduces damages awarded to a plaintiff if it can be shown that they received benefits from a collateral source, and the applicable sources are described in the statute.

6. **Expert Admissibility Standard – *Daubert v. Frye***

Michigan follows the *Daubert* standard, as laid out in Mich. R. Evid. 702: "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of

reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *See also* Mich. Comp. Law § 600.2955.

7. First Party Notice Requirements

An insured must provide timely notice of a claim. If that notice is not provided in a timely manner, the insurer's obligation is voided if it can show prejudice. *Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 281 Mich. App. 429, 433, 761 N.W.2d 846, 851 (2008); *see also Wendel v. Swanberg*, 384 Mich. 468, 478 n. 8, 185 N.W.2d 348 (1971).

8. Insurer's Duty to Defend

An insurer's duty to defend arises out of allegations in the plaintiff's pleading. *Fremont Mut. Ins. Co. v. Wieschowski*, 182 Mich. App. 121, 451 N.W.2d 523 (1989); *Frankenmuth Mut. Ins. Co. v. Beyer*, 153 Mich. App. 118, 395 N.W.2d 36 (1986); *Farm Bureau Mut. Ins. Co. of Michigan v. Hoag*, 136 Mich. App. 326, 356 N.W.2d 630 (1984). In order to determine whether an insurer has a duty to defend its insured, the court must look to the language of the insurance policy and construe its terms to find the scope of the coverage of the policy. *Arco Indus. Corp. v. Am. Motorists Ins. Co.*, 448 Mich. 395, 402, 531 N.W.2d 168 (1995). The duty extends to situations where the insurer knows the truth of an unpleaded fact that would bring the complaint into coverage. Under Michigan law, once triggered, an insurer's duty to defend continues until that stage in the proceedings is reached where there is no longer any uncertainty as to the possibility of coverage. *Mich. Mun. Risk Mgmt. Auth. v. State Farm Fire and Cas. Co.*, 559 F. Supp. 2d 794 (E.D. Mich. 2008).

In the event an insurer breaches its duty to defend, the insurer may be liable for the judgment, even if it exceeds the policy limits. Under Michigan law, when an insurer fails to fulfill its duty to defend, it becomes liable for all foreseeable damages flowing from the breach, including amounts paid in settlement. *Mich. Mun. Risk Mgmt. Auth. v. State Farm Fire and Cas. Co.*, 559 F. Supp. 2d 794 (E.D. Mich. 2008); *Admiral Ins. Co. v. Columbia Cas. Ins. Co.*, 194 Mich. App. 300, 486 N.W.2d 351 (1992).

Insurers owe a duty to defend until the claims against the policyholder are confined to those theories outside the scope of coverage under the policy. *Am. Bumper & Mfg. Co. v. Hartford Fire Ins. Co.*, 452 Mich. 440, 455, 550 N.W.2d 475, 483 (1996).

9. Bad Faith Claims Against Insurers

Michigan has recognized a cause of action for bad faith arising out of an insurer's failure to defend. The court has defined "bad faith" as "reckless, indifferent, or intentional disregard of the interests of the person owed a duty." *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.*, 426 Mich. 127, 136, 393 N.W.2d 161, 164 (1986). Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith. Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment. The court discusses 12 factors that may be considered in determining bad faith:

1) failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured;

2) failure to inform the insured of all settlement offers that do not fall within the policy limits;
3) failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances;
4) failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury;
5) rejection of a reasonable offer of settlement within the policy limits;
6) undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high;
7) an attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits;
8) failure to make a proper investigation of the claim prior to refusing an offer of settlement within the policy limits;
9) disregarding the advice or recommendations of an adjuster or attorney;
10) serious and recurrent negligence by the insurer;
11) refusal to settle a case within the policy limits following an excessive verdict when the chances of reversal on appeal are slight or doubtful; and
12) failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal, especially where trial counsel so recommended.

10. Mandatory Arbitration Rules

Michigan public policy indicates a preference for arbitration, but its previous statute regarding mandatory arbitration was repealed. The agreement to arbitrate is a valid contract. *Rembert v. Ryan's Family Steak Houses, Inc.*, 235 Mich. App. 118, 163-166, 596 N.W.2d 208 (1999). To be valid, an arbitration agreement must meet the "general rules regarding the validity of contracts." *Id.* at 125, 596 N.W.2d 208.

A court will only vacate or modify an arbitration decision where a clear error of law is evident on the face of the decision or where an arbitrator has exceeded his authority. *DAIIE v. Gavin*, 416 Mich. 407, 428-429, 331 N.W.2d 418 (1982).

Minnesota

1. Comparative fault

The Minnesota Comparative Fault Act controls the apportionment of fault in civil cases, including products liability cases. Minn. Stat. § 604.01 defines the scope of the Act, the theories of recovery and defenses subject to comparison, and bars recovery for claimants who are more at fault than the person from whom recovery is sought. Section 604.02 governs joint and several liability and loss reallocation. Subdivision 3 of section 604.02 establishes special rules for loss reallocation in certain products liability cases.

2. Insurance Minimum Limits

Minnesota's No-Fault Act requires minimum limits for "basic economic loss" (no-fault benefits), "residual liability insurance" (bodily injury and property damage), and uninsured and underinsured motorist coverage:

A. Basic Economic Loss (Minn. Stat. § 65B.44, subd. 1; 65B.49, subd. 2):
$40,000 for loss arising out of the injury of any one person consisting of:
- $20,000 for medical expense loss arising out of injury to any one person, and
- $20,000 for income loss, replacement services loss, funeral expense loss, survivor's economic loss, and survivor's replacement services loss arising out of the injury to any one person.

B. Residual liability insurance (Minn. Stat. § 65B.49, subd. 3(1)):
- $30,000 bodily injury per person per accident,
- $60,000 bodily injury per accident for multiple people, and
- $10,000 property damage per accident.

C. Uninsured and Underinsured motorist coverage (Minn. Stat. § 65B.49, subd. 3a(1)):
- $25,000 because of injury to or the death of one person in any accident, and
- $50,000 because of injury to or the death of two or more persons in any accident. In the case of injury to, or the death of, two or more persons in any accident, the amount available to any one person must not exceed the coverage limit provided for injury to, or the death of, one person in any accident.

3. Statutes of Limitations:

Negligence: Six years. Minn. Stat. § 541.05, subd. 1(5).

Negligent construction (product liability): Four years. Minn. Stat. § 541.05, subd. 2.

Wrongful Death: Action commenced within three years of date of death, provided that the action commenced within six years of act or omission. Minn. Stat. § 573.02.

Breach of Contract: Six years. Minn. Stat. § 541.05, subd. 1(1).

Unlawful Trade Practices: Six years. Minn. Stat. § 541.05, subd. 1(2).

4. Punitive damages and damages caps

Punitive damages

In all cases other than products liability cases, punitive damages may be awarded where the damage is only to property, at least where, the defendant's behavior is intentional. Punitive damages may be awarded in wrongful death actions. Minn. Stat. § 573.02, subd. 1 provides, in part, that in wrongful death actions, "[p]unitive damages may be awarded as provided in section 549.20." Punitive damages are not available for breach of contract, including breach of warranty claims, even when the breach is malicious or in bad faith. *Minnesota-Iowa Television Co. v. Watonwan T.V.*

Improvement Ass'n, 294 N.W.2d 297, 309 (Minn. 1980). If, however, the breach is accompanied by an independent tort, punitive damages may be appropriate. *Id.* Statutes limit punitive damages in claims brought against the state and against local units of government. Minn. Stat. §§ 3.736, subd. 3; 466.04, subd. 1(b).

As such, coverage for most punitive-damages claims is barred by public policy. The rationale for this rule is related to the ban on covering intentional acts. Ordinarily, a person may not insure against intentional acts or other misconduct serious enough to warrant punitive damages. *State Fund Mut. Ins. Co. v. Enebo*, 458 N.W.2d 161, 163 (Minn. App. 1990). Allowing a defendant to shift responsibility for paying punitive damages to an insurer would frustrate the deterrent purpose of punitive damages. *Id.* Moreover, the ban on insuring punitive damages is limited to the tortfeasor. It does not extend to those vicariously liable for the tortfeasor. There is no reason why the employer should not be free to acquire insurance to protect itself for vicarious liability for an employee's misconduct. *Perl v. St. Paul Fire & Marine Ins*, 345 N.W.2d 209, 216 (Minn. 1984). "Any insurance corporation or association may insure against vicarious liability for punitive and exemplary damages within any of the kinds of business pertaining to the issuance of liability insurance that the insurance corporation or association is authorized to transact" under Minnesota law. Minn. Stat. § 60A.06 subd. 4.

There is no public policy against *excluding* punitive damages. On the contrary, such exclusion is fully consistent with public policy, because it prevents the insured from escaping the sanctions of the punitive damages statute. *Perl v. St. Paul Fire & Marine Ins.,* 345 N.W.2d at 216.

5. Collateral Source Rules

When liability is admitted or is determined by the trier of fact, and when damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources, a party may file a motion within ten days of the date of entry of the verdict requesting determination of collaterall sources.

If the motion is filed, the parties shall submit written evidence of, and the court shall determine: (1) amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted; and (2) amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff or members of the plaintiff's immediate family for the two-year period immediately before the accrual of the action to secure the right to a collateral source benefit that the plaintiff is receiving as a result of losses. Minn. Stat. § 548.251.

The court shall reduce the award by the amounts determined under subdivision 2, clause (1), and offset any reduction in the award by the amounts determined under subdivision 2, clause (2)." *Id.* at subd. 3(a).

6. Expert Admissibility Standard – *Daubert v. Frye*

Minnesota applies the *Frye* standard. Minn. R. Evid. 702, states "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent

must establish that the underlying scientific evidence is generally accepted in the relevant scientific community."

7. First Party Notice Requirements

The general rule in Minnesota is that late notice defeats coverage only if there is actual prejudice to the insurer. *E.g.*, *Terrell v. State Farm Ins. Co.*, 346 N.W.2d 149, 151 (Minn. 1984); *Reliance Ins. Co. v. St. Paul Ins. Cos.*, 307 Minn. 338, 239 N.W.2d 922 (1976); *Farrell v. Neb. Indem. Co.*, 183 Minn. 65, 235 N.W. 612 (1931). Courts applying Minnesota law, however, have recognized an exception to the actual-prejudice rule where a policy makes notice a condition precedent to coverage. That is, where the giving of notice of loss or the furnishing of proof of loss is a condition precedent to coverage under the insurance contract, then the actual-prejudice rule does not apply and late notice is fatal to recovery. *Sterling State Bank v. Va. Sur. Co.*, 285 Minn. 348, 354-55, 173 N.W.2d 342, 346 (1969).

8. Insurer Duty to Defend

The general rule in Minnesota is that "[t]he obligation to defend is contractual in nature and is generally determined by the allegations of the complaint against the insured and the indemnity coverage afforded by the policy." *Farmers & Merchs. State Bank of Pierz v. St. Paul Fire & Marine Ins. Co.*, 242 N.W.2d 840, 842 (1976). "Where the pleadings do not raise a claim arguably within the scope of coverage, the insurer has no duty to defend or investigate further to determine whether there are other facts present which trigger such a duty." *Garvis v. Emp'rs Mut. Cas. Co.*, 497 N.W.2d 254, 258 (Minn. 1993). The insurer may not simply rely on the pleadings, however, if it has independent knowledge of facts that indicate there may be a covered claim, or if the insured tells the insurer of such facts. *Id.* As a corollary, there is no duty to defend where the actual facts outside the complaint clearly establish there is no obligation to defend. *Farmers & Merchs. State Bank of Pierz*, 242 N.W.2d at 842.

The insurer must demonstrate that all parts of the cause of action fall clearly outside the coverage afforded by the policy to avoid the duty to defend. *Atl. Mut. Ins. Co. v. Judd Co.*, 380 N.W.2d 122, 126 (Minn. 1986); *see In re Liquidation of Excalibur Ins. Co.*, 519 N.W.2d 494, 497 (Minn. App. 1994). If any part of the suit against the insured is arguably covered by the policy, the insurer must defend the entire suit. *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165 (Minn. 1986). The duty to defend exists even if the complaint only inferentially alleges a covered claim. *F. D. Chapman Const. Co. v. Glens Falls Ins. Co.*, 297 Minn. 406, 211 N.W.2d 871, 872 (1973).

9. Bad Faith Claims against Insurers

A. First-party insurance

Minnesota common law does not recognize a cause of action in tort for bad faith in the context of first-party insurance. *See, e.g.*, *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 237 (Minn. 1986); *Haagenson v. Nat'l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 652-53 (Minn. 1979).

In 2008, the Minnesota legislature created a bad-faith cause of action against first-party insurance carriers. Minn. Stat. § 604.18. The statute requires the insured to prove two elements of bad faith, the first objective and the second subjective: (1) the absence of a reasonable basis for denying the benefits of the insurance policy; and (2) that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a

reasonable basis for denying the benefits of the insurance policy. Minn. Stat. § 604.18, subd. 2(a). The statute permits a court the discretion to award an insured "an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or $250,000, whichever is less." Minn. Stat. § 604.18, subd. 3. The court may also award attorney fees incurred to establish a violation of Minnesota's bad-faith statute, up to $100,000.

B. Third-party insurance

In contrast to first-party insurance, there is no statutory claim for bad faith in the third-party insurance context. But Minnesota common law does recognize a bad-faith failure-to-settle claim in the third-party context:

> The insurer's duty of good faith is breached in situations in which the insured is clearly liable and the insurer refuses to settle within the policy limits and the decision not to settle within the policy limits is not made in good faith and is not based upon reasonable grounds to believe that the amount demanded is excessive.

Short v. Dairyland Ins. co., 334 N.W.2d 384 (Minn. 1983).

10. Mandatory Arbitration Rules

In Minnesota, the original No-Fault Act had no provision for arbitration. In 1975, the legislature authorized voluntary arbitration. Since then, arbitration has been made mandatory and the maximum for mandatory arbitration was raised from $5,000 to $10,000. Minn. Stat. § 65B.525, subd. 1.

Parties may not arbitrate coverage disputes. *Johnson v. Am. Fam. Mut. Ins. Co.*, 426 N.W.2d 419, 421 (Minn. 1988). Therefore, if there is a question about the existence of coverage, the court must decide the coverage issue before binding arbitration proceeds. Likewise, immunity determinations must be made by the court, not the arbitrator.

No-fault arbitrators are limited to deciding factual issues. Legal issues are reserved for the courts. *AMCO Ins. Co. v. Ashwood-Ames*, 534 N.W.2d 740, 741 (Minn. App. 1995).

Mississippi

1. Comparative Fault

At the heart of Mississippi's comparative fault system is the concept of contributory negligence. 2 MS Prac. Encyclopedia MS Law § 16:3. Contributory negligence is the failure of the plaintiff to act with reasonable care for his or her own safety. *Id.* Under the Mississippi doctrine of comparative fault, contributory negligence is an affirmative defense that the defendant has the burden of proving. *Id.* The defendant must prove both that the plaintiff was contributorily negligent and that such negligence was a contributing proximate cause of the harm the plaintiff suffered. *Id.*

Under Mississippi's comparative negligence statute, if the plaintiff proves that the defendant's negligence was a proximate cause of the plaintiff's injury, the plaintiff is entitled to recover. *Id.* citing Miss. Code Ann. § 11-7-15. The jury assesses negligence by percentage and must diminish any damage allowed in proportion to the negligence attributable to the person whose injury, damage, or death is the subject of the claim. *Id.* Of course, the plaintiff's negligence that is the sole proximate cause of the plaintiff's injury completely bars recovery. *Id.*

The purpose of the statute is to allocate negligence and a percentage of fault between the plaintiff and defendant. 6 MS Prac. Encyclopedia MS Law § 52:68. "Mississippi is a pure comparative negligence state." *Id.* quoting *Bradford v. Barnett*, 615 So. 2d 580, 582 (Miss. 1993). So even if the plaintiff is 90 percent at fault, he or she would be still be entitled to recover ten percent of his or her damages as opposed to nothing. *Id.*

The Mississippi comparative negligence statute states:

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property."

Id. quoting Miss. Code Ann. § 11-7-15.

Further, Section 11-7-17 states, "All questions of negligence and contributory negligence shall be for the jury to determine." *Id.* quoting Miss. Code Ann. § 11-7-17.

The statute is not applicable if the negligence of the injured party is the sole proximate cause of the injuries, or where the sole proximate cause of the accident is the defendant's negligence. *Id.* Otherwise, if both the plaintiff and defendant are negligent, then the statute is applicable and the jury must be instructed on the law of comparative negligence. "Mississippi's comparative negligence statute speaks only in terms of reducing recovery in proportion to the fault of the injured party." *Id.* quoting *Hammond v. Shalala*, 2001 WL 640837 (N.D. Miss. 2000).

2. Insurance Minimum limits

The minimum liability requirements are the following: $25,000 per person (limited to a single accident), $50,000 per accident for bodily injury, and $25,000 per accident for property damage. Miss. Code Ann. § 63-15-3.

Mississippi law requires that purchasers of automobile liability insurance coverage be given the opportunity to purchase uninsured motorist coverage to cover bodily injuries and property damage. Miss. Ins. Law and Prac. § 18:2. Under the statute, automobile liability insurance policies must contain UM coverage in limits set by the Mississippi Motor Vehicle Safety Responsibility Law. *Id.*

The limits for UM coverage may be increased beyond the minimum limits required by statute at the option of the insured. *Id.* However, UM limits, which as first-party coverage are intended to provide protection for the insured, may not exceed the limits of liability coverage for third parties. *Id.* This means that if an insured has liability limits covering bodily injuries in the amount of

$50,000, the insured's UM limits for bodily injury coverage cannot exceed $50,000. *Id.* Furthermore, if the insured has property damage liability limits of $25,000, the insured's UM limits cannot exceed $25,000 for property damage. *Id.*

Essentially, the statute requires that auto policies provide to third parties at least as much liability coverage as that provided to the insured under the UM coverage. *Id.* citing *Johnston v. Safeco Ins. Co. of America*, 727 F.2d 548 (5th Cir. 1984). The statute has a bias in favor of protecting third parties injured by the insured at least as much as the insured is protected from injuries caused by third parties. *Id.* An insured may not prefer herself to third parties when setting coverage limits. *Id.* However, the insured may choose UM coverage limits in amounts less than the insured's liability limits (or, as is discussed below, may choose not to carry UM coverage), as long as the UM limits, if UM coverage is elected, do not fall below the minimum limits provided by statute. *Id.* For example, an insured with liability limits of $50,000 for bodily injury coverage may choose to carry only $25,000 of UM coverage for bodily injury. *Id.*

3. Statute of limitations

Negligence: Generally, negligence is governed by the three-year catch-all limitation. Miss Code Ann. § 15-1-49. However, there are specific statutory limitations for certain torts.

Negligent Construction: Claims against architects, builders, and contractors for improvements to real property must be filed within six years after the date of acceptance of the improvement by the buyer-owner. Miss. Code Ann. § 15-1-41.

Product liability: The statute of limitation for product liability claims under Mississippi law is governed by the three-year catch-all limitation. *See* Miss. Code Ann. § 15-1-49.

Wrongful Death: The enforceable statute of limitations for wrongful death claims is subject to the provisions found in Title 15 of the Mississippi Code. 9 MS Prac. Encyclopedia MS Law § 77:8. Since a wrongful death action is generally predicated on an underlying tort, it is limited by the statute of limitation applicable to the tort resulting in the wrongful death. *Id.* For example a wrongful death action based on the underlying tort of assault and battery will have a one-year statute of limitations, while an action based on the underlying tort of simple negligence will be subject to the general three-year statute of limitations. *Id.* A claim based on breach of warranty will be barred if the statute of limitations in the Uniform Commercial Code has run, as a breach of warranty claim accrues at the time of delivery of the defective product. *Id.*

Breach of Contract: Claims for breach of contract must be commenced within six years after the cause of action has accrued. Miss. Code Ann. § 75-2-725. A cause of action accrues when the breach occurs, without regard to whether the aggrieved party has knowledge of the breach. 7 MS Prac. Encyclopedia MS Law § 64:102. Unless a warranty explicitly extends to future performance of the goods, a breach of warranty occurs when the delivery of the goods occurs. *Id.*

Unlawful Trade Practices: Mississippi's Consumer Protection Act (MCPA) is governed by the three-year catch-all limitation. Miss Code Ann. § 15-1-49.

4. Punitive Damages and Damages Caps

Non-Economic Damages Cap: Mississippi has a cap on non-economic damages of $1,000,000 for all actions other than medical malpractice. Miss. Code Ann. § 11-1-60.

The non-economic damage caps have been upheld as constitutional by the Fifth Circuit in

Learmonth v. Sears, Roebuck and Co., 710 F.3d 249 (5th Cir. 2013).[1] Medical malpractice claims have a non-economic damage cap of $500,000. Miss. Code Ann. § 11-1-60. There are no limits to economic damages (past, present or future medicals, lost wages, etc). *Id.*

Punitive Damages: Mississippi does allow recovery of punitive damages. A plaintiff may recover punitive damages upon proof that the defendant committed a willful or malicious wrong or acted with gross, reckless disregard for the rights of the plaintiff. Miss. Code Ann. § 11-1-65. The plaintiff must prove the claim for punitive damages by clear and convincing evidence. *Id.*
When awarding punitive damages, the jury may consider the emotional distress of the plaintiff, and even the plaintiff's attorney's fees. 5 MS Prac. Encyclopedia MS Law § 40:83. The amount of punitive damages is, in Mississippi, "solely committed to the jury's fettered discretion." *Id.* quoting *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1190 (Miss. 1990). When evaluating punitive damage claims, the Supreme Court appears to focus less on a numeric formula, and more on the egregious nature of the insurer's conduct. *Id.* When reviewing punitive damage awards, the Supreme Court noted that punitive damage awards may be overturned or reduced where the amount is arbitrary or unreasonable, or where the verdict "evinces passion, bias and prejudice on the part of the jury so as to shock the conscience." *Id.* quoting *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985). While the Court does compare the punitive damage award to the defendant's net worth, and does consider the relation between punitive damages and actual damages, it has eschewed any rule that would limit punitive damages to a specific percentage of the defendant's net worth, or would require a ratio of punitive damages to actual damages. *Id.*

Miss. Code Ann. § 11-1-65(3)(a) limits a plaintiff's recovery of punitive damages as follows:

> In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the following:
>
> (i) Twenty Million Dollars ($20,000,000.00) for a defendant with a net worth of more than One Billion Dollars ($1,000,000,000.00);
>
> (ii) Fifteen Million Dollars ($15,000,000.00) for a defendant with a net worth of more than Seven Hundred Fifty Million Dollars ($750,000,000.00) but not more than One Billion Dollars ($1,000,000,000.00);
>
> (iii) Five Million Dollars ($5,000,000.00) for a defendant with a net worth of more than Five Hundred Million Dollars ($500,000,000.00) but not more than Seven Hundred Fifty Million Dollars ($750,000,000.00);
>
> (iv) Three Million Seven Hundred Fifty Thousand Dollars ($3,750,000.00) for a defendant with a net worth of more than One Hundred Million Dollars ($100,000,000.00) but not more than Five Hundred Million Dollars ($500,000,000.00);
>
> (v) Two Million Five Hundred Thousand Dollars ($2,500,000.00) for a defendant with a net worth of more than Fifty Million Dollars ($50,000,000.00) but not more than One Hundred Million Dollars

[1] Note: A Mississippi Circuit Court held the non-economic damage caps were unconstitutional. *See Tanner v. Eagle Oil & Gas Co.*, 2012 WL 7748580 (Miss. Cir. Ct. 2012).

($100,000,000. 00); or
(vi) Two percent (2%) of the defendant's net worth for a defendant with a net worth of Fifty Million Dollars ($50,000,000.00) or less.

5. Collateral Source Rule

The collateral-source rule has long been recognized by the Mississippi Supreme Court. The rule is based on common law and provides that "a wrongdoer is not entitled to have the damages to which he is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source, wholly independent of him." McGee v. River Region Med. Ctr., 59 So.3d 575, 581 (Miss. 2011) (quoting Coker v. Five-Two Taxi Service, Inc., 52 So.2d 356, 357 (Miss. 1951)).

The collateral-source rule is often a source of debate in determining the proof of damages a party may present at trial. Generally, the issue arises as it did in Wal-Mart Stores, Inc. v. Frierson, 818 So.2d 1135, 1138 (Miss. 2002):

> Prior to trial, the parties disagreed as to the proof Frierson could present to the jury with respect to the extent of his injuries. The Friersons had no private health insurance. Medicaid and Medicare paid a portion of Frierson's medical expenses. Pursuant to Medicaid or Medicare regulations, that portion of Frierson's expenses not paid by Medicaid or Medicare was 'written off,' or eradicated, by those who had provided medical assistance to him. The Friersons made no independent payments. Wal-Mart filed a motion in limine attempting to prevent the Friersons from introducing evidence of any of the medical expenses which had been eradicated. Wal-Mart argued that allowing the introduction of these expenses would allow the Friersons to realize an impermissible windfall as no one would ever be required to pay the amounts written off.

In Frierson the court ultimately extended the collateral source rule in the context of Medicare payments. 818 So.2d 1135, 1138. Although defendants have made numerous attempts to prevent plaintiffs from showing their "billed versus paid" medical bills, the Mississippi Supreme Court has continually rejected the "windfall" argument. For example, in Brandon HMA, Inc. v. Bradshaw, Medicaid paid plaintiff's medical bills. 809 So.2d 611, 618 (Miss. 2001). Thus, the defendant-hospital argued that allowing a plaintiff to recover for expenses he himself never had to pay undermined the purpose of compensatory damages, which is to make the injured party whole. Id. The plaintiff countered by relying on the well-recognized collateral source rule that prevents a tortfeasor from using "the money of others (insurance companies, gratuitous gifts, etc.) to reduce the cost of its own wrongdoing." Id.

The Mississippi Supreme Court agreed with the plaintiff and held as follows:

> Today for the first time, we hold that Medicaid payments are subject to the collateral source rule. [Plaintiff's] brief summarized the logic

> nicely: '[T]he Hospital (Brandon) does not get a break on damages just because it caused permanent injuries to a poor person.' We conclude that the trial court did not err in admitting [Plaintiff's] medical bills which exceed the amount paid by Medicaid.

Although Frierson and Bradshaw seem to suggest that the applicability of the collateral source rule to medical bills has no limits, the Mississippi Supreme Court has found a narrow exception to this rule. In McGee v. River Region Med. Ctr., the defendant-hospital argued that a plaintiff should not be allowed to recover the "written-off" portion of his medical bills. 59 So.3d 575, 581 (Miss. 2011). The Mississippi Supreme Court qualified its holdings in Frierson and Bradshaw by stating that "we do not read these cases to establish a per se rule that 'written off' medical expenses are admissible.'" Id. Instead, "[f]rom an evidentiary perspective, every case turns on its own facts and the purpose for which the evidence is offered." Id. The question comes down to relevance, "provided he or she can demonstrate relevance, a plaintiff should be allowed to present evidence of his or her total medical expenses, including those amounts 'written off' by medical providers." Id. *See* Mississippi Code Annotated § 41-9-119 ("proof that medical, hospital, and doctor bills were paid or incurred because of any illness, disease, or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable.").

Along these lines, the Mississippi Supreme Court has made clear that an "opposing party may [] 'rebut the necessity and reasonableness of the bills by proper evidence' if desired." *Estate of Bolden v. Williams,* 17 So. 3d 1069, 1072 (Miss. 2009) (quoting *Jackson v. Brumfield*, 458 So. 2d 736, 737 (Miss. 1984)). Therefore, it is incumbent upon the defendant to present evidence to contradict a plaintiff's admission of medical bills into evidence in order for a jury to award a plaintiff less than the amount presented.

The Mississippi Supreme Court recently underscored this approach by allowing a defendant to subpoena documents from a medical provider, as well as obtain a 30(b)(6) deposition of the medical provider, aimed at discovering information regarding certain billing records, the necessity of the services and/or treatment rendered, and the reasonableness of the fees charged. *Williams v. Memorial Hospital at Gulfport*, No. 2015-IA-00792-SCT, 2015 Miss. LEXIS 367 (Miss. Jul. 20, 2015). The Court found that "in order to rebut the presumption [provided in Miss. Code Ann. § 41-9-119, defendant was] entitled to discover relevant information regarding the reasonableness and necessity of [the medical provider's] charges which are claimed by plaintiff to be recoverable damages, and [] the trial court erred by quashing the subpoena and prohibiting the deposition." *Id.* at *3. Accordingly, although a personal injury plaintiff in Mississippi can chalkboard their entire medical bills regardless of what was actually paid, a defendant can contest the *reasonableness* of these charges through proper evidence, including obtaining information directly from the medical provider.

The McGee court went on to outline the admissibility of collateral source payments issue as whether the collateral source rule applies to a plaintiff's *recovery* of damages even though the total medical bills may be found to be relevant and admissible. Id. Importantly, the court found the following:

> Applying the rule to the facts of this case, we find that the collateral source rule simply does not apply to the 'written-off' portion of the [hospital's] bill. The rule, by its very language, applies only to prohibit the introduction of evidence of payments from collateral sources *wholly independent of the tortfeasor.* In this case, [the hospital], to whom the bill was owed, is also the alleged tortfeasor. [The hospital] provided medical services, but was not paid by [Plaintiff], Medicare,

> or any other source for a large portion of those services. To accept [Plaintiff's] argument would require [the hospital] to absorb the cost of services rendered for which there was no reimbursement and then be potentially liable for those services again in damages. We therefore find that, although the entire medical bill may be relevant to aid the jury in assessing the seriousness and the extent of the injury, [Plaintiff] may not recover as damages those amounts 'written off' by [the hospital].

Id. (emphasis by the court).

Although the Mississippi Supreme Court found a narrow exception to the collateral source rule in McGee, Mississippi courts have been reluctant to expand this narrow exception in subsequent cases. For example, the District Court for the Southern District of Mississippi held that, in a medical malpractice case against a governmental entity, the plaintiff's award cannot be reduced despite Medicaid, *i.e.* the government, being the payer of plaintiff's medical bills. Chickaway et al. v. United States, No. 4:11-CV-00022-CWR-LRA, 2012 WL 3236518 (S.D. Miss. August 7, 2012). In its holding, the district court rejected the government defendant's argument that the collateral source rule did not apply because it was both the tortfeasor and source of the medical payments. *Id. See also* Johnson v. 21st Century Centennial Ins. Co., No. 1:15CV74-LG-RHW, 2016 WL 4471887 (S.D. Miss. Aug. 2016) (Noting that *McGee v. River Region Med. Ctr.*"did not overrule well-settled Mississippi law on [the collateral source issue].")

Additionally, the Mississippi Supreme Court has found that payments disbursed by a defendant's insurance company are not from a collateral source and can therefore be credited against the amount of damages that the claimant is entitled to recover. Pearl Pub. Sch. Dist. v. Groner, 784 So. 2d 911, 916 (Miss. 2001). Moreover, the collateral-source rule applies only when the compensation is for the same injury for which the damages at issue are sought. Wright v. Royal Carpet Serv., 29 So. 3d 109, 113-14 (Miss. Ct. App. 2010). Therefore, if the source of damages is derived from separate and distinct alleged torts, the collateral source rule is inapplicable. Id. For example, in a case where the compensation derived from a settlement for injury of mesothelioma due to asbestos exposure, the settlement was not precluded from being admissible evidence in a case for unlawful termination of health insurance. Geske v. Williamson, 945 So. 2d 429, 431 (Miss. Ct. App. 2006).

If the evidence is introduced for a purpose other than to mitigate defendant's damages, the collateral-source rule is not violated, and the evidence is properly admitted. Wright, 29 So. 3d at 115. The Supreme Court has reiterated that for purposes of impeachment, evidence of collateral source payments may be admitted in certain cases where the plaintiff testifies falsely that he paid for expenses himself when the expenses were actually paid by a third party. Robinson Prop. Group, L.P., v. Mitchell, 7 So. 3d 240, 244-45 (Miss. 2009). However, when evidence of collateral-source payments is admitted for the narrow purpose of impeaching false or misleading testimony, granting a limiting instruction may be appropriate to avoid jurors' consideration of plaintiffs' claims as unimportant or trivial and to avoid a refusal or reduction of plaintiffs' verdicts. Id. at 245. No Mississippi court has specifically addressed the collateral source rule in the context of punitive damages.

6. Expert Admissibility Standard – *Daubert v. Frye*

In order to testify regarding scientific, technical, or other specialized issues, a witness must first be

qualified as an expert. 4 MS Prac. Encyclopedia MS Law § 33:68. Mississippi has adopted the United States Supreme Court's standard for judging the admissibility of expert testimony. *Id.* Therefore, the test for the admission of experts is often termed "the *Daubert* rule" while Mississippi has a growing body of decisions based upon our own Rule 702.

"Expert testimony must be relevant and reliable to be admissible." *Id.* quoting *Illinois Cent. R. Co. v. Brent*, 133 So. 3d 760, 781 (Miss. 2013). In assessing whether the witness should be qualified as an expert, the trial court may consider an "illustrative, but not exhaustive" list, including:

> (1) whether the theory or technique can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance in the relevant scientific community. *Id.*

The Advisory Committee Note notes that the trial court has the "gate keeping responsibility … to determine whether the expert testimony is relevant and reliable." *Id.* Once qualified by a trial court, an expert will rarely be excluded on appeal since "[a] trial judge's decision as to whether a witness is qualified to testify as an expert is given the widest possible discretion." *Id.*

7. First Party Notice Requirements

The approach to notice requirements in first-party insurance cases is similar to the approach used in liability insurance cases. Miss. Ins. Law and Prac. § 8:5. *Hood v. Fireman's Fund Insurance Company*, 412 F. Supp 846 (S.D. Miss. 1976) provides an illustration. *Id.* There, the federal district court found that an insurance policy covering the insured's cattle did not make giving notice of loss a condition precedent to the insured's recovery. *Id.* Therefore, absent proof that the insurer suffers prejudice by late notice, the insured who did not give written proof of loss within the 90-day period set forth in the policy did not forfeit his rights to recover for cattle lost in a flood. *Id.* Presumably, under the approach used in *Hood*, had the insurance policy clearly made notice a condition precedent to validating the coverage, the insurer would not have had the obligation to prove prejudice. *Id.*

8. Insurer Duty to Defend

The general rule in Mississippi and elsewhere is that a liability insurer has the duty to defend claims falling within coverage under the policy. Miss. Ins. Law and Prac. § 11:4. "The traditional test for whether an insurer has a duty to defend under the policy language is that the obligation of a liability insurer is to be determined by the allegations of the complaint or declaration." *Id.* quoting *Farmland Mut. Ins. Co. v. Scruggs,* 886 So. 2d 714 (Miss. 2004). Federal courts applying Mississippi law have termed this the "allegations of the complaint rule." *Id.* quoting *Universal Underwriters Ins. Co. v. American Motorists Ins. Co.*, 541 F. Supp. 755, 762 (N.D. Miss. 1982). If the allegations made against the insured bring the action within the coverage of the policy, the insured is entitled to a defense of such allegations, even though the actual facts later reveal that the claims presented were not within coverage. *Id.*

The supreme court has referred to the duty to defend claims within coverage as an absolute duty of the insurer. *Id.* It seems unlikely that the supreme court meant to suggest that, once the duty to defend is activated by allegations in a complaint, the insurer's obligation to defend becomes absolute in the sense of entirely unconditional. *Id.* It seems clear, for example, that the insurer's continuing duty to defend would be conditional on the insured's continuing cooperation with the defense of the action pursuant to the cooperation clause in the policy. *Id.* In that sense, the duty to defend, once activated, remains conditional on the insured's ability to satisfy its part of the insurance bargain in defending the action. *Id.* However, as noted, the duty to defend is not dependent on the insurer's obligation to indemnify the insured, since a duty to defend extends even to groundless and fraudulent claims. *Id.* In that sense, the duty to defend is independent of, and not conditioned on, the duty to indemnify. *Id.*

Addressing whether the duty to defend is in all contexts "absolute," the supreme court acknowledged that a duty to defend was, in fact, conditional in *Southern Healthcare Services v. Lloyd's of London,* 110 So. 3d 735 (Miss. 2013). *Id.* There the court found that the insurer's duty to defend was not activated until the insured paid its deductible, which applied not only to the claim, but also to defense costs. *Id.* As such, the insured did not have a duty to fund the insured's defense until the insured's deductible of $250,000 was exhausted by legal fees. *Id.*

The corollary to the rule that the insurer has a duty to defend claims within coverage is that the insurer has no obligation to defend a claim outside of coverage. *Id.* This rule becomes important when some allegations of the complaint are within coverage and some are not. *Id.*

To whom a defense is owed under a liability policy depends on the allegations in the complaint and on the language of the insurance policy defining insureds. *Id.* Insureds may be named in the policy as primary insureds, or as additional named insureds, or may be covered as additional unnamed insureds. *Id.* For example, although insured under homeowners' policy, the husband of a defendant co-insured was not entitled to claim a defense where he was not sued in the underlying tort action. *Id.* citing *Mitchell v. State Farm and Cas. Co.*, 799 F. Supp. 2d 680 (N.D. Miss. 2011). The fact that sole proprietor had liability insurance for his janitorial service business did not entitle him to a defense of claims arising from his unrelated, and uninsured, tree-cutting business. *Id.* citing *QBE Ins. Corp. v. McFarland*, 2011 WL 3625308 (S.D. Miss. 2011).

Reviewing similar cases from the state court of appeals and the Fifth Circuit, each found that an additionally named insured under a concrete subcontractor's liability policy covering a construction project was not entitled to a defense of a claim resulting from the subcontractor's completed operations. *Id.* citing *Noble v. Wellington Assoc. Inc.*, 145 So. 3d 714 (Miss. Ct. App. 2013); *Carl E. Woodward, L.L.C. v. Acceptance Indem. Ins. Co.,* 743 F.3d 91 (5th Cir. 2014).

9. Bad Faith Claims Against Insurers

When the Mississippi Supreme Court refers to the tort of bad faith, it speaks of a remedy in insurance cases in which the insured is entitled to recover punitive damages. Miss. Ins. Law and Prac. § 13:2. While Mississippi allows extra-contractual recovery other than punitive damages, that recovery is not had under the remedy for the tort of bad faith. *Id.* The distinction is semantic, but important to understanding the court's opinions. *Id.* Bad faith is a remedy that allows for punitive damages. *Id.*

In order to recover punitive damages against an insurance company for bad-faith refusal to pay a claim, or refusal to honor an obligation under an insurance policy, the insured must first

demonstrate that the claim or obligation was in fact owed. *Id.* Prevailing on the contract claim is a condition precedent to prevailing on the claim of bad faith. *Id.* If the insurer did not owe the claim, the insurer is not guilty of bad faith by not paying it or in delaying payment. *Id.* Second, the insured must demonstrate that the insurer had no arguable reason to refuse to pay the claim or to perform its contractual obligation. *Id.* Finally, in order to recover punitive damages from the insurer for bad faith, the insured must demonstrate that the insurer's breach of the insurance contract "results from an intentional wrong, insult, or abuse as well as from such gross negligence as constitutes an intentional tort." *Id.* quoting *Caldwell v. Alfa Ins. Co.*, 686 So. 2d 1092, 1095 (Miss. 1996).

Under this framework, an insurer that does not breach the underlying insurance contract, or an insurer that, while breaching the underlying contract, has an arguable reason for doing so, does not commit the tort of bad faith. *Id.* Further, even if the insurer breaches a contract without an arguable reason for doing so, the insurer still cannot be subjected to punitive damages unless the insurer's conduct is sufficiently outrageous to constitute an intentional wrong. *Id.*

Where the insurer's conduct in breaching the contract does not rise to the level of the tort of bad faith, the insurer may nonetheless be liable for extra-contractual damages caused by the breach. *Id.* Such extra-contractual damages may include damages for emotional distress and attorney's fees that are foreseeable results of an unjustified refusal to pay the insured's claim. *Id.*

10. Mandatory Arbitration Rules

Courts typically decide the validity of an arbitration agreement if contested. 1 MS Prac. Encyclopedia MS Law § 5:5. However, "when the parties have explicitly agreed that the question of arbitrability is to be decided by an arbitrator rather than the court, that agreement must be interpreted by an arbitrator." *Id.* citations omitted. A court considers two factors when considering a motion to compel arbitration. First, it determines whether there is a valid arbitration agreement. *Id.* Second, the court considers whether the dispute falls within the scope of the arbitration agreement. *Id.* If the court finds that the parties intended to arbitrate, it considers "whether legal constraints external to the agreement foreclosed the arbitration of those claims." *Id.* citations omitted. Mississippi courts have long held that mutuality of obligation is not required for an arbitration agreement to be valid, so long as the agreement is supported by consideration. *Id.* Moreover, an arbitration agreement does not require an express jury trial waiver to be valid and enforceable. *Id.*

Mississippi courts employ a strong presumption in favor of arbitration; however, the persons bound by the provision must have clearly manifested assent before arbitrability may be presumed. *Id.* Mississippi courts, in applying principles of contract law, recognize the right of an individual to agree to arbitrate disputes before such disputes arise. *Id.* An arbitration clause will not apply to disputes arising out of a contract to which both parties did not mutually assent. *Id.* In *Driver Pipeline Co., Inc. v. Williams Transport, LLC*, 104 So. 3d 845, 850 (Miss. 2012), the contract at issue "reveal[ed] no agreement to arbitrate." *Id.* The Mississippi Supreme Court held that although there is a strong federal assumption in favor of arbitration, it will not force parties to arbitrate disputes unless the parties have explicitly agreed to do so. *Id.* Indeed, the Mississippi Supreme Court has refused to enforce an arbitration clause when a party failed to initial or otherwise assent to the arbitration clause in an agreement. *Id.*

The Mississippi Court of Appeals has enforced arbitration agreements "against [a] non-signator[y] if

such non-signatory is a third-party beneficiary" of the arbitration agreement. *Id.* quoting *Forest Hill Nursing Center, Inc. v. McFarlan,* 995 So. 2d 775 (Miss. Ct. App. 2008). In doing so, the Court of Appeals explained that, though it should not force a party to arbitrate unless that party has explicitly agreed to do so, a party should not be allowed to avoid the burdens of a contract after having reaped its benefits. *Id.* Likewise, in *Adams v. Greenpoint Credit, LLC,* 943 So. 2d 703, 706 (Miss. 2006), the Court of Appeals found that a husband, who entered into a financing agreement with an arbitration provision, was required to submit to arbitration his claim that a creditor fraudulently withdrew funds from his bank account. *Id.* However, the Court of Appeals found that his daughter, who was not a party to the agreement that contained the arbitration provision, was not required to arbitrate because she was neither a party to the contract nor a "third-party beneficiary to whom the benefits of the contract attach." *Id.* Further, "heirs-at-law may be bound by arbitration agreements to which they were not signatories." *Id.* Because "wrongful death beneficiaries are entitled to maintain an action and recover damages as would the decedent," plaintiffs in wrongful death suits may be required to arbitrate claims that the decedent would have been compelled to arbitrate. *Id.*

Similarly, a nonsignatory may enforce an arbitration clause if the dispute arises out of a contract under which the nonsignatory had "certain rights and responsibilities." *Id.* In *Fradella v. Seaberry*, 952 So. 2d 165, 173 (Miss. 2007), a realtor represented the buyers and sellers of property, and the buyer filed suit against the realtor who, in turn, sought to compel arbitration. *Id.* The Mississippi Supreme Court found that the clear intent of the parties was to submit to arbitration any disputes arising under the agreement, and although the realtor was not a party to the agreement, the terms of the agreement specifically discussed the realtor's relationship with the buyer and seller. *Id.* Further, the realtor "relied upon [that agreement] to delineate her duties and responsibilities with regard to the transaction." *Id.* Likewise, a nonsignatory may compel arbitration if the relationship between the nonsignatory and at least one of the parties to the contract indicates that the dispute and his or her involvement is within the scope of the agreement. *Id.* However, even if a nonsignatory reaps the benefits of a contract such that the doctrine of third-party beneficiaries would apply, a party will not be bound to arbitration if no valid contract existed. *Id*

When separate documents are executed "at the same time, by the same parties, as part of the same transaction," courts may read those documents collectively to discern that the parties intended to submit all disputes to arbitration. *Id.* However, even if writings are executed contemporaneously, a court may properly refuse to compel arbitration if the arbitration provision does not apply to the contract as a whole. *Id.*

Missouri

1. Comparative Fault

Missouri is a pure comparative fault state where comparative fault is "an affirmative defense in which the party asserting it must prove that the actions or omissions of the opposing party contributed to the asserting party's loss and negated or reduced the asserting party's legal responsibility." *Business Men's Assurance Co. of Am. v. Graham*, 891 S.W.2d 438, 447 (Mo. Ct. App. 1994). Missouri follows the Uniform Comparative Fault Act. *Id.* Any fault chargeable to the

plaintiff shall diminish proportionately the amount awarded as compensatory damages, but shall not bar recovery. Mo. Rev. Stat. § 537.765.2.

2. Insurance Minimum Limits

Missouri's minimum liability insurance requirements are as follows (Mo. Rev. Stat. § 303.190):

- $25,000 for bodily injury to or death of one person in any one accident;
- $50,000 for bodily injury to or death of two or more persons in any one accident; and
- $10,000 for damage to or destruction of property of others in any one accident.

Uninsured motorist coverage requirements are as follows (Mo. Rev. Stat. § 379.203):

- $25,000 for bodily injury to or death of one person in any one accident; and
- $50,000 for bodily injury to or death of two or more persons in any one accident.

Underinsured motorist coverage is not mandated in Missouri.

3. Statute of Limitations

- **Negligence**: An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated, must be brought within five years. Mo. Rev. Stat. § 516.120(5).

- **Breach of Contract:** An action upon any writing for the payment of money or property must be brought within ten years. Mo. Rev. Stat. § 516.110(1). An action brought on any covenant of warranty contained in any deed of conveyance of land must be filed within ten years. Mo. Rev. Stat. § 516.110(2).

  All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in § 516.110, must be brought within five years. Mo. Rev. Stat. § 516.120(1).

- **Products Liability:** The statute of limitations for a products liability claim is five years from the date the cause of action was discovered or should have been discovered. Mo. Rev. Stat. § 516.120(5).

- **Wrongful Death:** Wrongful death action shall be commenced within three years after the cause of action accrued. Mo. Rev. Stat. § 537.100.

- **Medical Malpractice:**Medical malpractice action shall be brought within two years from the date of occurrence of the act of neglect complained of. Mo. Rev. Stat. § 516.105.

- **Trespass:** An action for trespass on real estate is governed by a five year statute of limitations. Mo. Rev. Stat. § 516.120(3).

- **Others:** An action for libel, slander, assault, battery, false imprisonment, and for recovery under the Fair Labor Standards Act must be brought within two years. Mo. Rev. Stat. § 516.140.

4. Punitive Damages and Damages Caps

Punitive Damages

Punitive damages do not and cannot exist as an independent cause of action; they must be brought in conjunction with a claim for actual damages. *Klein v. Gen. Elec. Co.*, 728 S.W.2d 670, 671 (Mo. Ct. App. 1987). Punitive damages are justified only where the defendant's conduct is tantamount to intentional wrongdoing, where the natural and probable consequence of the conduct is injury. *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 73 (Mo. Ct. App. 2003). Plaintiff must establish a claim for punitive damages with clear and convincing evidence. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. 1996).

No award of punitive damages shall exceed the greater of $500,000 or five times the net amount of the judgment awarded to the plaintiff against the defendant. Mo. Rev. Stat. § 510.265.

Damages Caps

The Missouri Supreme Court held that caps previously enacted by legislation on non-economic damages recoverable from a health care provider, not including wrongful death claims, violated the right to a trial by jury. *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. 2012). The legislature has since amended its statute and new caps have been enacted. No plaintiff shall recover more than $400,000 for non-economic damages in any action against a health care provider for damages for personal injury arising out of the rendering of or the failure to render health care services. Mo. Rev. Stat. § 538.210. If the action is for a catastrophic personal injury, the cap is raised to $700,000. *Id.* The cap also stands at $700,000 for any action against a health care provider for wrongful death. *Id.*

Missouri caps the liability of all Missouri state government entities, with the cap changing on an annual basis as published by the Secretary of State. Mo. Rev. Stat. § 537.610. The table of sovereign immunity limits can be found at: http://insurance.mo.gov/industry/sovimmunity.php.

5. Collateral Source Rules

No evidence of collateral sources is admissible unless an exception listed below applies. Mo. Rev. Stat. § 490.715.1. If a defendant, his insurer, or his authorized representative pays all or part of the plaintiff's special damages, the defendant may introduce evidence that some other person paid those amounts, but may not identify the person who made such payments. Mo. Rev. Stat. § 510.715.2. If a defendant introduces such evidence, the introduction constitutes a waiver of any right to a credit against a judgment. Mo. Rev. Stat. § 510.715.3.

Under the collateral source rule, a wrongdoer is not entitled to have the damages for which he is

liable reduced by proving that the plaintiff has received or will receive compensation from a collateral source. *Hagedorn v. Adams*, 854 S.W.2d 470, 476-77 (Mo. Ct. App. 1993). "The application of the collateral source rule prevents an alleged tortfeasor from attempting to introduce evidence at trial that the plaintiff's damages will be covered, in whole or in part, by the plaintiff's insurance." *Smith v. Shaw*, 159 S.W.3d 830, 832 (Mo. 2005).

If a plaintiff injects his or her financial status into a lawsuit, inadvertently or purposefully, information regarding collateral sources payments is admissible. *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 545 (Mo. Ct. App. 2008).

6. Expert Admissibility

The standard for the admissibility of expert testimony is governed by statute. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Mo. Rev. Stat. § 490.065. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. *Id.* The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable. *Id.* If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case. *Id.*

7. First Party Notice Requirements

First party notice requirements is driven by the language contained in the insurance policy. Where a policy's notice clause requires the insured to notify the insurer of an occurrence "immediately" or "as soon as practicable," the language will be construed to mean "within a reasonable period of time." *Billings Mutual Ins. Co. v. Cameron Mutual Ins. Co.*, 229 S.W.3d 138 (Mo. Ct. App. 2007). There are two doctrines that excuse compliance with policy provisions requiring timely notice: the excuse of incapacity and substantial compliance. *Tresner v. State Farm Ins. Co.*, 913 S.W.2d 7, 10 (Mo. 1995).

Generally, failure to immediately notify an insurance company of the loss does not bar recovery by the insured unless the policy conditions require forfeiture or the company can demonstrate that it was prejudiced as a result of the delay. *Katz Drug Co. v. Commercials Standard Ins. Co.*, 647 S.W.2d 831, 836 (Mo. Ct. App. 1983). The burden is on the insurer to show the effects of a delay in notice. When an insured fails to notify the insurer of a loss within the timeframe prescribed by the policy, the insurer must show that it was prejudiced by that failure in order to forfeit the coverage to which the insured would otherwise be entitled. Prejudice to the insurer is not presumed from the mere fact of an insured's delayed notice, and the presence or absence of prejudice is an issue of fact. *Tresner*, 913 S.W.2d at 11.

8. Insurer Duty to Defend

Under Missouri law, an insurer's duty to defend is broader than the duty to indemnify. *McCormack Baron Mgmt. Servs., Inc. v. Am. Guarantee & Liab. Ins. Co.*, 989 S.W.2d 168, 170 (Mo. 1999).

An insurer's duty to defend exists when the petition states some ground of liability covered by its insurance policy. *Wood v. Safeco Ins. Co. of Am.*, 980 S.W.2d 43, 46 (Mo. Ct. App. 1998). If the petition alleges facts that state a claim potentially within the policy's coverage, there is a duty to defend. *Id.* However, there is no duty to defend where the underlying claim is outside the coverage of the insurance policy. *Id.* The presence of some insured claims in the petition gives rise to a duty to defend, even though uninsured claims or claims beyond the coverage may also be present. *Id.* at 47.

A policy may specifically provide for termination of a duty to defend upon payment of the policy limits, but insurers are required to act in good faith in the interest of all insureds under the policy. *Millers Mut. Ins. Ass'n of Ill. v. Shell Oil Co.*, 959 S.W.2d 864, 871 (Mo. Ct. App. 1997).

9. Bad Faith Claims Against Insurers

Bad faith is the intentional disregard of the financial interest of the insured in an effort to avoid the responsibility imposed upon the insurer by its policy. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 828 (Mo. 2014). A bad faith refusal to settle action arises from an insurer's breach of its duty to settle third-party claims in good faith. *Id.* An insurer may be liable over and above its policy limits if it acts in bad faith by refusing to settle the claim against its insured within its policy limits when it has a chance to do so. *Id.* A bad faith refusal to settle action will lie when a liability insurer: (1) reserves the exclusive right to contest or settle any claim; (2) prohibits the insured from voluntarily assuming any liability or settling any claim without consent; and (3) is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy. *Id.* at 827. Where a bad faith refusal to settle action lies, the insurer is liable for the amount of the judgment recovered against the insured in excess of the policy limits. *Id.*

An excess judgment is not an essential element to a bad faith claim and the lack of an excess judgment does not negate a claim. *Id.* at 833. An insurer's payment of its policy limits does not insulate the insurer from a bad faith claim. *Id.* A bad faith refusal to settle action is assignable. *Id.* at 830. An excess insurer may pursue a bad faith claim against the primary insurer. *Id.* at 832.

The failure of an insurer to defend its insured when it is contractually obligated to do so results in a breach of contract. *Landie v. Century Indemnity Company*, 390 S.W.2d 558 (Mo. Ct. App. 1965). "For such breach of contract the company is liable to its insured to pay any judgment recovered against him up to the limits of the policy plus attorney fees, costs, interest and any other expenses incurred by the insured in conducting the defense of the suit which it was the obligation of the company to perform under its contract." *Id.* at 562. Thus, where the breach is deemed to have been made in good faith, the measure of damages is that applied to breach of contract actions. *Id.*
However, where the insurer erroneously refused to defend its insured in bad faith, and further refused to consider its duty of good faith in considering the possibility of settlement within the policy limits, the insurer is liable in tort for damages resulting from such bad faith. *Id.* at 565-66. In the event of a judgment entered in excess of the policy limits, the insurer could be liable for the amount of its policy limits, plus that part of the judgment exceeding the limits. *Id* at 566. Although, the Supreme Court of Missouri rejected a claim for attorney's fees because a bad faith claim is a tort

action, not an action on contract. *Zumwalt v. Utilities Insurance Company*, 228 S.W.2d 750 (Mo. 1950). Further, *Zumwalt* permits an award of punitive damages upon a showing that the insurer acted "maliciously, willfully, intentionally, or recklessly" in causing injury to the insured. *Id.* at 373-74. However, where evidence only shows that the insurer acted in bad faith by considering its own interest while disregarding its duty to its insured, and did not show malicious conduct, the insured cannot recover punitive damages. *Id.* at 374. An insured can recover damages for emotional distress in a bad faith claim. *Rinehart v. Shelter General Insurance Company*, 261 S.W.3d 583 (Mo. Ct. App. 2008).

10. Mandatory Arbitration Rules

There is no mandatory arbitration rule in Missouri.

Montana

1. Comparative Fault

Montana is a modified comparative fault state. A plaintiff is barred from recovery if his or her fault exceeds 50 percent. If the trier of fact determines the plaintiff's fault is 50 percent or lower, the plaintiff is entitled to recover damages, but the recovery will be reduced in direct proportion to the plaintiff's percentage of fault. Mont. Code Ann. § 27-1-702.

The plaintiff's fault is compared against "any other person whose negligence may have contributed as a proximate cause to the injury complained of…" Mont. Code Ann. § 27-1-703(4). Generally each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant, but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of. Mont. Code Ann. § 27-1-703(1). However, where a party's negligence is determined to be 50% or less of the combined negligence of all persons who may have contributed as a proximate cause to the injury complained of, then that person is severally liable only and is responsible only for the percentage of negligence attributable to that person. Mont. Code Ann. § 27-1-703(2).

In an action based on death of a person or injury to a person or property, a defendant's liability is several only, there is no joint liability. Mont. Code Ann. § 27-1-705(2). A defendant is liable only for the percentage of damages equal to the ratio of that defendant's fault to the total fault attributed to all persons involved, regardless of whether others at fault are a party to the action. *Id.* The percentage of fault attributable to parties to the action may total less than 100% if the trier of fact finds that fault contributing to cause the claimant's loss is attributable to other persons. Mont. Code Ann. § 27-1-705(4). Assessment of fault against a nonparty does not subject the nonparty to liability in the action or any other action and may not be introduced as evidence of liability in any other action. Mont. Code Ann. § 27-1-705(3). A defendant must affirmatively plead comparative fault and identify each person against who the defendant alleges is at fault. Mont. Code Ann. § 27-1-705(6). \

2. Insurance Minimum Limits

Minimum motor vehicle liability limits are as follows:

- $25,000 because of bodily injury to or death of one person in any one accident and subject to the limit for one person
- $50,000 because of bodily injury to or death of two or more persons in any one accident
- $20,000 because of injury to or destruction of property of others in any one accident

Mont. Code Ann. § 61-6-103(1). All vehicle liability insurance policies must include uninsured motorist coverage with at least the minimum limits set forth above, unless the named insured rejects such coverage in writing. Mont. Code Ann. § 33-23-201. Montana has no statutory insurance requirement concerning underinsured motorist or medical payments coverage.

3. Statute of Limitations

The statutory periods of limitation begin to run when a cause of action accrues. A cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim is complete, and a court or other agency is authorized to accept jurisdiction. Generally lack of knowledge of the claim or cause of action does not postpone the beginning of the limitation period, however when the facts constituting the claim are 1) by their nature concealed or self-concealing or 2) the defendant has taken action to prevent the injured party from discovering the injury or cause, then the limitations period may be tolled until discovery. Mont. Code Ann. § 27-2-101.

Negligence: Negligence claims are governed by the general tort action statute of limitations, which provides that the limitation period for "an action upon a liability not founded upon an instrument in writing is within 3 years." Mont. Code Ann. § 27-2-204(1).

Negligent Construction: Negligent construction claims must be commenced during the period within three years after the completion of construction. Mont. Code Ann. § 27-2-204; *Johnston v. Centennial Log Homes & Furnishings, Inc.*, 2013 MT 179, ¶ 28, 370 Mont. 529, 305 P.3d 781.

Product Liability: The applicable statute of limitations period for products liability in tort is 3 years. Mont. Code Ann. § 27-2-204; *Bennett v. Dow Chemical Co.*, 220 Mont. 117, 713 P.2d 992 (1986).

Wrongful Death: A wrongful death action must be commenced within three years; ten years if the wrongful death is the result of a homicide. Mont. Code Ann. § 27-2-204(2).

Breach of Contract: An action on any contract, obligation, or liability founded upon an instrument in writing must be commenced within 8 years. Mont. Code Ann. § 27-2-202(1). An action upon a contract, account, or promise not founded on an instrument in writing must be commenced within 5 years. Mont. Code Ann. § 27-2-202(2).

Unlawful Trade Practices: Claims under Montana's Unfair Trade Practices Act and Consumer Protection Act are subject to the 2 year statute of limitations for liabilities created by statute. Mont. Code Ann. § 27-2-211(1); *Johnston v. Centennial Log Homes & Furnishings, Inc.*, 2013 MT 179, ¶28, 370 Mont. 529, 305 P.3d 781.

4. Punitive Damages and Damages Caps

Punitive Damages: A plaintiff must prove by clear and convincing evidence that the defendant is guilty of "actual fraud or actual malice." To prove actual malice a plaintiff must show the defendant intentionally disregarded facts that 1) created a high probability of injury to the plaintiff and 2) deliberately acted with indifference to or in conscious or intentional disregard of the high probability of injury to the plaintiff. To prove actual fraud a plaintiff must have a right to rely on the representations of the defendant and show that the defendant made a representation with knowledge of its falsity or concealed a material fact with the purpose to deprive the plaintiff of property or legal rights or otherwise cause injury. Mont. Code Ann. § 27-1-221.

Non-Economic Damages Cap: In a malpractice claim or claims against one or more health care providers based on a single incident of malpractice, an award for past and future damages for noneconomic loss may not exceed $250,000. All claims for noneconomic loss deriving from injuries to a patient are subject to an award not to exceed $250,000. This limitation applies regardless of whether claims are based on the same act or a series of acts that allegedly caused the injury, injuries, death, or deaths, or whether the act or series of acts were by one or more health care providers. Where a single incident of malpractice injures multiple, unrelated patients, then the limitation on noneconomic damages applies to each patient. For a verdict in excess of the noneconomic damages cap, the court must first reduce the award to $250,000 and then apply any other reductions (such as offsets for comparative fault). Though awards cannot exceed $250,000, this limitation may not be disclosed to a jury and any damages for noneconomic loss may not be discounted to present value. Mont. Code Ann. § 25-9-411.

5. Collateral Source Rules

Montana's collateral source reduction statute applies to actions arising from bodily injury or death. Under the statute there are three prerequisites which must be satisfied before a plaintiff's recovery is subject to reduction: (1) the total award must exceed $50,000; (2) the plaintiff must be fully compensated for his/her damages; and (3) the collateral source must not have a subrogation right. Mont. Code Ann. § 27-1-308(1). Evidence of collateral benefits is not admissible at trial, and any collateral source reduction must be made by the trial judge following a hearing and separate submission of evidence. Mont. Code Ann. § 27-1-308(3). Before an insurance policy payment may be used as a collateral source reduction, the following amounts must be deducted from the amount of the insurance policy payment: (1) the amount the plaintiff paid for the 5 years prior to the date of injury; (2) the amount the plaintiff paid from the date of injury to the date of judgment; and (3) the present value of the amount the plaintiff is obligated to pay to keep the policy in force for the period for which any reduction of an award is made. Mont. Code Ann. § 27-1-308(2).

6. Expert Admissibility Standard – *Daubert v. Frye*

Under Rule 702, Mont. R. Evid., expert testimony is allowed if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . ." The test for allowing expert testimony is "whether the matter is sufficiently beyond common experience that the opinion of the expert will assist the trier of fact to understand the evidence or to determine a fact in issue." *Jim's Excavating Service v. HKM Assoc.*, 265 Mont. 494, 509, 878 P.2d 248, 257 (1994). Where an issue is resolvable by common knowledge and does not require a professional standard of care, expert testimony is not required and is therefore inadmissible. *Durbin v. Ross*, 276 Mont. 463, 477, 916 P.2d 758, 767 (1996)

If the offered expert testimony includes novel scientific evidence, the *Daubert* factors are applied to determine if admission would be appropriate. *State v. Cline*, 275 Mont. 46, 55, 909 P.2d 1171, 1177 (1996). First, the court considers narrowly whether the scientific evidence is novel. *Id.* at 55, 909 P.2d at 1177. Once deemed novel, the *Daubert* factors to be analyzed include the following:

(1) Whether the theory or technique can be and has been tested;

(2) Whether the theory or technique has been subjected to peer review and publication;

(3) The known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the techniques operation; and

(4) Whether the theory or technique has been generally accepted or rejected in the particular scientific field.

State v. Moore, 286 Mont. 20, 41-42, 885 P.2d 457, 470-71 (1994) (*citing Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 591, 113 S. Ct. 2786, 2796-97 (1993)). The factors derived from *Daubert* are to be collectively analyzed and weighed to determine admissibility. *Cline*, 275 Mont. at 56, 909 P.2d at 1177.

7. First Party Notice Requirements

Montana's "notice prejudice" rule provides that notice of a claim that is outside the time limit established in the written insurance policy only precludes coverage if the insurer can demonstrate that it was prejudiced by the late notice. *Estate of Gleason v. Central United Life Ins. Co.*, 2015 MT 140, ¶ 23, 379 Mont. 219, 350 P.3d 349. To date, the Montana Supreme Court has only found prejudice when an insured failed to notify the insurer of a lawsuit until after the judgment was rendered because the late notice deprived the insurer of the ability to investigate, locate witnesses, appoint counsel, engage in discovery, negotiate a settlement, and develop a trial strategy. *Steadele v. Colony Ins.*, 2011 MT 208, ¶¶ 28-29, 361 Mont. 459, 260 P.3d 145.

8. Insurer Duty to Defend

Under Montana law an insurer's duty to defend is independent from, and broader than, its duty to indemnify. *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶ 21, 321 Mont. 99, 90 P.3d 381. The duty to defend is triggered when "a complaint against an insured alleges facts, which if proven, would result in coverage." *Id.* When determining whether the duty to defend has been triggered, all "factual disputes must be resolved in favor of coverage." *Id.* at ¶ 24. The insurer must also look beyond the four corners of the complaint it has information in its possession that may give rise to coverage even though the complaint fails to recite it. *Revelation Ind. Inc. v. St. Paul Fire & Marine Ins.*, 2009 MT 123, ¶ 30, 350 Mont. 184, 206 P.3d 919.

When an insurer refuses to defend a claim, and does so unjustifiably, that insurer becomes liable for defense costs and judgments, even those in excess of policy limits. *Tidyman's Mgmt. Serv., Inc. v. Davis*, 2014 MT 205, ¶¶ 24-25, 376 Mont. 80, 330 P.3d 1139. The only way for an insurer to avoid its duty to defend is if it can make an "unequivocal demonstration" that none of the allegations stated in the complaint would result in coverage. *Id.* ¶ 23. If it can be clearly and unequivocally demonstrated that the plaintiff's claim against the insured no longer falls within the policy's coverage, the insurer may step out of suit. *Insured Titles, Inc. v. McDonald*, 275 Mont. 111, 115, 911 P.2d 209, 212 (1996).

In the case of overlapping insurance, a Montana federal district court has applied Montana law and held all insurers owe a duty to defend. *Liberty Mut. Ins. Co. v. U.S. Fid. & Guar. Co.*, 232 F. Supp. 76, 84 (D. Mont. 1964). Each insurer is responsible to pay its pro rata share of defense costs based on applicable limits of each policy. *Id.* at 84. This pro rata contribution should be applied regardless of insurer's participation in the defense of the insured. *Am. States Ins. Co. v. Angstman Motors, Inc.*, 343 F. Supp. 576, 587 (D. Mont. 1972).

9. Bad Faith Claims Against Insurers

Montana's Unfair Trade Practices Act ("UTPA") provides a laundry list of prohibited behavior for which an insurance company may be liable to its policy holder and/or an injured third party.

The statute provides that insurers may not, with such frequency as to indicate a general business practice, do any of the following:

(1) misrepresent pertinent facts or insurance policy provisions relating to coverages at issue;

(2) fail to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(3) fail to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(4) refuse to pay claims without conducting a reasonable investigation based upon all available information;

(5) fail to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(6) neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;

(7) compel insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds;

(8) attempt to settle a claim for less than the amount to which a reasonable person would have believed the person was entitled by reference to written or printed advertising material accompanying or made part of an application;

(9) attempt to settle claims on the basis of an application that was altered without notice to or knowledge or consent of the insured;

(10) make claims payments to insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments are being made;

(11) make known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(12) delay the investigation or payment of claims by requiring an insured, claimant, or physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(13) fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

(14) fail to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

Mont. Code Ann. § 33-18-201.

Montana law allows either an insured or a third-party claimant to bring an independent cause of action against an insurer for actual damages caused by the insurer's violation of subsections (1), (4), (5), (6), (9), or (13) as set forth above, without having to prove the violations occurred with such frequency as to indicate a general business practice. Mont. Code Ann. § 33-18-242(1-2). However, a third party claimant may not file an action under this section until after the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim. Mont. Code Ann. § 33-18-242(6)(b). An insurer is protected from liability under the UTPA if the insurer had a

reasonable basis in law or in fact for contesting the claim or the amount of the claim, whichever is at issue. Mont. Code Ann. § 33-18-242(5). Montana law has also allowed common law bad faith claims for both third-party and first-party claimants in limited circumstances that are not addressed by the UTPA. *Brewington v. Emp'l Fire Ins. Co.*, 1999 MT 312, ¶ 18, 297 Mont. 243, 992 P.2d 237; *Thomas v. Nw. Nat. Ins. Co.*, 1998 MT 343, ¶¶ 33-36, 292 Mont. 357, 973 P.2d 804.

Montana state and federal courts have developed rigorous requirements for advance payment by insurers of certain expenses and damages suffered by third-party claimants. Violation of this duty owed by the insurer to third parties has made advance payment issues a primary source of bad faith claims in Montana. Where liability is reasonably clear, an insurer has an obligation to pay the third party claimant's medical expenses as they are incurred. *Ridley v. Guar. Nat'l Ins. Co.*, 286 Mont. 325, 331-32, 951 P.2d 987, 991 (1997) (finding the industry practice of refusing to advance pay medical expenses pending full settlement was in violation of the UTPA). In determining whether liability is reasonably clear for the purposes of *Ridley* advance payments, the Montana Supreme Court has approved the following jury instruction:

> You must decide whether [insurance company] engaged in an unfair trade practice by not making a good faith attempt to bring about a prompt, fair, and equitable settlement of a claim in which liability was reasonably clear.
>
> To determine if liability was reasonably clear, you must decide whether a reasonable person, with knowledge of the relevant facts and law, would have concluded for good reason that [defendant] was liable to [plaintiff]. In doing so, you should take into account that, under Montana law, if [defendant] was 50% or more negligent, then [plaintiff] would be entitled to recover damages from [defendant], even if [plaintiff] was partially negligent.
>
> So, you must determine in this case whether a person, with knowledge of the relevant facts and law, would have concluded for good reason that [defendant] was 50% or more negligent.

Peterson v. St. Paul Fire and Marine Ins. Co., 2010 MT 187, ¶ 44, 357 Mont. 293, 239 P.3d 904.

The Montana Supreme Court's holding in *Ridley* was later expanded in *DuBray*, where the court extended an insurer's advance pay obligations to include advance payment of lost wages. *Dubray v. Farmers Ins. Exch.*, 2001 MT 251, ¶ 14, 307 Mont. 134, 36 P.3d 897. *DuBray* effectively broadened the duty of insurance companies to pay for all "damages which are not reasonably in dispute without first executing a settlement agreement and final release." *Id.*

10. Mandatory Arbitration Rules

Montana's version of the Uniform Arbitration Act (UAA) authorizes enforcement of agreements to arbitrate arising between the parties after the agreement is made, but provides in part that this provision does not apply to: "any agreement concerning or relating to insurance policies or annuity contracts except for those contracts between insurance companies." Mont. Code Ann. § 27-5-114(c); *Young v. Security Union Title Ins. Co.*, 1998 MT 335, ¶ 21, 292 Mont. 310, 971 P.2d 1233. The Montana Supreme Court has held that enforcement of an insurance contract providing for arbitration of disputes concerning the value of the lost property was specifically excluded from subsection (c) of Montana's UAA. *Garretson v. Mountain. W. Farm Bureau Mut. Ins. Co.*, 234 Mont. 103, 105, 761 P.2d 1288, 1289 (1988). As a result the Court looks to Montana's common law for resolution of the issue. *Id.* at 106-07, 761 P.2d at 1290. Pursuant to Montana common law, agreements to arbitrate factual questions relating to value or quantity are enforceable. *Id.*

Nebraska

1. Comparative Negligence

Under Neb. Rev. Stat. § 25-21,185.09, if the Plaintiff's contributory negligence is adjudged to be less than 50% of the total fault, the Plaintiff is entitled to recover proportionate damages reduced by the Plaintiff's percentage of fault. In a non-conspiracy action involving more than one tortfeasor, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only, not joint; each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence. *See* Neb. Rev. Stat. § 25-21,185.10.

2. Insurance Minimum Limits

Nebraska's only minimum insurance requirement is in the uninsured/underinsured motorist context. Neb. Rev. Stat. § 60-509 provides that in those contexts, uninsured/underinsured coverage is a minimum of $25,000 for a single personal injury or property damage and $50,000 for injury to two or more persons.

3. Statute of Limitations

Nebraska's statute of limitations for negligence actions, and most every other tort action, including fraud, is four (4) years. *Neb. Rev. Stat. § 25-207*. Actions for libel and slander must be brought within two years of when the action accrued, however. *Neb. Rev. Stat. § 25-208*. For actions alleging a breach of warranty on improvements to real property based on deficient design, planning, supervision or construction of the improvement, the limitations period is still four years. But if the defect is not discovered and could not have been discovered within the first four years, then an action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. Regardless of discovery, no action can be commenced for breach of warranty on improvements to real property more than ten (10) years after the construction work is completed. *Neb. Rev. Stat. § 25-223*.

All professional negligence and malpractice actions are subject to a two-year statute of limitations. Like the breach of warranty claims described above, professional negligence actions are also subject to a ten-year statute of repose. The difference, however, is that if the cause of action is not discovered or could not have been discovered within the initial two-year period, the Plaintiff can bring the action within one (1) year of when the cause of action was discovered or reasonably could have been discovered, whichever is earlier. *Neb. Rev. Stat. § 25-222*.

On contract actions, a four-year statute of limitations applies to actions on oral contracts, whereas a five-year statute of limitations applies to actions on written contracts. *Neb. Rev. Stat. § 25-205*.

For product liability actions, a four-year limitations period applies. *Neb. Rev. Stat. § 25-224*. Such actions are also subject to a ten-year statute of repose; however, the commencement of the ten-year period depends on where the product was manufactured. For products manufactured in Nebraska, the period for the statute of repose begins to run on the date the product which allegedly caused the personal injury was first sold or leased for use or consumption. *Id.* For products manufactured outside Nebraska, the statute of repose in the state of manufacture applies, but only if it is more than ten years. *Id.*

Wrongful death actions must be commenced within two (2) years after the death of such person. *Neb. Rev. Stat. § 30-810*.

4. Punitive Damages and Damages Caps

Nebraska law does not allow for the recovery of punitive damages, except in limited situations defined by statute. Nebraska has a statutory damage cap in place for claims against political subdivisions: $1,000,000 for any person for any number of claims arising out of a single occurrence; and, $5,000,000 for all claims arising out of a single occurrence. *Neb. Rev. Stat. § 13-926*.

5. Collateral Source Rules

Nebraska adheres to the majority rule that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. The purpose, obviously, is to prevent a tortfeasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice.

6. Expert Admissibility Standard

Nebraska has adopted the *Daubert* standard, in abrogation of the *Frye* standard. *See, Schafersman v. Agland Coop.*, 631 N.W.2d 862 (Neb. 2001).

7. Insurer Duty to Defend

An insurer's duty to defend is broader than its duty to indemnify. The insurer's duty to defend is first measured by the allegations of the petition against the insured. The insurer must not only look to the allegations of the complaint, but it must also investigate and ascertain the relevant facts from all available sources. The duty to defend arises if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the actual facts by the insurer would or does disclose facts that would obligate the insurer to indemnify. In other words, an insurer bears a duty to defend its insured whenever it ascertains facts which give rise to the potential liability under the policy.

8. Bad Faith Claims Against Insurers

To show a bad faith claim, the plaintiff must show the absence of a reasonable basis for denying benefits of the insurance policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. If a lawful basis for denial actually exists, or even if the claim is "fairly debatable," the insurer generally cannot be held liable for bad faith.

9. Mandatory Arbitration Rules

Nebraska law prohibits mandatory arbitration clauses in insurance policies. The lone exception to this prohibition is that mandatory arbitration clauses in reinsurance contracts between insurance companies are enforceable. Beyond that, mandatory arbitration clauses are generally enforceable if they are writing, with several statutory exceptions. *See Neb. Rev. Stat. § 25-2602.01*.

Nevada

1. **Comparative Fault:** In Nevada, any comparative negligence is not a total bar to recovery. Recovery is barred only if the negligence of the Plaintiff is greater than the negligence of the defendant(s). Nev. Rev. Stat. 41.141.

2. **Insurance Minimum Limits:** Commercial liability insurance is not mandatory in Nevada. In Nevada, every owner of a motor vehicle that is registered in the State must maintain minimum insurance in the amount of $15,000 for bodily injury to or death of one person in any one accident, and $30,000 for bodily injury to or death of two or more persons in any one accident; and $10,000 for injury to or destruction of property of others in any one accident. Nev. Rev. Stat. 485.185.

3. **Statute of Limitations**

   a. **Negligence:** 2 years. Nev. Rev. Stat. 11.190(4)(e).

   b. **Negligent Construction:** Statute of repose is 6 years: "No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than 6 years after the substantial completion of such an improvement, for the recovery of damages for: (a) Any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement; (b) Injury to real or personal property caused by any such deficiency; or (c) Injury to or the wrongful death of a person caused by any such deficiency. 2. The provisions of this section do not apply: (a) To a claim for indemnity or contribution. (b) In an action brought against: (1) The owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodging house in this State on account of his or her liability as an innkeeper.(2) Any person on account of a defect in a product." Nev. Rev. Stat. 11.202.

   c. **Product Liability:** 2 years. Nev. Rev. Stat. 11.190(4)(e).

   d. **Wrongful Death:** 2 years. Nev. Rev. Stat. 11.190(4)(e).

   e. **Breach of Contract:** 6 years. Nev. Rev. Stat. 11.190(1)(b). 4 years for a contract, obligation, or liability NOT founded upon an instrument in writing. Nev. Rev. Stat. 11.190(2)(c).
   f. **Unlawful Trade Practices**: 2 years. Nev. Rev. Stat. 598.0915; Nev. Rev. Stat. 11.190(4)(b).

4. **Punitive Damages and Damages Caps**

   a. **Punitive Damages:** Punitive damages are not available in breach of contract cases. Punitive damages are limited to: (a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more; or (b) Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $100,000. The punitive damages caps do not apply to: a) A manufacturer, distributor or seller of a defective product; (b) An insurer who acts in bad faith regarding its obligations to provide insurance coverage; (c) A person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations; (d) A person

for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or A person for defamation.

b. **Non-Economic Damages Cap:** Non-economic damages in medical malpractice actions are limited to $350,000. Nev. Rev. Stat. 41A.035. Statutory caps on non-economic damages are constitutional. Tam v. Eighth Judicial District Court, 358 P.3d 234 (Nev. 2015). The cap is applied per incident, regardless of how many plaintiffs, defendants, or claims are involved. Nev. Rev. Stat. 41A.035, Tam v. Eighth Judicial District Court, 358 P.3d 234 (Nev. 2015).

5. **Collateral Source Rules: "**The Nevada Supreme Court does not permit the admission of evidence of collateral sources of payment for any purpose whatsoever." McConnell v. Wal-Mart Stores, Inc., 995 F. Supp. 2d 1164, 1169-70 (D. Nev. 2014), citing to Proctor v. Castelletti, 112 Nev. 88, 911 P.2d 853, 854 (1996) ("We now adopt a *per se* rule barring the admission of a collateral source of payment for an injury into evidence for *any* purpose." (emphases added)). "That a medical provider ultimately accepts less than a billed amount, whether from an insurance company or from the victim directly, is not relevant to whether the tortfeasor is liable for the full value of the harm he has caused." Id.

6. **Expert Admissibility Standard – Daubert v. Frye:** Expert admissibility is governed by NRS 50.275, which tracks FRE 702; however, Nevada has not adopted Daubert. Hallmark v. Eldridge, 124 Nev. 492, 498-99, 189 P.3d 646, 650-51 (2008). "To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement). In determining whether a person is properly qualified, a district court should consider the following factors: (1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." Hallmark v. Eldridge, 124 Nev. 492, 498-99, 189 P.3d 646, 650-51 (2008).

   "Hallmark's refrain is functional, not talismanic, because the "standard for admissibility varies depending upon the expert opinion's nature and purpose." FCH1, LLC v. Rodriguez, 130 Nev. Adv. Op. 46, 335 P.3d 183, 188 (2014).

7. **First Party Notice Requirements:** Pursuant to Nevada Administrative Code 686A.660(4), "No insurer may, except where there is a time limit specified in the insurance contract or policy, require a claimant to give written notice of loss or proof of loss within a specified time or seek to relieve the insurer of the obligations if the requirement is not complied with, unless the failure to comply prejudices the insurer's rights."

"When an insurance policy explicitly makes compliance with a term in the policy a condition precedent to coverage, the insured has the burden of establishing that it complied with that term." Las Vegas Metro. Police Dep't v. Coregis Ins. Co., 127 Nev. Adv. Op. 47, 256 P.3d 958, 962 (2011).

"For an insurer to deny coverage due to late notice, the insurer must show the notice was late and the delay materially impaired the insurer's ability to contest liability." Big-D Const. Corp. v. Take it for Granite Too, 917 F. Supp. 2d 1096, 1114 (D. Nev. 2013).

8. **Insurer Duty to Defend: "**The duty to indemnify arises when an insured 'becomes legally obligated to pay damages in the underlying action that gives rise to a claim under the policy.' In other words, for an insurer to be obligated to indemnify an insured, "the insured's activity and the resulting loss or damage [must] *actually* fall within the [] policy's coverage." United Nat'l Ins. Co. v. Frontier Ins. Co., 120 Nev. 678, 686, 99 P.3d 1153, 1157-58 (2004).
The duty to defend is broader than the duty to indemnify. Id. The duty to defend arises whenever there are facts that give rise to the potential of liability. Id.

"However, 'the duty to defend is not absolute.' A potential for coverage only exists when there is arguable or possible coverage. Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy." Id.

9. **Bad Faith:** In Nevada, to establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must establish (1) that the insurer had no reasonable basis for disputing coverage, and (2) that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage. Powers v. United Servs. Auto. Ass'n, 114 Nev. 690, 702-03, 962 P.2d 596, 604 (1998) opinion modified on denial of reh'g, 115 Nev. 38, 979 P.2d 1286 (1999).

"Bad faith is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct. " Guar. Nat. Ins. Co. v. Potter, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996).

"An insured may institute a bad faith action against his or her insurer once the insured establishes 'legal entitlement' and unreasonable conduct by the insurer concerning its obligations to the insureds." Pemberton v. Farmers Ins. Exch., 109 Nev. 789, 797, 858 P.2d 380, 384 (1993).

An essential element for the tort of bad faith is a denial or delay in the payment of a valid claim. Guar. Nat. Ins. Co. v. Potter, 112 Nev. 199, 200, 912 P.2d 267, 269 (1996). A finding of bad faith must be supported by substantial evidence. Id.

"Liability for bad faith is strictly tied to the implied-in-law covenant of good faith and fair dealing arising out of an underlying contractual relationship." K Mart Corp. v. Ponsock, 103 Nev. 39, 48, 732 P.2d 1364, 1370 (1987).

"When no contractual relationship exists, no recovery for bad faith is allowed." United Fire Ins. Co. v. McClelland, 105 Nev. 504, 511, 780 P.2d 193, 197 (1989).

"Nevada follows the rule that proof of bad faith, by itself, does not establish liability for punitive damages." United States Fidelity v. Peterson, 91 Nev. 617, 620, 540 P.2d 1070, 1072 (1975). To recover punitive damages, plaintiff must also show evidence of "oppression, fraud, or malice, express or implied." Id.

10. **Mandatory Arbitration Rules:** In Nevada, in counties where the population exceeds 100,000, nonbinding arbitration of certain civil matters filed in district court is required. Nev. Rev. Stat. 38.250. Civil matters where the amount in controversy does not exceed $50,000 per plaintiff, not including attorney's fees, interest, and court costs, must be submitted to nonbinding arbitration. Nev. Rev. Stat. 38.250. Civil matters may be exempted from arbitration upon petition, if the amount at issue exceeds $50,000, the case presents significant issues of public policy, or there are unusual circumstances that constitute good cause from removal from the program. Nevada Arbitration Rule 5(A). The request for exemption must be filed within 20 days after the filing of an answer by the first answering defendant. Nevada Arbitration Rule 5(A).

New Jersey

1. COMPARATIVE FAULT

New Jersey is a "Modified Comparative Negligence" jurisdiction. New Jersey's Comparative Negligence Act, N.J.S.A. 2A:15-5.1, will not bar recovery if plaintiff's negligence was not greater than the negligence of the defendants. Therefore, plaintiff may recover damages only if plaintiff is found to be less than 51% comparatively negligent; i.e. the "50% threshold" to recovery. Any damage award received by plaintiff will be reduced by the portion of fault attributed to the plaintiff, if any, by the finder of fact.

The Comparative Negligence Act also governs a plaintiff's recovery of damages in a case involving multiple defendants. N.J.S.A. 2A:15-5.3(a)-(c). With respect to joint and several liability, a recovering party may recover the full amount of its damages against any party determined to be responsible for 60% or more of the total damages. If a party is found to be less than 60% responsible for total damages, it can be held responsible only for payment of that percentage of damages directly attributable to its negligence.

Importantly, under the Comparative Negligence Act, the factfinder must allocate fault among all parties, including settling and non-settling defendants. See Young v. Latta, 123 N.J. 584, 592 (1991). Hence, plaintiff's are often reluctant to settle out with one party as they are fearful of the "empty chair" defense at trial.

Notably N.J.S.A. 2A:15-5.8 and N.J.S.A. 2A:22A-6(b) completely insulates "social hosts" and "licensed alcoholic beverage servers," respectively, from joint and several liability for damages caused by their intoxicated guests or customers, even if the host's or server's level of responsibility equals or exceeds the 60% threshold contained in N.J.S.A. 2A:15-5.3 mentioned above. The statutory language suggests that the insulation may also extend to all parties in social host and licensed server cases.

N.J.S.A. 2A:15-5.3(d) of the Comparative Negligence Act retains traditional joint and several liability in environmental tort actions where negligence or fault cannot be apportioned. See James v. Bessemer Processing Co., 155 N.J. 279, 299-301 (1998) (a plaintiff's inability to identify precisely the particular product that caused the alleged damages will not be fatal to the case).

New Jersey courts have ruled that it is proper for a lawyer to propose specific percentages of liability at trial in opening and closing arguments when asking juries to apportion liability among multiple tort defendants. Additionally, defendants are entitled to

2. INSURANCE MINIMUM LIMITS

All NJ drivers must have a few specific coverages, but others are optional. Below are the coverages New Jersey requires to drive in the state: (1) Bodily Injury Liability Coverage: Minimum coverage level is $15,000 per person and $30,000 per accident; (2) Property Damage Liability Coverage: Minimum coverage level is $5,000 per accident; (3) Personal Injury Protection (PIP): Minimum coverage level is $15,000; (4) Uninsured/Underinsured Motorist Bodily Injury Coverage: Minimum coverage level is $15,000 per person and $30,000 per accident; (5) Uninsured/Underinsured Motorist Property Damage Coverage: Minimum coverage level is $5,000 per accident with a $500 deductible.

3. STATUTES OF LIMITATION

Negligence:
Two years for personal injury claims. See N.J.S.A. 2A:14-2. The action accrues on the date of the act or omission giving rise to the claim; or on the date the injured party discovers, or reasonably should have discovered that he may have a basis for an actionable claim. See Hardwicke v. Am. Boychoir Sch., 902 A.2d 900, 925 (N.J. 2006).

Negligent Construction:
6 years for property claims. See N.J.S.A. 2A:14-1. The action accrues on the date of the act or omission giving rise to the claim; or on the date the injured party discovers, or reasonably should

have discovered that he may have a basis for an actionable claim. See Hardwicke v. Am. Boychoir Sch., 902 A.2d 900, 925 (N.J. 2006).

Products Liability:
The limitations period is two years against product manufacturers and sellers. See Dziewiecki v. Bakula, 853 A.2d 234, 237 (N.J. 2004). The statute of limitations period accrues on the date the injured party discovers or reasonably should have discovered, the basis for an actionable claim. See Lapka v. Porter Hayden Co., 745 A.2d 525, 529 (N.J. 2000).

Wrongful Death:
Two years for wrongful death claims. See N.J.S.A. 2A:31-3; Presslaff v. Robins, 403 A.2d 939, 940 (N.J. Super. Ct. App. Div. 1979. New Jersey has no statute of limitations for a wrongful death action, if the death resulted from murder, aggravated assault or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity, or adjudicated delinquent. See N.J.S.A. 2A:31-3. The statute of limitations is two years for survival actions. Thomas v. Correctional Med. Servs., Inc., 2009 WL 737105, at *3 (D.N.J. Mar. 17, 2009).

The limitations period for a wrongful death claim accrues on the date of decedent's death. See N.J.S.A. 2A:31-3. The discovery rule does not apply to wrongful death causes of action. See Presslaff, at 942. The limitations period for a survival claim accrues on the date of the alleged improper acts or omissions, not on the date of the decedent's death. See Kisselbach v. County of Camden, 638 A.2d 1383, 1386 (N.J. Super. Ct. App. Div. 1994).

Breach of Contract:
Six years for non-sales contracts and four years for contracts for the sale of goods under the Uniform Commercial Code. See N.J.S.A. 2A:14-1 and 12A:2-725. For non-sales contract actions, the statute of limitations accrues on the date that the right to institute and maintain a suit first arose. Nat'l Util. Serv., Inc. v. Cambridge-Lee Indus., Inc. 199 Fed. Appx. 139, 142 (3d Cir. 2006. For a sales contract action the statute accrues at the time of either the breach or anticipatory breach. See N.J.S.A. 12A:2-725. Parties to a sales contract can reduce the limitations period but it must be at least one year and may not extend beyond four years. Id. The discovery rule does not toll sales contract causes of action because these actions accrue when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. Id.

Unlawful Trade Practices:
The limitations period for unfair competition is six years under the common law and section 56:4-1 of New Jersey's unfair competition statute. Accrual likely begins on the date of the act giving rise to the claim. See Kelly v. Est. of Arnone ex. rel. Ahern, 2009 WL 2392108 at *7 (D.N.J. Aug. 3, 2009).

4. PUNITIVE DAMAGES

Punitive damages may not be apportioned among joint tortfeasors based on their respective percentages of fault. The Punitive Damages Act, adopted in 1995, provides that "[i]n any action in which there are two or more Defendants, an award of punitive damages must be specific as to a

Defendant, and each Defendant is liable only for the amount of the award made against that Defendant." N.J.S.A. 2A:15-5.13(e). Accordingly, punitive damages can neither be apportioned nor subject to contribution among joint tortfeasors. See Blazovic v. Andrich, 124 N.J. 90, 108 (1991). The New Jersey Tort Claims Act prohibits an award of punitive damages against a public entity. See N.J.S.A. 59:9-2©.

Punitive damages must be specifically requested in the complaint in order for the issue to go to the jury. See N.J.S.A. 2A:15-5.11. If a Plaintiff can prove, "By clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions" punitive damages may be awarded. See N.J.S.A. 2A:15-5.12.

With respect to a cap on punitive damages, no Defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that Defendant for compensatory damages or $350,000, whichever is greater. See N.J.S.A. 2A:15-5.14(b). The jury shall not be informed of the cap on punitive damages established by the above-noted section. See N.J.S.A. 2A:15-5.16.

5. COLLATERAL SOURCE RULES

The Collateral Source Statute, adopted in 1987, provides that certain "benefits" received by the victim of an accident must be disclosed to the court and deducted from any damage award recovered by the victim if those "benefits" duplicate any element of damages included in the award. See N.J.S.A. 2A:15-97. The purpose of the enactment was to prevent the possibility of a double recovery of compensatory damages by a Plaintiff.

There are exceptions from the deduction rule for life insurance proceeds, workers' compensation benefits, and PIP benefits paid by automobile insurance. See N.J.S.A. 2A:15-97. With respect to Medicaid, the appellate division has concluded that such benefits need not be deducted as a collateral source if the Plaintiff must reimburse the payer out of the proceeds of any judgment or settlement relating to the same injury. Under those circumstances, the benefits would not constitute a double recovery. See Lusby by and through Nichols v. Hitchner, 273 N.J. Super. 578, 590 (App. Div. 1994).

Social Security Disability payments are includable as a collateral source deduction and the Plaintiff may obtain a credit against the amount deducted, however, for the amount of Social Security contributions that correspond to the disability benefits received. See Woodger v. Christ Hosp., 364, N.J. Super. 144, 153-154 (App. Div. 2003). Social Security survivor and death benefits are also includable as a collateral source deduction. See Cockerline v. Menendez, 411 N.J. Super. 596, 623-624 (App. Div.), certif. den. 201 N.J. 499 (2010).

6. EXPERT ADMISSIBILITY STANDARDS – Daubert v. Frye

As N.J.R.E. 702 was drafted pursuant to pre-Daubert New Jersey state case law, it is safe to say that the New Jersey Supreme Court has not adopted the Daubert standard for the admissibility of expert testimony. A history of the how the Supreme Court crafted the present standard will follow.

N.J.R.E. 702, Testimony by Experts, reads;

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

N.J.R.E. 702 sets forth the standard - helpfulness to the trier of fact - by which a court is to determine if proffered "expert testimony" should be placed before the jury. The 1991 Supreme Court Committee Comment notes that the rule "intends to incorporate New Jersey case law establishing the general criteria for admissibility of expert testimony as articulated by State v. Kelly, 97 N.J. 178, 208 (1984)." The 1991 comment goes on to state the criteria as restated by Landrigan v. The Celotex Corporation, 127 N.J. 404, 413 (1992) as follows:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

Current N.J. Rules of Evidence, comment on N.J.R.E. 702 (2015) (alteration to original).

Since the Kelly test was developed it has been cited in practically all New Jersey cases that involve the admission of expert testimony. The case itself is cited directly by over 430 cases and many other cases cite to the three-part test without mention of Kelly. The most notable cases that cite to the three-part Kelly test are Rubanick, Landrigan, and Kemp. Rubanick v. Witco Chemical Corp., 125 N.J. 421, 431-432 (1991), Landrigan v. Celotex Corp., 127 N.J. 404, 414-15 (1992), and Kemp v. State, 174 N.J. 412, 424 (2002).

Two years before the Daubert opinion, the New Jersey Supreme Court in Rubanick, supra,125 N.J. 421, relaxed the "general acceptance" standard for the admissibility of expert testimony in toxic-tort litigation. Noting that the Third Circuit was more flexible with the reliability of emerging scientific theories in toxic-tort litigation, the Court held that a new scientific theory in that particular subject matter can be reliable "if it is based on sound methodology that draws on scientific studies reasonably relied on in the scientific community, and has actually been used and applied by responsible experts or practitioners in the particular field." Id. at 447. Notably, the Court in Rubanick also quoted from and applied features of the general admissibility test it had previously announced in Kelly, including whether the field of science involved "must be at a state of the art such that an expert's testimony could be sufficiently reliable." Id. at 431-32 (quoting Kelly, supra, 97 N.J. at 210).

Unlike the federal approach, which required a separate determination for the reliability of the data used and the methodology used to interpret the data, Rubanick distinguished the corresponding State rule as employing a single determination of reliability. Id. at 228. Rubanick also provided a distinct explanation of qualifications for the proffered expert, such as sufficient education in their field, an ability to assess data and apply scientific methodology, and an explanation of the conclusion reached. Id. at 449. Moreover, future trial courts were directed to consider whether "comparable experts accept the soundness of the methodology" and actually rely on that information. Id. at 451-52.

One year later, the Court in Landrigan, 127 N.J. 404, provided additional substance to the new toxic-tort law requirements for the admission of expert testimony. The Court reaffirmed the Kelly test, quoting all three Kelly factors and identifying them as "basic requirements" of the evidence rule. Id. at 413. In addition, the opinion announced that the proffered expert should be able to "identify factual bases for their conclusions, explain their methodology, and demonstrate that both . . . are scientifically reliable." Id. at 417. For guidance, an expert may draw support from professional journals, texts, conferences, symposia, or judicial opinions accepting the methodology. Id. at 417. In other words, the court should examine each step in the witness' reasoning. Id. at 421. Significantly, the Court reaffirmed in Landrigan the Kelly test, this time quoting all three Kelly factors and identifying them as "basic requirements" of the evidence rule. Id. at 413.

In 1992, the Court adopted N.J.R.E. 702 to replace Evid. R. 56(2) and tracked the language of the then-existing version of Fed. R. Evid. 702. N.J.R.E. 702 is quoted above as is the N.J.R.E. 702 official comment.

These narrow developments relating to toxic-tort cases were expanded in Kemp, supra, 174 N.J. 412, where New Jersey further clarified the standard for the admission of expert testimony under the language of N.J.RE. 702, which has displaced former Evid. R. 56(2). In explaining the rule, Kemp first confirmed that N.J.R.E. 702 tracks the 1973 version of the federal rule despite ensuing developments in the federal case law. Id. at 423-24. Specifically the court stated that "[w]e do not intend by this opinion to incorporate the Daubert factors into N.J.R.E. 702." Kemp, supra, 174 N.J. at 424 n.3.

Next, Kemp stated that the Kelly criteria requires "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony." Id. at 424 (citing Landrigan, supra,127 N.J. at 413 (quoting Kelly, supra, 97 N.J. at 208)). After evaluating the many burdens of the "general acceptance" test on other tort claims, the Court held that the exception carved out in Rubanick should be extended beyond toxic-tort litigation. Id. at 430.

In reaching this decision, the Court in Kemp explained how "[s]everal other varieties of tort litigation exist in which a medical cause-effect relationship has not been confirmed . . . but compelling evidence nevertheless suggests that such a relationship exists." Ibid. The proffered witness was a professor at a medical school and published writer, who had relied on the plaintiff's

medical reports which were written by different doctors and specialists at different time periods. Id. at 418. The witness drew conclusions from the reports, explained his process of reasoning, and argued for and against competing medical studies. Id. at 431. The only problem with the proffered testimony was the witness' failure to demonstrate that his methodology was consistent with other qualified experts in the field. Id. at 431-32. However, the trial court merely evaluated a deposition, allowing the defense to more easily attack the reliability of the opinion. Id. at 432.

Kemp analyzed then existing federal precedent for determining reliability of expert testimony at an in limine hearing. Id. at 428 (citing Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 417 (1999)). At the federal level, the Third Circuit emphasized how the party seeking to admit evidence should have a fair opportunity to justify their submissions. Ibid. (citing Padillas, 186 F.3d at 417). Even where a party did not request an in limine hearing, federal case law had indicated that the trial court "has an independent responsibility for the proper management of complex litigation." Id. at 429 (citing Padillas, 186 F.3d at 417). Kemp agreed with this approach, holding that "in cases in which the scientific reliability of an expert's opinion is challenged and the court's ruling on admissibility may be dispositive of the merits, the sounder practice is to afford the proponent of the expert's opinion an opportunity to prove its admissibility at a Rule 104 hearing." Id. at 432-33.

Subsequently, in Hisenaj v. Kuehner, 194 N.J. 6, 17-18 (2008), the Court considered the reliability of the expert testimony of a biomechanical engineer offered by the defendant in a personal injury automobile accident case. The Court succinctly set forth the standard for determining reliability:

> Scientific reliability of an area of research or expertise may be established in one of three ways. When an expert in a particular field testifies that the scientific community in that field accepts as reliable the foundational bases of the expert's opinion, reliability may be demonstrated. Scientific literature also can evidence reliability where that "literature reveals a consensus of acceptance regarding a technology." So long as "comparable experts [in the field] accept the soundness of the methodology, including the reasonableness of relying on [the] underlying data and information," reliability may be established. Rubanick, supra, 125 N.J. at 451, 593 A.2d 733. Finally, a party proffering expert testimony may demonstrate reliability by pointing to existing judicial decisions that announce that particular evidence or testimony is generally accepted in the scientific community

[Hisenaj, 194 N.J. at 17 (citations omitted, except Rubanick).]

The three ways of establishing reliability discussed by the Court are largely drawn from cases discussing the Frye general acceptance standard. However, the quotation from Rubanick makes clear that a multi-faceted reliability standard has been added as an alternative to the Frye general acceptance standard. See also State v. Jenewicz, 193 N.J. 440, 454 (2008) (applying reliability standards to the admissibility of an expert in a criminal case).

Notably, the Court's opinions in Hisenaj, supra, 194 N.J. at 15-16 (describing N.J.R.E. 702 as having "three well-known prerequisites," citing the factors derived from Kelly) and State v. Jenewicz, supra, 193 N.J. at 454 (repeating the three requirements of Kelly and noting that they are "construed liberally in light of Rule 702's tilt in favor of the admissibility of expert testimony") continued to endorse and apply the three-part criteria for admissibility first expressed in Kelly.

These standards continue to be applied by the Court in ensuing civil and criminal opinions. See State v. Rosales, 202 N.J. 549 (2010); Agha v. Feiner, 198 N.J. 50, 62 (2009); State v. Reed, 197 N.J. 280 (2009); Polzo v. County of Essex, 196 N.J. 569, 582 (2008); State v. Joseph, 426 N.J. Super. 204, 219 (App. Div. 2012); State v. Locascio, 425 N.J. Super. 474, 489 (App. Div. 2012). So, the holdings in Kelly, Rubanick, and Kemp would appear to apply not only to determining causation in toxic tort and medical malpractice cases, but also every civil and criminal case in which expert testimony is offered.

7. FIRST PARTY NOTICE REQUIREMENTS

The PIP statute, specifically N.J.S.A. 39:6A-5, provides that the insurance company "may require written notice as soon as practicable after an accident." No set time deadline is provided by the statute. Practically, if the company receives a medical bill that on its face indicates that it is for medical treatment to an insured as a result of a car accident, the claimant has complied with the notice requirement. As a general rule, when the Company receives notice of an accident, the Company will send the insured claimant a PIP Application to be completed and returned. The PIP application will seek information to confirm residency, relation to the named insured, the date and happening of the accident, the injuries sustained, and the identity of medical providers already seen. A treatment provider (not including hospitals or some other listed types of providers) must provide "notice of commencement of treatment" to the company, within 21 days of the first office visit with that provider. If the provider gives late notice, the company is entitled to reduce the amount payable by anywhere from 10% (if notice is received 22 to 30 days after commencement of treatment), all the way up to 100% (if notice of commencement of treatment is provided more than 161 days after commencement of treatment).

The PIP carrier must pay an eligible bill within 60 days of receipt, although the company has the right to request a 45 day extension, if needed. If a bill is not paid within that time frame, the company can be subject to an interest charge.

The above is an excerpt from the article "Overview of NJ PIP Law" authored by Thomas L. Grimm, Esq., of Margolis Edelstein. For additional information regarding NJ PIP Law, the article can be found at: **http://www.margolisedelstein.com/files/overview_of_nj_pip_law_-_grimm_4-09.pdf**

8. INSURER DUTY TO DEFEND

In New Jersey, an insurer must provide a policyholder with a defense against any claims that are potentially covered by the policy. Abouzaid v. Mansard Gardens Assoc. LLC, 207 N.J. 67 (2011). Accordingly, the duty to defend is triggered whenever a complaint is filed against an insured which contains allegations that, if proven to be true, may be covered by the terms of the insurance policy. Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165 (1992). In circumstances where the underlying coverage question cannot be decided from the face of the complaint, the insurer is obligated to provide a defense until all potentially covered claims are resolved. Flomerfelt v. Cardiello, 202 N.J. 432 (2010). The Flomerfelt court noted that the duty to defend "is not dependent upon whether there is a finding that the claim is covered; instead it attaches because ... there are potentially covered claims." Id. The insurer's duty to defend analysis "is not necessarily limited to the facts asserted in the complaint." Abouzaid 207 N.J. 67. Rather, "an insurer's duty to provide a defense may also be triggered by facts indicating potential coverage that arise during the resolution of the underlying dispute." Id. Accordingly, even when it is uncertain whether a claim falls within the scope of indemnity coverage, so long as there is "a potential for plaintiffs to prove a covered claim" the duty to defend attaches. Id. Usually nothing more than a poorly plead negligence claim is sufficient to trigger the duty to defend in most cases.

9. THIRD PARTY BAD FAITH CLAIMS

New Jersey permits both first-party bad faith claims and third-party bad faith claims. In order to establish bad faith, plaintiff must "show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard or the lack of a reasonable basis for denying the claim."

10. MANDATORY NON-BINDING ARBITRATION

All personal injury actions, except those involving claims for professional malpractice and products liability, are subject to mandatory, non-binding arbitration. However, any personal injury action not subject to mandatory, non-binding arbitration may be submitted to arbitration on written stipulation of all parties. As arbitration is non-binding, the award may be rejected by any party by filing a notice of rejection of the award, as well as, demand for trial de novo with the applicable fee of $200. If neither party rejects the award, the amount of the award plus prejudgment interest become binding and a motion to confirm the arbitration award is filed with the court.

New Hampshire

1. COMPARATIVE FAULT

New Hampshire follows a modified comparative fault system. A plaintiff cannot recover if the plaintiff's share of fault is greater than the fault of the defendant, or the defendants in the aggregate. N.H. RSA 507:7-d. In other words, the plaintiff will not recover if he is 51% or more at fault. Any damages awarded are reduced in proportion to the amount of fault attributed to the plaintiff. Id.

New Hampshire also follows a hybrid model of joint and several liability. A defendant can be held liable for the total damages if his comparative fault is over 50%, but he will only be liable for his proportion of damages if he is less than 50% responsible. N.H. RSA 507:7-e, I(b). The fact-finder may apportion fault to parties who were not named in the action or who may have settled. DeBenedetto v. CLD Consulting Eng'rs, Inc., 153 N.H. 793, 803 (2006).

2. INSURANCE MINIMUM LIMITS

New Hampshire does not have an insurance requirement, however, if a noninsured driver is involved in an accident, he must be able to pay for personal injury damages of up to $50,000 and up to $25,000 for property damage, or risk losing his license and registration. N.H. RSA 264:3. Some drivers may be required to have insurance or proof of financial ability to pay for damages from an accident if they have been convicted of certain motor vehicle law violations, such as DWI, homicide or assault arising out of driving a motor vehicle, or multiple speeding violations. N.H. RSA 264:2.

3. STATUTES OF LIMITATION

The statute of limitations for all personal actions is 3 years. N.H. RSA 508:4. If an injury and its causal relationship to an act or omission were not discovered and could not have reasonably been discovered at the time, the 3 year period does not start until the plaintiff discovers, or should have discovered, the injury and its causal relationship to the act or omission. Id. Actions to recover damages for personal injury, injury to property, wrongful death, or economic loss arising from construction must be brought within 8 years. N.H. RSA 508:4-b.

The statute of limitations runs for two years after a minor reaches the age of majority or after a mentally incompetent person's disability is removed. N.H. RSA 508:8. If a judgment that does not bar the right of action is rendered, the action may be brought again within 1 year of the judgment. N.H. RSA 508:10.

4. PUNITIVE DAMAGES

Punitive damages are not allowed in New Hampshire, unless otherwise provided by statute. N.H. RSA 507:16. "Enhanced compensatory damages" can be awarded when an act is wanton, malicious, or oppressive. There must be ill will, hatred, hostility, or evil motive on the part of the defendant. Such damages are awarded only in exceptional cases. Stewart v. Bader, 154 N.H. 75, 87 (2006).

5. COLLATERAL SOURCE RULES

"Under the collateral source rule if a plaintiff is compensated in whole or in part for his damages by some source independent of the tort-feasor he is still permitted to make full recovery against him." Moulton v. Groveton Papers Co., 114 N.H. 505, 509 (1974). The New Hampshire Supreme Court has not ruled on whether the rule applies to expenses that have been written off by health care providers, but a number of trial court cases in the state have addressed the issue. The majority have applied the rule, finding that the plaintiff's recovery is measured by the reasonable value of services and not the actual amount charged. The New Hampshire Supreme Court held that the statute abolishing the collateral source rule in medical malpractice actions, N.H. RSA § 507-C:7, I, was unconstitutional. Carson v. Maurer, 120 N.H. 925 (1980), *overruled on other grounds by* Cmty. Res. for Justice, Inc. v. City of Manchester, 154 N.H. 748, 762 (2007).

6. EXPERT ADMISSIBILITY STANDARDS – Daubert v. Frye

New Hampshire applies the Daubert standard. See Baker Valley Lumber, Inc. v. Ingersoll-Rand Co., 148 N.H. 609, 614 (2002). N.H. RSA 516:29-a codifies the Daubert standard. See Baxter v. Temple, 157 N.H. 280, 284 (2008). New Hampshire courts consider the Daubert factors to be "helpful, not definitive" and the overall inquiry to be flexible. Id.

7. FIRST PARTY NOTICE REQUIREMENTS

The New Hampshire Supreme Court has stated that "whether there has been a breach of the policy provisions requiring notice to be given 'as soon as practicable' does not depend on the length of the delay alone but also upon the reasons for the delay and whether the delay resulted in prejudice to the insurer." Wilson v. Progressive N. Ins. Co., 151 N.H. 782, 785 (2005). "It is a combination of these three factors that determines whether there has been a substantial breach of the notice requirements of the policy so as to relieve the insurer of its obligation to defend and pay any judgments." Id. Whether a notice requirement has been met is a question of fact and the trial court may determine the relative weight to give the factors. Id. "[P]rejudice is central to a determination of whether failure to report constitutes a material breach of an insurance contract." Id. The Court has never held that an insurer is per se prejudiced by a delay. Id. at 786. The insurer must provide the court with facts showing prejudice, but it need not show actual loss of evidence to demonstrate prejudice. Id.

8. INSURER DUTY TO DEFEND

In New Hampshire, "[a]n insurer's obligation to defend its insured is determined by whether the cause of action against the insured alleges sufficient facts in the pleadings to bring it within the express terms of the policy." Todd v. Vt. Mut. Ins. Co., 168 N.H. 754, 759 (2016) (quotation omitted). "In considering whether a duty to defend exists based upon the sufficiency of the pleadings, [courts] consider the reasonable expectations of the insured as to his rights under the policy." Id. "An insurer's obligation is not merely to defend in cases of perfect declarations, but also in cases in which, by any reasonable intendment of the pleadings, liability of the insured can be inferred, and neither ambiguity nor inconsistency in the underlying writ can justify escape of the insurer from its obligation to defend. Id. In cases of doubt as to whether the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's

favor. Id. The New Hampshire Supreme Court has also held that "under New Hampshire law, the excess insurer's duty to defend is triggered only when the primary insurer's coverage is exhausted. Old Republic Ins. v. Stratford Ins., 168 N.H. 548, 553 (2016).

The Court has also explained the distinction between the duty to defend and the duty to indemnify. See Great Am. Dining v. Phila. Indem. Ins. Co., 164 N.H. 612, 627-628 (2013). "The duty to defend arises prior to the completion of litigation, and therefore insurers are required to meet their defense obligation before the scope of the insured's liability has been determined. In contrast, the duty to indemnify arises only once liability has been conclusively determined." Id.

9. THIRD PARTY BAD FAITH CLAIMS

The New Hampshire Supreme Court has held that "a plaintiff may maintain an action against an insurer for negligent failure to settle a case without prior payment of or proof of ability to pay the excess judgment." Dumas v. State Farm Mut. Auto. Ins. Co., 111 N.H. 43, 46 (1971). There is no tort action for an insurer's wrongful refusal or delay to settle a first-party claim. Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 611-12, 614 (1978). An insured must prove that the insurer's failure or delay to make a payment was a breach of contract. Id. at 612. "Not every delay or refusal to settle or pay a claim under the policy will constitute a breach of the contract," but in every contract there is an implied obligation of good faith and fair dealing. Id. It is a breach of the covenant to delay payment under the policy to coerce the insured into accepting less than full performance of the insurer's contractual obligations. Id. "Whether the defendant's delay was in fact in bad faith, whether the damages alleged to have resulted from the delay were in fact foreseeable, and whether these damages could have been avoided with reasonable efforts by the insured are questions for the jury." Id. at 612-13.

10. MANDATORY NON-BINDING ARBITRATION

All civil cases are assigned to alternative dispute resolution (ADR) unless the parties represent by joint motion that they have engaged in formal ADR before a neutral third party prior to suit being filed, or the action is exempted by the court for good cause. Superior Court Rule (Civil) 32(a).

New Mexico

1. Comparative Fault

New Mexico is a pure comparative fault state. N.M.S.A. 1978, § 41-3A-1(A), except in limited circumstances where joint and several liability applies N.M.S.A. 1978 § 41-3A-1(C).

2. Insurance Minimum Limits

Drivers are required to operate motor vehicles with a minimum of liability insurance. Minimum liability amounts required in New Mexico are:

$25,000 for bodily injury or death to one person in any accident subject to this limit for one person.
$50,000 for bodily injury or death of two or more persons in any one accident.
$10,000 for injury to or destruction of property to others in any one accident.

Or, if evidence is in the form of a surety bond or a cash deposit, the total amount shall be $60,000 on deposit with the New Mexico state treasurer.

3. Statute of Limitations

For claims founded upon accounts and for injuries to property, 4 years.
Actions for injury to the person or reputation of any person, 3 years.
Products liability, 3 years from when a Plaintiff knows, or reasonably should know through diligent inquiry that he or she has been injured.
Wrongful death, 3 years from the date of death.
Trade practices and frauds, legal malpractice, 4 years.
Actions founded on contracts in writing within 6 years.
Medical Malpractice – 3years from the date of the act of malpractice occurred, except for minors.

4. Punitive Damages and Damages Caps

Punitive Damages:

"Punitive damages are awarded for the limited purpose of punishment and to deter others from the commission of like offenses . . . the amount of punitive damages must be based on reason and justice, taking into account all of the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown." UJI 13-1827 NMRA.
Punitive damages are based on conduct that is willful, reckless, wanton, fraudulent or in bad faith. Id.

Non-economic Damages Caps:

Punitive damages are unavailable against the state under the New Mexico Tort Claims Act, Inspection of Public Records Act and in contract actions. Faber v. King 2015-NMSC-015, _____ P.3d _____. New Mexico adopted and adapted the three guidepost-test of BMW of North America, Inc. vs. Gore, 517 U.S. 559, 574 (1996) in Aken v. Plains Electric Generation and Transmission Coop, Inc., 2002-NMSC-021, 132 N.M. 401, 49 P.3d 662. Those three criteria are as follows: (1) the reprehensibility of the defendants conduct, or the enormity and nature of the wrong; (2) the relationship between the harm suffered and punitive damages award; and (3) the difference between the punitive damages award and the civil and criminal penalties authorized or imposed incomparable cases.

5. Collateral Source Rule

In New Mexico the collateral source rule is an exception to the rule against double recovery. McConal Aviation, Inc. v. Commercial Aviation Ins. Co. 110 N.M. 697, 700, 799 P.2d 133, 136 (1990). A statement of the collateral source rule is that "compensation received from a collateral source does not operate to reduce damages recoverable from a wrong-doer." Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc. 213-NMSC-017, 301 P.3d 387. In other words, if a plaintiff is compensated for his or her injuries by any source unaffiliated with the defendant, the defendant must still pay damages, even if this means the plaintiff recovers twice.

6. Expert Admissibility Standard

The admissibility of expert testimony in New Mexico is guided by Rule 11-702 NMRA, which sets out three requirements: (1) that the expert be qualified; (2) that the testimony be of assistance to the trier of fact; (3) that the experts testimony be about scientific, technical, or other specialized knowledge with a reliable basis. State v. Downey, 2008-NMSC-061, ¶ 25, 145 N.M. 232, 195 D.3d 1244. The scientific procedure which supports the testimony must be capable of supporting opinions based on a reasonable probability rather than conjecture. State v. Alberico, 1993-NMSC-047, ¶ 53, 116 N.M. 156, 861 P.2 192. New Mexico is not in lock step with federal standards for the admissibility of expert testimony. See Rule 11-702 Comments ("New Mexico has not adopted the changes made to the federal rule in 2002 to incorporate the requirements of Daubert v. Merrel Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) in light of the differences between federal law and New Mexico law regarding whether Daubert applies to non-scientific testimony".)

7. First Party Notice Requirements

The requirement of notice and filing proofs of loss is a condition precedent to the insurers liability …. and enables the insurer to take such action as might be necessary to protect his interests." Zingerle v. Commonwealth Ins. Co., 1958-NMSC-022, 63 N.M. 454, 321 P.2 636 (S. Ct. 1958). These conditions can be waived, but the burden is upon the insured to show that compliance has been waived. Id. The test of whether there has been a waiver of notice and proof of loss in insurance cases was established in Western Farm Bureau Mut. Ins. Co. v. Lee, 63 N.M. 59, 312 P.2d 1068. "Conditions of an insurance policy requiring the insured to furnish various notices after loss in a particular manner are for the benefit of the insurer and maybe waived by words or conduct inconsistent with an intention to demand exact compliance from which the insured is led to believe such compliance is necessary."

With respect to reliance to constitute a waiver of proof of loss, it has been held necessary that there be some reliance on the conduct of the insurer, which misled the insured to his prejudice. If an insurer has done nothing to lead the insurer that proofs of loss were not necessary, it is not estopped from asserting that it did not intend a waiver. Gillum v. Southland Life Ins. Co., 1961-NMSC-150, 70 N.M. 293, 373 P.2d 536 (1961).

8. Insurer Duty to Defend

In New Mexico the insurer's duty to defend is determined by the language in the insurance policy. That duty is broader than the duty to indemnify. In New Mexico it is the norm that an insurer, although it is denying coverage and liability, must nonetheless defend its insured unless and until it receives a judicial ruling in its favor relieving it of any further obligations. An insurer's "good faith belief that there was no coverage . . . is not a defense to the breach of the duty to defend." Lujan v. Gonzales, 1972 NMSA-098, ¶ 22, 84 N.M. 229, 501 P.3d 673.

9. Bad Faith Claims Against Insurers

A policy of insurance is a contract, and there is implied in every insurance policy a duty on the part of the insurance company to deal fairly with the policy holder. Fair dealing means to act honestly and in good faith in the performance of the contract. UJI 13-1701. An insurance company acts in bad faith when it refuses to pay a claim of the policy holder for reasons which are frivolous or unfounded. UJI 13-1702. A liability insurance company has a duty to defend its insured against all claims which fall within the coverage of the policy. A liability insurance company must act reasonably under the circumstances to conduct a timely investigation and fair evaluation of its duty to defend. An insurance company acts in bad faith in refusing to defend a claim if the terms of the insurance policy do not provide a reasonable basis for their refusal. UJI 13-1703. A liability insurance company has a duty to timely investigate and fairly evaluate the claim against its insured, and to accept reasonable settlement offers within policy limits. An insurance company's failure to conduct a competent investigation of the claim and to honestly and fairly balance its own interests and the interests of the insured and rejecting a settlement offer within policy limits is bad faith. If the company gives equal consideration to its own interests and the interests of the insured, and based on honest judgment and adequate information, does not settle the claim and proceeds to trial,

it has acted in good faith. UJI 13-1704. In a "bad faith" claim, what is customarily done by those engaged in the insurance industry, is evidence of whether the insurance company acted in good faith. However, the good faith of the insurance company is determined by the reasonableness of its conduct, whether such conduct is customary in the industry or not. Industry customs and standards are evidence of good or bad faith, but they are not conclusive. UJI 13-1705.

10. Mandatory Arbitration Rules

There is no statewide mandatory arbitration rule. Some districts have mandatory arbitration rules. See, e.g. 2nd Judicial District Court Rule LR2-603 Sect. II-"all cases, jury and non-jury, shall be referred to arbitration where no party seeks relief other than a money judgment, and no party seeks an amount in excess of $25,000 from any party or combination of parties, exclusive of punitive damages, interest, costs and attorneys' fees."

New York

Comparative Fault

New York is a state that recognizes pure comparative fault. The comparative negligence statute, New York Civil Practice Law and Rules § 1411, was passed in 1975 and states that in any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, will not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages. In other words, a jury must determine each party's percentage of fault and damages must be awarded proportionally according to that determination.

Pursuant to CPLR § 1412, culpable conduct claimed in diminution of damages, in accordance with § 1411, is an affirmative defense that must be pled and proved by the party asserting the defense, placing the burden of proof on the defendant asserting comparative fault.

Insurance Minimum Limits

New York's mandatory insurance requirements are set forth in New York Code of Rules and Regulations at 11 NYCRR § 60-1.. New York's minimum liability insurance requirements are as follows:

- **Bodily Injury:** $25,000 per person / 50,000 per accident for injury and $50,000 per person / 100,000 per accident for death.
- **Property Damage**: $10,000 for property damage caused by any one accident.
  Personal Injury Protection (PIP): No-fault benefits will cover up to $50,000 in medical benefits and lost wages. Article 51 of the Insurance Law
- **Uninsured and Underinsured (UM/UIM)** $25,000 per person /$50,000 per accident for bodily injury.

Statute of Limitations

Negligence: Negligence actions are governed by the three-year statute of limitations under N.Y. C.P.L.R. § 214(5). The statute provides that an action to recover damages for a personal injury shall be commenced within three years.

Negligent Construction: Under New York law, claims against an architect or other non-medical professional are generally governed by the three-year statute of limitations set forth in CPLR

214(6). Claims for construction defects against a contractor or construction manager are generally considered to be based in breach of contract and thus, are governed by the six-year statute of limitations set forth in CPLR 213(2). An owner's claims against its architect and contractor begin to accrue upon the substantial completion of the project. In re Arbitration Between Oriskany Central School Disrict & Edmund J. Booth Architects, A.I.A., 85 N.Y.2d 995, 630 N.Y.S.2d 960 (1995). The fact that the design or construction defect may be latent and is not discovered until long after the work is complete does not affect the date of accrual of the claims.) Yeshiva Univ. v Fidelity & Deposit Co. of Md., 116 AD2d 49, 500 NYS2d 241 (1st Dept. 1986); Rite Aid of N.Y. Inc. v. R.A. Real Estate Inc., 40 A.D.3d 474, 474, 837 N.Y.S.2d 48, 49 (1st Dept. 2007). However, as the architect's service may continue for some time after the completion of physical construction, there are instances when the claims against the architect may not begin to accrue until long after the statute of limitations for claims against the contractor have begun to run.

Product Liability: Product liability actions must be must be commenced no later than three years after the date of the accident. NY CPLR § 214(5). New York does not distinguish between the various types of negligence in setting forth the statutes of limitations.

Wrongful Death: A wrongful death action must be commenced against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued, and must commenced within two years after the decedent's death. There is an explicit exception in the case of an action on behalf of a decedent whose death was caused by the terrorist attacks on September eleventh, 2001, if that decedent is not someone who was identified by the attorney general of the United States as a participant or conspirator in such attacks. In such a case, an action must be commenced within two years and six months after the decedent's death. NY CLS EPTL § 5-4.1.

Breach of Contract: An action on a contact or liability, whether written or oral, express or implied, must be commenced within six years. N.Y. C.P.L.R. § 213(2).

Unlawful Trade Practices: The statutes of limitations for business torts differ from tort to tort. The statute of limitations for trade libel is one year. N.Y. C.P.L.R. § 215; See also Besicorp Ltd. v. Kahn, 290 A.D.2d 147, 736 N.Y. S.2d 708 (3d Dept. 2002). The statute of limitations for misappropriation of business opportunity, tortious interference with a contract, and conversion is three years. N.Y. C.P.L.R. § 214. See also Powers Mercantile Corp. v. Feinberg, 109 A.D.2d 117, 490 N.Y.S.2d 190 (1st Dept. 1985); Besicorp, *supra*; Niagra Mohawk Power Corp. v. Freed, 288 A.D.2d 818, 733 N.Y.S.2d 828 (4th Dept 2001); California Capital Equity, LLC v IJKG, LLC, 2016 NY Slip Op 50112(U); Kenneth D. Laub & Co. v. Bear Stearns Cos., 262 A.D.2d 36, 692 N.Y.S.2d 30 (1st Dept. 1999); See also D'Amico v. First Union Nat'l Bank, 285 A.D.2d 166, 728 N.Y.S.2d 146 (1st Dept. 2001)(holding that a conversion claim's three year statute of limitations begins to run when a plaintiff becomes aware that its agent's possession is hostile.

The statute of limitations for fraud, fraudulent transfers, and breach of contract is six years. See N.Y. C.P.L.R. § 213(8). For claims of breach of fiduciary duty and unfair competition, courts have applied both three-year and six-year statute of limitation periods. Compare Silvester v. Time Warner, Inc., 1 Misc. 3d 250, 763 N.Y.S.2d 912 (N.Y. Sup. 2003) (applying three-year statute of limitations for monetary damages) with Serio v. Rhulen, 24 A.D.3d 1092, 806 N.Y.S.2d 283 (3d Dept. 2005) and Niagra Mohawk Power Corp. v. Freed, 288 A.D.2d 818, 733 N.Y.S.2d 828 (4th Dept 2001) (applying six-year statute of limitations). While the New York Court of Appeals has ruled that an unfair competition claim based on the misappropriation and unauthorized use of a

master recording was subject to a three-year statute of limitations under N.Y. C.P.L.R. § 214, (see Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 488, 448 N.E.2d 1324, 1327, 462 N.Y.S.2d 413, 416 [1983]), the Southern District of New York has held that unfair competition claims are subject to the six-year period for fraud claims, see Charles Atlas, Ltd. v. DC Comics, Inc., 112 F. Supp. 2d 330, 334 (S.D.N.Y. 2000) (applying N.Y. C.P.L.R. § 213(1)) (holding that courts have lookedto the most analogous state statute of limitations, which is the six year statute of limitations for fraud claims from the tim the plaintiff discovered the fraud or could reasonably have discovered it).

In most instances, a six-year statute of limitations applies for breach of fiduciary duty claims based on fraud, or seeking solely equitable relief. Bouley v. Bouley, 19 A.D.3d 1049, 797 N.Y.S.2d 221 (4th Dept. 2005); Spitzer v. Schussel, 7 Misc. 3d 171, 792 N.Y.S.2d 798 (N.Y. Sup. Ct. 2005) Where, however, the claim seeks monetary damages, the three-year statute of limitations applies. Bouley, supra. Spitzer, supra.

Punitive Damages and Damages Caps

Punitive Damages: No separate cause of action for punitive damages exists under New York law. Punitive damages may be only be recovered if they are available upon establishing the underlying claim, In re Pfohl Bros. Landfill Litig., 26 F.Supp.2d 512, 548 (WDNY 1998). Punitive damages are only awarded in New York in situations involving actions which are "morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant, but to deter [it], as well as others who might otherwise be so prompted, from indulging in similar conduct in the future," Seynaeve v. Hudson Moving & Storage, Inc., 261 A.D.2d 168, 169 (1st Dept. 1999).

Punitive damages may be awarded not only for intentionally harmful conduct, but for willfully or wantonly negligent or reckless actions as well, Fordham-Coleman v. Nat'l Fuel Gas Distribution Corp., 42 A.D.3d 106, 113, 834 NYS.2d 422, 428 (4th Dept. 2007). Punitive damages are generally not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights, Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 358 (1976) overruled in part on other grounds. New York law provides that fraudulent conduct may give rise to punitive damages. However, mere fraud is insufficient to support a claim of punitive damages. Evil and reprehensible motives are still required. Solutia Inc. v. FMC Corp., 456 F.Supp.2d 429, 453, reconsideration denied (SDNY 2006).

Non-Economic Damages: New York does not place a cap on non-economic damages.

Collateral Source Rules

New York's collateral source rule is codified in N.Y. C.P.L.R. § 4545 and applies to actions for personal injury, property damage, or wrongful death where the plaintiff seeks to recover the costs of medical and dental treatment, custodial care, rehabilitation services, loss of earnings and/or other economic loss. The statute authorizes the court to reduce awards for these types of damages by any amount the plaintiff has or will, with reasonable expectation, receive from collateral sources. Id. Collateral sources generally include insurance (excepting life insurance proceeds), social security, workers' compensation, and employee benefits. The defendant bears the burden of demonstrating, by "clear and convincing evidence", that there is a "direct correspondence" between an item of loss awarded by the jury and a collateral source payment. Kihl v. Pfeffer, 47 A.D.3d 154, 163-64 (2d Dep't 2007); Oden v. Chemung County Indus. Development Agency, 661 87 N.Y.2d 81, 87 (1995).

Expert Admissibility Standard – *Daubert v. Frye*

New York courts utilize the Frye standard when evaluating whether proposed expert testimony regarding scientific principles or discoveries is admissible. Cornell v. 360 W.51st Realty, LLC, 22 N.Y. 762 (2014). Under the Frye test, expert testimony is admissible if the methods the testimony is grounded upon are "generally accepted as reliable" within the scientific community. Id at 780. The party opposing the admissibility of exert testimony may request a Frye hearing, but a New York court need not hold such a hearing unless the party seeking to preclude the testimony establishes that the expert's testimony involves "novel or experimental" matters. Parker v. Byrd, 51 A.D.3d 267, 274 (1st Dep't 2008). Once a scientific procedure has been proved generally accepted and reliable, courts may then take judicial notice that the scientific procedure is reliable without conducting a Frye hearing. People v. Wesley, 83 N.Y.2d 417, 436 (1994).

First Party Notice Requirements

With respect to most policies of insurance issued or delivered **before** January 17, 2009, the insured's failure to satisfy the policy's notice requirements is a failure to comply with a condition precedent to the insurer's liability that, as a matter of law, vitiates the contract. Argo Corp. v. Greater New York Mut. Ins. Co., 4 N.Y.3d 332 (2005). For most policies issued or delivered on or **after** January 17, 2009, an insurer may disclaim coverage based on the insured's failure to satisfy the policy's notice requirements only if it was prejudiced by such failure. N.Y. Insur. Law § 3420. See also Guideone Ins. Co. v. Darkei Noam Rabbinical College, 120 A.D.3d 625, 626-27 (2d Dep't 2014). An insurer is prejudiced if the failure to timely provide notice "materially impairs" the ability of the insurer to investigate or defend the claim. Id. The insurer bears the burden of proving prejudice if notice was provided within two years. The burden shifts to the insured to prove no prejudice if notice was provided after two years. N.Y. Insur. Law § 3420(c)(2)(A).

Insurer Duty to Defend

In New York an insurer's duty to defend is "exceedingly broad" (*Colon v. Aetna Life & Cas. Ins. Co.*, 66 NY2d 6, 494 NYS2d 688, 484 NE2d 1040 [1985]). An insurer must defend whenever the four corners of the complaint suggest – or the insurer has actual knowledge of facts establishing – a reasonable possibility of coverage under the policy (Continental Cas. Co. v.Rapid-Am. Corp., 80 NY2d 640, 593 NYS2d 966, 609 NE2d 506 [1993]; Fitzpatrick v. Am. Honda Motor Co., 78 NY2d 61, 571 NYS2d 672, 575 NE2d 90 [1991]). If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false, or baseless the suit may be (Auto. Ins. Co. of Hartford v. Cook, 7 NY3d 131, 818 NYS2d 176, 850 NE2d 1152 [2006]; Ruder & Finn Inc. v. Seaboard Sur. Co., 52 NY2d 663, 439 NYS2d 858, 422 NE2d 518 [1981]).

The duty to defend remains even though facts outside the four corners of the pleadings indicate that the claim may be meritless or not covered (Auto. Ins. Co. of Hartford, 7 NY3d 131; Fitzpatrick, 78 NY2d 61). For that reason, a policy that represents it will provide the insured with a defense actually constitutes "litigation insurance" in addition to liability coverage (*Auto. Ins. Co. of Hartford*, 7 NY3d 131; Seaboard Sur. Co. v. Gillete Co., 64 NY2d 304, 486 NYS2d 873, 476 NE2d 272 [1984]; Intl. Paper Co. v. Cont. Cas. Co., 35 NY2d 322, 361 NYS2d 873, 320 NE2d 619 [1974]). Thus, an insurer may be required to defend under the insurance contract even though it may not be required to pay once the litigation is over (Auto. Ins. Co. of Hartford, 7 NY3d 131).

The duty to defend is broader than the insurer's obligation to indemnify (Cont. Cas. Co., 80 NY2d 640). An insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision (Allstate Ins. Co. v. Zuk, 78 NY2d 41, 571 NYS2d 429, 574 NE2d 1035 [1991]; Servidone Constr. Corp. v. Security Ins Co. of Hartford, 64 NY2d 419, 488 NYS2d 139, 477 NE2d 441 [1985]).

Bad Faith Claims against Insurers

In New York, the notion that an insurer may be held liable for the breach of its duty of, "good faith" in defending and settling claims over which it exercises exclusive control on behalf of its insured is an enduring principle, well settled in this State's jurisprudence (Pavia v. State Farm Mut. Ins. Auto. Ins. Co., 82 NY2d 445[1993]). The duty of "good faith" settlement is an implied obligation derived from the insurance contract (Pavia, 82 NY2d 445). By refusing to settle within the policy limits, an insurer risks being charged with bad faith on the premises that it has advanced its own interests by compromising those of the insured (Pavia, 82 NY2d 445).

At the root of the "bad faith" doctrine is the fact that insurers typically exercise complete control over the settlement and defense of claims against their insureds, and, thus, under established agency principles may fairly be required to act in the insured's best interests (Pavia, 82 NY2d 445). On the other hand, courts are reluctant to expose insurance carriers to liability far beyond the bargained-for policy limits for conduct amounting to a mere mistake in judgment (Pavia, 82 NY2d 445). As such, a "bad faith" prosecution is barred where the insurer's conduct amounts to ordinary negligence (Pavia, 82 NY2d 445; Gordon v. Nationwide Mut. Ins. Co., 30 NY2d 427, 334 NYS2d 601, 285 NE2d 840 [1972]).

To establish a prima facie case of bad faith, the insured must establish that the insurer's conduct constituted a "gross disregard" of the insured's interests – that is, "a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer" (Selective Ins. Co. of Am. v. County. of Rensselaer, 26 N.Y.3d 649; 47 N.E.3d 458 [2016]).

Mandatory Arbitration Rules

In New York, under the State Rules of Court, the Chief Administrator may establish a mandatory arbitration program in any trial court in any county (NY Ct. R. § 28.2[a]). In each county where an arbitration program is established, all civil actions for a sum of money only, except those commenced in small claims parts and not subsequently transferred to a regular part of court, that are noticed for trial or commenced in the Supreme Court, County Court, the Civil Court of the City of New York, a District Court or a City Court, on or after the effective date of the order where recovery sought for each cause of action is $6,000 or less, or $10,000 or less in the Civil Court of the City of New York, or such other sum as may be authorized by law, exclusive of costs and interest, shall be heard and decided by a panel of arbitrators (N.Y. Ct. R. §28.2[b]). The Chief Administrator may also, at any time, upon the establishment of the program in any particular court or county or thereafter, provide for the submission to arbitration of actions seeking recovery of such sums, that are pending for trial in those courts on the effective date of the order (N.Y. Ct. R. § 28.2 [b]).

Certain types of cases may also be subject to mandatory arbitration by operation of law. For example, the New York Comprehensive Motor Vehicle Insurance Reparations Act, popularly known as the "No-Fault Automobile Insurance Law," provides for arbitration of claims between insurers concerning first-party benefits paid by one of the insurers (NY Ins. Law § 5105; 11 NYCRR § 65-4.11).

North Carolina

1. Comparative Fault

There is no comparative fault in North Carolina. With respect to plaintiff's conduct, North Carolina is a contributory negligence state. Likewise, the judge or jury would not apportion fault between defendants, but instead, joint and several liability would apply.

North Carolina provides for a statutory right to contribution among joint tortfeasors. N.C. Gen. Stat. Chapter 1B. No right to contribution exists for a tortfeasor who has intentionally caused or contributed to the injury or wrongful death of the claimant. N.C. Gen. Stat. § 1B-1(c).

When a tortfeasor pays more than its pro rata share of the award, that tortfeasor is then entitled to seek contribution from any joint tortfeasors. N.C. Gen. Stat. § 1B-1(b). A tortfeasor who settles and receives a release from a claimant in a case is also discharged from liability for contribution to another tortfeasor. N.C. Gen. Stat. § 1B-4.

2. Insurance Minimum Limits

N.C. Gen. Stat. § 20-279.21 sets forth North Carolina's mandatory insurance requirements:

Bodily Injury and Property Damage: $30,000 for bodily injury or death of one person in any one accident; $60,000 for bodily injury of death of two or more persons in any one accident (subject to the limit of $30,000 per person); and $25,000 for property damage in any one accident. N.C. Gen. Stat. § 20-279.1(b)(2).

Uninsured and Underinsured (UM/UIM): The default minimum limit for UM/UIM coverage is equal to the highest limit of bodily injury liability coverage for any one vehicle insured under the policy. However, the named insured can select greater or lesser limits, except that the UM limits may not be less than 30/60 and the UIM limits must exceed 30/60. The maximum limit for UM/UIM coverage is $1 million per any one accident. N.C. Gen. Stat. § 20.279.1(b)(3).

3. Statute of Limitations:

Negligence: Generally, negligence actions must be commenced within three (3) years from the time the bodily harm or damage to physical property becomes apparent or ought to have reasonably become apparent. The statute of repose is ten (10) years from the last act or omission from the defendant giving rise to the cause of action. N.C. Gen. Stat. § 1-52.

Negligent Construction: Negligent construction giving rise to personal injury other than death falls under the general three (3) year statute of limitations. N.C. Gen. Stat. § 1-52. If the claim is for wrongful death, there is a two (2) year statute of limitations. N.C. Gen. Stat. § 1-53. There is a six (6) year statute of repose from the later of the specific last act or omission giving rise to the cause of action or substantial completion of the improvement. N.C. Gen. Stat. § 1-50(a)(5).

Product Liability: There is a three (3) year statute of limitations for personal injury due to product liability, and a two (2) year statute of limitations for wrongful death stemming from product liability. N.C. Gen. Stat. §§ 1-52; 1-53. North Carolina has a twelve (12) year statute of repose, running from the date of the initial purchase for use or consumption of the product. N.C. Gen. Stat. § 1-46.1. There is no strict liability in tort for product liability actions in North Carolina. N.C. Gen. Stat. § 99B-1.1.

Wrongful Death: With the cause of action accruing from the date of death, the statute of limitations for wrongful death actions is two (2) years. N.C. Gen. Stat. § 1-53.

Breach of Contract: Breach of contract claims fall within the three (3) year limitation prescribed in N.C. Gen. Stat. § 1-52. However, an action for breach of a contract for the sale of goods must be brought within four (4) years after the action accrues – i.e., when the breach occurs. N.C. Gen. Stat. § 25-2-725.

Unlawful Trade Practices: Generally, North Carolina's Act prohibiting unfair and deceptive trade practices requires causes of action to commence within four (4) years of the accrual of the action. N.C. Gen. Stat. § 75-16.2.

4. Punitive Damages and Damages Caps

Punitive Damages: Punitive damages are allowed only if the claimant proves by clear and convincing evidence that an aggravating factor of fraud, malice, or willful and wanton conduct was present and related to the injury for which compensatory damages were awarded. N.C. Gen. Stat. § 1D-15. The cap for punitive damages is either three time the amount of compensatory damages or $250,000, whichever is greater. N.C. Gen. Stat. § 1D-25.

Noneconomic Damages: The only cap for noneconomic damages is found in medical malpractice cases. North Carolina limits the amount of noneconomic damages in medical malpractice actions to $500,000 times the ratio of the Consumer Price Index for November of the previous year to the Consumer Price Index for November of 2011. N.C. Gen. Stat. § 90-21.19. Per the Editor's note to the statute, the noneconomic cap as of January 1, 2014, was calculated as $515,000. An exception to the cap exists where the factfinder finds that (1) the plaintiff suffered disfigurement, loss of use of part of the body, permanent injury, or death, and (2) that the defendant acted in reckless disregard of the rights of other, was grossly negligent, fraudulent, or acted with intent or malice; in those cases there is no limit to the amount of noneconomic damages that may be awarded. N.C. Gen. Stat. § 90-21.19(b).

5. Collateral Source Rules

North Carolina evidentiary rules limit the evidence offered to prove past medical expenses to the amounts actually paid or that will need to be paid to satisfy the medical bills, regardless of the source of the payment. N.C. Gen. Stat. § 8C-1, Rule 414. North Carolina appellate courts have yet to substantively evaluate Rule 414, which became effective on October 1, 2011, for causes of action arising on or after that date. As such, it is uncertain how this legislation may affect the introduction of evidence as to a plaintiff's insurance coverage or evidence that would clearly identify the source of paid medical expenses.

6. Expert Admissibility Standard – *Daubert v. Frye*

Ostensibly, North Carolina is a *Daubert* jurisdiction. North Carolina's legislature amended Rule 702(a) of the North Carolina Rules of Evidence to conform to Rule 702(a) of the Federal Rules of Evidence in 2011. 2011 N.C. Sess. Laws 400, § 1(c) (S.B. 33); 2011 N.C. Sess. Laws 283, § 1.3 (H.B. 542). The North Carolina Court of Appeals held that this amendment adopted the *Daubert* standard "and its progeny" for applying North Carolina's Rule 702(a) to determine the admissibility of expert opinions. *State v. McGrady*, 232 N.C. App. 95, 753 S.E.2d 361, 367 (2014), *disc. rev. allowed*, 367 N.C. 505 (2014). However, the North Carolina Supreme Court accepted discretionary review of *McGrady* on the issue of whether or not North Carolina has adopted *Daubert*. Although the parties finished briefing in November 2014 and oral argument was heard in March 2015, the North Carolina Supreme Court has not yet issued an opinion.

A decade earlier, the North Carolina Court of Appeals held that North Carolina had impliedly adopted *Daubert* in *Howerton v. Arai Helmet, Ltd.*, 158 N.C. App. 316, 581 S.E.2d 816 (2003), but this was rejected upon review by the North Carolina Supreme Court, which reversed, requiring legislative action for North Carolina to depart from the modified-*Frye* standard set forth in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004) ("North Carolina is not, nor has it ever been, a Daubert jurisdiction."). In *McGrady*, the Court of Appeals held that the 2011 amendment to N.C. R. Evid. 702(a) represented a departure from *Howerton's* rejection of *Daubert*. *McGrady*, 753 S.E.2d at 367.

If *McGrady* is reversed, North Carolina will revert to the previous standard in *Goode*, which set forth a three-step inquiry: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant? *Goode*, 314 N.C. at 527-29, 461 S.E.2d at 639-40.

Importantly, the North Carolina Rules of Civil Procedure were amended for cases filed on or after October 1, 2015, to change expert discovery to resemble, but not adopt, the Federal rule. 2015 N.C. Sess. Laws 153 (H.B. 376). The new Rule 26(b)(4) of the North Carolina Rules requires disclosure of expert witnesses that a party may use at trial, instead of requiring the opposing party to submit a formal interrogatory requesting the disclosure, at least 90 days before the trial date and for rebuttal experts, within 30 days of the other party's disclosure, unless the parties stipulate or the court orders otherwise. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 26(b)(4) (2015). It also provides for deposition of experts and payment of a reasonable fee to the expert for time spent at the deposition without court order. N.C. R. Civ. P. 26(b)(4)(b)-(c). Non-testifying experts, draft expert reports, and communications between the expert witness and the attorney for the party that retained the expert are now explicitly shielded from disclosure. N.C. R. Civ. P. 26(b)(4)(d)-(e). As with the Federal Rule, the protection for attorney-expert communications does not apply to communications that related to expert fees or identify facts or assumptions provided by the attorney for the expert to consider in forming opinions. N.C. R. Civ. P. 26(b)(4)(e)(1)-(3).

7. First Party Notice Requirements

Under North Carolina law, an insured's breach of the policy's notice provisions will not automatically defeat coverage under the policy. In *Great American Ins. Co. v. Tate Const. Co.*, 303 NC 387, 279 S.E.2d 769 (1981) ("*Tate I*") and *Great American Ins. Co. v. Tate Const. Co.*, 315 N.C. 714, 340 S.E.2d 743 (1986) ("*Tate II*"), the North Carolina Supreme Court adopted the following test to determine whether late notice will defeat coverage: (1) Did the insured give notice "as soon as practicable?" (2) Did the insured act in good faith in delaying notice? (3) Was the insurer materially prejudiced by the delay? *Tate I*, 303 N.C. at 399, 279 S.E.2d at 776. Generally, the first element is satisfied in any case where the insurer is raising the defense. Then, the burden of proof is on the insured to show good faith, which is a subjective test based upon: (a) Was the insured aware of his fault, and (b) Did the insured purposely and knowingly fail to notify the insurer? *Tate II*, 315 N.C. at 720, 340 S.E.2d at 747.

If the insured establishes good faith on the second element, the burden shifts to the insurer to show material prejudice from the delay, generally due to the unavailability of witnesses or evidence, including the following relevant factors: "…the availability of witnesses to the accident; the ability to discovery other information regarding the conditions of the locale where the accident occurred; any physical changes in the location of the accident during the period of the delay; the existence of official reports concerning the occurrence; the preparation and preservation of demonstrative and illustrative evidence, such as the vehicles involved in the occurrence, or photographs and diagrams of the scene; the ability of experts to reconstruct the scene and the

occurrence...." *Tate I*, 303 N.C. 387 at 398, 279 S.E.2d 769, 776 (1981). However, North Carolina courts have found material prejudice as a matter of law where a default judgment was entered against the insured before notice was given. *South Carolina Ins. Co. v. Hallmark Enterprises, Inc. v. McNeil-Patterson Agency, Inc.,* 88 N.C. App. 642, 364 S.E.2d 678 (1988); *accord Royal Ins. Co. of America v. The Cato Corp.,* 125 N.C. App. 544, 481 S.E.2d 383 (1997) (no duty to defend or indemnify where default judgment was entered before insurer was notified and the deadline to appeal had expired).

If a policy requires submission of a written proof of loss, the insurer must furnish a form to be used within 15 days of receiving notice, or the claimant is deemed to have complied with the requirements. N.C. Gen. Stat. § 58-3-40 (2015). Even if the form is timely furnished, a claimant who fails to submit a required written proof of loss does not relieve the insurer of its obligation to pay, where: (1) the insured can prove that the failure was for "good cause," and (2) the insurer cannot prove that the failure materially prejudiced the insurer's ability to determine the amount of the loss. *Smith v. Nationwide Mut. Ins. Co.*, 321 N.C. 60, 66, 361 S.E.2d 571, 575 (1987).

8. Insurer Duty to Defend

An insurer's duty to defend a North Carolina insured is triggered when an insurer receives actual notice of the underlying action and has no duty to reimburse defense costs incurred before notice was given, unless the language of the policy provides otherwise. *Kubit v. MAG Mut. Ins. Co.*, 210 N.C. App. 273, 279 708 S.E.2d 138, 146 (2011). To determine whether the underlying action is covered by the policy, North Carolina courts review the pleadings "side-by-side with the policy to determine whether the events as alleged are covered or excluded." *Waste Mgmt. of the Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 693, 340 S.E.2d 374, 378 (1986). Although the duty to defend is broader than the duty to indemnify in the sense that even unmeritorious allegations can create a duty to defend if coverage would exist under the set of unsubstantiated facts as alleged, there is no duty to defend where the facts are not even arguably covered under the policy at issue. *Id.* at 692, 340 S.E.2d at 378; *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, LLC*, 364 N.C. 1, 12-13, 692 S.E.2d 605, 610-611 (2005) ("…the question is not whether some interpretation of the facts as alleged could possibly bring the injury within the coverage provided by the insurance policy; the question is, assuming the facts as alleged to be true, whether the insurance policy covers that injury."). The insurer may also consider facts learned from the insured and discoverable from reasonable investigation, such as affidavits filed by the plaintiff that contract the allegations of the complaint. *Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 638, 386 S.E.2d 762, 764, *disc. rev. denied*, 326 N.C. 595, 393 S.E.2d 876 (1990).

However, even if facts pled in a third-party complaint or otherwise discovered by the insurer indicate that a policy exclusion applies to preclude coverage, the insurer who then refuses to defend does so "at [its] peril." *Waste Mgmt.*, 315 N.C. at 691, 340 S.E.2d at 377. If a liability insurer refuses to defend without justification or where a defense is required by the policy, the insurer is "estopped from denying coverage and is obligated to pay the amount of any reasonable settlement made in good faith by the insured." *Duke*, 96 N.C. App. at 637, 386 S.E.2d at 763.), Further, "[i]f the claim is within the coverage of the policy, the insurer's refusal to defend is unjustified even if it is based upon an honest but mistaken belief that the claim is not covered." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 735, 504 S.E.2d 574, 578 (1998). Where the pleadings, when compared to the policy, include some claims that are covered and others that do not fall within coverage or are excluded, the insurer still has a duty to defend. *Id.*

If more than one insurer has a duty to defend, the costs of the defense should be shared equally among them. *Ames v. Continental Cas. Co.*, 79 N.C. App. 530, 540, 340 S.E.2d 479, 486 (1986). Although the existence of multiple insurers may yield an equitably allocated indemnification obligation, the duty to defend exists even in cases with hybrid claims; therefore the costs of

defending an action are shared equally among insurers. *Id.*; *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986).

Tender of the policy limits does not relieve the insurer of the duty to defend. *Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990)

9. Bad Faith Claims against Insurers

North Carolina insureds have recourse to both common-law and statutory sources for bad-faith claims. Any failure or refusal to pay under policy provisions for a first-party claim may give rise to a breach of contract action; additionally, in all endeavors related to their performance of insurance contract obligations, North Carolina insurers have the duty to act in good faith and may deny claims based upon an honest disagreement or innocent mistake. *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 421, 424 S.E.2d 181, 185, *aff'd in part*, *disc. rev. improvidently allowed in part*, 334 N.C. 682, 435 S.E.2d 71(1993) (per curiam).

For common-law bad faith claims, tortious conduct must accompany the breach of a contract, such as "fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, willfulness…" *Newton v. Std. Fire Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 279, 301 (1976). To recover punitive damages for bad faith refusal to settle, the plaintiff must prove: (1) a refusal to pay after recognition of a valid claim, (2) bad faith, and (3) aggravating or outrageous conduct." *Lovell*, 108 N.C. App. at 420, 424 S.E.2d at 184 (upholding a jury award of $225,000 in punitive damages for failure to pay a $2,000 medical payments claim). Although Chapter 1D of the North Carolina General Statutes, which governs the award of punitive damages in all causes of action, was enacted in 1995, North Carolina bad faith opinions continue to apply the punitive damages tests from the older line of bad faith cases. *See, e.g. Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 201, 528 S.E.2d 372, 378 (2000); To meet the modern requirements for an award of punitive damages, a plaintiff must prove, by clear and convincing evidence, fraud, malice, or willful or wanton conduct. N.C. Gen. Stat. § 1D-15(a)-(b) (2015).

Additionally, North Carolina's Unfair and Deceptive Trade Practices Act, at N.C. Gen. Stat. §§ 75-1.1 *et seq.*, has been read to allow a private right of action by a first-party insured against an insurer for bad faith claims. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986); *Gray v. N.C. Ins. Underwriting Assoc.*, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000); *Wilson v. Wilson*, 121 N.C. App. 662, 665, 468 S.E.2d 495, 497 (1996) (holding that third-party claimants may not recover against insurers for Chapter 75 claims). Prevailing parties in Chapter 75 actions recover trebled damages for compensatory damages caused by statutory violations, and may, at the discretion of the court, recover attorney's fees. N.C. Gen. Stat. §§ 75-16, 75-16.1 (2015). To establish a statutory violation, a plaintiff must demonstrate: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or his business. *Gray*, 352 N.C. at 68, 529 S.E.2d at 681.

Violations of the unfair claims settlement practices defined by the statutory scheme regulating insurance companies at N.C. Gen. Stat. § 58-63-15(11) are "unfair or deceptive acts" as a matter of law. *Gray*, 352 N.C. at 71, 529 S.E.2d at 683.

Under the North Carolina statute, unfair claims settlement practices include:

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;
e. Failing to affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed;
f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
g. Compelling [the] insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured;
h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;
i. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;
j. Making claims payments to insureds or beneficiaries not accompanied by [a] statement setting forth the coverage under which the payments are being made;
k. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
l. Delaying the investigation or payment of claims by requiring an insured claimant, or the physician, of [or] either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information;
m. Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; and
n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

N.C. Gen. Stat. § 58-63-15(11) (2015). However, a violation of Chapter 75 may be proven even if the practice is so frequent as to be a "general business practice" of the insurer, which would otherwise be required for prosecution by the Commissioner of Insurance under Chapter 58. *Gray*, 352 N.C. at 71, 529 S.E.2d at 683. A defense of "good faith" is not a bar to a Chapter 75 action. *Pearce*, 316 N.C. at 471, 343 S.E.2d at 180 ("the question "whether the defendant acted in bad faith is not pertinent" to whether his representation violated N.C.G.S. § 75–1.1") (quoting *Marshall v. Miller*, 302 N.C. 539, 544, 276 S.E.2d 397, 400–01 (1981)).

In North Carolina, uninsured or underinsured motorist bad faith claims are considered to be first-party, rather than third-party claims. *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 306, 435 S.E.2d 537, 545 (1993). A bad-faith claim may arise in the context of a third-party claim, such as where the insurer refuses to settle liability claims within the policy limits. *Wynnewood Lumber Co. v. Travelers' Ins. Co.*, 173 N.C. 269, 91 S.E. 946, 947 (1917);

The statute of limitations for claims for unfair and deceptive trade practices is four years, running from the date of the violation. *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 251, 628 S.E.2d 427, 430 (2006). The statute of limitations for common-law bad faith claims, whether sounding in contract or tort, is three years from the date of the accrual of the action, usually date of the bad-faith failure or refusal to pay. N.C. Gen. Stat. § 1-52(1), (5) (2015).

10. Mandatory Arbitration

North Carolina applies basic contract law principles to the interpretation of insurance policies, including arbitration provisions, and contractual provisions govern the rights and duties of the parties, based upon the intent of the parties at the time the contract was entered into. *Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990) (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978)). The right to arbitration is a contractual right and may be waived by the party seeking to enforce that right. *Capps v. Virrey*, 184 N.C. App. 267, 273, 645 S.E.2d 825, 829 (2007). For example, insured can waive the right to mandatory arbitration by participating in discovery available in litigation but not available in arbitration. *Id.* However, where there is ambiguity in an arbitration provision or another defense, such as waiver, is raised to a motion to compel arbitration, North Carolina courts favor resolution in favor of arbitration as a matter of public policy. *Cyclone Roofing Co., Inc. v. David M. LaFave Co., Inc.*, 312 N.C. 224, 229, 312 S.E.2d 872, 876 (1984).

Generally, a party impliedly waives its right to arbitration if by its delay or actions taken inconsistent with arbitration, the other party is prejudiced by an order compelling arbitration. *Id.* at 229-30, 312 S.E.2d at 876-77. A party may be prejudiced if "(1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration." *Id.* (quoting *Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986)).

Claims prosecuted in North Carolina's Small Claims and District Courts, which have original jurisdiction of cases where the amount in controversy does not exceed $10,000 or $25,000, respectively, are required to proceed through mandatory, **non-binding** arbitration, unless all parties consent to its wavier. N.C. Gen. Stat. § 7A-37.1(c) (2015). The arbitrator's decision may be appealed for trial *de novo*. N.C. Gen. Stat. § 7A-37.1(c2).

North Dakota

1. Comparative Negligence

Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. N.D. Cent. Code § 32-03.2-02.

Except when 2 people acted in concert to commit a tortious act, when two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to their percentage of fault. N.D. Cent. Code § 32-03.2-02.

2. Insurance Minimum Limits

North Dakota's statutes require certain limits for basic no-fault benefits, motor vehicle liability coverage (bodily injury and property damage), and uninsured and underinsured motorist coverage:

D. Basic No-Fault Benefits (N.D. Cent. Code § 26.1-41):

- $30,000 maximum for all economic loss incurred and resulting from accidental bodily injury to any one person as the result of any one accident, regardless of the number of persons entitled to the benefits:

E. Motor Vehicle Liability Insurance (N.D. Cent. Code § 39-16.1-11):
   - $25,000 bodily injury or death of one person per accident,
   - $50,000 bodily injury per accident for multiple people, and
   - $25,000 property damage to others' property, per accident.

F. Uninsured and Underinsured motorist coverage (N.D. Cent. Code § 26.1-40-15.2 & -15.3; § 39-16.1-11)):
   - $25,000 because of injury to or the death of one person in any accident, and
   - $50,000 because of injury to or the death of two or more persons in any accident.

3. Statute of Limitations

An action for libel, slander, assault, battery, false imprisonment, professional malpractice must be brought within two years of when the action claim for relief accrued. An action against a physician or hospital for damages resulting from malpractice will not be extended beyond six years of the act of alleged malpractice by a nondiscovery unless discovery was prevented by fraudulent conduct of the physician or hospital. N.D. Cent. Code Ann. § 28-01-18.

An action against a licensed insurance agent as applied to negligence and breach of contract claims is subject to a 2 two year statute of limitations. Unless discovery was prevented by fraudulent conduct of the insurance agent, an action will not be extended beyond six years after performance of the service for which the claim for relief arises. N.D. Cent. Code Ann. § 26.1-26-51.

An action for breach of contract for sale under North Dakota's Uniform Commercial Code must be commenced within 4 years after the claim for relief has accrued. N.D. Cent. Code Ann. § 41-02-104.

An action for negligence, action upon a contract obligation, or liability, action for trespass upon real property, action takings goods, or action for breach of contract, trespass, conversion, and fraud must be brought within 6 years from when the action accrued after the claim for relief accrued. N.D. Cent. Code Ann. § 28-01-16.

An action on a contract in any conveyance or mortgage of or instrument affecting the title to real property (except a covenant of warranty) must be commenced within 10 ten years after the final decision against the title of the covenanter. N.D. Cent. Code Ann. § 28-01-15.

4. **Punitive Damages and Damages Caps**

In an action for breach of obligation (not arising from a contract) where the defendant is guilty of oppression, fraud, or actual malice, the judge court or jury can may award exemplary damages (with the actual damages) in order to punish the defendant. Upon commencement of an action, a complaint may not seek exemplary damages. A plaintiff instead must make a motion to amend the complaint after filing the suit and must allege an applicable legal basis (oppression, fraud, or actual malice) and factual basis supported by affidavits or deposition testimony. The party opposing the motion may respond with affidavits or deposition testimony. The Court may grant the motion only if finds, after considering all the submitted evidence, that there is sufficient evidence to supporting a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice. N.D. Cent. Code § 32-03.2-11.

The amount of exemplary damages can may not exceed two times the compound amount of compensatory damages or $250,000, whichever is greater. No punitive damages can may be awarded absent an award of if the claimant is not entitled to compensatory damages. N.D. Cent. Code Ann. § 32-03.2-11.

5. Collateral Source Rules

A collateral source payment is any sum from any other source paid or to be paid to cover an economic loss which the receiver doesn't need to repay need not be repaid by the party recovering economic damages, but does include (not including life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party) recovering economic damages. After an award of economic damages, the paying party responsible for payment is entitled to and can may apply to the court for a reduction of the economic damages to the extent that the losses are covered by a payment from a collateral source. N.D. Cent. Code Ann. § 32-03.2-06.

6. Expert Admissibility Standard

Under North Dakota law, the admission of expert testimony is governed by Rule 702 of the North Dakota Rules of Evidence, which provides: if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of the opinion or otherwise. State v. Hernandez, 2005 ND 214, 707 N.W.2d 449; Gonzalez v. Tounjian, 2003 ND 121, 665 N.W.2d 705.

North Dakota has not explicitly adopted Daubert. E.g., Hernandez, 2005 ND 214, ¶ 6.

7. First Party Notice Requirements

The general rule in North Dakota is that late notice defeats coverage only if failure to provide timely notice of a claim "resulted in a likelihood of appreciable prejudice" to the insurer. *Finstad v. Steiger Tractor, Inc.*, 301 N.W.2d 392, 398 (N.D. 1981).

8. Insurer Duty to Defend

An insurer is not liable for a loss caused by the willful act of the insured, but the insurer is not exonerated by the negligence of the insured. N.D. Cent. Code Ann. § 26.1-32-04. Ordinarily, an insurer has a duty to defend an underlying action against its insured if the allegations in the complaint give rise to potential liability or a possibility of coverage under the insurance policy. E.g., Tibert v. Nodak Mut. Ins. Co., 2012 ND 81, 816 N.W.2d 31.

The duty to defend is generally determined by the allegations of the injured claimant. *Farmers Union Mut. Ins. Co. v. Decker*, 704 N.W.2d 857, 863 (N.D. 2005). An insurer has a duty to defend an underlying action against its insured if the allegations in the complaint give rise to potential liability or a possibility of coverage under the insurance policy. *Nodak Mut. Ins. Co. v. Heim*, 559 N.W.2d 846, 849 (N.D. 1997). When several claims are made against the insured, the insurer has a duty to defend the entire lawsuit if there is potential liability or a possibility of coverage for one of the claims. *Id.* An insurer does not have a duty to defend an insured if there is no possibility of coverage under the policy. *Decker*, 704 N.W.2d at 863.

9. Bad Faith Claims Against Insurers

A. Statutory claim

Plaintiffs have argued that Chapter 26.1-04 of the Unfair Insurance Practices Act in the North Dakota Century Code creates a private civil right of action. But the North Dakota Supreme Court has declined to determine whether Chapter 26.1-04 creates a private civil right of action under the facts presented in those cases, because even if such a right of action were presumed, the plaintiffs had failed to show that the insurers had engaged in statutorily prohibited conduct. *Dvorak v. Am. Family Mut. Ins. Co.*, 508 N.W.2d 329, 333 (N.D. 1993); *Volk v. Wis. Mortg. Assur. Co.*, 474 N.W.2d 40, 45 (N.D. 1991). The North Dakota Supreme Court, however, has noted that if there

were a private cause of action, it could only be established through evidence of the company's engagement in prohibited conduct "with a frequency indicating a general business practice." *Dvorak*, 508 N.W.2d at 333; *Volk*, 474 N.W.2d at 45. Thus, whether there is a statutory basis for an insured to bring a bad-faith claim is an open question. See *Dvorak*, 508 N.W.2d at 333 & n.3 (stating that "[i]t is unnecessary to decide, whether under other circumstances, Chapter 26.1-04, N.D.C.C. might create a private civil claim for relief"). Nevertheless, a violation of N.D. Cent. Code § 26.1-04-01, et seq., may be used as evidence of bad faith. *See Moore v. Am. Family Ins. Co.*, 576 F.3d 781, 786-77 (8th Cir. 2009); *Ingalls v. Paul Revere Life Ins. Grp.*, 561 N.W.2d 273 (N.D. 1997).

B. Common law

North Dakota common law recognizes bad-faith claims against insurers in both the first-party context and third-party insurance context. First-party insurance: *E.g.*, *Hartman v. Estate of Miller*, 656 N.W.2d 676 (N.D. 2003); *Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co.*, 279 N.W.2d 638, 645 (N.D. 1979). Third-party insurance: *E.g.*, *Smith v. Am. Family Mut. Ins. Co.*, 294 N.W.2d 751, 758 (N.D. 1980). Under North Dakota law, "[a]n insurer has a duty to act fairly and in good faith in dealing with its insured, including a duty of fair dealing in paying claims, providing defenses to claims, negotiating settlements, and fulfilling all other contractual obligations." *Hartman*, 656 N.W.2d at 680. "The gravamen of the test for bad faith is whether the insurer acts unreasonably in handling an insured's claim." *Id.* An insurer is not guilty of bad faith for denying a claim if the claim is fairly debatable, or if there is a reasonable basis for denying the claim or delaying payment. *Id.* Thus, an insurer acts unreasonably and in bad faith by failing to compensate the insured for a loss covered by the policy, unless the insurer has a proper cause for refusing payment. *Id.*; *Fetch v. Quam*, 623 N.W.2d 357 (N.D. 2001). Similar to the refusal to indemnify, the insurer's refusal to defend is in bad faith if it is unreasonable, that is, without proper cause. *Fetch*, 623 N.W.2d 357. An insurer "is held to know the law of North Dakota." *Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co.*, 279 N.W.2d 638, 644 (N.D. 1979).

North Dakota also recognizes a bad-faith claim for failure to settle. The North Dakota Supreme Court has stated generally that an insurer has a "duty to settle a case for the benefit of the insured [in order] to protect the insured from exposure to liability in excess of the insurance coverage." *Cont'l Cas. Co. v. Kinsey*, 513 N.W.2d 66, 69 (N.D. 1994). Thus, an insurer may be liable for bad faith for failing to settle a claim within policy limits where an insured has liability exposure exceeding policy limits. *See id.* The duty to settle is implied in law to protect the insured from exposure to liability in excess of coverage as a result of "the insurer's gamble—on which only the insured might lose." *Dvorak v. Am. Family Mut. Ins. Co.*, 508 N.W.2d 329, 331 (N.D. 1993).

10. Mandatory Arbitration Rules

North Dakota has no current statutes limiting addressing mandatory arbitration clauses in insurance contracts.

North Dakota has adopted the Uniform Arbitration Act. N.D. Cent. Code ch. 32-29.3.

Ohio

1. Comparative Fault

In Ohio, the contributory fault of a plaintiff does not bar the plaintiff from recovery for damages that have directly and proximately resulted from the tortious conduct of another, so long as the fault of the plaintiff is not greater than the combined fault of all other parties, whether or not those parties are named in the lawsuit. Ohio Rev. Code §2315.33. Put simply, this means that if the plaintiff is not more than 50% at fault in causing his injuries, he can recover. The amount of damages that the plaintiff can recover is diminished by an amount proportionally equal to the percentage of fault of the plaintiff. Id.

Where a plaintiff is found more negligent than defendant, comparative negligence prevents recovery.

In *Fortner v. Powell*, the court affirmed the jury verdict in favor of the defendant. Fortner was helping Powell move. They were using Powell's pick-up truck. Powell was driving, and on one trip Fortner sat in the pick-up bed. Fortner lost her balance and fell out of the truck, sustaining injuries. The jury unanimously found that Fortner was 75% negligent and that Powell was 25% negligent. Because the plaintiff was more negligent than the defendant, comparative negligence prevented her from collecting from the defendant. *Fortner v. Powell*, 2008-Ohio-4065, 2008 WL 3319287 (Ohio Ct. App. 10th Dist. Franklin County 2008).

Comparative negligence does not apply to strict products liability cases.

In *Eastman v. Stanley Works,* Plaintiff was a framing contractor, who used a Stanley Fat Max 22 hammer (FM22) on a daily basis. Plaintiff was injured when "one of the claws … broke off, flew into his left eye, and ruptured his left eyeball." Plaintiff was not wearing safety goggles at the time because it was rainy and muddy, and he claimed that this caused the goggles to fog. The FM22 contained a label stating that persons should wear goggles when using the hammer, and plaintiff acknowledged that it is safer to wear goggles. Expert testimony suggested that there may have been a manufacturing defect. Plaintiff commenced a products liability case. The jury awarded compensatory damages to plaintiff in the amount of $986,300, and also found that the plaintiff was 35% negligent and that this negligence was a proximate cause of his injury. The court entered a judgment for the full amount of the award. Comparative negligence does not apply to strict products liability cases. As such, awarding of the full amount of damages was proper. *Eastman v. Stanley Works*, 180 Ohio App. 3d 844, 2009-Ohio-634, 907 N.E.2d 768 (10th Dist. Franklin County 2009).

Where a defendant's conduct is marked by malice, comparative negligence will not reduce a plaintiff's recovery.

In *Estate of Beavers v. Knapp*, the court ruled that a reduction in damages because of the comparative negligence of the plaintiff was not appropriate. Defendant was driving a truck, and plaintiff was operating a motorcycle at the time of the accident. Plaintiff tried to avoid defendant and failed to do so. After running over the plaintiff, the defendant fled the scene, picked up his load bound for New York, and attempted to establish a false alibi for the time of the accident. The court ruled that actual malice negates comparative negligence, so no matter how much plaintiff's negligence may have contributed to his injuries, damages need not be reduced if the jury found the defendant to have acted with malice. *Estate of Beavers v. Knapp*, 175 Ohio App. 3d 758, 2008-Ohio-2023, 889 N.E.2d 181 (10th Dist. Franklin County 2008).

2. Insurance Minimum Limits

The long-standing public policy of Ohio is to ensure that all motorists maintain some form of liability coverage on motor vehicles operated within the state. *Loxley v. Motorists Mut. Ins. Co.*, 2004-Ohio-3771, 2004 WL 1587041 (Ohio Ct. App. 2d Dist. Montgomery County 2004). The Motor Vehicle Financial Responsibility Law (Financial Responsibility Law) reflects that policy; such law encourages maintaining proof of financial responsibility with respect to the operation of motor vehicles on roads throughout Ohio so as to minimize those situations in which persons are not compensated for injuries and damages sustained in motor vehicle accidents. Ohio Rev. Code §§4509.01 to 4509.99; *Duffy v. Registrar, Bureau of Motor Vehicles*, 1998 WL 166130 (Ohio Ct. App. 8th Dist. Cuyahoga County 1998).

Under Revised Code 4509.51, Ohio minimum limits are as follows:

Type of Injury	Financial Responsibility Minimum Limits
Bodily injury to or death of one person in any one accident	$25,000.00
Bodily injury to or death of two or more persons in any one accident	$50,000.00
Injury to property of others in any one accident	$25,000.00

The Financial Responsibility Law also provides sanctions that encourage owners and operators of motor vehicles on Ohio highways to obtain liability insurance sufficient in amount to protect others who might be injured through the negligent operation of a motor vehicle. *Fazio v. Hamilton Mut. Ins. Co.*, 106 Ohio St. 3d 327, 2005-Ohio-5126, 835 N.E.2d 20 (2005).

In Ohio, the Financial Responsibility Law prohibits the registration of any vehicle in Ohio that is required to file proof of financial responsibility unless such proof is both furnished and maintained. Ohio Rev. Code §4509.45. This required proof may be evidenced by filing any of the following: (1) A financial responsibility identification card as provided for by statute; (2) A certificate of insurance as a domestic insurer, or proof of financial responsibility by nonresident; (3) A bond as provided for by statute; (4) A certificate of deposit of money or securities in compliance with the governing statute; or (5) A certificate of self-insurance, as provided for by statute, that is supplemented as required. *Id.* Statutory requirements for uninsured motorist (UM) coverage are incorporated into all motor vehicle insurance contracts issued in the state. *Drake-Lassie v. State Farm Ins. Cos.* 10th Dist., No. 09-17-1998, 129 Ohio App.3d 781, 719 N.E.2d 64.

3. Statute of Limitations

Under Ohio law, a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed." *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 507, 692 N.E.2d 581.

Negligence

Ohio courts have long held that the four-year statute of limitations provided for by R.C. 2305.09(D) applies to all professional negligence claims that are not related to medical or legal malpractice. *Carpenter v. Long,* 2011-Ohio-5414, ¶ 107, 196 Ohio App. 3d 376, 400, 963 N.E.2d 857, 875. Notably, the statute of limitations on professional negligence cases begins to run from when the act is committed, not when the plaintiff suffers damage from the allegedly negligent act. Thus, in the

context of a negligent procurement claim, the four year statute of limitations for professional negligence began to run on the date the motorist obtained her insurance policy, rather than on the date of the accident. *Auckerman v. Rogers*, Green County No. 2011-CA-23, 2012-Ohio-23, ¶18, 2012 WL 29345.

Negligent Construction

In the case of negligent construction, a cause of action must be brought within ten years after the cause of action accrues. R.C. §2305.131. *Cincinnati Ins. Co. v. Wylie*, 48 Ohio App. 3d 289, 290, 549 N.E.2d 1198, 1199 (1988). However, the Ohio Supreme Court recently held that the ten-year statute of limitations was unconstitutional as applied in barring suit brought by a condominium association more than two years after it was on notice of problems caused by defectively installed footers in construction of the more than ten-year-old condominium building. *Oaktree Condo. Assn., Inc. v. Hallmark Bldg. Co.,* 2014-Ohio-1937, 139 Ohio St. 3d 264, 11 N.E.3d 266. Notably, because cause of action in that case accrued and vested before the effective date of the statute, retroactive application of the statute of repose would take away the association's substantive right and conflict with constitutional prohibition on passage of retroactive laws. *Id.*

Misrepresentation

A cause of action for misrepresentation must be brought within four years after the misrepresentation was or should have been discovered. R.C. §2305.09; *Craggett v. Adell Ins. Agency*, 92 Ohio App.3d 443 (1993).

Breach of Contract

An action upon a specialty or an agreement, contract, or promise in writing shall be brought within eight years after the cause of action accrued. R.C. 2305.06. A claim based on a contract not in writing must be brought six years after the cause of action accrues. R.C. 2305.07.

Legal Malpractice

A plaintiff must commence an action for legal malpractice within one year from the date upon which the cause of action accrued. 2305.11(A). The statute of limitations begins to run or the legal malpractice action has "accrued" when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later. Under Ohio law, a "cognizable event" is an event sufficient to alert a reasonable person that his attorney has committed an improper act in the course of legal representation.

Medical Malpractice

An action upon a medical, dental, optometric or chiropractic claim must be commenced within one year after the cause of action accrues. Ohio Rev. Code §2305.113(A). A cause of action accrues, and the statute of limitation period begins to run, upon the latter of: (1) the date of negligence; (2) the termination of the physician-patient relationship for that condition; or (3) when the patient discovers or, in the exercise of reasonable care and due diligence, should have discovered, the resulting injury. *Frysinger v. Leech*, 32 Ohio St.3d 38, 512 N.E.2d 337 (Ohio 1987); *Oliver v. Kaiser Community Health Found.*, 5 Ohio St.3d 111, 449 N.E.2d 438 (Ohio 1983). *See also Simonds v. Kearney*, 2002 WL 242103 (9th Dist. Feb. 20, 2002). A patient may extend the statute of limitations up to 180 days by giving to the person against whom the claim will be made written notice within the statute of limitations. Ohio Rev. Code § 2305.113(B)(1).

Personal Injury

The statute of limitations for personal injury is two years. *Al-Mosawi v. Plummer,* 2012-Ohio-6034, ¶ 14.

Products Liability

The statute of limitations for products liability is two years. R.C. 2305.10(A); *Oaktree Condo. Assn., Inc. v. Hallmark Bldg. Co.,* 2014-Ohio-1937, ¶ 14, 139 Ohio St. 3d 264, 268, 11 N.E.3d 266, 270.

Unlawful trade practices

The statute of limitations for unlawful or deceptive trade practices will depend on the underlying tort.

In *Plumbing & Pipefitting Indus. Local 219 Pension Fund v. Buck Consultants, LLC,* the court found that the four-year statute of limitations from Ohio Revised Code Section 2305.09(D) applied because the deceptive trade practice in that case was based on the plaintiff's claims for professional negligence. *Plumbing & Pipefitting Indus. Local 219 Pension Fund v. Buck Consultants, LLC,* No. 4:07–CV1609, 2007 WL 4287870, *4, (N.D.Ohio Dec. 6, 2007) (applying Ohio law).

However, where the underlying tort was based in defamation, the court found that the one year statute of limitations for defamation applied to the plaintiff's claim for deceptive trade practices under Ohio Revised Code § 4165.02(A)(10). *Lasmer Indus., Inc. v. AM Gen., LLC,* 741 F. Supp. 2d 829, 838-39 (S.D. Ohio 2010) (applying Ohio law).

Wrongful Death

The statute of limitations for wrongful death is two years. R.C. 2125.02(D)(1). *Scott v. McCluskey*, 2012-Ohio-2484, ¶ 21, 972 N.E.2d 626, 632. Notably, in the medical malpractice context, where a patient dies as a result of medical malpractice, the executor or administrator of the patient's estate may bring an action on behalf of the patient's beneficiaries (wrongful death action) within two years of the patient's death pursuant to Ohio Revised Code §§ 2125.01 and 2125.02. Wrongful death actions are distinct and separate from the decedent's personal claims, and the estate may pursue a wrongful death claim within two years of the decedent's death even if the decedent's own action for medical malpractice would have been barred by the statute of limitations. *Koler v. St. Joseph Hosp.*, 69 Ohio St.2d 477, 432 N.E.2d 821 (Ohio 1982).

4. Punitive Damages and Damages Caps

Punitive Damages

Punitive damages are limited to twice the amount of compensatory damages. Ohio Rev. Code §2307.80. Punitive damages may be limited further if the defendant is a small employer or an individual. R.C. 2315.21(D)(2)(b); R.C. 2315.21(A)(4), (5). A court shall not enter judgment against an individual or a small employer for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or 10%

of the employer's or individual's net worth when the tort was committed, up to a maximum of $350,000. *Id.*

Other Damages Caps

In a civil action upon a medical, dental, optometric, or chiropractic claim to recover damages for injury, death, or loss to person or property there is no limitation on compensatory damages that represent the economic loss of the person who is awarded the damages in the civil action. Ohio Revised Code § 2323.43.

Ohio Revised Code Section 2323.43 limits non-economic damage awards in the vast majority of malpractice cases to the greater of $250,000, or three times economic damages, up to a maximum of $350,000. In catastrophic cases limited to loss of limb, loss of organ system, permanent and substantial physical deformity, or injury that prevents an injured party to care for oneself the limit is $500,000. If additional plaintiffs have derivative claims, the limit for the entire occurrence is $500,000, or $1,000,000 for catastrophic injuries. These limits do not apply to wrongful death claims.

5. Collateral Source Rules

Collateral source excludes payments in compensation for losses

The common-law collateral-source rule excludes evidence of payments in compensation for claimed losses that a plaintiff received from other sources. *Evans v. Thobe*, 2011-Ohio-3501, 958 N.E.2d 616 (Ohio Ct. App. 2d Dist. Montgomery County 2011). The collateral source rule prohibits the introduction of evidence of insurance or other benefits; it was designed to protect the plaintiff from having to inform the jury that some or all of his expenses were paid by another, thus giving the tortfeasor a windfall. *Ross v. Nappier*, 185 Ohio App. 3d 548, 2009-Ohio-6995, 924 N.E.2d 916 (11th Dist. Geauga County 2009).

Ohio refuses to allow the defendant wrongdoer to receive the benefit of payments that come to the plaintiff from a "collateral source." *Ferrell v. Summa Health Sys.*, 165 Ohio App. 3d 110, 2005-Ohio-5944, 844 N.E.2d 1233 (9th Dist.2005). The rule prevents the jury from learning anything about the collateral income so that it will not influence the decision of the jury. *Pryor v. Webber*, 23 Ohio St. 2d 104, 52 Ohio Op. 2d 395, 263 N.E.2d 235 (1970).

Defendants may introduce evidence of collateral benefits

Under Ohio Revised Code Section 2315.20, a defendant may, in any tort action, introduce evidence of collateral benefits payable to the plaintiff as a result of damages subject to the claim on which the action is based, except as specified. The Ohio Supreme Court has held that the purpose of the statute is to limit the collateral source rule, noting that the trend in other states is to limit and in some cases abolish the collateral source rule. *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362, 857 N.E.2d 1195 (2006) (holding that either the bill itself or the amount actually paid can be submitted to prove the reasonable value of medical services.). In fact, once medical bills are admitted, a defendant may then present evidence to challenge their reasonableness. *Id.* at ¶9.
Notably, permitting a tortfeasor to introduce evidence of write-offs by health care providers does not violate the purpose of the common-law collateral source rule, because the tortfeasor is not

benefiting from actual payments by third parties. *Jaques v. Manton*, 2010-Ohio-1838, 928 N.E.2d 434 (Ohio 2010). The statutory collateral benefits rule which precluded evidence of third-party payments to plaintiff as result of damages for injury that is subject of claim on which action was based when payor had right of subrogation did not apply to evidence of amount that injured motorist's medical provider wrote off from amounts billed for services rendered. R.C. § 2315.20; *Jaques*, 2010-Ohio-1838, at ¶15.

6. Expert Admissibility Standard

Relevant and Reliable

Under Ohio law, to be admissible, an expert's testimony must be both relevant and reliable. The trial judge acts as a gatekeeper to ensure that evidence which is not relevant or unreliable does not reach the trier of fact. The Ohio Supreme Court has described the trial court's role as a "gatekeeping function" as one that "imposes an obligation upon a trial court to assess both the reliability of an expert's methodology and the relevance of any testimony offered before permitting the expert to testify. *Miller v. Bike Athletic Co.,* 80 Ohio St. 3d 607, 1998-Ohio-178, 687 N.E.2d 735 (1998).

Daubert Factors

Ohio has adopted the evidentiary requirements for admissibility discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc. State v. Nemeth*, 82 Ohio St. 3d 202, 1998-Ohio-376, 694 N.E.2d 1332 (1998); *Miller v. Bike Athletic Co.,* 80 Ohio St. 3d 607, 1998-Ohio-178, 687 N.E.2d 735 (1998); *Turker v. Ford Motor Co.,* 2007-Ohio-985, 2007 WL 701046 (8th Dist. Cuyahoga County 2007).

The *Daubert* factors include: (1) whether the theory or technique has been tested; (2) whether it has been subjected to peer review; (3) whether there is a known or potential rate of error; and (4) whether the methodology has gained general acceptance. While none of these factors is a determinative prerequisite to admissibility, these factors may aid in determining reliability. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786 (1993).

Expert Qualifications in the relevant area of inquiry

To be relevant, a witness must demonstrate expert qualifications in the relevant area of inquiry. *Daubert*, 509 U.S. at 597. Whether a witness is qualified to render expert testimony pursuant to Evid. R. 702(B) is a threshold inquiry which is a separate and distinct analysis from the "reliability" requirement. The witness must possess knowledge in the relevant subject area superior to the ordinary juror or layperson. *Id.* The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question. *Hertzfeld v. Hayward Pool Prods, Inc.,* 2007-Ohio-7097, 2007 WL 4563446 (6th Dist. Lucas County 2007).

Although expert testimony is permitted in accordance with Evidence Rule 702, the qualifications of an individual to testify as an expert witness must also meet the requirements established under Evidence Rule 104(A). The trial court's decision as to whether an individual possesses the qualifications necessary to permit his expert testimony lies within the sound discretion of the trial court, and the appellate court will only reverse if the trial court abused its discretion. The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's

attitude is unreasonable, arbitrary or unconscionable. *Kerns v. Hobart Bros. Co.,* 2008-Ohio-2242, 2008 WL 1991909 (2d Dist. Miami County 2008).

7. First Party Notice Requirements

Meaningful opportunity to investigate

A notice provision in an insurance policy allows the insurer to become aware of occurrences early enough that it can have a meaningful opportunity to investigate. *Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau*, 88 Ohio St. 3d 292, 2000-Ohio-330, 725 N.E.2d 646 (2000). Such a provision also gives the insurer the ability to determine whether the allegations made by the insured state a claim that is covered by the policy and to determine whether liability exists. *Id.*; *Heller v. Standard Acc. Ins. Co.,* 118 Ohio St. 237, 160 N.E. 707 (1928).

Further, it allows the insurer to step in and control the potential litigation, protect its own interests, maintain the proper reserves in its accounts, and pursue possible subrogation claims. *Ormet*, 88 Ohio St. 3d at 303, 725 N.E.2d at 655; *see also Kelley v. State Farm Mut. Auto. Ins. Co.,* Cuyahoga County No. 98749, 2013-Ohio-585, 2013 WL 655902, ¶23 (Feb. 21, 2013). Further, a notice provision in an insurance policy allows insurers to defend against fraudulent, invalid, or excessive claims. *Id.*

Notice should be given as soon as practicable

The requirement that notice be given "as soon as practicable" means that the notice must be provided within a reasonable time in light of all the surrounding facts and circumstances. *Ormet*, 88 Ohio St. 3d at 303, 725 N.E.2d 655. Notably, in *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, the Ohio Supreme Court held that notice provisions are conditions precedent to coverage, so that an insured's failure to provide notice in a timely fashion bars coverage. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835 (2002); *see also Stiggers v. Erie Ins. Group*, Cuyahoga County No. 87654, 2006-Ohio-5920, 2006 WL 3233958 (Nov. 9, 2006); *Schluter Sys., LP v. Cent. Mut. Ins. Co.,* Cuyahoga County No. 92637, 2009-Ohio-4375, 2009 WL 2625751 (Aug. 27, 2009).

Ferrando two-step test

Notably, in Ferrando v. Auto-Owners Mut. Ins. Co. the Court established a two-step test to determine whether coverage may be avoided based upon late notice. The test was described by the Court as follows:

> The two-step approach in late-notice cases requires that the court first determine whether the insured's notice was timely. This determination is based on asking whether the UIM insurer received notice within a reasonable time in light of all the surrounding facts and circumstances. … If the insurer did receive notice within a reasonable time, the notice inquiry is at an end, the notice provision was not breached, and UIM coverage is not precluded. If the insurer did *not* receive reasonable notice, the next step is to inquire whether the insurer was prejudiced. Unreasonable notice gives rise to a presumption of prejudice to the insurer, which the insured bears the burden of evidence to rebut.

Ferrando v. Auto-Owners Mut. Ins. Co., 98 Ohio St. 3d 186, 208, 2002-Ohio-7217, 781 N.E.2d 927 (2002) (emphasis in original). Notably, *Ferrando* involved a case in which coverage was sought pursuant to underinsured motorist provisions. *Id.*

There is no doubt that the "two-step approach" announced by the Court in *Ferrando* applies outside the context of uninsured/underinsured motorists claims. In *McKean v. Howell*, a case involving a claim made under an automobile liability policy, the Court applied the *Ferrando* two-step analysis, explaining: "[w]hile *Ferrando* concerned underinsured motorist coverage (UIM) and has been extended to uninsured motorist policies (UM), we find that it is also applicable to liability coverage cases." *McKean v. Howell*, Stark County No. 2004CA00041, 2005-Ohio-721, 2005 WL 419712 (Feb. 18, 2005). In addition, other cases not involving uninsured or underinsured motorists coverage have routinely applied the *Ferrando* holding. *See, e.g., Jokic v. State Auto. Mut. Ins. Co.*, Lake County No. 2004-L-135, 2005-Ohio-7044, 2005 WL 3610428 (Dec. 29, 2005) (homeowner's policy); *Bellaire TV Cable Co., Inc. v. Valley Constr. Co.*, Belmont County No. 01-BA-44, 2002-Ohio-3203, 2002 WL 1396737 (Jun 26, 2002) (CGL construction liability policy).

8. Insurer Duty to Defend

One claim – all claims rule

Ohio law follows the "one claim—all claims rule," under which when a complaint against an insured asserts several claims for relief, some, but not all, of which are potentially covered under the terms and conditions of the insurance policy, the insurer is contractually obligated to defend the insured against all claims in the lawsuit, regardless of the ultimate outcome of the lawsuit or the insurer's ultimate liability to the insured. *Medpace, Inc. v. Darwin Select Ins. Co.*, 13 F. Supp. 3d 839 (S.D. Ohio 2014) (applying Ohio law). If an insurer must defend one claim within a complaint, it must defend the insured on all the other claims within the complaint, even claims that bear no relation to the policy coverage, but the duty to defend does not encompass a duty to prosecute the insured's compulsory counterclaim to claims for which the insurer is providing the defense. *Owners Ins. Co. v. Barone*, 832 F. Supp. 2d 804 (N.D. Ohio 2011) (applying Ohio law); *Sharonville v. Am. Employers Ins. Co.*, 109 Ohio St. 3d 186, 2006-Ohio-2180, 846 N.E.2d 833 (2006); *Granger v. Auto Owners Ins.*, 2013-Ohio-2792, 991 N.E.2d 1254 (Ohio Ct. App. 9th Dist. Summit County 2013); *Red Head Brass, Inc. v. Buckeye Union Ins.* Co., 135 Ohio App. 3d 616, 735 N.E.2d 48 (9th Dist. Wayne County 1999).

The scope of a liability insurer's duty to defend its insured is broader than its duty to indemnify the insured for a loss under the policy and is triggered by the insured's demand that the insurer provide a defense to a claim of alleged liability for a covered loss, arguably or potentially under the policy. *Lipker v. Doseck*, 176 Ohio App. 3d 89, 2008-Ohio-1756, 889 N.E.2d 1093 (2d Dist.2008); *Twin Maples Veterinary Hosp. v. Cincinnati Ins. Co.*, 159 Ohio App. 3d 590, 2005-Ohio-430, 824 N.E.2d 1027 (2d Dist.2005).

A "suit" triggering the duty includes substantial efforts which force the insured to take action or suffer serious consequences if the insured fails to cooperate or includes the functional equivalent of a suit. *Professional Rental, Inc. v. Shelby Ins. Co.*, 75 Ohio App. 3d 365, 599 N.E.2d 423 (11th Dist.1991). The fact that the insured voluntarily intervenes in an action to protect its interests still constitutes an adverse claim against the insured within the insurer's duty. *Fifth Third Mortg. Co. v. Chicago Title Ins. Co.,* 692 F.3d 507 (6th Cir. 2012) (applying Ohio law).

Significantly, the insurer's duty is not determined by the action's ultimate outcome or the insurer's ultimate liability. *Sharonville v. Am. Employers Ins. Co.*, 109 Ohio St. 3d 186, 2006-Ohio-2180, 846 N.E.2d 833 (2006). An insurer's duty to defend continues until such time as the claim against the insured is confined to a recovery that the policy does not cover, and the duty does not automatically cease when the trial court enters judgment. *City of Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St. 3d 177, 459 N.E.2d 555 (1984); *Insurance Co. of North America v. Travelers Ins. Co.*, 118 Ohio App. 3d 302, 692 N.E.2d 1028 (8th Dist.1997); *Bruce v. Junghun*, 182 Ohio App. 3d 341, 2009-Ohio-2151, 912 N.E.2d 1144 (10th Dist.2009). The duty persists regardless of the outcome of the underlying lawsuit against the insured, consistent with the "allegations test" of the existence of the duty, making the duty commensurate with the scope of the allegations. *Grange Mut. Cas. Co. v. Rosko*, 146 Ohio App. 3d 698, 2001-Ohio-3508, 767 N.E.2d 1225 (7th Dist.2001).

Once the insurer is able to establish that there is no set of facts that would bring the allegations of the complaint within coverage of its policy, its duty to defend is extinguished. *Maxum Indemnity Co. v. Selective Ins.* Co. of S.C., 2012-Ohio-2115, 971 N.E.2d 372 (Ohio Ct. App. 9th Dist. Wayne County 2012).

The liability insurer must bear the entire cost of defense where there is no reasonable means of prorating the costs of defense between the covered and the not-covered items. *Lincoln Elec. Co. v. St. Paul Fire and Marine Ins. Co.*, 10 F. Supp. 2d 856 (N.D. Ohio 1998), aff'd in part, rev'd in part on other grounds, 210 F.3d 672, 41 U.C.C. Rep. Serv. 2d 753, 2000 FED App. 0152P (6th Cir. 2000) (applying Ohio law). An insurer's obligation to defend suits is entirely independent of the obligation to pay for bodily injuries and property damages. *National Cas. Co. v. Insurance Co. of North America*, 230 F. Supp. 617, 29 Ohio Op. 2d 292, 8 Fed. R. Serv. 2d 22.11, Case 1 (N.D. Ohio 1964) (applying Ohio law).Courts, generally, have refused to permit the insurer to pay or to tender into court its policy limits and thereby relieve itself of its duty to defend. *Id.*

The scope of an insurer's duty to defend is heightened or broader under express provisions for the defense of claims even though the claims are groundless, false, or fraudulent. *Sharonville v. Am. Employers Ins. Co.,* 109 Ohio St. 3d 186, 2006-Ohio-2180, 846 N.E.2d 833 (2006); *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St. 3d 241, 2007-Ohio-4948, 874 N.E.2d 1155 (2007).

9. Bad Faith Claims against Insurers

Duty to deal in good faith

In Ohio, insurers have a duty to deal in good faith with its insureds in connection with the settlement of a disputed claim brought by its insured or by a third-party. The insurer's duty to act in good faith in settling claims runs only from the insurer to the insured, not to third parties. *Intercity Auto Sales, Inc. v. Evans*, Cuyahoga County, No. 95778, 2011-Ohio-1378, 2011 WL 1080271 (Mar. 24, 2011); *Gillette v. Estate of Gillette*, 163 Ohio App. 3d 426, 2005-Ohio-5247, 837 N.E.2d 1283 (10th Dist.2005).

In order for an insured to assert a breach of the duty of good faith, the insured and insurer must share a contractual relationship, and the insurer must have acted unfairly in performing or refusing

to perform its duty to provide the insured a benefit promised under the policy. An insurer owes no duty of good faith to a plaintiff seeking liability coverage from a tortfeasor's insurer, and such a plaintiff is barred from bringing a claim for bad faith against the insurer. *Gillette*, 163 Ohio App. 3d at ¶19. An injured third party may not maintain an action directly against the insurer for breach of a nonexistent duty to the injured third party. *Murrell v. Williamsburg Local School Dist.*, 92 Ohio App. 3d 92, 634 N.E.2d 263 (12th Dist. 1993); *Pasipanki v. Morton*, 61 Ohio App. 3d 184, 572 N.E.2d 234 (9th Dist.1990); *D.H. Overmyer Telecasting Co., Inc. v. American Home Assur. Co.*, 29 Ohio App. 3d 31, 502 N.E.2d 694 (8th Dist.1986).

An insurer's lack of good faith in the handling and settlement of insurance claims is the equivalent of bad faith. *Wasserman v. Buckeye Union Cas. Co.,* 32 Ohio St. 2d 69, 290 N.E.2d 837 (1972); *Slater v. Motorists Mut. Ins. Co.,* 174 Ohio St. 148, 187 N.E.2d 45 (1962); *Miller v. Kronk*, 35 Ohio App. 3d 103, 519 N.E.2d 856 (10th Dist.1987).

The basis of a bad faith claim against an insurer arises not from a breach of the terms of the policy but from a breach of the positive duty imposed by law on the insurer due to the relationships of the parties. *Gillette,* 163 Ohio App. 3d at ¶14. The insurer's breach of duty is irrespective of breach of contract, and a plaintiff may bring a claim for the tort of bad faith as a separate action, apart from an insured's action alleging breach of contract. *Wiseman v. Universal Underwriters Ins. Co.*, 412 F. Supp. 2d 801 (S.D. Ohio 2005) (applying Ohio law).

A liability insurer who has reserved the right to settle claims made against the insured has a duty to act in good faith in considering whether to accept or reject a claimant's offer to compromise for an amount which falls within the policy limit of liability. *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, 187 N.E.2d 45 (1962); *Logan v. Allstate Ins. Co.*, 169 Ohio App. 3d 754, 2006-Ohio-6431, 865 N.E.2d 57 (10th Dist.2006). The legal duty of good faith imposed by the law on the insurer applies with equal force to the insurer's settlement of third-party claims against its insured as it does to those claims brought by the insured. *Motorists Mut. Ins. Co. v. Said*, 63 Ohio St. 3d 690, 1992-Ohio-94, 590 N.E.2d 1228 (1992).

To exercise good faith, an insurer, in considering the conflicting interests of the insurer and the insured, must exert at least an equal degree of attention and concern to the insured's interests as it would for its own interests in the matter. The insurer must make an appropriate investigation and have appropriate conferences between trial counsel and client; legal counsel must make an advisory opinion as to applicable law, and the insurer should formulate a general determination as to the degree of liability and convey such information to the insured; the insurer must fairly enter into negotiations where there is good reason to believe that the claim is meritorious and a reasonable expectation of successful defense is negligible; and any offer of settlement at or near policy limits should be conveyed to the insured to give the insured an opportunity to engage in settlement discussion and make appropriate offers of contribution. *Netzley v. Nationwide Mut. Ins. Co.,* 34 Ohio App. 2d 65, 296 N.E.2d 550 (2d Dist.1971).

An insurer may settle or pay claims in good faith to one insured, even if this results in actual exhaustion of the policy limits to the detriment of another insured, but if an insured has already agreed to a settlement of claims with the insurer, the insurer may not in good faith exhaust policy limits by paying the later claim of a second insured. *Elliott Co. v. Liberty Mut. Ins. Co.*, 434 F. Supp. 2d 483 (N.D. Ohio 2006) (applying Ohio law).

The question of good faith is for the jury but may be decided by the court as matter of law. *Netzley v. Nationwide Mut. Ins. Co.*, 34 Ohio App. 2d 65, 296 N.E.2d 550 (2d Dist. 1971); *Fair v. State Farm Fire & Cas. Co.*, 426 F. Supp. 2d 672 (N.D. Ohio 2006) (applying Ohio law).

10. Mandatory Arbitration Rules

Courts may adopt mandatory arbitration

By court rule, each court of common pleas in Ohio may adopt a plan for mandatory arbitration of most civil cases, including juvenile and domestic relations cases. CP Sup R 15. Types of civil cases excluded from coverage under mandatory arbitration include actions involving title to real estate, equitable relief and appeals. CP Sup R 15(A)(2)(a). For mandatory arbitration to apply, the case must be for less than or equal to the amount in controversy or, if exceeded, the parties must agree to arbitration. CP Sup R 15(A)(1).

The rule provides for the court to appoint a board of three arbitrators, unless the parties agree to the appointment of a single arbitrator. CP Sup R 15(A)(2)(b). The rule further provides for the procedure for the report and award and for appeals. CP Sup R 15(A)(2)(c) &(d).

Oklahoma

1. Comparative Fault

Oklahoma has adopted "modified" comparative negligence. *See* 12 O.S. §§13, 14. Contributory negligence of the plaintiff will not bar recovery unless it is "of greater degree than any negligence" of the defendant causing the injury, or the "combined negligence" of multiple defendants causing such injury. *Id; see also Bode v. Clark Equipment Co.*, 1986 OK 21, 719 P.2d 824. Comparative fault does not apply in products liability cases. *See Kirkland v. General Motors Corp.*, 1974 OK 52, 521 P.2d 1353, 1365.

2. Insurance Minimum Limits

The minimum liability coverage in Oklahoma for policies issued prior to April 1, 2005 was $10,000 per person and $20,000 per accident. *See* 47 O.S. § 7-103. For policies issued after April 1, 2005, the minimum liability is $25,000 per person for bodily injury, $50,000 per accident, and $25,000 for property damage per accident. *Id.*

3. Statute of Limitations

Negligence: Two years. *See* 12 O.S. §95(A)(3). "This limitation period generally begins to run from the date the negligent act occurred or from the date the plaintiff should have known of the act complained of." *Ranier v. Stuart & Freida, P.C.*, 1994 OK CIV APP 155, 887 P.2d 339, 340.

Negligent Construction: Two years. *See* 12 O.S. §95(A)(3). The discovery rule applies. *See Delashaw v. Tyson Foods, Inc.*, 100 Fed. Appx. 762 (10th Cir. 2004). "[T]he two-year limitations period will not begin to run with respect to 'hidden defects' until the defects are discovered or should have been discovered by the plaintiff." *Id.* at 767. Oklahoma has a ten (10) year statute of repose for

claims based on deficient design or construction. 12 O.S. §109; *Samuel Roberts Noble Foundation, Inc., v. Vick*, 1992 OK 140, 940 P.2d 619, 642.

Product Liability: Two years. *See* 12 O.S. §95; *Kirkland v. General Motors Corp.*, 1974 OK 52, 521 P.2d 1353, 1361; *Fuchs v. Fleetwood Homes of Texas*, 2006 OK CIV APP 148, 149 P.3d 1099, 1102.

Wrongful Death: Two years. *See* 12 O.S. §1053; *Kimberly v. DeWitt*, 1980 OK CIV APP 2, 606 P.2d 612, 616 ("The limitation provided in the wrongful death statute is two years, and it begins to run on the date of death.").

Breach of Contract: An action upon an express or implied contract must be brought within three (3) years. *See* 12 O.S. § 95(A)(2). An action upon "any contract, agreement, or promise in writing" must be brought within five (5) years. *See* 12 O.S. §95(A)(1).

Unlawful Trade Practices: Unless a special statute applies, claims for "injury to the rights of another" are governed by a two year statute of limitations. *See* 12 O.S. § 95. This includes actions based upon fraud. *Id; Bennett v. McKibben*, 1996 OK CIV APP 22, 915 P.2d 400, 405 (noting statute "requires civil actions based on fraud to be brought within two years."). The discovery rule applies to fraud claims. *See F.D.I.C. v. Palermo*, 815 F.2d 1329, 1339 (10th Cir. 1987). "A claim for fraud accrues when a person discovers the fraud. A party discovers fraud when he or she ascertains each element of the claim." *See Horton v. Hamilton*, 2015 OK 6, ¶ 18, 345 P.3d 357, 363

4. Punitive Damages and Damages Caps

Punitive Damages: Oklahoma allows for an award of punitive damages under certain circumstances in cases "not arising from contract." *See* 23 O.S. § 9.1. The statute contemplates three potential punitive damage scenarios: (1) When a defendant is guilty of **reckless disregard** for the rights of others, or where an insurer had recklessly disregarded its duty to deal fairly and in good faith, the amount of punitive damages is limited to $100,000.00 or the amount of actual damages, whichever is greater; (2) When the defendant has acted **intentionally and with malice**, the jury may award $500,000.00 or twice the amount of actual damages or the increased financial benefit derived by the defendant or the insurer from the conduct causing injury to the plaintiff, whichever is greatest; and (3) if the defendant or insurer has acted **intentionally and with malice** and the judge finds beyond a reasonable doubt that the defendant or insurer engaged in conduct **life-threatening to humans**, the jury may award any amount.

Plaintiff must establish his or her right to punitive damage with clear and convincing evidence. The statute provides for a bifurcated proceeding. If the jury finds (in first stage proceedings) that the defendant engaged in any of the conduct described above, a second stage proceeding will occur where the jury is allowed to consider the *amount* of punitive damages. 23 O.S. §9.1(A), (B). Oklahoma's punitive damages statute has survived a constitutional challenge. *See Gilbert v. Security Fin. Corp. of Okla., Inc.*, 2006 OK 58, 152 P.3d 165.

Non-Economic Damages Cap: In civil actions involving a "claimed bodily injury," the amount of plaintiff's "non-economic loss" shall not exceed $350,000.00. *See* 23 O.S. § 61.2. The cap does not apply if the defendant's conduct was reckless, grossly negligence, fraudulent or intentional/malicious. *Id.* The cap does not apply to actions brought under the Governmental Tort Claims Act or actions for wrongful death. *Id.* The constitutionality of this statute is currently being

litigated in Oklahoma courts. In addition, Oklahoma statutory law also recognizes a cap on "non-economic" damages of $300,000.00 in certain medical negligence cases (i.e., cases involving pregnancy, labor and delivery and emergency care), but the constitutionality of this statute is unclear in light of the Oklahoma's "special law" jurisprudence. *See, e.g., Zeier v. Zimmer, Inc.*, 2006 OK 98, 152 P.3d 861 (striking down affidavit of merit statute applicable to medical negligence cases).

5. Collateral Source Rules

Historically, Oklahoma courts have applied the collateral source rule, which holds that "compensation given to the injured party from a collateral source wholly independent of the wrongdoer does not operate to lessen the damages recoverable from the person who causes the injury." *See Mariani v. State ex rel. Oklahoma State Univ.*, 2015 OK 13, ¶ 8, 348 P.3d 194, 196. However, in 2011, the Oklahoma legislature enacted a statute which limits the admissibility of medical bills in a personal injury case. 12 O.S. § 3009.1. The intent of the statute is to limit a plaintiff's recovery to the "amounts paid" for medical services, and not the "amounts billed." The statute also protects the lien and subrogation rights of third parties. The constitutionality of the statute is currently being litigated in Oklahoma courts.

Another statute governs the admissibility of "payments of medical bills" in medical negligence cases. *See* 63 O.S. § 1-1708.1D. The statute allows evidence of "payment" of medical bills, unless the payment is subject to a right of subrogation or "other right of recovery." The constitutionality of this statute is unclear, in light of Oklahoma's "special law" jurisprudence.

6. Expert Admissibility Standard – *Daubert* v. *Frye*

Oklahoma has adopted the *Daubert* standard for deciding the admissibility of expert testimony in civil matters. *See Christian v. Gray*, 65 P.3d 591, 2003 OK 10. An expert may testify when that expert possesses "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue . . ." 12 O.S. § 2702. An expert witness must be qualified by his or her "knowledge, skill, experience, training or education." *Id.*

7. First Party Notice Requirements

An insured has a duty to provide the insurer with notice of a claim. *See First Bank of Turley v. Fid. & Deposit Ins. Co. of Maryland*, 1996 OK 105, 928 P.2d 298, 304-05. In the first-party context, Oklahoma applies the "notice-prejudice" rule, which provides that an insurer cannot deny a claim based on late notice absent a showing of prejudice arising from the late notice. *See Dang v. UNUM Life Ins. Co. of America*, 175 F.3d 1186 (10th Cir. 1999). This is true even where the notice provisions in the policy provided an express, definite time for compliance, but did not impose forfeiture of benefits or other adverse consequences for failure to comply with the time limits. *Id.*

The "notice-prejudice" rule does not apply to "claims-made" policies. *See State ex rel. Crawford v. Indemnity Underwriters Ins. Co.*, 1997 OK CIV APP 39, 943 P.2d 1099.

Statutory law provides that an insurer "shall furnish, upon written request of any insured claiming to have a loss under an insurance contract issued by such insurer, forms of proof of loss for completion by such person, but such insurer shall not, by reason of the requirement so to furnish

forms, have any responsibility for or with reference to the completion of such proof or the manner of any such completion or attempted completion." 36 O.S. §3629(A).

The Unfair Claims Settlement Practices Act prohibits an insurer from "failing to adopt and implement reasonable standards for prompt investigation of claims arising under its insurance policies or insurance contracts." 36 O.S. § 1250.5(3). In general, claims should be accepted or denied within 45 days after submission of executed proofs of loss. 36 O.S. § 1250.7. If further investigation is required, the time can be extended up to 120 days after the submission of executed proofs of loss. *Id.* Time frames may vary, depending on the type of claim submitted.

8. Insurer Duty to Defend

An insurer's duty to defend, under Oklahoma law, was succinctly described in *First Bank of Turley v. Fid. & Deposit Ins. Co. of Maryland*, 1996 OK 105, 928 P.2d 298, 304-05, as follows:

> An insurer ordinarily has no duty to defend an insured absent a request to provide a defense, which act serves to trigger the insurer's performance under the contract. It is the insured's sole duty to give its insurer timely and adequate notice of a third-party claim to aid the insurer in the discovery of facts bearing on coverage. Once an insurer receives notice of a claim and proof of loss, the insurer should evaluate the matter and make a reasonable investigation to determine whether a potential for coverage exists. An insured in turn has an obligation to cooperate with the insurer, which is both contractual and implied in law. An insurer who disputes the insured's demand to defend has three options. It can (1) seek declaratory relief that would define the insurer's rights and obligations; (2) defend the insured under a reservation of rights, or (3) refuse to take any action at the peril of being later found in breach of its duty to defend. The insurer's liability for breach of its defense duty by refusal to provide a defense is measured by the facts that were known and knowable – by what the insurer knows or by what the insurer was capable of discovering itself – at the time the insured's request was tendered.

An insurer's duty to defend is "separate from, and broader than, the duty to indemnify" and is "measured by the nature and kinds of risks covered." *Id.* at 303. "An insurer has a duty to defend an insured whenever it ascertains the presence of facts that give rise to the potential of liability under the policy." *Id.* That duty is assessed against the information "gleaned from the petition (and other pleadings), from the insured, and from other sources available to the insurer at the time defense is demanded (or tendered) rather than by the outcome of the third-party litigation." *Id.*

9. Bad Faith Claims against Insurers

In Oklahoma, the duty of good faith and fair dealing applies to nearly all insured-insurer relationships. *See Christian v. American Home Assurance Co.*, 577 P.2d 899, 905 (Okla. 1977); *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080 (Okla. 2005). Insurers are obligated to investigate, evaluate, negotiate, and pay an insured's claim in a timely and reasonable manner. *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105 (Okla. 1991) (the investigation and evaluation must be independent; the carrier may not rely on the investigation or evaluation of the tortfeasor's carrier); *Newport v. USAA*, 11 P.3d 190 (Okla. 2000) (lowball offers less than an insurer's own evaluation of the claim can constitute bad

faith); *Brown v. Patel*, 157 P.3d 117 (Okla. 2007). Both actual and punitive damages are available against an insurer. *See Christian*, 577 P.2d at 904.

Oklahoma has also adopted the Unfair Claims Settlement Practices Act (UCSPA). 36 O.S. §1250.1, *et seq*. The act contains a number of provisions that are relevant to claims-handling. The Oklahoma Supreme Court has held that the UCSPA does not provide the insured with a private cause of action against the insurer. *See McWhirter v. Fire Ins. Exchg, Inc.*, 1994 OK 93, 878 P.2d 1056, 1057. However, Courts have held that the UCSPA "can provide the district court with guidance in determining whether particular conduct on the part of an insurer is unreasonable and sufficient to constitute a basis for a bad faith claim." *See Beers v. Hillory*, 2010 OK CIV APP 99, ¶30, 241 P.3d 285, 294.

10. Mandatory Arbitration Rules

Oklahoma law does not mandate arbitration of any particular type of claim. However, Oklahoma has adopted the Uniform Arbitration Act. 12 O.S. § 1851. Oklahoma has a public policy favoring arbitration. *See Rollings v. Thermodyne Industries, Inc.*, 910 P.2d 1030 (Okla. 1996). Despite this fact, the Oklahoma Supreme Court has recently issued several opinions refusing to enforce arbitration agreements. *See Boler v. Security Health Care, LLC,* 2014 OK 80, 336 P.3d 468; *Johnson v. Convalescent Center of Grady County, LLC*, 2014 OK 102, 341 P.3d 71

Failure to invoke the arbitration clause in the litigation may result in waiver. *See, e.g., Biles v. State Farm*, 521 P.2d 890 (Okla. Ct. App. 1974). The Oklahoma Uniform Arbitration Act is expressly not applicable to "contracts with reference to insurance." 12 O.S. §1855(D). This has lead one court to conclude that "contracts with reference to insurance are generally not arbitrable . . ." *Towe Hester & Erwin, Inc., v. Kansas City Fire & Marine Ins. Co.*, 947 P.2d 594, 598 (Okla. Ct. App. 1997).

Oregon

1. Comparative Fault

Oregon is a modified comparative fault state. ORS 31.600. A plaintiff is barred from recovery if his or her fault exceeds 50 percent. If the trier of fact determines that plaintiff's fault is 50 percent or lower, the plaintiff is entitled to recover damages, but the recovery will reduced in proportion to the plaintiff's percentage of fault.

The plaintiff's fault is compared against "any party against whom recovery is sought, the fault of third-party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled." ORS 31.600(2). The total percentage of fault against all such persons must equal 100 percent. Under most circumstances, the liability of each defendant is several and not joint. ORS 31.610(1). Thus, each defendant is responsible only for its share of damages based on the percentage of fault assigned against that defendant by the trier of fact. ORS 31.610(2). It is important to note, however, that a defendant may be subject to reallocation for uncollectible portions of the judgment if that defendant's percentage of fault exceeds 25 percent and is also greater than plaintiff's percentage of fault.

2. Insurance Minimum Limits

ORS 806.010 sets forth Oregon's mandatory insurance requirements. Oregon's minimum liability insurance requirements are as follows:

- Bodily Injury and Property Damage: $25,000 per person; $50,000 per crash for bodily injury to others; and $20,000 per crash for damage to property. ORS 806.070.

- Personal Injury Protection (PIP): $15,000 per person. ORS 742.524(1)(a).

- Uninsured and Underinsured (UM/UIM): $25,000 per person; and $50,000 per crash for bodily injury. ORS 742.502(2)(a).

3. Statute of Limitations

Negligence: Negligence actions are governed by the "catch-all" two-year statute of limitations under ORS 12.110(1). The statute provides that "[a]n action for assault, battery, false imprisonment, or for any [other] injury to the person or rights of another, not arising on contract, and not specifically enumerated [in another statute]…shall be commenced within two years."

Negligent Construction: There is an ongoing dispute in Oregon as to whether the statute of limitations for a negligence claim involving damage to real property is six years or two years from the date of accrual. ORS 12.080(3) provides that "[a]n action…for interference with or injury to any interest of another in real property, excepting those mentioned in….ORS 12.135…shall be commenced within six years." However, in *Abraham v. T. Const. et al*, 350 Or 29, 34 n 3, 249 P3d 534 (2011), the Oregon Supreme Court, citing ORS 12.110, noted in a footnote that "tort claims arising out of the construction of a house must be brought within two years of the date that the cause of action accrues[.]" The Oregon Court of Appeals in *Riverview Condominium v. Cypress Ventures*, 266 Or App 574, 600, 339 P3d 447 (2014), recently rejected the Supreme Court's footnote as dictum and held that ORS 12.135's six-year statute of limitations applied to tort claims for construction defect.

Product Liability: Product liability actions must be must be commenced no later than two years after the date the "plaintiff discovers, or reasonably should have discovered, the personal injury or property damage and the casual relationship between the injury or damage and the product, or the causal relationship between the injury or damage and the conduct of the defendant." ORS 30.905(1).

If the action is for wrongful death, the claim must be filed no later than three years after the "decedent, the personal representative or a person for whose benefit an action could be brought under ORS 30.020 discovers, or reasonably should have discovered, the causal relationship between the death and the product, or the causal relationship between the death and the conduct of the defendant." ORS 30.905(3).

The statute of ultimate repose is different between an personal injury or property damage action and wrongful death action. In an personal injury/ property damage claim, the action must be "commenced **before the later of**: (a) 10 years from the date on which the product was first purchased for use or consumption, (b) the expiration of any statute of reposed for an equivalent civil action in the state in which the product was manufactured, or, if the product was manufactured in a foreign country, the expiration of any statue of repose for an equivalent civil action in the state into

which the product was imported." ORS 30.905(2). However, in a product liability civil action for death, the action must be "commenced **before the earlier of** (a) three years after the death of the decedent, (b)10 years from the date the product was purchased or (c) the equivalent statute either in the state where the product was manufactured or, if the product was manufactured in a foreign county, then the equivalent statute where the product was imported." ORS 30.905(4.)

Wrongful Death: A wrongful death action must be commenced within "three years after the injury causing the death of the decedent is discovered or reasonably should have been discovered...." ORS 30.020(1).

Breach of Contract: An action on a contact or liability, express or implied, must be commenced within six years. ORS 12.080.

Unlawful Trade Practices: An action based on an unlawful trade practice must be commenced within one year after the discovery of the unlawful practice. ORS 646.638(6).

4. Punitive Damages and Damages Caps

Punitive Damages: Oregon does allow recovery of punitive damages. Under Oregon law, a plaintiff cannot include a request for punitive damages in the complaint. ORS 31.725. Instead, after the complaint is filed, the plaintiff must file a motion to amend the pleading to include a claim for punitive damages. A court must grant the motion unless the affidavits and supporting documentation submitted by the moving party "fail to set forth specific facts supported by admissible evidence adequate to avoid the granting of a motion for a directed verdict to the party opposing the motion[.]"

Punitive damages must be proven by clear and convincing evidence. To recover, a plaintiff must prove that the defendant "has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." ORS 31.730(1). Negligence alone is not sufficient to support an award of punitive damages. *Badger v. Paulson Inv. Co., Inc.*, 311 Or 14, 28, 803 P2d 1178 (1991). If punitive damages are awarded at trial, the award must be allocated as follows: (1) 30% is paid to the prevailing party; (2) 60% is paid to the Criminal Injuries Compensation Act; and (3) 10% to the Attorney General for deposit in the State Court Facilities and Securities Account. ORS 31.735. There is no cap on punitive damages, but awards are subject to post-verdict review for excessiveness under Fourteenth Amendment's Due Process Clause.

Non-Economic Damages Cap: Oregon has a $500,000 statutory cap for non-economic damages, but the cap has been struck down as unconstitutional in various settings. ORS 31.710 provides that in all civil actions seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage, or claims for loss of care, comfort, companionship, society and loss of consortium, the amount awarded for noneconomic damages shall not exceed $500,000. Oregon courts have held that the non-economic damages cap is unconstitutional as applied to "civil cases in which the right to jury trial was customary in 1857," which includes most common-law personal injury actions, including claims for negligence. *Lakin v. Senco Prods., Inc.*, 329 Or 62, 82, 987 P2d 463, clarified, 329 Or 369 (1999). However, the Oregon Supreme Court has held that the non-economic damages cap is not unconstitutional as applied to purely statutory claims, such as claims for wrongful death. *Greist v. Phillips, 322 Or 281, 906 P2d 789 (*1995) (applying cap to wrongful death claim). In addition, the Oregon Court of Appeals in *Rains v. Stayton Builders Mart. Inc.*, 264 Or App 636, 336 P3d 483 (2014), recently held that the cap also applies to claims for

strict products liability. As of the date of publication of this compendium, the *Rains* decision was under review by the Oregon Supreme Court.

Governmental Damages Cap: Effective July 1, 2009, the Oregon Legislature increased the damages cap for state, and local public entities. The caps were increased annually and "beginning in 2015, the State Court Administrator shall determine the percentage of an increase or decrease in the cost of living for the previous calendar year, based on changes in the Portland-Salem, OR-WA Consumer Price Index for All Urban Consumers for All Items as published by the Bureau of Labor Statistics of the United States Department of Labor." ORS 30.271(4); ORS 30.272(4) and ORS 30.273(4). As of July 1, 2015, the cap on personal injury and death actions against the State is $2,048,300 (single) or $4,096,600 (multiple claims). The cap on personal injury and death actions against local entities is $682,800 (single claim) or $1,365,500 (multiple claims). Property damage claims are capped against the State and local entities at $112,000 (single claim) or $560,000 (multiple claims).

5. Collateral Source Rules

Under Oregon's collateral source rule, the court may deduct from the plaintiff's damages award certain collateral benefits that the plaintiff has received, but the following collateral benefits are exempt: any benefits that plaintiff or the injured party's estate must repay; insurance benefits which the plaintiff or a member of plaintiff's family paid a premium; retirement, disability or pension plan benefits, and federal Social Security benefits. ORS 31.580(1).

Evidence of collateral benefits is not admissible at trial, but shall be received by the court by affidavit submitted after the verdict and before entry of judgment. Similarly, Oregon law prohibits admission of evidence of "write offs" by medical providers. *White v. Jubitz Corp.*, 219 Or App 62, 182 P3d 215 (2008). Plaintiffs are allowed to recover as economic damages the reasonable value of medical treatment received, regardless of the amount actually paid for such services by plaintiff or plaintiff's insurer.

6. Expert Admissibility Standard – *Daubert v. Frye*

An important and unique feature of Oregon civil litigation is that there is **no expert discovery**. As a result, there are no expert reports, expert depositions, and a party is not entitled to know the identity of or opinions held by an opposing party's experts until that expert is called to testify at trial.

The admissibility of scientific evidence offered by an expert is determined by the court before it is admitted. A trial judge may require a Rule 104 hearing outside the presence of the jury where the admissibility of a particular type of scientific evidence is challenged as unreliable or irrelevant to the issues in the case. In ruling on the admissibility of scientific evidence, courts apply the *Daubert* standard. *See, State v. O'Key*, 321 Or 285, 889 P2d 663 (1995). The Oregon Supreme Court has expressly rejected the *Frye* standard of "general acceptance within the scientific community." *State v. Brown*, 297 Or 404, 687 P2d 751 (1984). Under Oregon's version of the *Daubert* standard (often referred to as "*Brown/O'Key*" standard), the court considers the following factors in ruling on the admissibility of scientific evidence:

(1) The technique's general acceptance in the field;
(2) The expert's qualifications and stature;
(3) The use which has been made of the technique;

(4) The potential rate of error;
(5) The existence of specialized literature;
(6) The novelty of the invention; and
(7) The extent to which the technique relies on the subjective interpretation of the expert.

7. First Party Notice Requirements

If a first party insured fails to give timely notice of a claim in violation of policy conditions, the insurer's coverage obligation is voided if the late notice caused the insurer to suffer prejudice. The insurer has the burden to show prejudice. *Halsey v. Fireman's Fund Ins. Co.,* 68 Or App 349, 354, 681 P2d 168, *rev. den.,* 297 Or 601, 687 P2d 795 (1984). Courts apply a two-part test in determining whether the insurer suffered prejudice (1) whether the notice was received in time for the insurer to make a reasonable investigation and adequately protect its interest and that of the insured; and (2) if the insurer could not adequately investigate, whether the insured acted reasonably in failing to give notice at an earlier time. *Lusch v. Aetna Cas. & Surety Co.,* 272 Or 593, 599, 538 P2d 902 (1975). An insurer is not necessarily prejudiced as a matter of law just because it receives notice by complaint or after a claim has been settled or tried. *See Halsey v. Fireman's Fund Ins. Co., supra,* 68 Or App. at 353, 681 P2d 168.

8. Insurer Duty to Defend

An insurer's duty to defend does not arise until the insured has tendered a claim for coverage. *Am Cas. Co. v. Corum*, 139 Or App. 58, 63, 910 P2d 1151 (1996). In order for an insurer's duty to defend to arise, the insured must formally tender to the insurer by providing a copy of the relevant pleading. *Oregon Insurance Guaranty Association v. Thompson*, 93 Or App 5, 11, 760 P2d 890 (1998) ("An insurer must receive a copy of the pleading so that it may review the allegations to determine whether there is coverage.").

After the claim is tendered, the insurer's duty to defend is determined by examining two documents: the complaint and the insurance policy. *Ledford v. Gutoski*, 319 Or 397, 399, 877 P2d 80, 82 (1994). The duty to defend exists when, based on the facts alleged in the complaint, "the claim against the insured…could, without amendment, impose liability for conduct covered by the policy." *Id* at 399-400. Extrinsic evidence is not used to determine whether an insurer owes a duty to defend. In evaluating whether an insurer has a duty to defend, the court looks only at the facts alleged in the complaint to determine whether they provide a basis for recovery that could be covered by the policy. *Marleau v. Truck Insurance Exchange*, 333 Or 82, 89, 37 P3d 148 (2001).

An insurer's duty to defend applies to "suits." Oregon courts recognize that "suits" include both civil lawsuits and administrative proceedings seeking remedies against the insured. *Sch. Dist. No. 1. v. Mission Ins. Co.*, 58 Or App 692, 696, 650 P2d 929 (1982), *rev. denied*, 294 Or 682 (1983). The insurer's duty to defend includes a duty to defend the entire action. Therefore, an insurer owes a duty to defend the insured even if the complaint asserts both covered and uncovered claims. *Marleau*, 333 Or at 91 (2001).

However, in narrow circumstances, Oregon courts will look outside the operative complaint and applicable policy to determine a duty to defend. Where there is a judicial determination of the insured's conduct which may affect coverage, evidence of that determination may be introduced. The victim sued the insured for injuries inflicted by assault and battery. In *Casey v. Nw. Sec. Ins. Co.*, 260 Or 485, 491 P2d 208 (1971,) a subsequent coverage action, the court permitted extrinsic evidence of the insured's assault conviction because that evidence conclusively established that

victim's injuries were intentionally inflicted. The liability policy excluded coverage for intentionally inflicted injuries. The court found that the insurer had no duty to defend the insured in the victim's civil action. *Id.* at 491. Also, in *Fred Shearer & Sons v. Gemini Ins. Co.,* 237 Or. App. 468, 240 P3d 67 (2010), *rev. denied* 349 Or. 602 (2011), the court held that extrinsic evidence could be used to determine whether a company was an additional insured under the policy where the complaint contained no relevant allegations that established the company's insured status, and where the coverage issue related solely to the status of a party as an insured.

In the case of overlapping insurance, all insurers owe a duty to defend. When two or more policies provide primary coverage for the same loss, and each policy attempts to limit its coverage by means of an "other insurance" clause, the clauses are ignored, and liability for the loss is prorated according to the applicable limits of each policy. *Lamb-Weston v. Oregon Automobile Ins. Co.,* 219 Or 110, 128-29, 341 P2d 110 (1959**)**. Each insurer is then responsible to pay its pro rata share of defense costs using the same formula that is used to apportion indemnity costs. *Burnett v. Western Pac. Ins.* Co., 255 Or 547, 555, 469 P2d 602 (1970).

The duty to defend is generally terminated when the lawsuit is resolved or after there is a judicial determination that the insurer owes no duty to defend. Moreover, when a judgment eliminates all covered claims against the insured, and the dismissal is not appealable, the insurer no longer has a duty to defend. *See, Klamath Pac. Corp. v. Reliance Ins. Co*., 151 Or App 405, 418, 950 P2d 909 (1997) (stating that an intermediate order from a trial court dismissing a claim is not a final resolution of that claim, and does not terminate the duty to defend).

Once defense has been undertaken, an insurer may withdraw its defense, so long as the withdrawal does not result in the insured suffering prejudice. *United Pac. Ins. Co. v. Pac. NW Research Found*., 39 Or App. 873, 877, 593 P2d 1278 (1979). Oregon courts have held that when an insurer reserves the right to withdraw, the insured cannot claim prejudice when the insurer exercises that right. *Id.*

An insurer may not avoid its duty to defend by merely tendering policy limits. *See, e.g., Maine Bonding v. Centennial Ins. Co*., 64 Or App. 97, 667 P2d 548 (1983), *aff'd* 298 Or 514 (1985).

9. Bad Faith Claims Against Insurers

Oregon does not recognize a tort of bad faith arising out of an insurer's failure to defend its insured. *Santilli v. State Farm*, 278 Or 53, 562 P2d 965 (1977). Instead, an insurer's duty to defend is a contractual duty, and an insurer's breach gives rise to a claim for contractual damages. *Northwest Pump v. American States Ins. Co*., 144 Or App 222, 925 P2d 1241 (1996). An insurer who fails to defend can be sued for breach of express contract or breach of the implied covenant of good faith and fair dealing. *See, McKenzie v. Pacific Health & Life Ins. Co*., 118 Or App 377, 847 P2d 879 (1993).

An insurer who breaches the duty to defend is liable in contract for the costs of defense. *Id.* An insurer who breaches the duty to defend can also be held liable to indemnify for judgments and reasonable settlement costs, but only if the underlying claim is covered. *Id.* Oregon law does not recognize coverage by estoppel. *Id.* The scope of the insurer's risk is determined by the terms of the insurance policy, not conduct subsequent to execution. As a result, an insurer who breaches the duty to defend cannot be held liable for uncovered claims or sums in excess of policy coverage. *Id.*

10. Mandatory Arbitration Rules

The rules governing mandatory arbitration in Oregon can be found at ORS 36.400, et seq., and UTCR Chapter 13. Generally, all civil cases in which the only claimed relief is for the recovery of money damages and the amount clamed is less than $50,000, exclusive of attorney fees, costs, and

disbursements, are subject to mandatory arbitration. The parties may move to exempt a case from mandatory arbitration for "good cause" by filing a motion for exemption within 14 days after notification by the court that the case is being transferred to arbitration.

Mandatory arbitration in Oregon is on an accelerated time-frame. As soon as all parties have appeared in a case which is eligible for mandatory arbitration, the court will send the parties notice assigning the case to arbitration and will include a "notice of selection of arbitrator form" which provides a random list of three or more proposed arbitrators. The parties may choose between the proposed arbitrators or stipulate to another arbitrator of their choosing. If they do not stipulate to an arbitrator, each party strikes one unacceptable name from the list and the clerk of court will then appoint an arbitrator from the remaining candidates. The assignment to arbitrator must occur within 21 days after the assignment of the matter to arbitration. UTCR 13.080. Once appointed, the arbitrator is responsible for scheduling the arbitration hearing. Except for good cause shown, the hearing must be schedule to take place not sooner than 14 days, or later than 49 days, from the date of assignment of the case to the arbitrator. UTCR 13.160. The parties may stipulate to a postponement or continuances only with the permission of the arbitrator and such continuances or postponements must also be within the 49-day period. *Id.* Any continuances or postponements beyond such period require the arbitrator to obtain approval of the presiding judge. *Id.* At least 14 days prior to the date of the arbitration hearing, the parties must submit all relevant pleadings, as well as a list of exhibits and witnesses, to the arbitrator and must make their exhibits available to the other side for copying. UTCR 13.170.

The result of an arbitration is appealable *de novo* to the trial court by the party against whom relief is granted or a party for whom relief was granted but who did not receive the amount of their claimed damages. ORS 36.425. Any such appeal must be filed within 20 days from the date of the arbitrator's decision and award. *Id.* A party who appeals an arbitration award but fails to improve its position after judgment on the trial *de novo* is subject to certain costs and reasonable attorney fees.

Pennsylvania

The laws applicable to motor vehicle insurance coverage are outlined in the Act 6 Amendments to the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa. C.S. §7102 *et seq.*

1. Comparative Fault and the Fair Share Act

Pennsylvania follows a comparative negligence regime pursuant to statute. 42 Pa.C.S. § 7102(a). Specifically, a plaintiff's comparative negligence will diminish, but not bar recovery unless he is found more negligent than the defendant(s). 75 Pa. C.S. §7102. For example, if a plaintiff is found twenty percent (20%) at fault, that plaintiff will be entitled to only eighty percent (80%) of the total award. However, if a plaintiff is found to carry greater than or equal to fifty-one percent (51%) of the fault, that plaintiff will be unable to recover *any* portion of the award.

Plaintiff's recovery against Defendant is further governed by Pennsylvania's Fair Share Act. 42 Pa. C.S. §7102. Under the Fair Share Act, any defendant found less than sixty percent (60%) liable will only be responsible for paying its exact percentage share of the entire verdict. However, if a defendant is held liable for sixty percent (60%) or more of the total apportioned liability, that defendant remains liable to pay the full amount of the judgment. *Id.*

There are certain exceptions to the Fair Share Act that are still subject to the prior joint and several liability regime and still permit a plaintiff to recover the entirety of an award against any defendant assessed at least 1% liability. Any accidents that occurred prior to June 28, 2011, the date the Act was signed, are not subject to the Act's limitations. Additionally, the Fair Share Act does not apply to the following causes of action: intentional torts, intentional misrepresentation, hazardous substance releases (under the Hazardous Sites Cleanup Act), or "dramshop" liability of tavern owners.

2. Insurance Minimums

With respect to Motor Vehicle coverage, Pennsylvania is a financial responsibility insurance state. Therefore, one must purchase liability coverage in the amount of $15,000 per individual and $30,000 per incident and property damage in the amount of $5,000. 75 Pa. C.S. §7102. An insurer shall include coverage providing a medical benefit in the amount of $5,000. 75 Pa. C.S. §7111. Types of insurance coverage are discussed in further detail below:

i. Liability Coverage

Liability coverage is mandatory for bodily injury claims in the amount of $15,000 per individual and $30,000 per incident. Higher limits are available. Liability coverage can also be purchased for property damage claims which applies to damage the individual has caused to the other person's vehicle.

ii. First Party (PIP) Coverage

PIP coverage is mandatory in the amount of at least $5,000. Regardless of allocation fault, an individual's medical bills up to the policy limits will be paid through PIP coverage.[2]

iii. Collision Coverage

Collision coverage is optional and pays an individual for damage done to his vehicle.

iv. Comprehensive Coverage

Comprehensive coverage is optional and provides protection if an insured's vehicle is stolen or damaged in ways other than collision with another vehicle.

v. Uninsured (UM) Motorist Coverage

UM coverage protects individuals injured by uninsured drivers and is optional in Pennsylvania. Act 6 requires an insurer offer UM coverage to an insured that is equal to the insured's liability policy limits. 75 Pa. C.S. §1731(A). The insurer must also inform the named insured that he may reject or reduce this coverage by signing a waiver, set forth in the Statute. 75 Pa. C.S. §1731(B) & (C).

vi. Underinsured (UIM) Motorist Coverage

UIM coverage applies if an individual is injured, it was not the individual's fault, and the other party does not have enough insurance to compensate the individual for injuries sustained. UIM coverage is optional in Pennsylvania. An insurer must offer UIM coverage to an insured that is equal to the insured's liability policy limits. The insurer must also inform the named insured that he may reject this coverage by signing a waiver set forth in the Statute. 75 Pa. C.S.§1731(B) & (C).

[2] All medical bills must be reduced pursuant to the standards in the MVFRL before payment.

vii. Limited vs. Full Tort

An insured may elect either Limited Tort or Full Tort in Pennsylvania. 75 Pa. C.S. §1705. For Full Tort, the insured will pay a higher premium and can bring a claim for any injury suffered as a result of an automobile accident, regardless of whether the damages are economic or noneconomic in nature. For Limited Tort, an insured will pay a lower premium, but the insured is barred from seeking recovery for noneconomic damages unless the injuries suffered fall within one of the statutory exceptions. More specifically, where a plaintiff is Limited Tort and there is no applicable exception, the plaintiff's recovery will be limited solely to economic damages with the plaintiff barred from recovering damages for pain and suffering.

There are several exceptions to the application of Limited Tort, including in accidents where the individual has suffered a "serious injury," defined as "a personal injury resulting in death, serious impairment of bodily function or permanent serious disfigurement," and in scenarios where the tortfeasor was driving a vehicle registered in another state or commonwealth. 75 Pa. C.S. §1702. In choosing an insurance policy, the insured must affirmatively opt to be Limited Tort. Moreover, Limited Tort is an affirmative defense, with the burden on defendant to affirmatively establish the plaintiff's Limited Tort status.

3. Statute of Limitations

i. Statute of Limitations for various claims

Generally, Pennsylvania has a two-year statute of limitations for actions arising in tort, 42. Pa. C.S. § 5524(7), a four-year statute of limitations for actions arising in contract, 42. Pa. C.S. § 5524(8), and a six-year "catchall" statute of limitations for everything else. 42. Pa. C.S. § 5527. The six-year "catchall" provision states "any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application period of a limitation by section 5531 (relating to no limitation) must be commenced within six years. "In actions involving minors, all applicable statutes of limitations toll and do not begin to run until the minor turns the age of majority - namely 18 years old. Below is a chart for quick reference:

Type of Action	**Years to File a Lawsuit**	**Statute**
Negligence	2 years	42 Pa. C.S. § 5524(7).
Personal Injury	2 years	42 Pa. C.S. § 5524(2).
Property Damage	2 years	42 Pa. C.S. § 5524(2).
Wrongful Death	2 years	42 Pa. C.S. § 5524(2).
Products Liability	2 years	42 Pa. C.S. § 5524(7).
Contract (in writing)	4 years	42 Pa. C.S.§ 5525(7), (8).
Contract (oral)	4 years	42 Pa. C.S. § 5525(3).
Unfair Trade Practices	6 years	Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL) 73 P.S. § 201-1, *et seq.* has no express limitation on

		private actions, and thus falls in the six-year "catchall" limitations period. 42 Pa. C.S. § 5527(6).

ii. Discovery Rule

The two-year period to bring a personal injury lawsuit generally begins to run as soon as the accident happened. However, sometimes courts permit a delay in starting that two year period where the injured plaintiff does not know of their injury. This is called the "discovery rule." The "discovery rule" allows the statute of limitation to be tolled to the time when the plaintiff discovers, or in the exercise of due diligence, reasonably should have discovered the facts giving rise to the cause of action. *Hayward v. Medical Center of Beaver Cty*., 530 Pa. 320, 324, 608 A.2d 1040, 1043 (1992) (citations omitted).

iii. Statute of Repose

A statute of repose, like a statute of limitations, cuts off certain legal rights if they are not acted on by a certain time. Unlike a statute of limitation, however, which is triggered by an injury, a statute of repose instead, bars actions after a specified period of time has run from the occurrence of some event *other than* the injury which gave rise to the claim. Specifically, in Pennsylvania, the Statute of Repose affords some relief to builders, contractors, engineers and architects because the statute provides a limitation on bringing a civil action against any persons performing design, planning, supervision or observation of construction of improvements to real property within 12 years after completion of the construction or the improvement. 42 Pa. C.S. §5536; *Vargo v. Koppers Co.,* 552 Pa. 371, 715. A.2d 423, (1998).

4. Punitive Damages and Damage Caps

i. Punitive Damages

Generally, punitive damages are awardable in Pennsylvania, where there is "conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others" *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984) (*adopting* Restatement of Torts (Second) §908(2)); *see, e.g., Hutchison ex rel. Hutchison v. Luddy*, 870 A.2d 766 (Pa. 2005). Specifically, punitive damages are only appropriate where a plaintiff demonstrates that defendants conduct is "so outrageous as to demonstrate willful, wanton or reckless conduct." *Feld, supra.* Per Pennsylvania standard jury instructions, the plaintiff must demonstrate this conduct by clear and convincing evidence. Punitive damages are available in Insurer's Bad Faith actions. 42 Pa. C.S. § 8371. Punitive damages are an extreme remedy, available only in the "most exceptional matters." *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005).

Claims for punitive damages are *not* independent causes of action, and must be dismissed if the compensatory claim is dismissed. However, there need not be a compensatory award for punitive damages to be awarded. *Kirkbride v. Lisbon Contractors, Inc*., 555 A.2d 800 (Pa 1989); *Rhoads v. Heberling*, 451 A.2d 1378 (Pa. Super. Ct. 1982).

Pennsylvania Courts have held that punitive damages are not insurable, because insurance for punitive damages is against public policy. *Esmond v. Liscio*, 224 A.2d 793 (Pa. Super. Ct. 1966); *Aetna Life & Cas. Co. v. McCabe*, 556 F. Supp. 1342 (E.D. Pa. 1983)

ii. Non-Economic Damages Cap

There is no statutory damage cap for punitive damages.

[P]unitive damages need bear no proportional relationship to the compensatory damages awarded in a particular case. Rather, a reasonable relationship must exist

between the amount of the punitive damage award and the twin goals of punishment and deterrence, the character of the tortious act, the nature and extent of the harm suffered by the plaintiff, and the wealth of the defendant.

Sprague v. Walter, 656 A.2d 890 (Pa. Super. 1995).

The courts are empowered, however, to reduce punitive damages, where "the award is plainly excessive and exorbitant in a particular case." *Id.* (*citing Haines v. Raven Arms,* 5 36 Pa. 452, 456, 640 A.2d 367, 369 (1994)). The inquiry in such review is "whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption." *Id.* (*internal quotation and citation omitted).*

5. Collateral Source Rules

Pennsylvania common law has long recognized the modern understanding of the collateral source rule. *See, e.g. Wolf v. Studebaker,* 65 Pa. 459 (1870). The collateral source rule provides that payments to Plaintiff from a collateral source shall not diminish the damages otherwise recoverable from a liable tortfeasor. *Beechwoods Flying Service, Inc. v. Al Hamilton Contracting Corp.,* 504 Pa. 618, 476 A.2d 350 (1984); *Boudwin v. Yellow Cab Co.*, 410 Pa. 31, 38, 188 A.2d 259, 262 (1963), *see also, Moidel v. Peoples Natural Gas Company, 397 Pa. 212, 154 A.2d 399 (1959); Lobalzo v. Varoli, 409 Pa. 15, 185 A.2d 557.*

In terms of public policy concerns: "[t]he principle behind the collateral source rule is that it is better for the wronged plaintiff to receive a potential windfall than for a tortfeasor to be relieved of responsibility for the wrong." *Johnson v. Beane*, 541 Pa. 449, 456, 664 A.2d 96, 100 (1995). The collateral source's evidentiary bar is only applicable admission of said evidence is intended to "reduce the amount of the tortfeasor's liability." *Id.* at 456 (refusing application where admission of payment was to determine to whom tortfeasor was liable). Accordingly, collateral source evidence may be admissible where it is relevant to an issue other than reduction of liability.

The rule is subject to certain statutory limitations. For example, Pennsylvania's *Motor Vehicle Financial Responsibility law* prevents double recovery in motor vehicle accidents. *Armstrong v. Antique Automobile Club,* 670 F.Supp.2d 387, 393-94 (M.D. Pa. 2009)(*citing* 75 PA. C.S. §1720, 1722) (excluding applicability to out-of-state accident victims and insurers). Additionally, the *Medical Care Availability and Reduction of Error Act* provides that claimants cannot recover for medical expenses or lost earnings to the extent said losses are "covered by a private or public benefit or gratuity that the claimant has received prior to trial" subject to certain exceptions. 40 Pa. Stat. Ann. § 1303.508 (West).

6. Expert Admissibility Standard – *Daubert v. Frye*

Under Pennsylvania Rule of Evidence 702, expert testimony is admissible if "(a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson; (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and (c) the expert's methodology is generally accepted in the relevant field." Pa. R. E. 702. Pennsylvania is among those jurisdictions that have adopted the standard set forth in *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) in determining the admissibility of expert testimony. In *Frye*, the Circuit Court for the District of Columbia held that expert scientific testimony is barred from admission into evidence unless the expert's opinion has achieved "general acceptance" in the relevant scientific community. *Id.* In other words, to meet the *Frye* standard, the scientific evidence presented to the court must be generally accepted in the relevant scientific community. The Supreme Court of Pennsylvania adopted this standard in *Commonwealth v. Topa*, 471 Pa. 223, 231; 369 A.2d 1277, 1281 (1977).

The adoption of the *Frye* "general acceptance" standard, represents an attempt by Pennsylvania courts to produce more "uniform, objective, and predictable results among the courts." *Grady v. Frito-Lay, Inc.,* 576 Pa. 546, 577; 839 A.2d 1038,1044-25 (Pa. 2008). To that end, the aim of the *Frye* test is to measure the quality of scientific evidence prior to admission so that judges and jurors, whose backgrounds in science vary widely, will not be misled by unreliable evidence. *See Blum v. Merrell Pharmaceuticals Inc.*, 705 A.2d at 1317. Therefore, in order for evidence to be deemed admissible, there must be a showing of an existence of the causal relationship that is generally accepted in the relevant scientific community. The Superior Court of Pennsylvania recently clarified in *Snizavaich v. Rohm & Haas Co.*, 2013 Pa. Super 315 (Pa. Super 2013), that "the proffered expert testimony must point to, rely on or cite some scientific authority - whether facts, empirical studies, or the expert's own research - that the expert has applied to the facts at hand and which supports the expert's ultimate conclusion." If a party wishes to challenge the admissibility of expert testimony, the party must file a Motion to Exclude.

7. First Party Notice Requirements

In Pennsylvania, insurers must provide first-party claimants with all necessary claims forms within ten (10) working days. 31 Pa. Code § 146.5(d). Insurers must advise first-party claimants of the acceptance or denial of the claim within fifteen (15) working days after the receipts of properly executed proofs of loss. 31 Pa. Code § 146.7(a)(1). If an insurer needs more time to determine whether a first-party claim should be accepted or denied, the insurer must notify the first party claimant within fifteen (15) working days after receipt of the proofs of loss, giving reasons more time is needed. 31 Pa. Code § 146.7 (c)(1).

In addition, 31 Pa. Code §§ 146.6 and 146.7 require every insurer to complete investigation of a claim within thirty (30) days, and if the investigation cannot be completed within thirty (30) days, provide the claimant with a reasonable written explanation for the delay stating when a decision may be expected every forty-five days thereafter. Furthermore, Pennsylvania's *Unfair Insurance Practices Act*, does not create a private cause of action for automobile insureds to bring a claim against an insurer for failing to disclose to the insured, as a first party claimant, benefits, coverages, or other provisions of the policy under which a claim was presented. See *Albert v. Erie Ins. Exchange*, 65 A.3d 923 (Pa. Super. 2013)

8. Insurer Duty to Defend

Under Pennsylvania law, "[a]n insurer is obligated to defend its insured if the factual allegations of the complaint on its face encompass an injury that is actually or potentially within the scope of the policy." *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 606 Pa. 584, 609, 2 A.3d 526, 541 (Pa. 2010). The Supreme Court of Pennsylvania most recently explained "the question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint." *Id.; see also Donegal Mut. Ins. Co. v. Baumhammers*, 595 Pa. 147, 938 A.2d 286, 290 (Pa. 2007) As such, extrinsic facts not alleged in the complaint do not affect the insurer's duty to defend. *See Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 896–7 (Pa. 2006).40-541 (Pa. 2010) (*internal citations omitted*).

If the complaint might or might not fall within the policy's coverage, the insurance company is obliged to defend. *Jerry's Sport Ctr., Inc.*, 2 A.3d at 540. "Accordingly, it is the potential, rather than the certainty, of a claim falling within the insurance policy that triggers the insurer's duty to defend." *Id.* As such, an insurer may not justifiably refuse to defend a claim against its insured unless it is clear from an analysis of the allegations contained within the complaint and the language of the policy that the claim does not potentially come within the coverage of the policy. *Id.* Therefore, it is necessary to compare the specific allegations in the complaint with the actual language of the policy. *See Gene's Restaurant, Inc. v. Nationwide Ins. Co.,* 519 Pa. 306, 548 A.2d 246, 246–47 (1988).

The Pennsylvania Supreme Court suggests that the factual allegations within the complaint are to be construed liberally and in favor of the insured. *Jerry's Sport Ctr., Inc.*, 2 A.3d 526, 542. The Court also notes "the duty to defend is not limited to meritorious actions; it even extends to actions that are groundless, false, or fraudulent as long as there exists the possibility that the allegations implicate coverage." *Id.*

9. Bad Faith Claims against Insurers

Third-Party Bad Faith

Pennsylvania courts recognize that an insurer's fiduciary duties to their insureds obligate them to act in good faith in their settlement or defense of third-party claims against their insureds. Where a verdict is found in excess of a policy limits against an insured, the carrier may be liable for the excess ***and*** for all known or reasonably foreseeable compensatory damages. *Cowden v. Aetna Cas. Ins. Co.*, 133 A. 233 (Pa. 1955). Case law has defined the good faith standard as requiring the carrier to "treat a claim against its insured as if the insurer alone were liable for the entire amount." *Id.* "The insurer must also assess the impact upon its insured of the insurer's decision to settle or to litigate the claim against its insured." *Birth Ctr. v. St. Paul Companies, Inc.*, 727 A.2d 1144, 1155 (Pa. Super. Ct. 1999) *aff'd*, 567 Pa. 386, 787 A.2d 376 (2001). An insurer's contractual right to settle or defend is *not* a right to risk the insured's financial well-being unless there is a real and substantial chance of finding non-liability. Rather, a decision to litigate must be based upon a reasonable assessment of the circumstance and real and substantial chance of a verdict in favor of the insured. Simply stated, an insurer will be held responsible for an excess verdict if it unreasonably denies a settlement offer.

Perhaps unsurprisingly, this "reasonableness" standard makes the bad faith inquiry highly fact-specific. For example, a mere excess verdict is not *per se* bad faith. Moreover, there is no absolute duty to settle simply because there is a possibility of an excess verdict. Courts have held, however, that failure to notify an insured of settlement offers may be bad faith, but is not *per se*. *Compare Haugh v. Allstate Ins. Co.*, 322 F.3d 227 (3d Cir. 2003) (holding failure to inform was bad faith) *with Schubert v. American Independent Ins. Co.,* 2003 U.S. Dist. LEXIS 10769 (E.D. Pa. 2003) (holding failure to inform only bad faith where it can be shown insurer's conduct proximately caused the damages).

First-Party Bad Faith

Pennsylvania's First-Party Bad Faith right arises from statute. Specifically, 42 Pa.C.S. § 8371 provides that where "the court finds that the insurer has acted in bad faith toward the insured," the court may: "(1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%. (2) Award punitive damages against the insurer. (3) Assess court costs and attorney fees against the insurer."

Pennsylvania courts have generally defined "bad faith" as a "frivolous and unfounded" refusal to pay policy proceeds, involving "conduct which imports a dishonest purpose" and involves the breach of the insurer's known duty of good faith and fair dealing through "some motive of self-interest or ill will." Plaintiff need not prove outright fraud to sustain a bad faith claim. Rather, pursuant to this standard, it is plaintiff's burden to demonstrate by clear and convincing evidence that the carrier "(1) lacked a reasonable basis for its denial of coverage or benefits, and (2) that the insurer either knew, or recklessly disregarded its lack of a reasonable basis in denying the claim." *See, e.g., Brown v. Progressive Ins. Co.*, 860 A.2d 493 (Pa. Super. 2004); *Terletsky v. Prudential Prop. and Cas. Ins. Co.*, 649 A.2d 680 (Pa. Super. 1994); *Hayes v. Harleysville Mutual Ins. Co.*, 841 A.2d 121 (Pa. Super. 2003); *Keefe v. Prudential Prop. and Cas. Ins. Co.*, 203 F.3d 218 (3d Cir. 2000). Some courts have held that the plaintiff must also demonstrate some harm to recover. *Ravindran v. Harleysville Ins. Co.*, 65 D.&C.4th 338 (C.P. Phila. 2002), affirmed without op., 839 A.2d 1170 (Pa. Super. 2003), *appeal denied,* 882 A.2d 479 (Pa. 2005); *Builders Square, Inc. v. National Union Fire Ins. Co. of Pittsburg*h, 1996 U.

S. Dist. LEXIS 19444 (E.D. Pa. 1996), (holding Legislature did not intend to create private cause of action for bad faith "in a vacuum" and no cause of action exists absent some harm to the plaintiff).

Moreover, the courts have held that "mere negligence or bad judgment" on the part of an insurer's representatives does not constitute bad faith under the statute. *Condio v. Erie Ins. Exchange*, 899 A.2d 1136 (Pa. Super. 2006); *Bonenberger v. Nationwide Mut. Ins. Co.*, 791 A.2d 378 (Pa. Super. 2002). Thus, the primary consideration is the degree to which the insurer knew, or recklessly disregarded the lack of a reasonable basis for its position. *Williams v. Hartford Cas. Ins. Co.*, 83 F.Supp.2d 567 (E.D. Pa. 2000).

Again, this inquiry is highly fact-specific and is not limited to mere denial of claims. For example, courts have held that failure to conduct a good faith investigation of claims, failing to communicate with the insured, misrepresenting policy terms/limits, arbitrarily refusing to accept evidence and making unreasonable "lowball" offers to an insured can constitute bad faith conduct. *Brown, supra*; *Hollock v. Erie Ins. Exchange*, 842 A.2d 409 (Pa. Super. 2004), *appeal granted*, 893 A.2d 66 (Pa. 2005), *appeal dismisse*d, 903 A.2d 1185 (Pa. 2006); *Condio, supra.*

This statutory scheme has been held to be preempted by federal statute and thus inapplicable with respect to claims made under self-funded ERISAs**.**

10. Mandatory Arbitration Rules

The Pennsylvania Judicial Code enables each judicial district in the Commonwealth to establish compulsory arbitration process. 42 PA.C.S.§ 7361. Pursuant to the Judicial code, any party may appeal a ruling in compulsory arbitration for a trial *de novo*, rendering an arbitration decision more or less non-binding, provided that a timely appeal is filed. Generally, the hearings are intended to be conducted in conformity with Pennsylvania Rule of Civil Procedure § 1038 governing non-jury trials. However, certain rules of evidence are relaxed to ensure the arbitrations remain quick and cost-effective.

Perhaps most significant is the allowance of introduction of certain documents - namely, damage estimates, lost earnings documents, bills, and expert reports - without the necessity of authentication and without the need for live testimony, provided the documents are supplied to all parties twenty days in advance of arbitration.

Any appeals from the arbitration award must be done within thirty (30) days from the entry of the award on the docket. Pa.R.C.P. § 1308. An appeal by one party is considered to be an appeal for all parties as to all issues. Pa.R.C.P. § 1309.

Pursuant to the Pennsylvania Judicial Code's enabling provision, most Pennsylvania courts have adopted some form of a mandatory arbitration program, with cases worth below a certain monetary threshold (determined by the court) compelled to proceed through arbitration. Generally speaking, the procedural rules will be established locally and vary greatly as a result. For example, as the jurisdictional limits of compulsory are set locally, it varies from county to county (there are 67 counties in PA). Though not exhaustive, below is a table of some of the arbitration cut-offs:

County	**Arbitration limit**
Philadelphia, Montgomery, Lehigh, Bucks, Lancaster	$50,000
Dauphin	$35,000
York, Lackawanna	$30,000

Allegheny	$25,000

Rhode Island

11. Comparative Fault

Rhode Island's comparative negligence statute provides:

> In all actions hereafter brought for personal injuries, or where personal injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property or person having control over the property, may not have been in the exercise of due care shall not bar a recovery, but damages shall be diminished by the finder of fact in proportion to the amount of negligence attributable to the person injured, or the owner of the property or the person having control over the property

9 R.I. Gen. Laws § 9-20-4.

The statute comes into play only after negligence is first established on the part of both the plaintiff and the defendant. Calise v. Hidden Valley Condo. Ass'n, Inc., 773 A.2d 834, 837–38 (R.I. 2001). Once that is established, the plaintiff's "damages shall be diminished by the finder of fact in proportion to the amount of negligence attributable" to the plaintiff. Section 9-20-4.

Section 9-20-4 only permits comparison of either the negligence between a plaintiff and a defendant or, in the case of multiple defendants, the comparison of any negligence on the part of the plaintiff and on the part of each particular defendant. It does not contemplate or address the proportionate negligence between the various defendants.

Rhode Island tortfeasors are jointly and severally liable. R. I. Gen. Laws § 10-6-2. "The right of contribution exists among joint tortfeasors; provided however, that when there is a disproportion of fault among joint tortfeasors, the relative degree of fault of the joint tortfeasors shall be considered in determining their pro rata shares." R. I. Gen. Laws § 10-6-3. "A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement." R.I. Gen. Laws § 10-6-5.

12. Insurance Minimum Limits

- Bodily Injury: $25,000 per person; $50,000 per incident R.I. Gen. Laws § 31-31-7
- Property Damage: $25,000 per incident R.I. Gen. Laws § 31-31-7
- UM/UIM: Pursuant to R.I. Gen. Laws Ann. § 27-7-2.1, an insured may decline to purchase uninsured/underinsured (UM/UIM) motorist coverage if the insured chooses to buy only minimum limits of bodily injury and property damage liability as required by law. However, if the insured elects to purchase UM/UIM coverange, the insured may not elect UM/UIM bodily injury liability limits less than the minimum under R.I. Gen. Laws § 31-31-7
- PIP: Not required.

13. Statute of Limitations

Except as otherwise specially provided, all civil actions shall be commenced within ten (10) years next after the cause of action shall accrue, and not after. R.I. Gen. Laws § 9-1-13.

Negligence: Actions for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue, and not after. R.I. Gen. Laws § 9-1-14.

Negligent Construction: Falls under Rhode Island's "catch all" provision and shall be commenced within ten (10) years next after the cause of action shall accrue, and not after. R.I. Gen. Laws § 9-1-13.

Product Liability: An action for the recovery of damages for personal injury, death, or damage to real or personal property, including any action based upon implied warranties arising out of an alleged design, inspection, listing, or manufacturing defect, or any other alleged defect of whatsoever kind or nature in a product, or arising out of any alleged failure to warn regarding a product, or arising out of any alleged failure to properly instruct in the use of a product, shall be commenced within ten (10) years after the date the product was first purchased for use or consumption. R.I. Gen. Laws § 9-1-13.

Wrongful Death: Except as otherwise provided, every action brought pursuant to this chapter shall be commenced within three (3) years after the death of the person. With respect to any death caused by any wrongful act, neglect or default which is not known at the time of death, the action shall be commenced within three (3) years of the time that the wrongful act, neglect or default is discovered or, in the exercise of reasonable diligence, should have been discovered. R.I. Gen. Laws § 10-7-2.

Breach of Contract: Falls under Rhode Island's "catch all" provision and shall be commenced within ten (10) years next after the cause of action shall accrue, and not after. R.I. Gen. Laws § 9-1-13.

Unlawful Trade Practices: Although Rhode Island's Deceptive Trade Practices Act (DTPA) does not have its own statute of limitations, the Rhode Island Supreme Court has held that the period of limitations for DTPA claims depends on the underlying nature of the claim itself. *Kennedy v. Acura*, 01-4063, 2002 WL 31331373, at *6 (R.I. Super. 2002)(citing *Paul v. City of Woonsocket*, 745 A.2d 169 (R.I. 2000) (holding that courts must look to the limitations period of the state's most analogous cause of action).

14. Punitive Damages and Damages Caps

Punitive Damages: Rhode Island allows for the recovery of punitive damages."The standard in Rhode Island for imposing punitive damages is rigorous and will be satisfied only in instances wherein a defendant's conduct requires deterrence and punishment over and above that provided in an award of compensatory damages." *Palmisano v. Toth*, 624 A.2d 314, 318 (R.I. 1993)(citing *Davet v. Maccarone,* 973 F.2d 22, 27 (1st Cir.1992)). "An award of punitive damages is considered an extraordinary sanction and is disfavored in the law, but it will be permitted if awarded with great caution and within narrow limits." *D'Amato v. Rhode Island Hospital Trust National Bank,* 772 F.Supp. 1322, 1324 (D.R.I.1991). The determination of whether a party has met the standard to impose a punitive damage award is a question of law. *Id.* Once the trial court has determined that punitive damages may be awarded, the amount of the award is left to the discretion of the trier of fact. The standard of proof is clear and convincing evidence. *Healey v. New England Newspapers, Inc.*, 555 A.2d 321 (R.I. 1989).

The Rhode Island Supreme Court has held that the Legislature intended to preclude the recovery of punitive damages in a wrongful death action, since the wrongful death statute limits damages to shoes involving pecuniary loss. *Simeone v. Charron*, 762 A.2d 442, 446 (R.I. 2000). Likewise, punitive damages are not permitted in survival actions. R.I. Gen. Laws § 9-1-8.

Non-Economic Damages Cap: Rhode Island does not cap noneconomic damages. *Baumgartner v. American Standard, Inc.*, 2015 WL 4523476 (R.I.Super. 2015)

15. Collateral Source Rules

The collateral source rule applies to negligence actions in Rhode Island, and provides that "a tortfeasor [is required] to pay in full the damages suffered by the injured person without credit for any amounts received by the injured person from sources independent of the defendant." *Colvin v. Goldenberg,* 273 A.2d 663, 666 (R.I. 1971); *see also Votolato v. Merandi*, 747 A.2d 455, 463 (R.I. 2000).Although this rule may allow plaintiffs to recover damages in excess of their injuries, the rationale underlying the rule is that it is better for the windfall to go to the injured party rather than to the wrongdoer. *Colvin v. Goldenberg,* 108 R.I. 198, 202, 273 A.2d 663, 666 (1971); *Oddo v. Cardi,* 100 R.I. 578, 584–85, 218 A.2d 373, 377 (1966). *Esposito v. O'Hair*, 886 A.2d 1197, 1199 (R.I. 2005).Rhode Island's collateral source rule does not apply to workers' compensation benefits, *Moniz v. Providence Chain Co.*, 618 A.2d 1270, 1272 (R.I. 1993).

The collateral source rule does not apply to medical malpractice actions pursuant to the Medical Malpractice Reform Act, R.I. Gen. Laws § 9-19-34.1. A medical malpractice defendant may offer evidence of a plaintiff's receipt of collateral payments. If the defendant elects to introduce such evidence, the plaintiff may offer evidence of contributions or payments made to secure such benefits. *Id.* The jury must be instructed to reduce the award by the difference between the benefits received and payments made. *Id.*However, Medicaid payments do not fall within the collateral source statute and are therefore inadmissible in a medical malpractice action. *Esposito v. O'Hair*, 886 A.2d 1197, 1204 (R.I. 2005)

16. Expert Admissibility Standard – *Daubert v. Frye*

Rhode Island's Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion.

R.I. R. Evid. 702.

The Rhode Island Supreme Court has not expressly adopted *Daubert*, but cites to it with approval. To illustrate, in *Morabit v. Hoag*, 80 A.3d 1, 12 (R.I. 2013), the Rhode Island Supreme Court expressly instructed trial courts to look to the following four factors from *Daubert* in assessing the reliability and validity of expert testimony:

> (1) whether the proffered knowledge has been or can be tested; (2) whether the theory or technique has been the subject of peer review and publication; (3) whether there is a known or potential rate of error; and (4) whether the theory or technique has gained general acceptance in the scientific community.

17. First Party Notice Requirements

A requirement in an insurance policy that notice be given to the insurer 'as soon as practicable' or 'immediately' is satisfied if the insured acts diligently and with all reasonable dispatch, having in mind all the circumstances and facts of a particular case. *Pickering v. Am. Employers Ins. Co.*, 109 R.I. 143, 158–60, 282 A.2d 584, 592–93 (1971). In determining whether notice was given within a reasonable time, the following circumstances, among others, have been considered to be relevant: the length of delay in giving the notice, the reasons for the delay and the probable effect of the delay on the insurer. *Id.* Consideration of the effect of the delayed notice involves the extent, if any, of prejudice suffered by an insurer because it was not notified of a loss or claim within the reasonable time. *Id.* The carrier has the burden of showing such prejudice. *Id.* Moreover, a technical breach of the notice provisions will not bar recovery; the Rhode Island Supreme Court has included within the term 'notice' such items as the furnishing of a proof of claim and a copy of the summons and complaint. *Id.*

18. Insurer Duty to Defend

In general, the duty to defend an insured in Rhode Island is determined by applying the 'pleadings test.' " *Derderian v. Essex Ins. Co.*, 44 A.3d 122, 127 (R.I. 2012)(multiple citations omitted). "That test requires the trial court to look at the allegations contained in the complaint, and 'if the pleadings recite facts bringing the injury complained of within the coverage of the insurance policy, the insurer must defend irrespective of the insured's ultimate liability to the plaintiff." As a general principle, Rhode Island will find that a duty to defend arises when the complaint in the underlying tort action contains facts sufficient to bring the case within or potentially within the coverage of the policy. *Hingham Mut. Fire Ins. Co. v. Heroux*, 549 A.2d 265, 266 (R.I. 1988)

19. Bad Faith Claims Against Insurers

Rhode Island law provides:

> an insured under any insurance policy as set out in the general laws or otherwise may bring an action against the insurer issuing the policy when it is alleged the insurer wrongfully and in bad faith refused to pay or settle a claim made pursuant to the provisions of the policy, or otherwise wrongfully and in bad faith refused to timely perform its obligations under the contract of insurance. In any action brought pursuant to this section, an insured may also make claim for compensatory damages, punitive damages, and reasonable attorney fees.

R.I. Gen. Laws Ann. § 9-1-33.

A plaintiff suing an insurer for bad faith must prove that the insurer breached its contract (the insurance policy) as a necessary prerequisite to a bad faith claim. *Lewis v. Nationwide Mut. Ins. Co.*, 742 A.2d 1207, 1209 (R.I. 2000).Rhode Island state courts routinely sever and stay a plaintiff's bad faith claims from his or her breach of contract claims and try the cases separately. *Bartlett v. John Hancock Mut. Life Ins. Co.*, 538 A.2d 997, 999-1000 (R.I. 1988). Thus, the insurer's claims file is protected from discovery unless and until the plaintiff proves that the insurer breached the contract.

20. Mandatory Arbitration Rules

Rhode Island's Automobile Insurance Statutes Mandatory Arbitration Provision mandates that all motor vehicle insurance contract include an arbitration provision. It states:

> (a) Every contract of motor vehicle liability insurance, issued in the state by an insurance carrier authorized to do business in the state, shall contain the following provisions:

(1) Any person, referred to in this section as "the plaintiff," suffering a loss, allegedly resulting out of the ownership, maintenance, or use of a motor vehicle by an insured or self-insured, and allegedly resulting from liability imposed by law for property damage, bodily injury, or death, may, at his or her election, whenever the claim is for fifty thousand dollars ($50,000) or less, submit the matter to arbitration pursuant to chapter 3 of title 10;

27 R.I. Gen. Laws Ann. § 27-10.3-1 (West)

Rhode Island does not require that medical malpractice actions be arbitrated.

South Carolina

1. Comparative Fault

South Carolina is a modified comparative negligence/fault state. Under South Carolina law, a plaintiff may only recover damages if his own negligence is not greater than the combined fault of the defendants. *Hurd v. Williamsburg County*, 363 S.C. 421, 611 S.E.2d 488, 492 (2005). If plaintiff is partially negligent, but his negligence does not exceed the combined negligence of others, he may recover, but the recovery will be reduced in proportion to his negligence. If plaintiff's fault is 50% and the defendants combined fault is 50%, plaintiff can recover 50% of his damages. Generally, comparison of the plaintiff's negligence with that of the defendants is a question of fact for the jury to decide.

As to co-defendants, or alleged joint-tortfeasors, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent (50%) of the total fault for the indivisible damages. A defendant whose conduct is determined to be less than fifty percent (50%) of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury. S.C. Code. Ann. § 15-38-15. If a defendant is determined to be 50% or more at fault, that defendant is subject to joint and several liability.

2. Insurance Minimum Limits

South Carolina law requires that all automobile insurance policies contain certain minimum coverage amounts. S.C. Code Ann. § 38-77-140 forbids the selling of an auto insurance policy "unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles within the United States or Canada . . . as follows:

(1) twenty-five thousand dollars because of bodily injury to one person in any one accident and, subject to the limit for one person;

(2) fifty thousand dollars because of bodily injury to two or more persons in any one accident; and

(3) twenty-five thousand dollars because of injury to or destruction of property of others in any

one accident."

In addition, S.C. Code Ann. § 33-77-160 requires insurers to offer under and uninsured motorist coverage "up to the limits of the insured's liability coverage in addition to the mandatory coverage."

3. Statute of Limitations

Negligence:
General negligence actions are covered by the default three year statute of limitations in S.C. Code Ann. § 15-3-530. Medical malpractice actions must be brought within "three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled" per S.C. Code Ann. § 15-3-545.

Negligent Construction:
Actions for negligent construction are subject to the three year statute of limitations found in S.C. Code Ann. § 15-3-530 for actions based in negligence or contract. In defective construction cases, courts apply the "discovery rule" when determining the date on which the statute of limitations begins to run. The three year statute of limitations begins to run when the plaintiff knew or, through the exercise of reasonable diligence, should have known that it had sustained an injury and that another party was responsible for the injury (even if it does not know the identity of the responsible party at the time the injury is discovered). *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

South Carolina also has a statute of repose which applies to improvements to real property. The statute of repose is eight (8) years from the date of substantial completion of the improvement, for completion dates occurring after July 1, 2005. S.C. Code. Ann. § 15-3-640. For improvements that were completed prior to July 1, 2005, a thirteen (13) year statute of repose applies. Claims related to defective construction are barred if not brought within the applicable statute of repose period; with the exception of claims of gross negligence, recklessness and/or fraud.

Product Liability:
Products liability actions are subject to the default three year statute of limitations in S.C. Code Ann. § 15-3-530.

Wrongful Death:
Wrongful death actions are subject to a three year statute of limitations per S.C. Code Ann. § 15-3-530(6).

Breach of Contract:
The three year statute of limitations in S.C. Code Ann. § 15-3-530 applies to all actions arising out of contract save those identified in § 15-3-520 ("action upon a bond or other contract in writing secured by a mortgage of real property" and "an action upon a sealed instrument, other than a sealed note and personal bond for the payment of money only whereon the period of limitation is the same as prescribed in Section 15-3-530, except that a sealed contract for sale or an offer to buy or sell goods whereon the period of limitation is the same as prescribed in Section 36-2-725").

Unlawful Trade Practices:
Unlawful Trade Practice Act claims fall under the three year statute of limitations found in S.C. Code Ann. § 15-3-530.

Workers Compensation:
Under the South Carolina workers compensation act, an injured worker has two (2) years from the date of injury to bring a claim for workers compensation. S.C. Code Ann. § 42-15-40. However, no such limitation applies to a claimant who is mentally incompetent or a minor dependent as long as he has no guardian, trustee or committee. S.C. Code Ann. § 42-15-50.

4. Punitive Damages and Damages Caps

Punitive Damages: The Supreme Court of "South Carolina [holds that] 'punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future.'" *Gamble v. Stevenson*, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991)(citation omitted). The court has identified seven factors that should be considered when reviewing punitive awards:

> To ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) . . . "other factors" deemed appropriate.

Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991)(citation omitted).

The South Carolina Court of Appeals has stated that courts "must analyze [a punitive] award in light of the United States Supreme Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 809 (1996)." The relevant factors identified "for determining the reasonableness of punitive damages awards [include]: (1) the degree of reprehensibility; (2) the ratio of the punitive damages award to the actual harm inflicted on the plaintiff; and (3) the comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *Welch v. Epstein*, 342 S.C. 279, 307, 536 S.E.2d 408, 422 (Ct. App. 2000)(citing *Gore*, 517 U.S. at 809).

Non-Economic Damages Cap: South Carolina law limits recovery for non-economic damages against a single healthcare provider to three hundred fifty thousand dollars ($350,000) per claimant. S.C. Code Ann. § 15-32-220(A). This statute also limits damages against a single health care institution to three hundred fifty thousand dollars ($350,000) per claimant. S.C. Code Ann. § 15-32-220(B). If "final judgment is rendered against more than one health care institution, or more than one health care provider, or any combination

thereof" each individual provider's or institution's liability is capped at three hundred fifty thousand dollars ($350,000). S.C. Code Ann. § 15-32-220(C).

The foregoing caps "do not apply if the jury or court determines that the defendant was grossly negligent, wilful, wanton, or reckless, and such conduct was the proximate cause of the claimant's noneconomic damages, or if the defendant has engaged in fraud or misrepresentation related to the claim, or if the defendant altered or destroyed medical records with the purpose of avoiding a claim or liability to the claimant." S.C. Code Ann. § 15-32-220(E).

5. Collateral Source Rules

The collateral source rule is applicable in South Carolina. *Covington v. George*, 359 S.C. 100, 597 S.E.2d 142 (2004); *Pustaver v. Gooden*, 350 S.C. 409, 566 S.E.2d 199 (Ct. App. 2002). "To qualify as a collateral source, the source must be wholly independent of the wrongdoer." *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 172, 604 S.E.2d 385, 393 (2004) (citation and internal quotation marks omitted). There are no notable exceptions to this rule.

Under South Carolina law, a tortfeasor has no right to a reduction of damages because of payments or compensation received by the injured party from a source *wholly independent* of the wrongdoer. Stated differently, a tortfeasor has no right to reduce or offset damages for which it is liable by proving that the plaintiff has received, or will receive, compensation or indemnity for the loss from a collateral source, wholly independent of the tortfeasor. The only requirement for the collateral source rule is that the source be wholly independent. A "wholly independent" source has been defined as a source that the wrongdoer has not contributed to, or a source that has not made payments to the injured party on behalf of the wrongdoer.

6. Expert Admissibility Standard – *Daubert v. Frye*

The South Carolina Rules of Evidence employ very common language with regard to experts: "a witness qualified as an expert by knowledge, skill, experience, training, or education." Rule 702(A), SCRE. In order for an expert's evidence to be heard by a jury, a court must "[find] that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010) (citation omitted).

7. First Party Notice Requirements

South Carolina law indicates that:

"an insurer, seeking to relieve itself of liability because of the violation by the insured of a cooperation clause in the policy, has the burden of showing not only that the insured failed to cooperate within the meaning of the policy provision but [sic] that it was substantially prejudiced thereby. Such issue is generally one of fact for the jury and becomes one of law for the court only where there can be but one reasonable inference from the evidence."

Vaught v. Nationwide Mut. Ins. Co., 250 S.C. 65, 156 S.E.2d 627 (1967). *See also Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 446 S.E.2d 417 (1994).

8. Insurer Duty to Defend

City of Hartsville v. S. Carolina Mun. Ins. & Risk Fin. Fund provides a comprehensive overview of the duty to defend in South Carolina. 382 S.C. 535, 677 S.E.2d 574 (2009). First, "[i]f the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend. *Id.* at 543, 677 S.E.2d at 578 (citing *Gordon–Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 38 (1980)). Second, [a]n insurer's duty to defend is separate and distinct from its obligation to pay a judgment rendered against an insured. However, these duties are interrelated. If the facts alleged in a complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend." *Id.* at 544, 677 S.E.2d at 578 (citation omitted). Finally, "an insurer's duty to defend is not strictly controlled by the allegations in the complaint. Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer." *Id.* (citing *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 657, 661 S.E.2d 791, 798 (2008); *see BP Oil Co. v. Federated Mut. Ins. Co.*, 329 S.C. 631, 638, 496 S.E.2d 35, 39 (Ct. App.1998).

When multiple insurers are involved, each has a duty to defend as if no other insurer existed. *Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha*, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977). "The obligation is several and the insurer is not entitled to divide the duty nor require contribution from another absent a specific contractual right." *Id.*

9. Bad Faith Claims against Insurers

South Carolina "recognize[s] the existence of a cause of action for breach of the implied covenant of good faith and fair dealing by an insured against his or her insurer for consequential damages allegedly suffered because of the insurer's bad faith handling of third party claims. *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 504, 473 S.E.2d 52, 55 (1996). Such a claim sounds in tort, not in contract law. *Id.* at 503, 473 S.E.2d at 55. The Court of Appeals has limited this right of action: "South Carolina law does not recognize a cause of action by a third party for the tort of bad faith refusal to pay benefits." *Kleckley v. Nw. Nat. Cas. Co.*, 330 S.C. 277, 286, 498 S.E.2d 669, 674 (Ct. App. 1998) aff'd, 338 S.C. 131, 526 S.E.2d 218 (2000).

Under South Carolina law, the elements of a cause of action for bad faith refusal to pay first-party benefits under contract of insurance are: (1) existence of mutually binding contract of insurance between plaintiff and defendant; (2) refusal by insurer to pay benefits due under contract; (3) resulting from insurer's bad faith or unreasonable action in breach of implied covenant of good faith and fair dealing arising on contract; and (4) causing damage to insured. *University Medical Associates of Medical University of S.C. v. UnumProvident Corp.*, 335 F.Supp.2d 702 (2004).

There is one circumstance in which the third-party standing rule is excepted. Under the Doctrine of Necessaries, a widow was found to have standing to bring a bad faith claim against an insurer when her late husband was the insured party. *Ateyeh v. Volkswagen of Florence, Inc.*, 288 S.C. 101, 103, 341 S.E.2d 378, 380 (1986). The plaintiff "[stood] in a derivative policyholder position, and her interest in enforcement of the policy [was] not merely contingent. *Id.*

10. Mandatory Arbitration Rules

There is no mandatory arbitration requirement in South Carolina. However, all civil actions filed in circuit court, all cases in which a Notice of Intent to File Suit is filed pursuant S.C. Code Ann. § 15-79-125(A), and all contested issues in domestic relations actions filed in family court are subject to court-ordered mediation, unless the parties agree to conduct an arbitration. Exceptions to this "ADR Requirement" include: special proceedings (mandamus, habeas corpus, etc.); requests for temporary relief; appeals; post-conviction relief matters; contempt of court proceedings; forfeiture proceedings by government; mortgage foreclosures; family court cases initiated by DSS; and cases previously subjected to an ADR conference. S.C. Code Ann. § 15-79-125.

All medical malpractice actions are subject to mandatory mediation prior to filing a summons and complaint. S.C. Code Ann. § 15-79-125(C) and (E). Unless an extension is granted by a court, the mediation conference must occur "[w]ithin ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit." S.C. Code Ann. § 15-79-125(C). Contractual obligations to arbitrate, or participate in any other form of alternate dispute resolution are not affected by mandatory mediation. S.C. Code Ann. § 15-79-125(F).

South Dakota

1. Comparative Fault

South Dakota is a pure comparative fault state. SDCL 20-9-2. The fact that the plaintiff may have been guilty of contributory negligence does not bar a recovery when the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant. SDCL 20-9-2. However, in those cases, the plaintiff's damages shall be reduced in proportion to the amount of plaintiff's contributory negligence. SDCL 20-9-2. A plaintiff's recovery will be barred when the plaintiff's contributory negligence is greater than slight compared to the negligence of the defendant. *Good Low v. United States*, 428 F.3d 1126, 1128 (8th Cir. 2005).

2. Insurance Minimum Limits

Title 58 sets forth South Dakota's insurance laws, including mandatory insurance requirements. South Dakota's minimum liability insurance requirements are as follows:

- Bodily Injury and Property Damage: $25,000 per person; $50,000 per crash for bodily injury to or the death of two or more persons in any one accident; and $25,000 per crash for damage to property. SDCL 32-35-70

- Personal Injury Protection (PIP): not required. *See Nodak Mut. Ins. Co. v. McDowell*, 784 N.W.2d 483, 484 (S.D. 2010)

- Uninsured and Underinsured (UM/UIM): uninsured motorist coverage must equal the policy minimums for bodily injury or death. SDCL 58-11-9. Coverage cannot exceed $100,000 for the death of one person or $300,000 for one accident unless additional coverage is requested by the insured. SDCL 32-35-70

3. Statute of Limitations

Negligence: Negligence actions are governed by the "catch-all" three-year statute of limitations period under SDCL 15-2-14.

Negligent Construction: South Dakota statute provides that suits for construction defect be commenced within ten years of "substantial completion of construction." SDCL 15-2A-3. The date of substantial completion is based on the date on which the owner can "occupy or use the improvement for the use it was intended." SDCL 15-2A-3.

Product Liability: Product liability actions must be must be commenced no later than three years after the date when the personal injury, death, or property damage occurred, or "became known or should have become known to the injured party." SDCL 15-2-12.2.

Wrongful Death: An action for wrongful death shall be commenced within three years after the death of the deceased person. SDCL 21-5-3.

Breach of Contract: An action upon a contract, obligation, or liability, express or implied must be commenced within six years. SDCL 15-2-13.

Unlawful Trade Practices: An action based on deceptive trade practices must be brought within four years after the occurrence or discovery of the conduct which is the subject of the action. SDCL 37-24-33.

4. Punitive Damages and Damages Caps

Punitive Damages: South Dakota does allow recovery of punitive damages. South Dakota allows punitive damages in tort cases when a defendant has acted with oppression, fraud, or malice. SDCL 31-3-2. Malice can be presumed when a defendant demonstrates a disregard for the rights of another, where an insurer "acted in the spirit of mischief or criminal indifference to its civil obligation to its insured or, at a minimum, demonstrated a total disregard for the insured's rights by a bad faith breach of the insurance contract, the insured was entitled to an award of punitive damages." *Biegler v. American Family Mut. Ins. Co.*, 2001 SD 13, 621 N.W.2d 592, 2001 S.D. LEXIS 13 (S.D. 2001).

There is no "bright-line rule" on the ratio of punitive damages to compensatory damages. *Biegler v. American Family Mut. Ins. Co.*, 2001 SD 13, 621 N.W.2d 592, 2001 S.D. LEXIS 13 (S.D. 2001). South Dakota Courts have upheld punitive verdicts with ratios of 35 to 1, 30 to 1, 27 to 1, and 11 to 1. Veeder v. Kennedy, 1999 SD 23, P52 n 19, 589 N.W.2d 610, 621 n 19.

Non-Economic Damages Cap: South Dakota caps general non-economic damages for personal injury or death for medical malpractice at $500,000, but places no cap on economic or special damages. SDCL 21-3-11.

5. Collateral Source Rules

South Dakota's collateral source rule prevents defendants from offering proof of benefits provided by collateral sources received by the plaintiff which compensate the plaintiff, either in whole or in part for his or her injury. *Papke v. Harbert*, 738 N.W.2d 510, 532 (S.D. 2007). Further, South Dakota allows plaintiffs to recover the reasonable value of their medical services, which is a question for the jury. *Id.*

6. Expert Admissibility Standard – *Daubert v. Frye*

South Dakota follows the *Daubert* standard, and has codified it at SDCL 19-15-2. Before the court will admit expert testimony, it must determine that the testimony is based on a reliable foundation and is relevant. *Burley v. Kytec Innovative Sports Equip., Inc.*, 737 N.W.2d 397, 402-03 (S.D. 2007). The burden to prove this lies on the proponent of the testimony. SDCL 19-9-7. Admissibility must be proven by a preponderance of the evidence. *Burley v. Kytec Innovative Sports Equip., Inc.*, 737 N.W.2d 397, 402-03 (S.D. 2007). "Relevant" evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19-12-1. In order to determine whether scientific testimony may be received, the proponent must show the following:

(1) it has been tested;
(2) it has been subjected to peer review and publication;
(3) the known or potential rate of error must be known; and
(4) to what extent it has received general acceptance.

In re S.D. Microsoft Antitrust Litig., 657 N.W.2d 668, 670 (S.D. 2003). A party offering expert testimony need not prove to a judge in a *Daubert* hearing that the expert's opinion is correct; instead that party need only show that the testimony rests on "good grounds, based on what is known." *Burley v. Kytec Innovative Sports Equip., Inc.,* 737 N.W.2d 397, 406 (S.D. 2007). Any other deficiencies in an expert's testimony can be tested at trial. *Id.*

7. First Party Notice Requirements

South Dakota recognizes that the purpose of a notice requirement is "not to provide a technical escape hatch to allow the insurance company to deny coverage." *Auto-Owners Ins. Co. v. Hansen Hous., Inc.*, 604 N.W.2d 504, 513 (S.D. 2000). In doing so, South Dakota courts put the notice requirement in its proper perspective. *Id.* "The clear purpose of the notice provision is to protect the ability of the insurer to prepare a viable defense by preserving its ability fully to investigate the accident." *Id.* (quoting *Great American Ins. Co. v. C.G. Tate Constr. Co.*, 303 N.C. 387, 279 S.E.2d 769, 775 (NC 1981)). Thus, the goal of notice requirements is to protect an insurer from prejudice. *Id.*

If delayed notification "has not prejudiced the insurer's ability to defend a claim, then there is no reason to strictly enforce the notice requirement." *Id.* Thus, if the insurer cannot show prejudice, "it follows neither logic nor fairness to relieve the insurance company of its obligation under the policy in such a situation." *Id.*

8. Insurer Duty to Defend

An insurer's duty to defend and its duty to pay on a claim are severable and independent duties. *Biegler v. Am. Family Mut. Ins. Co.*, 621 N.W.2d 592, 595 (S.D. 2001). The duty to defend is much broader than the duty to pay a judgment rendered against the insured. *Id.*

The duty of an insurance company to defend its insured is determined by the allegations of the complaint and the action brought against the insured. *Fort Pierre v. United Fire & Cas. Co.,* 463 N.W.2d 845, 847 (S.D. 1990). The burden of showing no duty to defend rests on the insurer. *Hawkeye-Security Ins. Co. v. Clifford*, 366 N.W.2d 489, 492 (S.D. 1985). The insurer must show the claim clearly falls outside of policy coverage. *Id.* If, "after considering the complaint, and when

appropriate, other record evidence, doubt exists whether the claim against the insured arguably falls within the policy coverage, such doubts must be resolved in favor of the insured." *Id.*

9. Bad Faith Claims Against Insurers

South Dakota case law has repeatedly recognized a cause of action for first-party bad faith. *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 771 N.W.2d 623, 629-30 (S.D. 2009). In order to show proof of bad faith, "there must be an absence of a reasonable basis for denial of policy benefits [or failure to comply with a duty under the insurance contract] and the knowledge or reckless disregard [of the lack] of a reasonable basis for denial." *Id.* The court will infer and impute knowledge of the lack of a reasonable basis for denial to an insurance company where "there is a reckless disregard of a lack of reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured." *Id.* An insurance company may challenge claims of bad faith which are "fairly debatable" and will only be found liable when it is determined that the company "intentionally denied (or failed to process or pay)" a claim without a reasonable basis. *Id.* If the claim is fairly debatable, an insurer has a reasonable basis to deny the claim, and cannot be said to have denied the claim in bad faith. *Id.* (citing 46A CJS Insurance § 1873 (2008)). The focus is on the "existence of a debatable issue, not on which party was correct." *Id.*

The South Dakota Supreme Court has also recognized first-party bad faith as an intentional tort. *Id.* This tort occurs when "an insurance company consciously engages in wrongdoing during its processing or paying of policy benefits to its insured." *Hein v. Acuity*, 2007 SD 40, P 10, 731 NW2d 231, 235 (citations omitted). The Court has recognized that in the first-party context, "there exists a contractual relationship, whereby the insurer has accepted a premium from its insured to provide coverage." *Id.* Thus, bad faith can extend to situations beyond "mere denial of policy benefits." *Id.* Bad faith conduct can also include the failure to conduct a reasonable investigation concerning the claim. *Id.* This is determined based on the facts and law available to the insurer at the time it decided to deny coverage. The question of whether an insurer has acted in bad faith is usually a question of fact. *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 771 N.W.2d 623, 629-30 (S.D. 2009).

10. Mandatory Arbitration Rules

South Dakota has adopted the Uniform Arbitration Act. *See* SDCL 21-25A *et seq.* Under these statutes, South Dakota courts will generally enforce an arbitration provision in a written contract. SDCL 25-21A-1. However, the same is not true with regard to arbitration provisions in insurance policies. South Dakota statute states, "[E]very [arbitration] provision in any such policy requiring arbitration or restricting a party thereto or beneficiary thereof from enforcing any right under it by usual legal proceedings in ordinary tribunals or limiting the time to do so is void and unenforceable." SDCL 25-21A-3. There is little case law interpreting this statutory bar, and no case law challenging the validity of the statute.

Tennessee

1. Comparative Fault

In 1992, the Tennessee Supreme Court abandoned contributory negligence in favor of a system of modified comparative fault. *McIntyre v. Balentine,* 833 S.W.2d 52, 56 (Tenn.1992). so long as a plaintiff's negligence remains less than a defendant's negligence the plaintiff may recover; in such a case, plaintiff's damages are to be reduced in proportion to the percentage of the total negligence attributable to the plaintiff. *Id.* Additionally, the court adopted the non-party defense, allowing juries to apportion fault to a culpable person or entity though they are not a party to the lawsuit. *Id.* at 58.

The doctrine of joint and several liability no longer applies to circumstances in which separate, independent, negligent acts, of more than one tortfeasor, combine to cause a single,

indivisible injury. *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 87 (Tenn. 2001)(citing *Banks v. Elks Club Pride of Tennessee 1102*, 301 S.W.3d 214, 223 (Tenn. 2010); *Owens v. Truckstops of Am.,* 915 S.W.2d 420, 431 n. 13, 432 (applying joint and several liability to parties in the chain of distribution of a product when the theory of recovery is strict liability); *see also Resolution Trust Corp. v. Block,* 924 S.W.2d 354, 355–56 (Tenn.1996) (holding the officer and director jointly and severally liable to the corporation for their collective actions)).

2. Insurance Minimum Limits

Tennessee financial responsibility law requires auto owners to maintain:

- A written proof of liability insurance coverage provided by a single limit policy with a limit of not less than sixty-five thousand dollars ($65,000) applicable to one (1) accident;
- (A split-limit policy with a limit of not less than twenty-five thousand dollars ($25,000) for bodily injury to or death of one (1) person, not less than fifty thousand dollars ($50,000) for bodily injury to or death of two (2) or more persons in any one (1) accident, and not less than fifteen thousand dollars ($15,000) for damage to property in any one (1) accident;
- A deposit of cash with the commissioner in the amount of sixty-five thousand dollars ($65,000); **or**
- The execution and filing of a bond with the commissioner in the amount of sixty-five thousand dollars ($65,000).

Tenn. Code Ann. § 55-12-102 (West)

3. Statute of Limitations

Tennessee applies different statute of limitations to personal injury and property claims, even though they may arise out the same circumstances:

Negligence/Personal Injury: One year. Tenn. Code § 28-3-104(a)(1)

Negligence/Property Damage: Three years. Tenn. Code § 28-3-105(1)

Negligent Construction: Within four (4) years after substantial completion of such an improvement. Tenn. Code Ann. § 28-3-202 (West)

Product Liability: One, Three, or Four Years.

Resulting in personal injury, One Year. Tenn. Code § 28-3-104(a)(1), (b);

Resulting in property damage. Three Years. Tenn. Code § 28-3-105(1)

Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28-3-104, 28-3-105, 28-3-202 and 47-2-725, but notwithstanding any exceptions to these provisions, it must be brought within six (6) years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption, or within one (1) year after the expiration of the anticipated life of the product, whichever is the shorter, except in the case of injury to minors whose action

must be brought within a period of one (1) year after attaining the age of majority, whichever occurs sooner.
Tenn. Code Ann. § 29-28-103 (West)

Wrongful Death: One year. Tenn. Code § 28-3-104(a)(1).
Breach of Contract: Four to six years.
(a) The following actions shall be commenced within six (6) years after the cause of action accrued:
(1) Actions for the use and occupation of land and for rent;
(2) Actions against the sureties of guardians, executors and administrators, sheriffs, clerks, and other public officers, for nonfeasance, misfeasance, and malfeasance in office; and
(3) Actions on contracts not otherwise expressly provided for.

(b) The cause of action on title insurance policies, guaranteeing title to real estate, shall accrue on the date the loss or damage insured or guaranteed against is sustained.

(c) The cause of action on demand notes shall be commenced within ten (10) years after the cause of action accrued.

Tenn. Code Ann. § 28-3-109.

An action for breach of any contract for sale must be commenced within four (4) years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one (1) year but may not extend it
Tenn. Code Ann. § 47-2-725 (West)

Unlawful Trade Practices: An action for misappropriation must be brought within three (3) years after the misappropriation is discovered or, by the exercise of reasonable diligence, should have been discovered. Tenn. Code Ann. § 47-25-1707 (West)

4. **Punitive Damages and Damages Caps**

Punitive Damages:

Under Tennessee law, punitive damages may only be awarded if the claimant proves by clear and convincing evidence that the defendant against whom punitive damages are sought acted maliciously, intentionally, fraudulently or recklessly. Tenn. Code § 29-39-104.

Entitlement to punitive damages and the amount of damages to be awarded shall be determined in a bifurcated proceeding. Tenn. Code § 29-39-104.

If awarded, punitive or exemplary damages shall not exceed an amount equal to the greater of two (2) times the total amount of compensatory damages awarded or $500,000, except in cases involving specific intent to cause injury, fraudulent concealment, a tortfeasor under the influence of alcohol, drugs, or other intoxicants, or if the defendant's act or omission results in the defendant being convicted of a felony under the laws of Tennessee, another state, or under federal law, and that act or omission caused the damages or injuries. Tenn. Code § 29-39-104.

Non-Economic Damages Cap:

The Tennessee Civil Justice Act of 2011, Tenn. Code Ann. 29-39-101 *et seq*., limits the amount an injured plaintiff may recover for non-economic damages to a cap of $750,000 (except in instances of intentional misconduct, records destruction, or conduct under the influence of alcohol or drugs). In an injury or loss is catastrophic in nature, as defined in subsection (d), the $750,000 amount limiting noneconomic damages, as set forth in subdivision (a)(2) and subsection (b) is increased to, but the amount of damages awarded as noneconomic damages shall not exceed, one million dollars ($1,000,000)

In the March 2015 opinion of *Clark v. Cain, et al.*, the circuit court ruled that Tennessee's cap on non-economic damages that may be awarded to injured plaintiffs was unconstitutional. In a per curium opinion, the Tennessee Supreme Court issued an order vacating the trial court's judgment and finding the issue of the constitutionality of the statutory limit on non-economic damages was not ripe for determination at the summary judgment stage, in a negligence action for personal injuries resulting from a motor vehicle collision, since there had not yet been a verdict in favor of the plaintiffs in excess of the statutory cap. Clark v. Cain, 479 S.W.3d 830 (Tenn. 2015). Thus, commentators speculate this issue may be ultimately addressed and resolved in the future.

5. Collateral Source Rules

Under Tennessee's collateral source rule, the fact that the plaintiff in an action for damages in tort has received payments from a collateral source, other than the defendant, is not admissible in evidence and does not reduce or mitigate the defendant's liability. Fye v. Kennedy, 991 S.W.2d 754 (Tenn. Ct. App. 1998)

The one exception is for medical malpractice cases where damages are permitted "only to the extent that such costs are not paid or payable and such losses are not replaced, or indemnified in whole or in part, by insurance provided by an employer either governmental or private, by social security benefits, service benefit programs, unemployment benefits, or any other source except the assets of the claimant or of the members of the claimant's immediate family and insurance purchased in whole or in part, privately and individually." Tenn. Code § 29-26-119.

6. Expert Admissibility Standard – *Daubert v. Frye*

The Tennessee Supreme Court has held that although Tennessee does not expressly adopt *Daubert,* "the non-exclusive list of factors to determine reliability are useful in applying our Rules 702 and 703." *McDaniel v. CSX Transp., Inc* 955 S.W.2d 257, 265 (Tenn. 1997). A Tennessee trial court may consider in determining reliability: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by *Frye,* the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation. *Id.*

Tennessee's Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court

> determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Tenn. R. Evid. 703

7. First Party Notice Requirements

A condition in an insurance policy which requires the insured to give notice of an occurrence "as soon as practicable" imposes a duty on the insured to give notice when he becomes, or should become, aware of facts which would suggest to a reasonably prudent person that the event for which coverage is sought might reasonably be expected to produce a claim against the insurer. *Reliance Ins. Co. v. Athena Cablevision Corp.*, 560 S.W.2d 617, 618 (Tenn. 1977) (citations omitted). Notice provisions of an insurance policy are valid conditions precedent to coverage, and in the absence of notice as required no coverage is afforded even though the policy does not contain a forfeiture clause and the insurer has not been prejudiced by the delay in notice. *Allstate Ins. Co. v. Wilson*, 856 S.W.2d 706, 709 (Tenn. Ct. App. 1992). A forma proof of loss may not be required in some situations, such as in *McKimm v. Bell*, 790 S.W.2d 526 (Tenn. 1990), where the court held that the insureds sufficiently complied with requirements of "proof of loss" provision of uninsured motorist policy so as to preclude insurer from denying coverage, even though insureds did not submit written proof of claim, where insurer availed itself of opportunity to interrogate insureds fully concerning details of accident and personal injury sustained, including particulars of nature, extent and treatment of injuries.

8. Insurer Duty to Defend

Under Tennessee law the question of whether a duty to defend arises depends solely on the allegations contained in the underlying complaint. *Travelers Indem. Co. of Am. v. Moore & Associates, Inc.*, 216 S.W.3d 302, 305 (Tenn. 2007); *St. Paul Fire & Marine Ins. Co. v. Torpoco,* 879 S.W.2d 831, 835 (Tenn. 1994) (quoting *Am. Policyholders' Ins. Co. v. Cumberland Cold Storage Co.,* 373 A.2d 247, 249 (Me.1977)).

An insurer has a duty to defend when the underlying complaint alleges damages that are within the risk covered by the insurance contract and for which there is a potential basis for recovery. *Id.* The duty to defend arises if even one of the allegations is covered by the policy. *Id.* The duty to defend is broader than the duty to indemnify because the duty to defend is based on the facts alleged, while the duty to indemnify is based upon the facts found by the trier of fact. *Id.* Any doubt as to whether the claimant has stated a cause of action within the coverage of the policy is resolved in favor of the insured. *Id.* (citing *Dempster Bros., Inc. v. U.S. Fid. & Guar. Co.,* 54 Tenn.App. 65, 388 S.W.2d 153, 156 (1964)).

9. Bad Faith Claims Against Insurers

"In order to recover bad faith penalties under this statute, a plaintiff must prove: '(1) the policy of insurance must, by its terms, have become due and payable, (2) a formal demand for payment must have been made, (3) the insured must have waited 60 days after making demand before filing suit (unless there was a refusal to pay prior to the expiration of the 60 days), and (4) the refusal to pay must not have been in good faith.'" *Ginn v. American Heritage Life Ins. Co.,* 173 S.W.3d 433, 443 (Tenn.Ct.App.2004). Further, in pleading a cause of action under Tenn. Code § 56–7–105, the pleader "must plead facts tending to show a formal demand was made" and this "entails [an]

explicit threat of bad faith litigation" if the demand is not met. *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.,* 590 F.Supp.2d 970, 975 (M.D.Tenn.2008).

Unfair claims handling by insurers is further regulated under Tenn. Code Ann. § 56-8-104(8).

Third party bad faith claims are not permitted. Clark v. Hartford Acc. & Indem. Co., 457 S.W.2d 35, 38 (Tenn. Ct. App. 1970) (observing, "In this State a judgment creditor of an insured, alleging bad faith and negligence on the part of the insurer in refusing to settle within the insured's policy limits, cannot sue the insurer for excess judgment over the policy limits . . . the insurer owe[s] no duty to the judgment creditor of the insured, the breach of which could have caused any damage to the judgment creditor.")

10. Mandatory Arbitration Rules

Under Tenn. Code Ann. § 29-5-101, all causes of action, whether there be a suit pending therefor or not, *may* be submitted to the decision of one (1) or more arbitrators, except where one of the parties is an infant or adjudicated incompetent or an action respecting a claim for real property (with some exceptions). However, in absence of valid contractual provision or agreement requiring arbitration, arbitration is not required.

Texas

1. Comparative Fault – Texas follows the rule that a claimant may not recover damages if his percentage of responsibility is *greater than* 50 percent. Tex. Civ. Prac. & Rem. Code Ch. 33.001.

2. Insurance Minimum Limits – In Texas, The current minimum liability limits are $30,000 for each injured person, up to a total of $60,000 per accident, and $25,000 for property damage per accident. This basic coverage is called 30/60/25 coverage.

3. Statute of Limitations

Negligence: Two years from date of occurrence.

Negligent Construction: A claimant must bring a suit for damages for certain, statutorily specified claims against a person who constructs or repairs an improvement to real property no later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property, or a deficiency in the construction or repair of the improvement.

If the damage, injury, or death occurs during the 10th year of the limitations period, the claimant may bring suit not later than two years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. Code Ch. 16.009(a) and (e).

Product Liability: Two years from injury or date injury should have been discovered.

Wrongful Death: Two years from date of death.

Breach of Contract: Four years. Tex. Civ. Prac. & Rem. Code Ch. 16.004(b).

Unlawful Trade Practices: All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should

have discovered the occurrence of the false, misleading, or deceptive act or practice. The period of limitation provided in this section may be extended for a period of 180 days if the plaintiff proves that failure timely to commence the action was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action. A demand must also be submitted sixty days before filing an action.

4. Punitive Damages and Damages Caps

Punitive Damages: Exemplary damages in Texas are designed to penalize a defendant for outrageous, malicious or otherwise morally culpable conduct and to deter such conduct. *Owens-Corning Fiberglass Corp. v. Malone,* 972 S.W.2d 35, 40 (Tex. 1998). Exemplary damages are not compensatory. Tex. Civ. Prac. & Rem. Code § 41.001(5). Exemplary damages are considered special damages and must be specifically pleaded. *See Al Parker Buick Co. v. Touchy,* 788 S.W.2d 129, 130 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). In most cases, an award of actual damages against a defendant is necessary to support an award of exemplary damages. *Safeshred, Inc. v. Martinez,* 365 S.W.3d 655, 660 (Tex. 2012).

Punitive damages are available if the jury finds the Defendant grossly negligent. (11) "Gross negligence" means an act or omission:

(A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Non-Economic Damages Cap: The Damages Act applies to causes of action filed on or after September 1, 2003. With few exceptions, the Damages Act applies to any cause of action in which a plaintiff seeks to recover exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.002(a), (b). The Damages Act does not apply to a cause of action brought under the Deceptive Trade Practices Act except a cause of action brought under Tex. Bus. & Com. Code § 17.46(b)(26) (selling, offering to sell, or illegally promoting an annuity contract). Tex. Bus. & Com. Code § 17.49(h). The Damages Act also does not apply to an action brought under the Texas Insurance Code Chapter 541.

The Damages Act provides that exemplary damages may be reduced by the statutory cap. The statutory cap on exemplary damages is the greater of:

1. The amount of noneconomic damages up to $750,000 plus two times the amount of economic damages; or
2. $200,000.

Tex. Civ. Prac. & Rem. Code § 41.008(b).

5. Collateral Source Rules:, Pursuant to the collateral source rule, evidence of collateral sources of payment to an injured plaintiff are inadmissible. Evidence of collateral payments made to the

plaintiff from other sources, such as insurance, pension, or retirement funds, employee benefit accounts, or Social Security, is generally not admissible. The collateral source rule precludes a tortfeasor from obtaining the benefit of, or even mentioning, payments to the injured party from sources other than the tortfeasor. Under the rule, a defendant is not entitled to present evidence of, or obtain an offset for, funds received by the plaintiff from a collateral source.

With regard to health insurance and evidence of write-offs or adjustments, The Texas Supreme Court recently made three substantial and decisive holdings. Specifically the Court and held that:

a) Common-law collateral source rule does not allow recovery as damages of medical expenses a health care provider is not entitled to charge;

b) Section 41.0105 of the Texas Civil Practice and Remedies Code limits a claimant's recovery of medical expenses to those which have been or must be paid by or for the claimant; and

c) Only evidence of recoverable medical expenses is admissible at trial.

Thus, the Texas Supreme Court has limited a claimant's recovery of medical expenses to those which have been or must be paid by or for the claimant, and that those amounts that were neither paid nor incurred must be excluded from evidence at trial.

6. Expert Admissibility Standard – Daubert v. Frye – Texas courts follow the Daubert standard. The Texas Supreme Court has further interpreted Texas Rule of Evidence 702 and reinforced the gatekeeping function of the trial court. See *E.I. du Pont de Nemours & Co. v. Robinson* 23 S.W.2d 549 (Tex. 1995) and *Merrell Dow Pharmaceuticals v. Havner* 953 S.W.2d 706 (Tex. 1997).

7. First Party Notice Requirements – Within fifteen working days after receipt by the insurer of properly executed proofs of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer. If the insurer needs more time to determine whether a first party claim should be accepted or denied, it shall also notify the first party claimant within fifteen working days after receipt of the proofs of loss, giving the reasons more time is needed. If the investigation remains incomplete, the insurer shall, 45 days from the date of the initial notification and every 45 days thereafter, send to such claimant a letter setting forth the reasons additional time is needed for investigation.

8. Insurer Duty to Defend – In Texas, under most liability-insurance policies, the insurer assumes the duty to defend the insured against any suit that is covered by the policy. The duty to defend is the obligation to retain counsel and to pay attorney fees, expert expenses, alternative-dispute-resolution fees, and other costs associate with defending a suit. All that is needed to trigger the insured's duty to defend is a suit against the insured making an allegation that, if true, would be covered by the policy. IF a suit only makes allegations outside the scope of the policy's coverage, there is no duty to defend.

Duty to defend disputes are generally litigated under the Texas Declaratory Judgments Act. Tex. Civ. Prac. & Rem. Code Sections 37.001 – 37.011. The Declaratory Act allows either party to the insurance contract to sue for a declaration of the parties' rights. If the insurer prevails, it does not owe a duty to defend. IF the insured prevails, (1) the insurer must defend the insured against the underlying lawsuit, and (2) if the insured has asserted additional claims, such as breach of contract, the insured may be able to recover damages for those claims.

Duty to defend litigation is often initiated by the insurer. The insured responds with an answer and (usually) a counterclaim, including request for declaratory relief. Both parties are technically plaintiffs, and both are generally requesting the same thing – that is, a declaration of their rights under the policy. Regardless of who sues first, the insured has the initial burden of proving that a covered claim has been asserted against the insured.

9. Bad Faith Claims against Insurers – Texas Law tends to favor the insurance companies in this regard. A policyholder can bring a claim for breach of the common law duty of good faith and fair dealing as well as a claim for Unfair Settlement Practices under Subchapter 541 of the Texas Insurance Code. There is considerable overlap in these two remedies. Under both causes of action, the policyholder must prove that the insurer had no reasonable basis for denial or delay in payment of the claim.

Any reasonable basis is sufficient to allow the insurer to avoid bad faith liability. Examples of what is considered to be a reasonable basis for denial include a legitimate dispute over the scope of damage to property or the cost of repair. A bona fide dispute over whether a claim is covered will also suffice. In addition, if it turns out that there is in fact no coverage for a claim, the insurer cannot held liable no matter how poorly it handled the matter. In other words, the insurer can avoid bad faith liability if it was "right for the wrong reason".

The principal difference in the common law and statutory causes of action for bad faith relate to damages. Under the common law, punitive damages are theoretically available but the current standard for recovery is so high that few if any plaintiffs have ever met it. The statutory cause of action is more attractive because it allows for recovery of treble damages if the insurer acted "knowingly", as well as for recovery of attorneys' fees.

10. Mandatory Arbitration Rules – Texas policy supports arbitration. The Texas General Arbitration Act ("TAA") tracks the relevant substantive parts of the Federal Arbitration Act, or FAA. See Tex. Civ. Prac. & Rem. Code § 171.001 (noting that a "written agreement to arbitrate is valid and enforceable" and may be avoided "only on a ground that exists at law or in equity for the revocation of a contract").

Like the FAA, the TAA requires a court to order parties to arbitrate their claims upon a showing that an agreement to arbitrate the claims exists and is enforceable. See Tex. Civ. Prac. & Rem. Code § 171.021. As with the FAA, a trial court has no discretion to refuse to order arbitration. See *In re MHI Partnership, Ltd.*, 7 S.W.3d 918, 923 (Tex. App. – Houston [1st Dist.] 1999, orig. proceeding) (trial court had no authority to defer ruling on motion to compel arbitration pending completion of discovery); cf. *In re Houston Pipe Line Co.*, 311 S.W.3d 449 (Tex. 2009) (pre-arbitration discovery is expressly authorized under the TAA when a trial court cannot fairly and properly make its decision on the motion to compel arbitration because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability). Also like the FAA, the proper procedure after

entry of an order referring a dispute to arbitration is to stay the case. Tex. Civ. Prac. & Rem. Code § 171.025.

Utah

1. Comparative Negligence

Contributory fault does not bar recovery in an action by any person to recover damages. The person seeking damages may recover from the defendant(s), as long as the amount of fault allocated to the defendant is higher than the amount of fault allocated to the person seeking the damages.

The Utah Liability Reform Act abolished joint and several liability. Currently no defendant is liable to any person seeking recovery for any amount larger than their proportion of fault. *Utah Code Ann. § 78B-5-818*

2. Insurance Minimum Limits

Uninsured/underinsured motorist coverage requires a minimum of $25,000 for a single personal injury or property damage, $65,000 for injury to two or more persons, and $15,000 for harm to property of others in any one accident. *Utah Code Ann. § 31A-22-304*

3. Statute of Limitations

Actions for libel, slander, false imprisonment, and seduction, professional malpractice must be brought within one year from when the action accrued. *Utah Code Ann. § 78B-2-302.*

An action for damages for a death caused by the wrongful act or neglect of another must be brought within 2 years from when the action accrued. *Utah Code Ann. § 78B-2-304*

An action trespass upon land, taking personal property, fraud or mistake, and identity theft must be brought within 3 years from when the action accrued. *Utah Code Ann. § 78B-2-305*

An action on a contract not in writing, negligence, professional malpractice, and most torts must be commenced within 4 years after the claim for relief has accrued. *Utah Code Ann. § 78B-2-307*

An action on any contract, obligation, or liability in writing must be commenced within 6 years after the claim for relief has accrued. *Utah Code Ann. § 78B-2-309*

4. Punitive Damages and Damages Caps

Punitive damages may only be awarded if compensatory or general damages are awarded, as well. It must be established that the acts of the wrongdoer are the result of willful, malicious, or intentionally fraudulent conduct or conduct that manifests a knowing and reckless indifference toward the rights of others.

As for the award, the first $50,000 of punitive damages shall go to the injured party and any amount in excess of $50,000 will be divided equally between the state and the injured party. *Utah Code Ann. § 78B-8-201*

5. Collateral Source Rules

A total damages award should be reduced by the total amount paid to the plaintiff from all collateral sources which are available to him. This includes medical or disability payments made under social security and insurance (except for life insurance benefits). *Utah Code Ann. § 78B-3-405*

6. Expert Admissibility Standard

Utah has developed its own test for the admissibility of scientific and expert testimony and refused to adopt the *Frye* or *Daubert* standards. See: *Phillips By & Through Utah State Dep't of Soc. Servs. v. Jackson*, 615 P.2d 1228, 1233 (Utah 1980); *Dikeou v. Osborn,* 881 P.2d 943 (Utah Ct. App. 1994).

A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify as to their opinion if the expert's scientific, technical, or other specialized knowledge will help the judge or jury to understand the evidence.
Scientific, technical, or other specialized knowledge may serve as the basis only if there is a showing that the principles underlying the testimony are reliable, based upon sufficient data, and have been reliably applied to the facts. *Utah R. Evid. 702*

7. Insurer Duty to Defend

An insurer's duty to defend arises if there is a potential liability. To negate the duty to defend, an insurer must demonstrate that none of the allegations underlying the claim is potentially covered or that policy exclusion conclusively applies to exclude all potential coverage. *Cincinnati Ins. Co. v. AMSCO Windows*, 921 F. Supp. 2d 1226, 1236 (D. Utah 2013), aff'd, 593 F. App'x 802 (10th Cir. 2014)

8. Bad Faith Claims Against Insurers

If an insurer denies an insured's claim that is fairly debatable, then the insurer is entitled to debate it and cannot be held to have breached the implied covenant of good faith and fair dealing. *Morris v. Health Net of California, Inc.,* 1999 UT 95, ¶ 7, 988 P.2d 940, 941

9. Mandatory Arbitration Rules

A recorded agreement to submit to arbitration between parties is valid, enforceable, and irrevocable, except when grounds exist to revoke the contract. *Utah Code Ann. § 78B-11-107*

Vermont

1. Comparative Fault

Vermont follows the doctrine of modified comparative negligence. Therefore, a plaintiff's contributory negligence shall not bar recovery so long as the plaintiff's negligence is not greater than the total negligence of the defendant(s). 12 V.S.A. § 1036. However, a plaintiff's recovery is reduced in proportion to the amount of negligence attributed to the plaintiff. For example, a lone plaintiff who is 40% negligent can recover only 60% of his or her damages; a lone plaintiff who is 50% negligent can recover only 50% of his or her damages.

Under Vermont's comparative negligence statute, 12 V.S.A. § 1036, joint and several liability has been replaced with several liability. Accordingly, the amount for which each tortfeasor is financially liable is proportionate to his or her share of fault. However, the Vermont Supreme Court has indicated that, in the absence of an allegation of the plaintiff's negligence, joint and several liability could still be applied to joint defendants. See Levine v. Wyeth, 944 A.2d 179 (Vt. 2006).

2. Insurance Minimums

In Vermont, the minimum required amounts of vehicle liability insurance are set by statute and vary based on the type of vehicle and seating capacity, as set forth in the table below. 23 V.S.A. §§ 800, 843, & 921.

Type of Vehicle	Minimum	Minimum limit	Minimum

		for any one person	per accident	Property Damage per accident
Private Motor Vehicle		$25,000	$50,000 for two or more persons	$10,000
Jitneys (carrying passengers for hire)				
	Seating Capacity of 7 or less	$50,000	$100,000	$50,000
	Seating Capacity of 8 to 12	$50,000	$250,000	$50,000
	Seating Capacity of 13 to 20	$50,000	$300,000	$50,000
	Seating Capacity of 21 to 30	$50,000	$350,000	$50,000
	Seating Capacity of 31 or more	$50,000	$300,000	$50,000
School Buses				
	Seating Capacity of 9 or less	$100,000	$300,000	$50,000
	Seating Capacity of 10 or more	$300,000	$500,000	$50,000

Additional coverage for uninsured/underinsured motorists is required: $50,000 coverage for one person, $100,000 coverage for two or more persons, and up to $10,000 per property damages claim. If the underlying liability coverage on the policy exceeds $50,000/$100,000, then the uninsured/underinsured motorists coverage must be the same, unless the policyholder directs otherwise. 23 V.S.A. § 941.

3. Statute of Limitations

a. Negligence – Generally, 3 Years. 12 V.S.A. § 512.

i. Medical Malpractice – A medical malpractice action can be brought after three years from the date of injury, so long as such action is brought within two years from the date when the injury was or should have been discovered and before the lapse of 7 years from the incident. The statute of limitations does not apply to injuries caused by fraudulent concealment or where the action is based on discovery of a foreign body in the patient's body. 12 V.S.A. § 521.

ii. "injuries to the person suffered by the act or default of another person" – must be brought within 3 years, but the statute of limitations begins only as of the date of the discovery of the injury. 12 V.S.A. § 512(4).

iii. Claims by Minors – The Statute of Limitations does not run while a plaintiff minor is under 18 years of age. 12 V.S.A. § 551(a).

b. Negligent Construction – 6 Years. 12 V.S.A. § 511; Congdon v. Taggart Bros., 153 Vt. 324, 571 A.2d 656 (1989).

c. Product Liability – 3 Years. 12 V.S.A. § 512(4).

d. Wrongful Death – 2 Years. 14 V.S.A. § 1492.

e. Breach of Contract – 6 Years. 12 V.S.A. § 511.

f. **Unlawful Trade Practices- "**Although the Insurance Trade Practices Act, 8 V.S.A. §§ 4721-4726, provides administrative sanctions for unfair and deceptive acts within the insurance industry, including for unfair claim settlement practices, 8 V.S.A. § 4724(9), the Act does not create a private right of action." Larocque v. State Farm Ins. Co., 163 Vt. 617, 618, 660 A.2d 286, 288 (1995). Therefore, the Insurance Trade Practices Act does not create a duty on the part of adjusters that would form the

basis for an independent tort action against them. Hamill v. Pawtucket Mut. Ins. Co., 179 Vt. 250, 892 A.2d 226 (2005).

4. Punitive Damages and Damages Caps

In Vermont, punitive damages are permitted to deter and to punish a defendant's outrageous conduct. See Generally Brueckner v. Norwich University, 169 Vt. 118, 730 A.2d 1086 (1999). In general, punitive damages are available where a defendant's conduct supports a showing of malice (e.g., conduct evidencing personal ill or a reckless disregard to the rights of others). Villeneuve v. Beane, 182 Vt. 575, 577, 933 A.2d 1139, 1142 (2007). However, it has been held that punitive damages are generally not recoverable for an ordinary accident caused by negligence on a highway. Walsh v. Segale, 70 F.2d 698 (2d Cir. 1934) (interpreting Vermont law).

There are no "caps" on compensatory or punitive damages in Vermont. Where punitive damages are recoverable, they do not require a particular relationship to the amount of compensatory damages. Crump v. P & C Markets, Inc., 154 Vt. 284, 576 A.2d 441 (1990). With respect to coverage under liability insurance policies, punitive damages are covered unless specifically excluded. State v. Glens Falls Ins. Co., 137 Vt. 313, 404 A.2d 101 (1979); American Protection Ins. Co. v. McMahan, 151 Vt. 520, 562 A.2d 462 (1989).

5. Collateral Source Rules

"For more than a century, Vermont courts have applied the collateral source doctrine to deny to a defendant a setoff for payment the plaintiff receives from a third, or collateral, source."
Hall v. Miller, 143 Vt. 135, 141, 465 A.2d 222, 225 (1983). Therefore, evidence that a plaintiff has received compensation for his injuries from a third party is inadmissible for the purpose of mitigating damages. Melo v. Allstate Ins. Co., 800 F. Supp. 2d 596, 599 (D. Vt. 2011) (quoting Houghton v. Leinwohl, 315 Vt. 380, 376 A.2d 733, 737 (1977)).

6. Expert Admissibility Standard – Daubert v. Frye

The Daubert Court delineated four nonexclusive factors a judge may consider when assessing admissibility: (1) whether the theory or technique involved is capable of being tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential error rate associated with the scientific technique; and (4) whether the theory or technique has been generally accepted in the scientific community. *State v. Streich,* 163 Vt. 331, 343, 658 A.2d 38, 47 (1995) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591-94, 113 S.Ct. 2786 (1993).

Vermont adopted the Daubert decision in *State v. Brooks,* 162 Vt. 26, 30, 643 A.2d 226, 229 (1993), because Daubert broadens the types of admissible expert opinion evidence and to

"promote more liberal admission of expert evidence." State v. Scott, 195 Vt. 330, 88 A.3d 1173. The Vermont Supreme Court has focused on the "liberal thrust" of Rule 702, stating that "the trial court's inquiry into expert testimony should primarily focus on excluding 'junk science'—because of its potential to confuse or mislead the trier of fact—rather than serving as a preliminary inquiry into the merits of the case." State v. Pratt, 128 A.3d 883, 889 (Vt. 2015) (quoting *Assocs. v. Daewoo Elecs. Am., Inc.*, 945 A.2d 381 (2008)).

Vermont supports a flexible, non-mechanical application of the Daubert factors. In Vermont, the Daubert factors "are not exhaustive, and a trial court has broad discretion to determine, on a case-by-case basis, whether some or any of the factors are relevant in evaluating the reliability of expert evidence before it." Scott, 88 A.3d 1173, 1177.

7. First Party Notice Requirements

8 V.S.A. §§ 4724 and 4812 authorizes the Vermont Department of Banking, Insurance, Securities, & Health Care Administration to promulgate regulations setting forth notification time requirements.

Section 5 of Regulation 79-2, Fair Claims Practices, provides that:

A. An insurer or its agent who has claim adjusting authority shall mail or orally acknowledge receipt of the claim notice directly to the claimant, within ten (10) working days. If the acknowledgement is made orally, notation of the acknowledgement shall be recorded in the insurer's record or file.
B. An insurer shall make appropriate written or oral reply within ten (10) working days of any communication from claimant which specifically addresses itself to questions raised by claimant.

Section 1 of Regulation 78-1 requires insurance companies to provide notice of diminution of coverage on or before the time that the insured receives the new policy or policy form.

8. Insurer Duty to Defend

Insurers have a duty to defend when the claim against the insured "might be of the type covered by the policy." Co-operative Ins. Companies v. Woodward, 191 Vt. 348, 353, 45 A.3d 89, 93 (2012) (quoting Garneau v. Curtis & Bedell, Inc., 158 Vt. 363, 366, 610 A.2d 132, 134 (1992)). The most expansive duty under insurance liability policies is the insurer's duty to defend, but there is no duty to defend when there is no possible factual or legal basis on which the insurer might be required to indemnify. Id. In determining whether there is a duty to defend, Vermont courts compare the language of the policy to the language of the complaint. Woodward, 191 Vt. at 353, 45 A.3d at 93. "If a claim is made or a suit is brought against an insured for damages because of bodily injury that is caused by an occurrence, there is coverage under the policy, unless an exclusion applies." Woodward, 191 Vt. at 353, 45 A.3d at 93 (quoting N. Sec. Ins. Co. v. Perron, 172 Vt. 204, 210, 777 A.2d 151, 155 (2001)).

One narrow exception to the general duty to defend exists where determination of a relevant policy exclusion involves factual questions not covered in the complaint. Blake v. Nationwide Ins. Co., 180 Vt. 14, 20, 904 A.2d 1071, 1076 (2006). An insurer may independently refuse to defend based on factual questions, but bears the risk of liability for incorrect factual and coverage determinations. Id.

9. Bad Faith Claims against Insurers

First-party claim

Vermont has recognized a cause of action for bad-faith failure of an insurer to pay a claim filed by its insured (sometimes called a "first-party claim"). Murphy v. Patriot Ins. Co., 197 Vt. 438, 444, 106 A.3d 911, 916 (2014); Bushey v. Allstate Ins. Co., 164 Vt. 399, 402, 670 A.2d 807, 809 (1995). To establish such a claim for bad faith, a plaintiff must show that (1) the insurance company had no reasonable basis to deny benefits of the policy, and (2) the company knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim. Id. An insurance company may challenge claims that are "fairly debatable" and "will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis." Booska v. Hubbard Ins. Agency, Inc., 160 Vt. 305, 310, 627 A.2d 333, 335 (1993) (quoting Anderson v. Continental Ins. Co., 85 Wis.2d 675, 271 N.W.2d 368, 377 (1978)). Thus, the rule limits recovery to instances in which an insurer not only errs in denying coverage but does so unreasonably. Bushey, 164 Vt. 399, 402, 670 A.2d 807, 809.

Third-party claim

Vermont has long recognized a cause of against an insurance company for bad faith in handling third-party claims brought against its insured (sometimes called "third-party claims"). Myers v. Ambassador Ins. Co., 146 Vt. 552, 555, 508 A.2d 689, 690 (1986). An insurer's legal duty is equivalent to that of a "fiduciary". When determining if a third-party's claim against an insured is covered under a policy, the insurer must act in good faith, and it must "take the insured's interests into account." Id. at 691. The insurer must also "diligently investigate the facts and the risks involved in the claim, and should rely only upon persons reasonably qualified to make such an assessment." Id. The insurer's duty to protect the insured is ongoing, and the insurer must inform the insured of significant developments as they arise. Id. The insured's damages are the difference between the judgment and the policy limit, plus interest and costs. Id.

10. Mandatory Arbitration Rules

The Vermont Arbitration Act does not apply to arbitration agreements contained in a contract of insurance. 12 V.S.A. §5653(a).

A valid arbitration agreement requires a provision that substantially provides as follows:

"ACKNOWLEDGMENT OF ARBITRATION.

I understand that (this agreement/my agreement with of) contains an agreement to arbitrate. After signing (this/that) document, I understand that I will not be able to bring a lawsuit concerning any dispute that may arise which is covered by the arbitration agreement, unless it involves a question of constitutional or civil rights. Instead, I agree to submit any such dispute to an impartial arbitrator." 12 V.S.A. §5652(b)

Virginia

11. Comparative Fault

While many states have adopted the doctrine of comparative fault, Virginia remains a pure contributory negligence state. Put simply, if the Plaintiff is at all at fault for his injuries, even 0.01%, he cannot recover from the tortfeasor. *See e.g., Litchford v. Hancock*, 232 Va. 496, 352 S.E.2d 335 (1987)(any negligence of plaintiff which is proximate cause of accident will completely bar recovery). However, there is a limited exception to this rule for employees of common carriers. Va. Code § 8.01-58.

12. Insurance Minimum Limits

Virginia Code § 46.2-472 sets forth the minimum liability limits required for a personal auto policy:

- Bodily Injury: $25,000 per person for bodily injury or death; $50,000 per accident for bodily injury or death; $20,000 per accident for destruction of property.

Virginia Code § 38.2-2206 requires that Uninsured and Underinsured (UM/UIM) must be offered in the same amount as liability insurance. That requirement may be waived by the insured, but in no case shall the UM/UIM limits be less than:

- UM/UIM bodily Injury: $25,000 per person for bodily injury or death; $50,000 per accident for UM/UIM bodily injury or death; $20,000 per accident for UM/UIM destruction of property.

13. Statute of Limitations

Negligence: In general, personal injury actions are subject to a two year statute of limitations. Va. Code § 8.01-243(A). Suits for property damage must be brought within five years. Va. Code § 8.01-243(B). The limitations period begins to run from the date of the injury or damage to the property, or, for contract actions, the date that the breach occurred. Va. Code § 8.01-230. The statute of limitations can be tolled in certain circumstances, such as during periods of incapacity or infancy. Va. Code § 8.01-229.

Negligent Construction: In Virginia, an action for allegedly faulty construction must arise from a contract as negligent construction is generally considered breach of a construction contract. *VMI v. King*, 217 Va. 751, 232 S.E.2d 895 (1977). The statute of limitations for breach of a written

contract is five years and, for breach of an unwritten contract the limitations period is three years. Va. Code § 8.01-246.

Product Liability: The statute of limitations for injury or damage from a defective product is governed by the general limitations periods contained in Va. Code § 8.01-243(A), two years for personal injury, and (B), five years for property damage.

Wrongful Death: A wrongful death action must be commenced by the personal representative of the decedent within two years of the date of death. Va. Code § 8.01-244(B).

Breach of Contract: The statute of limitations for breach of a written contract is five years. Va. Code § 8.01-246(2). The statute of limitations for breach of an unwritten contract, whether express or implied, is three years. Va. Code § 8.01-246(4).

Unlawful Trade Practices: The Virginia Consumer Protection Act has a two year statute of limitations. Va. Code § 59.1-204.1(A).

14. Punitive Damages and Damages Caps

Punitive Damages: In Virginia, a Plaintiff can sue for punitive damages, however, any verdict for punitive damages is capped at $350,000. Va. Code § 8.01-38.1. Pursuant to the statute, the jury cannot be advised of the cap. In the event a jury returns an award of punitive damages greater than the allowed cap, the trial judge must reduce the amount awarded to the maximum amount permitted under the statute. Notably, Virginia Model Jury Instructions require that the jury must state separately in the verdict the amount allowed as compensatory damages and the amount allowed as punitive damages. VMJI No. 9.080.

In general, punitive damages are disfavored and are available only where there is "misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others." *Xspedius Mgmt. Co. of Virginia, L.L.C. v. Stephan*, 269 Va. 421, 425 (2005) (citing *Giant of Virginia, Inc. v. Pigg*, 207 Va. 679, 685 (1967). While generally a claim for punitive damages arises pursuant to common law, statutory punitive damages are available in cases involving drunk drivers. Va. Code § 8.01-445. In order to recover statutory punitive damages, a Plaintiff must prove (1) a blood alcohol level of .15 which creates a presumption of willful or wanton conduct; (2) that the defendant knew or should have known that his ability to operate a motor vehicle would be impaired; and (3) that the defendant's intoxication was a proximate cause of the injury or death of the Plaintiff.

In addition, according to Virginia law, it is not against public policy to "purchase insurance providing coverage for punitive damages arising out of the death or injury of any person as the result of negligence, including willful and wanton negligence, but excluding intentional acts." Va. Code § 38.2-227.

Non-Economic Damages Cap: Virginia does not cap non-economic damages. However, it should be noted that damages for certain medical malpractice actions are capped by statute with the amount differing from year to year pursuant to a table provided in Virginia Code § 8.01-581.15. This cap does not distinguish between non-economic damages and other available damages.

15. Collateral Source Rules

In Virginia, Plaintiff's recovery is not affected by *any* compensation Plaintiff receives from collateral sources such as insurance proceeds, employment benefits, or donations. In addition, evidence of benefits received from collateral sources is not admissible at trial and collateral sources of Plaintiff's recovery cannot be disclosed to the jury.

Specifically with regard to loss of income, Virginia Code § 8.01-35 provides, in relevant part, that "provable damages for loss of income due to such injury or death shall not be diminished because of reimbursement of income to the plaintiff or decedent from any other source, nor shall the fact of any such reimbursement be admitted into evidence."

16. Expert Admissibility Standard – *Daubert v. Frye*

To date, Virginia has not addressed whether the federal *Daubert* standard should be employed in Virginia's trial courts. In Virginia, the opinion testimony of experts is addressed by Virginia Code § 8.01-401.1. This statute provides, in pertinent part, that "any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence."

Virginia common law also governs the admissibility of expert testimony and establishes that ""'the admission of expert testimony is limited and 'subject to certain fundamental requirements, including the requirement that the evidence be based on an adequate foundation.'" *CNH America, LLC v. Smith*, 281 Va. 60, 67, 704 S.E.2d 372, 376 (2011); *Tittsworth v. Robinson*, 252 Va. 151, 154, 475 S.E.2d 261, 263 (1996). For example, expert testimony cannot be speculative or founded in assumptions that have no basis in fact. *Id.* Expert testimony should also be excluded if the trial court is unsatisfied that the expert has considered all the variables bearing on the inferences to be drawn from the facts observed. *Swiney v. Overby*, 237 Va. 231, 233 - 34 (1989); *Grasty v. Tanner*, 206 Va. 723, 727 (1966).

The Supreme Court of Virginia has stated that it must be the trial court, and not the jury, who decides whether a proper foundation has been laid for the introduction of expert testimony. *John v. Im*, 263 Va. 315, 559 S.E.2d 694 (2002). Yet, the Court only makes a "threshold finding" as to whether the expert opinion has a proper foundation and can be considered by the jury in situations where scientific reliability is questioned because unfamiliar scientific evidence is offered. *Id.* at n. 3. It is then up to the jury to determine if the expert opinion is reliable and credible. *Id.*

Rule 4:1(b)(4) of the Rules of the Supreme Court of Virginia requires a party to disclose the subject matter on which the expert is expected to testify *and* the substance of the facts and a summary of the grounds for each opinion. In Virginia, expert testimony can also be excluded if a part fails to adequately disclose the substance of an expert's opinion. *John Crane, Inc. v. Jones*, 274 Va. 581, 650 S.E.2d 851, 857 (2007).

17. First Party Notice Requirements

Under Virginia law, "the giving of notice of the accident, the giving of notice of the suit, and the forwarding of suit papers [a]re conditions precedent to coverage under the policy, requiring substantial compliance by the insured." *Erie Ins. Co. v. Meeks*, 223 Va. 287, 290, 288 S.E.2d 454, 456 (1982); *see also State Farm Fire & Cas. Co. v. Walton*, 244 Va. 498, 423 S.E.2d 188 (1992). Thus, an insured's compliance with one of the notice conditions does not excuse the insured from complying

with other notice conditions. *See, e.g., State Farm Fire & Cas. Co. v. Wallace*, 997 F.3d 439, (W.D. Va. 2014) (timely notice of suit did not excuse failure to provide timely notice of an "occurrence").

The insured's obligation to give notice of a claim or occurrence arises when there has been an "incident which was sufficiently serious to lead a person of ordinary intelligence and prudence to believe that it might give rise to a claim for damages." *Id.; see also Nationwide Mut. Ins. Co. v. Boyd*, 2010 WL 331757 at *5 (E.D. Va. Jan. 25, 2010) (emphasizing that the obligation to give notice arises when an event is sufficiently serious that it "might" give rise to a claim for damages and not just when an event portends of a "definite suit or a probable claim") (emphasis in original).

A violation of the notice conditions of the policy must be "substantial and material" in order to bar coverage. *See, e.g., Penn-America Ins. Co. v. Mapp*, 461 F. Supp. 2d 442, 452 (E.D. 2006). Under Virginia law, prejudice is not required to demonstrate a "substantial and material" breach. *Walton*, 244 Va. 504, 423 S.E.2d at 192; *State Farm Mut. Auto. Ins. Co. v. Porter*, 221 Va. 592, 597, 272 S.E.2d 196, 199-200 (Va. 1980). However, prejudice may be a factor in determining the materiality of the breach of the condition. Id. Prejudice arguably becomes less of a factor as the delay in providing notice increases. *See, e.g., Nationwide Mut. Fire Ins. Co. v. Overstreet*, 568 F. Supp. 2d 638, 646 (E.D. Va. 2008) (explaining that, the longer the delay, the less relevance prejudice has); *see also Walton*, 244 Va. at 505, 423 S.E.2d at 192 (delay of over two years in reporting claim constituted a substantial and material breach irrespective of prejudice); *State Farm Fire & Cas. Co. v. Wallace*, 997 F.3d at 451-53 (378-day delay in notifying insurer of occurrence barred coverage as a matter of law).

18. Insurer Duty to Defend

Under Virginia law, an insurer's duty to defend arises where the "pleading 'alleges facts and circumstances, some of which, if proved, fall within the risk covered by the policy.'" *Parker v. Hartford Fire Ins. Co.*, 222 Va. 33, 35, 278 S.E.2d 803, 804 (1981); *Lerner v. Gen. Ins. Co. of Am.*, 219 Va. 101, 104, 245 S.E.2d 249, 251-52 (1978). "The obligation to defend is not negated merely by the unsuccessful assertion of a claim otherwise facially falling within the risks covered by the policy." *Virginia Elec. & Power Co. v. Northbrook Property & Cas. Ins. Co.*, 252 Va. 265, 266, 475 S.E.2d 264, 269 (Va. 1996). If it is clear from the pleading that the claim is not covered, the insurer is not obligated to defend. *Reisen v. Aetna Life & Cas. Co.*, 225 Va. 327, 331, 302 S.E.2d 529, 531 (1983); *Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 46, 245 S.E.2d 247, 249 (1978).

Thus, under Virginia law, the duty to defend inquiry is typically limited to the four corners of the complaint and the four corners of the insurance contract. *See, e.g., AES Corp. v. Steadfast Ins. Co.*, 283 Va. 609, 725 S.E.2d 532, 535 (2012) ("only the allegations in the complaint and the provisions of the insurance policy are to be considered in deciding whether there is a duty to defend"). Importantly, however, if it is not clear from the allegations whether the insurer owes a duty to defend, the insurer's refusal to defend is at its own risk; the insurer will be deemed to have breached its duty to defend if the subsequent development of facts bring the claim within the coverage afforded under the policy. *Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 189, 397 S.E.2d 100, 102 (1990).

19. Bad Faith Claims Against Insurers

Virginia does not recognize an independent tort cause of action for bad faith against an insurer. Virginia does, however, recognize a common law cause of action for bad faith in both the first-party and third-party insurance contexts. *See, e.g.*, *Aetna v. Price,* 206 Va. 749, 146 S.E.2d 220 (1966) (failure to settle third-party claim within policy limits); *A&E Supply Co. v Nationwide Mut. Fire*

Ins. Co., 798 F. 2d 669 (4th Cir. 1986) (refusal to settle first-party claim). A common law claim for bad faith is grounded in contract law and not tort law, and thus must be made in conjunction with a claim for breach of contract. *Id.* at 676; *see also Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 71, 76, 524 S.E.2d 649, 651 (2000); *Davies v. Virginia CVS Pharmacy, LLC*, 7:14-CV-00175, 2014 WL 6460787, at *7 (W.D. Va. Nov. 17, 2014).

Virginia Code § 38.2-209 provides that an insured may recover costs and reasonable attorney fees if the insurer's failure or refusal to provide coverage was not in good faith. Notably, § 38.2-209 does not create a separate and independent cause of action for bad faith. Instead, it is only a source of additional recovery on a breach of contract claim against the insurer. *See, e.g.*, *Massachusetts Bay Ins. Co. v. Decker*, 7:11-CV-00342, 2012 WL 43614, at *1 (W.D. Va. Jan. 9, 2012); *Tiger Fibers, LLC v. Aspen Specialty Ins. Co.*, 594 F.Supp.2d 630 (E. D. Va. 2009); *Salomon v. Transamerica* 801 F. 2d 659, 661 (4th Cir.); *A & E Supply Co., Inc. v. Nationwide Mut. Fire Ins.*, 798 F. 2d 669, 674 (4th Cir. 1986).

Virginia Code § 8.01-66.1 applies to claims under motor vehicle insurance, including medical payments coverage. Section 8.01-66.1(A) applies to claims of $3,500 or less in excess of the deductible and permits double the amount due under the policy and counsel fees and expenses if the denial was not made in good faith. *See, e.g.*, *Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 71, 524 S.E.2d 649 (2000). Section 8.01-66.1(D) applies to claims in excess of $3,500 and permits double the statutory rate of interest from the date the claim was submitted and attorney fees and expenses if the claim denial was not in good faith.

Virginia Code § 38.2-807 applies to unlicensed insurers only and permits the recovery of attorneys fees of up to 12 ½ percent of the verdict where the insurer fails to make payment for thirty days after demand and the refusal was "vexatious and without reasonable cause. *Structural Concrete Products, LLC v. Clarendon Am. Ins. Co.*, Case No. 3:07cv253, 2007 WL 2437661 (E.D. Va. Aug. 22, 2007); *see also National Fire Ins. Co. of Hartford v. Dervishian,* 206 Va. 563, 145 S.E.2d 184 (1965) (declining to apply predecessor statute to licensed insurer).

20. Mandatory Arbitration Rules

Virginia law does not provide for mandatory arbitration.

Washington

1. Comparative Fault

Washington is a pure comparative fault state. *See* RCW Chapter 4.22 et seq. Under Washington's comparative fault system, a plaintiff's negligence will not bar recovery, but it will reduce the amount of damages that the plaintiff can recover based on the plaintiff's percentage of fault. RCW 4.22.005.

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. RCW 4.22.015. The term also includes breach of warranty, unreasonable assumption of risk and unreasonable failure to avoid injury or to mitigate damages. *Id.* Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. *Id.* A comparison of fault shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relationship between such conduct and the damages. *Id.*

The entities whose fault shall be determined include the plaintiff, defendants, third-party defendants, entities released by the plaintiff, entities with any other individual defense against the

plaintiff and entities immune from liability to the plaintiff. RCW 4.22.070(1). The sum of the percentages of the total fault attributed to at-fault entities must equal one hundred percent. *Id.*

Generally, comparative fault defendants are severally liable. RCW 4.22.070(1). However, joint liability may be imputed and a party held responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party. RCW 4.22.070(1)(a).

If the trier of fact determines that the plaintiff was not at fault, the defendants against whom judgment is entered shall also be jointly and severally liable for the sum of their proportionate shares of the plaintiff's total damages. RCW4.22.070(1)(b).

A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. RCW 4.22.040(1). This right may be enforced either in the original action or by a separate action brought for that purpose. *Id.* The basis of contribution among liable persons is the comparative fault of each such person. *Id.* However, the court may determine that two or more persons are to be treated as a single person for purposes of contribution. *Id.* Contribution is available to a person who enters into a settlement with a claimant only if the liability of the person against whom contribution is sought has been extinguished by the settlement and to the extent that the amount paid to settle was reasonable at the time of the settlement. RCW 4.22.040(2).

2. Insurance Minimum Limits

RCW 46.30.020 sets forth Washington's mandatory insurance requirements. Washington's minimum liability insurance requirements are as follows:

- Bodily Injury and Property Damage: $25,000 per person for bodily injury or death; $50,000 per accident for bodily injury or death; $10,000 per accident for destruction of property. RCW 46.29.090(1).
- Personal Injury Protection (PIP): must be offered as optional coverage, but may be rejected in writing by insured. RCW 48.22.085.
- Uninsured and Underinsured (UM/UIM): must be offered in the same amount as liability insurance, but may be waived in writing by insured. RCW 48.22.030.

3. Statute of Limitations

Negligence: Negligence actions must be commenced within three years. RCW 4.16.080.

Negligent Construction: Negligent construction claims must be commenced during the period within six years after substantial completion of construction, or during the period within six years after the termination of services, whichever is later. RCW 4.16.300; RCW 4.16.301. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. RCW 4.16.301.

Product Liability: Product liability claims must be commenced within three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause. RCW 7.72.060(3).

A product seller shall not be subject to liability for harm if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired. RCW 7.72.060(1). "Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. *Id.* "Time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold. *Id.* In the case of a product which has been remanufactured by a manufacturer, "time of delivery" means the time of delivery of the

remanufactured product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold. *Id.*

However, a product seller may be subject to liability for harm caused by a product used beyond its useful safe life if the product seller has warranted that the product may be utilized safely for such longer period; intentionally misrepresents or conceals facts about its product and that conduct was a proximate cause of the plaintiff's harm; or the harm was caused by exposure to a defective product, which exposure first occurred within the useful safe life of the product, even though the harm did not manifest itself until after the useful safe life had expired. RCW 7.72.060(1)(b). If the harm was caused more than twelve years after the time of delivery, a presumption arises that the harm was caused after the useful safe life had expired, which may only be rebutted by a preponderance of the evidence. RCW 7.72.060(2).

Wrongful Death: Wrongful death actions must be commenced within three years of the date of death. RCW 4.16.080.

Medical Malpractice: Medical malpractice actions must be commenced within three years of the conduct or omission alleged to have caused the injury, or within one year of the time the patient or patient's representative discovered, or reasonably should have discovered, that the injury was caused by the conduct or omission, whichever period expires later. RCW 4.16.350(3).

Breach of Contract: An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. RCW 62A.2-725(1) [UCC]. By the original agreement, the parties may reduce the period of limitation to not less than one year, but may not extend it. *Id.* A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. RCW 62A.2-725(2). A breach of warranty occurs when tender of delivery is made, except that were a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered. *Id.*

Unlawful Trade Practices: A private action for unlawful trade practices must be commenced within four years. RCW 19.86.120. The running of a statute is tolled during the pendency of any action brought upon the same matter by the Attorney General. *Id.*

4. Punitive Damages and Damages Caps

Punitive Damages: Since its earliest decisions, the Washington Supreme Court has consistently disapproved punitive damages as contrary to public policy. *Dailey v. North Coast Life Ins. Co.,* 129 Wn.2d 572, 574, 919 P.2d 589 (1996) (citing *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 50-56, 25 P. 1072 (1891)). Punitive damages not only impose on the defendant a penalty generally reserved for criminal sanctions, but also award the plaintiff with a windfall beyond full compensation. *Dailey*,129 Wn.2d at 574. However, punitive damages are allowed when expressly authorized by the Legislature. *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981).

Non-Economic Damages Cap: In *Sofie v. Fibreboard*, 112 Wn.2d 636, 771 P.2d 711 (1989), the Washington Supreme Court ruled that once the determination of damages in a personal injury action is vested in a jury, that jury's decision cannot be constrained by statutory limits.

5. Collateral Source Rules

Washington recognizes the collateral source rule in personal injury actions. This allows a plaintiff to recover damages from a tortfeasor without regard to compensation received for the same injury from an independent source, such as the plaintiff's insurer's payments of medical expenses. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000); *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 798, 953 P.2d 800 (1998); see also *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 804, 585 P.2d 1182 (1978) (Part A Medicare payments are collateral source); see also Washington Pattern Jury Instruction (WPI) 2.13.

Evidence of collateral source payments may be inadmissible even when otherwise relevant to prevent the evidence from being improperly used by the jury to reduce plaintiff's damages. *Cox*, 141 Wn.2d at 440-41. The collateral source rule is applied broadly, with relatively few exceptions

The collateral source rule was statutorily modified to allow introduction of evidence that the plaintiff received compensation for his or her injury from another source, such as from plaintiff's insurer or employer's insurer. RCW 7.70.080. However, the Washington Supreme Court held the statute violated the separation of powers doctrine. *See Diaz v. State*, 175 Wn.2d 457, 471, 285 P.3d 873 (2012).

6. Expert Admissibility Standard – *Daubert v. Frye*

Generally. In Washington, the testimony of an expert witness is subject to the so-called *Frye* rule. In Washington, an expert's testimony should not exceed the limits of the expert's underlying science or art. If the expert's opinion is based upon a scientific theory or method, the theory or method must be one that is generally accepted in the scientific community. This is the so-called *Frye* rule, derived from *Frye v. U.S*., 293 F. 1013, 34 A.L.R. 145 (App. D.C. 1923).

The *Frye* rule most often applies in criminal cases involving medical or scientific testimony, but the rule applies across the board to all cases – civil and criminal – and to other areas of expertise such as engineering and economics. *See, e.g., Eakins v. Huber*, 154 Wn.App. 592, 225 P.3d 1041 (2010) (medical testimony in civil case); *Moore v. Harley Davidson Motor Co. Group, Inc.*, 158 Wn.App. 407, 241 P.3d 808 (2010), review denied, 171 Wn.2d 1009, 249 P.3d 1028 (2011) (cause of motorcycle engine failure in civil case).

Washington courts do not follow the federal rule – the so-called *Daubert* rule – that is a more complex, multifactor formula for determining admissibility. *Moore v. Harley-Davidson Motor Co. Group, Inc.*, 158 Wn.App. 407, 241 P.3d 808 (2010) (rejecting federal rule).

7. First Party Notice Requirements

A claim does not have to be in writing unless a specific insurance policy so requires. If the claimant provides information sufficient to allow the insurer to frame an intelligent estimate of its rights and liabilities, the Washington Administrative Code (WAC) and Washington case law deem that a proper "claim" has been made. Moreover, the claim can be made directly to the insurer or to the insurer's agent. WAC 284-30-320(7); RCW 48.18.460; *Towney v. New York Life Ins. Co.,* 27 Wn.2d 829, 180 P.2d 815 (1947).

If a first party insured fails to give timely notice of a claim in violation of policy conditions, the insurer's coverage obligation may be voided for breach of the insured's duty of cooperation. The duty of cooperation is a defense to coverage which is routinely relied upon by insurance carriers in denying comprehensive general liability (CGL) claims. Under Washington law, an element necessary to this defense is a showing by the carrier that it suffered actual prejudice. *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 535 P.2d 816 (1975).

8. Insurer Duty to Defend

In Washington, as in most jurisdictions, the duty to defend is deemed broader than the duty to indemnify. An insurer must defend if the complaint arguably or potentially states a claim that, if proven, would be a covered claim under the policy. Once triggered, the duty to defend continues throughout the course of the litigation against the insured, unless the defense is offered under a reservation of rights and the facts of the case eventually reveal that a withdrawal of the defense is appropriate. In any event, the insurer cannot withdraw its defense under circumstances that might prejudice the insured.

In its recent decision in *Expedia, Inc. v. Steadfast Ins. Co.,* No. 88673-3, 2014 WL 3199497 (Wash. July 3, 2014) the Washington State Supreme Court made several rulings enhancing the rights of liability insurance policyholders in this State. First, the Court reaffirmed that in duty-to-defend cases the "eight corners" of the insurance policy and the complaint filed in the underlying litigation

generally determine whether a duty to defend is triggered. *Id.* Second, the Court confirmed that when such a duty is triggered the insurance carrier must pay its insured's defense costs in the underlying action while the carrier litigates defenses that might eventually relieve it of the duty to defend. *Id.* Third, the Court held that "an adjudication of the duty to defend cannot be delayed by discovery." *Id.* Fourth, the Court held that in a duty-to-defend case, discovery that may prejudice the insured's position in the underlying litigation should be stayed. *Id.* Finally and importantly, the Court indicated that "[a]ll discovery logically related to the underlying claims" is potentially prejudicial to the insured's position and should therefore be stayed until the underlying claims have been resolved.

9. Bad Faith Claims Against Insurers

RCW 48.01.030 requires insurers to deal with their insureds in good faith. Under Washington law, an insurance company's breach of the duty of good faith and fair dealing "in all insurance matters" can constitute a Consumer Protection Act violation under RCW 19.86.090. *See, e.g., Salois v. Mutual of Omaha Ins. Co.,* 90 Wn.2d 355, 359-61, 581 P.2d 1349 (1979); see also *Overton v. Consolidated Ins. Co.*, 101 Wn. App. 651, 661, 6 P.3d 1178 (2000), affd in part rev'd in part 145 Wn.2d 417, 38 P.3d 322 (2002). Consumer Protection Act remedies include, inter alia, treble damages up to $10,000, court costs, and attorney fees. RCW 19.86.090

A denial of an arguable insurance claim is not considered bad faith as long as the decision was based on reasonable conduct of the insurer. *See, e.g., Phil Schroeder, Inc. v. Royal Globe Ins.*, 99 Wn.2d 65, 73-74, 659 P.2d 509 (1983). Bad faith will not be found where the legal sufficiency of the insurer's reasons for denying coverage is unclear. *Overton*, 101 Wn. App. at 661. However, an insurer can be found to have acted in bad faith even when correctly denying a claim—if the denial was made without a reasonable investigation first. *Coventry Assocs. v.Amer. States Ins. Co.,* 136 Wn.2d 269, 961 P.2d 933 (1998).

10. Mandatory Arbitration Rules

Any civil, non-domestic action, other than an appeal from a court of limited jurisdiction, is subject to mandatory arbitration by statute if the action is at issue in superior court, requests relief for money damages only, and no claim exceeds the jurisdictional limit of $50,000, exclusive of attorney's fees, interest, or costs. *See* RCW 7.06 et seq.

West Virginia

1. Comparative Fault

With respect to causes of action arising on or after May 25, 2015 the new modified comparative fault standard under W.Va. Code §§ 55-7-13a-d applies. Under this new standard, defendants are responsible only for their share of damages. A plaintiff is barred from recovery if his fault is greater than the fault of all other persons combined. The outcome is not certain if plaintiff is found to be 50% at fault.

In making its determination, the trier of fact will consider the fault of all persons, including nonparties, as long as the plaintiff entered into a settlement with the nonparty, or a defending party gives notice within 108 days (recently amended to 180 days)[3] after being served that the non-party was wholly or partially at fault. W.Va. Code § 55-7-13d(a)(2). If fault is assessed to non-parties, it does not subject them to liability and may not be introduced as evidence of liability in any other action. W.Va. Code § 55-7-13d(a)(5). Fault allocated to an immune or limited liability defendant may not be allocated to any other defendant. Joint and several liability will apply to: (1) defendants

[3] Per House Bill 2002 the applicable time period is "one hundred-eight days". That may have been a printer's error. Now Senate Bill 7 reflects that the applicable time period is 180 days. Senate Bill 7 applies to all causes of action arising or accruing on or after May 24, 2016.

who consciously conspire to commit a tortious act or omission, (2) a defendant who is driving under the influence, (3) a defendant whose criminal conduct is the proximate cause of plaintiff's injury, and (4) a defendant who illegally disposes of hazardous waste. W.Va. Code § 55-7-13c(a)-(h).

Under this new statute, if a plaintiff is unable to collect the full amount from any defendant one year after the judgment becomes final, he is permitted to seek reallocation of the uncollectible amount among the other defendants according to their percentage of fault, up to each defendant's percentage of fault multiplied by the uncollectible amount. However, reallocation cannot increase the liability of any defendant whose percentage of fault is equal to or less than that of the plaintiff. W.Va. Code § 55-7-13c(d).

The new statute does not apply to suits under the Governmental Tort Claims and Insurance Reform Act, the Uniform Commercial Code, or the Medical Professional Liability Act.

With respect to causes of action arising before May 25, 2015, former West Virginia Code Section 55-7-24 imposes joint liability on defendants found to be more than 30% at fault. If a defendant is found to be 30% or less at fault, he is required to pay only the percentage of the damages for which he is actually found to be liable.

Under the former statute, if a plaintiff is unable to collect the full amount from any defendant six months after the verdict is rendered, he is permitted to seek reallocation of the uncollectible amount among the other defendants according to their percentage of fault, up to each defendant's percentage of fault multiplied by the uncollectible amount. However, reallocation cannot increase the liability of any defendant whose percentage of fault is (1) less than or equal to that of the plaintiff, or (2) less than ten percent. This former version of Section 55-7-24 took effect on July 8, 2005, and applied only to causes of action that accrued on or after July 1, 2005. The rules of joint and several liability were applicable to: (1) Any party who acted with the intention of inflicting injury or damage; (2) Any party who acted in concert with another person as part of a common plan or design resulting in harm; (3) Any party who negligently or willfully caused the unlawful emission, disposal or spillage of a toxic or hazardous substance; or (4) Any party strictly liable for the manufacture and sale of a defective product.

2. Insurance Minimum Limits

a. Bodily Injury to Others

For motor vehicle liability policies in effect before January 1, 2016, compulsory limits are $20,000 per person and $40,000 per accident involving two or more persons. W.Va. Code § 17D-4-2. The combined recovery under a liability policy for an injured party's claim and a derivative claim for loss of consortium by the spouse or children of the injured party cannot exceed the per person limit. *Fed. Ins. Co. v. Karlet*, 189 W.Va. 79, 428 S.E.2d 60 (1993). With regard to policies placed or renewed beginning January 1, 2016, insurers must increase minimum bodily injury liability coverage to $25,000 per person and $50,000 per accident. W.Va. Code § 17D-4-2(b).

b. Property Damage to Others:

Compulsory limits for policies in effect before January 1, 2016 are $10,000. W.Va. Code § 17D-4-2. With regard to policies placed or renewed beginning January 1, 2016, insurers must increase minimum coverage for property damage that occurs from a single accident to $25,000. W.Va. Code § 33-6-31(b), *referencing* W.Va. Code § 17D-4-2(b); HB 2790 (Mar. 11, 2015).

c. Uninsured Motorist (UM) and Underinsured Motorist (UIM) Coverage:

For policies in effect before January 1, 2016, minimum UM coverage is: Bodily injury, $20,000 per person, $40,000 per accident; property damage, $10,000. UM/UIM coverage must be offered for purchase in amounts of up to $100,000 per person, $300,000 per accident, and $50,000 in property damage. W.Va. Code § 33-6-31(b). With regard to policies placed or renewed beginning January 1, 2016, insurers must increase minimum UM coverage to bodily injury liability coverage of $25,000 per person, $50,000 per accident, and $25,000 property damage liability coverage. W.Va.

Code § 33-6-31(b), *referencing* W.Va. Code § 17D-4-2(b); HB 2790 (Mar. 11, 2015). UIM coverage is not mandatory.

3. Statutes of Limitation

Type of Action	Years to File a Lawsuit	Statute
Negligence	2 years, but suit must be filed within 1 year if the claim would not survive the death of the injured party.	W.Va. Code § 55-2-12.
Negligent Construction	10 years from the date of acceptance of the improvement or occupancy of the property, whichever occurs first.	W.Va. Code § 55-2-6a.
Product Liability	2 years	W.Va. Code § 55-2-12.
Wrongful Death / Survival Action	2 years	W.Va. Code § 55-2-12; § 55-7-6(d).
Breach of Contract	Written: 10 years Oral: 5 years	W.Va. Code § 55-2-6.
Unfair Trade Practices	1 year	Claims involving unfair claims settlement practices that arise under the Unfair Trade Practices Act are governed by the 1 year statute of limitations set forth in W.Va. Code § 55-2-12(c).

4. Punitive Damages and Damages Caps

a. Punitive Damages

By statute effective June 8, 2015:

> [the plaintiff must establish] by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.

W.Va. Code § 55-7-29(a). This new statute also allows for bifurcation. The first phase would determine liability. If the jury rules against the defendant, then the court will determine whether sufficient evidence exists to proceed with a consideration of punitive damages. If the court finds that sufficient evidence exists, then the same jury shall determine if a defendant is liable for punitive damages. W.Va. Code § 55-7-29(b).

The statute does not specify whether it applies to claims that accrued before its effective date or pending suits, and as of April, 2016, courts have not considered this issue. *See Moore v. Ferguson*, No. 2:15-CV-04531, 2015 WL 3999596, *3 n. 3 (S.D.W.Va. July 1, 2015) (declining to consider this issue).

With regard to cases not covered by the new legislation, punitive damages may be awarded in cases of intentional torts or gross, reckless, or wanton negligence. *See Hensley v. Erie Ins. Co.*, 168 W.Va. 172, 283 S.E.2d 227 (1981). For punitive damages to be awarded, there must be a reasonable relationship between such damages and the harm that was likely to occur from defendant's conduct, as well as the harm that actually has occurred. *Alkire v. First Nat'l Bank*, 197 W.Va. 122, 475 S.E.2d 122 (1996).

The relevant factors include:

1. The reprehensibility of the defendant's conduct;
2. Profit from the wrongful conduct;
3. Deterrence; and
4. The reasonable relationship between punitive damages, compensatory damages, and financial position of the defendant.

Id. The cost of litigation alone to the plaintiff is a factor that may justify punitive damages. Any award of punitive damages must also comply with the United States Supreme Court's holding in *B.M.W. of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996) and therefore may not be grossly excessive. Plaintiff's evidence of defendant's conduct, in arguing for punitive damages, must have a specific nexus to the actual harm suffered by the plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003).

W.Va. Code §55-7-29(c) sets a cap on punitive damages at four times the amount of compensatory damages or $500,000, whichever is greater.

b. Non-Economic Damages Cap

Damages are capped in medical malpractice cases, where the defendant carries the required level of insurance.

The current version of the Medical Professional Liability Act (MPLA) applies "to all causes of action alleging medical professional liability which are filed on or after July 1, 2015." W.Va. Code § 55-7B-10(b). Under section 55-7B-8(a), the maximum recovery of damages for noneconomic loss is generally $250,000. However, section 55-7B-8(b) allows for a maximum recovery for noneconomic loss damages of $500,000 "where the damages for noneconomic losses suffered by the plaintiff were for: (1) Wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life-sustaining activities." Both caps are subject to increase for "inflation by an amount equal to the Consumer Price Index published by the United States Department of Labor, not to exceed one hundred fifty percent of the amounts specified in said subsections" of the specified limits. W.Va. Code § 55-7B-8(c). The caps apply only to defendants which "have medical professional liability insurance in the aggregate amount of at least $1 million for each occurrence covering the medical injury which is the subject of the action." W.Va. Code § 55-7B-8(d).

5. Collateral Source Rules

The West Virginia Supreme Court has adopted the collateral source rule, holding that evidence that a plaintiff received compensation from a collateral source is not admissible. *See e.g. Pack v. Van Meter,* 177 W.Va. 485, 488, 354 S.E.2d 581, 584 (1986). Recently the Supreme Court of West Virginia clarified that "[w]hen an insurer makes an advance payment to a tort-claimant upon condition that the advance payment will be credited against a future judgment or determination of damages, the damages recovered by the claimant on a subsequent judgment shall be reduced by the amount of the advance payment." Syl. pt. 2, *Doe v. Pak*, ___ S.E.2d ___, 2016 WL 364949 (W.Va. Jan. 26, 2016).

6. Expert Admissibility Standard – *Daubert v. Frye*

West Virginia applies the *Daubert* standard. *See Harris v. CSX Transp.*, 232 W.Va. 617, 622, 753 S.E.2d 275, 280 (2013). This standard instructs a trial judge to make a preliminary assessment of whether an expert's scientific testimony is based on reasoning or methodology that is scientifically valid and properly can be applied to the facts at issue. The following factors may be considered:

1. Whether the theory or technique in question can be and has been tested;
2. Whether it has been subjected to peer review and publication;
3. Its known or potential error rate;
4. The existence and maintenance of standards controlling its operation; and
5. Whether it has attracted widespread acceptance within a relevant scientific community.

The court's role is "not to decide whether the preferred evidence is right, but whether the science is valid enough to be reliable." *Id.* at 621-22, 279-80. Reliability is defined as "whether the testimony is to a reasonable degree based on the use of knowledge and procedures that have been arrived at using the methods of science – rather than being based on irrational and intuitive feelings, guesses, or speculation." *Id.*

7. First Party Notice Requirements

With respect to occurrence-based policies, West Virginia courts require that the insurer prove prejudice resulting from the insured's delay in notice of a claim or suit, but that burden arises only after the insured proves the reasonableness of his delay in notifying the liability insurer. *Colonial Ins. Co. v. Barrett*, 208 W.Va. 706, 712, 542 S.E.2d 869, 875 (2000). The test is whether the insurer would have been in a better position regarding the investigation of the claim. *Dairyland Ins. Co. v. Voshel,* 189 W.Va. 121, 125, 428 S.E.2d 542, 546 (1993). In *Dairyland*, the West Virginia Supreme Court of Appeals held that the insurer was prejudiced by a nearly two-year delay in notification of a claim because by the time the insurer was able to investigate the claim, a previous owner of the vehicle at issue could not be found, making the chain of title, and thus coverage of the vehicle, difficult to establish. *Id.*

The Supreme Court has agreed with the majority of jurisdictions that proof of prejudice resulting from delay in notice is not required with regard to claims-made policies. *Lindsay v. Attorneys Liab. Prot. Soc., Inc.*, No. 11-1651, 2013 WL 1776465, *4 (W.Va. Apr. 25, 2013) (memorandum, not precedential).

8. Insurer Duty to Defend

An insurer's duty to defend its insured is broader than its duty to indemnify. *Camden-Clark Memorial Hosp. Ass'n v. St. Paul Fire and Marine Ins. Co.*, 224 W.Va. 228, 237, 682 S.E.2d 566, 575 (2009). "An insurer's duty to defend is normally tested by whether the allegations in the complaint against the insured are reasonably susceptible of an interpretation that the claim may be covered by the terms of the policy." *Bruceton Bank v. U.S. Fid. & Guar. Ins. Co.*, 199 W.Va. 548, 486 S.E.2d 19 (1997). An insurer has a heavy burden and "must meet a rigorous standard" to avoid its obligation to defend. *Silk v. Flat Top Constr., Inc.*, 192 W.Va. 522, 453 S.E.2d 356 (1994). However an insurer need not defend the insured if the alleged conduct is entirely foreign to the risk insured against. *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988).

9. Bad Faith Claims against Insurers

a. Third-Party Bad Faith

The West Virginia Third-Party Bad Faith Act was enacted on April 9, 2005, effective July 8, 2005. W.Va. Code § 33-11-4a. The Act bans lawsuits by third-party claimants against insurers of alleged tortfeasors under the Unfair Trade Practices Act (UTPA). Non-policyholders must file

administrative complaints with the insurance commissioner. The procedure is set forth in the West Virginia Code of State Rules, W.Va. CSR §§ 114-76-1 *et seq.* The Act does not preclude first-party claims under the UTPA. The Act does not preclude a common law cause of action by a policyholder for breach of the implied covenant of good faith and fair dealing arising from the insurance contract. *See Dorsey v. Progressive Classic Ins. Co.*, 232 W.Va. 595, 753 S.E.2d 93 (2013) (holding that a passenger in the insured vehicle was a first-party insured under the terms of the insurance policy, and thus she could pursue an action against the insurer for violations of the UTPA).

b. First-Party Bad Faith

In West Virginia, an insurer's duties are defined by statute and by the common law duty of good faith and fair dealing which is implied into the insurance contract. A breach occurs where a policyholder must sue his own insurer over any first party claim, and the policyholder substantially prevails in the action. The insurer is liable for (1) net economic loss, (2) aggravation, (3) inconvenience, and (4) the payment of the policyholder's reasonable attorneys' fees. *See e.g. Marshall v. Saseen*, 192 W.Va. 94, 100, 450 S.E.2d 791, 797 (1994); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73 (1986).

An insured "substantially prevails" in a property damage action against his insurer when the action is settled for an amount equal to or approximating the amount claimed by the insured immediately prior to the commencement of the action, as well as when the action is concluded by a jury verdict for such an amount. *Jordan v. National Grange Mut. Ins. Co.*, 183 W.Va. 9, 393 S.E.2d 647 (1990).

A statutory remedy for first party bad faith is available under the UTPA, W.Va. Code § 33-11-4 (9) *et seq*., and the corresponding regulations, W.Va. CSR 114-14-1 *et seq.* An insured must prove: (1) that the insurer violated the provisions of the UTPA in the adjustment of the underlying claim, (2) that the insurer's conduct was not an isolated violation, but instead demonstrates a general business practice of violating the UTPA, and (3) that the insurer's conduct with respect to its handling of the insured's claim actually caused injury to the insured. W.Va. Code § 33-11-4(9).

Punitive damages can only be awarded if the policyholder can establish "actual malice" on the part of the insurer. "Actual malice" means that the insurer actually knew the claim was proper, but willfully, maliciously, and intentionally used an unfair business practice in settling or failing to settle the policyholder's claim. *McCormick v. Allstate*, 202 W.Va. 535, 505 S.E.2d 454 (1998).

In *Grubbs v. Westfield Ins. Co.*, 430 F. Supp. 2d 563 (N.D.W.Va. 2006), the court held that in-house employee-adjusters have no common law duty of good faith and fair dealing to insureds because the adjuster is not a party to the insurance contract.

10. Mandatory Arbitration Rules

West Virginia does not have compulsory arbitration.

The Revised Uniform Arbitration Act, effective July 1, 2015, W.Va. Code §55-10-1 *et seq*., addresses agreements to arbitrate.

Wisconsin

1. Comparative Fault - Wisconsin has a modified comparative negligence system wherein contributory negligence is not a complete bar to recovery unless such negligence is greater than the negligence of the person against whom recovery is sought. However, any damages allowed are reduced in proportion to the amount of negligence attributable to the plaintiff..

2. Insurance Minimum Limits – Liability coverage is not required in Wisconsin unless a driver gets in an accident and is subsequently required to prove financial responsibility. However,

uninsured motorist (UM) coverage and medical payments coverage are mandatory parts of every policy of liability insurance that is "issued or delivered" in the State of Wisconsin. From November 1, 2009, to October 31, 2011, underinsured motorist (UIM) coverage was required in Wisconsin. However, pursuant to 2011 Wisconsin Act 14, and effective November 1, 2011, insurers are no longer required to include underinsured motorist coverage in auto insurance policies. While underinsured motorist (UIM) coverage is not required in Wisconsin, with every liability policy an insurer must provide written notice of the availability of UIM coverage, including a brief description of the coverage. This is a one-time notification requirement for policies in effect as of November 1, 2011.

2011 Wisconsin Act 14 takes effect for all policies issued or renewed on or after November 1, 2011. It sets insurance policy limits as follows:

$25,000 for death or bodily injury to one person
$50,000 for death or bodily injury to two or more persons; and
$10,000 for damage or destruction of property.

3. Statute of Limitations

Negligence: Three years from date of occurrence.
Negligent Construction: Construction defect statute of limitations is six years.
Product Liability: Three years from injury or date injury should have been discovered
Wrongful Death: Three years from date of death.
Breach of Contract: Six years, whether that contract be in writing or oral.
Unlawful Trade Practices: Three years from the date of the occurrence

4. Punitive Damages and Damages Caps

Punitive Damages: Punitive damages are defined as all damages in excess of actual damages and are imposed for the dual purposes of punishing the wrongdoer and deterring others from engaging in similar conduct in the future. Wis. Stat. § 895.043 sets forth the standard and procedures for awarding punitive damages. In so doing, it limits the potential for recovering punitive damages to cases where "evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." Under prior case law, the standard was whether the defendant's conduct was "outrageous," defined otherwise as conduct which was "willful, wanton, in a reckless disregard of rights or interests."

The Court also noted that "a defendant's conduct giving rise to punitive damages need not be directed at the specific plaintiff seeking punitive damages in order to recover under the statute." However, the Court further concluded that merely negligent conduct is insufficient to support an award of punitive damages.

As to the reasonableness of punitive damage awards, the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a "grossly excessive punishment on a tortfeasor." Three considerations enter into the determination of whether an award is grossly excessive: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm suffered and the amount of the punitive damages award; (3) the difference between the punitive damage award and any statutory civil or criminal punishment for comparable conduct.

Non-Economic Damages Cap: The Wisconsin Legislative recently enacted a law limiting punitive damages awards. The new cap on punitive damages applies to actions commenced on or after February 1, 2011. The new statute caps punitive damage awards at a 2:1 ratio of compensatory damages or $200,000, whichever is greater. However, this cap on damages does not apply when the injury was caused by the operation of a vehicle, snowmobile, all-terrain vehicle, utility terrain vehicle, or a boat "under the influence of an intoxicant to a degree that rendered the defendant incapable of safe operation of the vehicle."

Although the damages cap does not apply to the operation of most motorized transportation, the Wisconsin Supreme Court expressed its displeasure of large ratios of punitive damages to compensatory damages and noted that in certain situations, even a higher single-digit multiplier would constitute a violation of due process.

5. Collateral Source Rules

As a general rule, the collateral source rule applies in Wisconsin. One exception is in cases involving medical malpractice claims, where evidence of collateral source benefits may be admissible. See Wis. Stat. §893.55(7); Lagerstrom v. Myrtle Werth Hospital - Mayo Health System, 285 Wis. 2d 1, 700 N.W.2d 201 (2005). The general rule is that the damages to be awarded to an injured person are not to be affected by the fact that the claimant received compensation from other sources, such as sick leave or insurance. Hence, a tortfeasor is liable under Wisconsin law to the plaintiff for amounts paid by collateral sources. Moreover, where the costs of the plaintiff's medical treatment have been paid by a healthcare insurer, the plaintiff is entitled to seek recovery for the reasonable value of the medical services rendered without consideration of the amounts actually paid by the insurer. Koffman v. Leichtfuss, 246 Wis. 2d 31, 230 N.W. 2d 201 (Wis. 2001). Gratuitous benefits granted by others, employer wage continuations, medical insurance payments, and worker's/unemployment compensation will not act to reduce a plaintiffs damages. However, if a plaintiff creates a windfall situation by his own actions, the collateral source rule will not apply to prevent such reduction. An example of the latter is where a plaintiff incurs debts for medical expenses that are later discharged in bankruptcy - the rule cannot be applied offensively so as to collect the amount of the bills from the tortfeasor. Oliver v. Heritage Mut. Ins. Co., 179 Wis. 2d 1, 505 N.W.2d 452 (Ct. App. 1993).

6. Expert Admissibility Standard – *Daubert v. Frye*

Wisconsin adopted the Daubert "reliability" standard for the admissibility of expert testimony effective February 1, 2011, with the adoption of 2011 Wisconsin Act 14, Section 23. Wisconsin adopted the Daubert reliability standard by amending Wis. Stat. § 907.02 to reflect identical language contained in Rule 702 of the Federal Rules of Evidence.

State v. Giese, 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687 is the sole reported decision in Wisconsin addressing the Daubert standard. In Giese, the court of appeals noted that the goal of the Daubert standard is to prevent the jury from hearing conjecture dressed up on the guise of expert opinion and that no matter how good an expert's credentials may be, that expert must not be permitted to speculate. The court also noted that coursing through Daubert lore is a palpable fear of *ipse dixit* ("because I said so") testimony, and that expert testimony must be more than subjective belief and unsupported speculation.

7. First Party Notice Requirements

Failure to furnish notice or proof of loss within the time required by the policy does not invalidate or reduce a claim unless the insurer is prejudiced thereby and it was reasonably possible to meet the time limit. Wis. Stat. Ann. § 631.81(1) (West 2016). However, the risk of non-persuasion is upon the person claiming there was no prejudice. Wis. Stat. Ann. § 632.26(2) (West 2016). Failure to give notice required by the policy within the time specified does not invalidate a claim made by the insured if it was not reasonably possible to give the notice within that time and notice was given as soon as reasonably possible. Wis. Stat. Ann. § 632.26(1)(b) (West 2016).

8. Insurer Duty to Defend

There is no general statutory duty to defend. Therefore, whether or not an insurer is relieved of the duty to defend upon exhaustion of policy limits depends upon the explicit language set forth in its insurance policy. If a policy contains a "pay and walk" clause, the insurer may pay its limits of liability and drop the defense of the insured only if the "pay and walk" provision is conspicuously brought to the attention of the insured through the use of bold, italicized, capitalized and/or colored type. In addition, the termination must: (1) occur after a determination of coverage and potential liability; (2) involve an exhaustion of the policy limit by payment of a judgment or settlement; (3) satisfy the terms of the policy; (4) not be contrary to public policy; and (5) not be in bad faith.

Where an insurer issues a binder and the policy to be issued will contain the "pay and walk" language, the binder also must contain that language in conspicuous print, and the insured must be furnished with a copy of the binder.

When seeking to terminate the duty to defend, it is not sufficient for an insurer merely to pay into court the maximum amount for which it might be liable, unless the payment also exhausts the policy's limit of liability. In other words, an insurer must pay its total policy limits before it is freed from the duty to defend.

The requirement that a pay and walk provision be conspicuous does not apply when indemnity for a permissive user is at issue. Hoffman v. Economy Preferred Ins. Co., 2000 WI App 22, 232 Wis. 2d 53, 606 N.W.2d 590. This is understandable because a permissive user would generally never be in a position to read the policy insuring another's vehicle.

9. Bad Faith Claims Against Insurers

There are three generally recognized types of bad faith claims in Wisconsin. First, an insured may bring a bad faith action against the insurance company for failing to settle the claim with a third-party claimant when the ultimate judgment exposes the insured to a judgment in excess of the policy limits. This type of claim is known as a third-party bad faith claim. Second, an insured may bring a bad faith action "when the insurer unreasonably and in bad faith withholds payment of the claim of its insured." This type of claim is known as a first-party bad faith claim. Third, a claimant may have a bad faith action against an insurance company based on the insurance company's failure to reimburse the claimant for a worker's compensation claim. Roehl Transport, Inc. v. Liberty Mut. Ins. Co., 2010 WI 49, ¶ 27, 325 Wis.2d 56, 784 N.W.2d 542.

In Roehl Transport Inc., a third-party case, the Wisconsin Supreme Court held that an insured may assert a bad faith claim where the insurer, acting in bad faith, fails to settle the claim for less than the policy deductible, even though the resulting judgment does not exceed the policy limits. Id. at ¶ 7. Although the insurer argued that the insured's claim should not be recognized as

arising within the scope of bad faith law in Wisconsin, the court rejected this contention, stating that the three categories were not exhaustive of bad faith claims that may be brought in Wisconsin, but merely summarized the law to date. Id. at ¶ 36. Where a new fact pattern is presented, the court must look to the principles of the tort of bad faith to determine whether the claim is proper. Id. at ¶ 37.

Traditionally, in order to prove a first-party bad faith claim, the insured must establish two elements: (1) there is no reasonable basis for the insurer to deny the insured's claim for benefits under the policy; and (2) the insurer knew of or recklessly disregarded the lack of a reasonable basis to deny the claim. Brethorst v. Allstate Property and Cas. Ins. Co., 2011 WI 41, ¶ 49, 334 Wis.2d 23, 798 N.W.2d 467. However, the recent holding in Brethorst adds that "some breach of contract by an insurer is a fundamental prerequisite for a first-party bad faith claim against the insurer by the insured." Id. at ¶ 65.

10. Mandatory Arbitration Rules

Wisconsin does not require mandatory arbitration in civil litigation. However, most venues throughout the state do impose the requirement of a non-binding mediation before trial into the case scheduling order. Even so, the parties may move for an exemption of this loose requirement with a showing of "good cause" as to why such a mediation would not be productive.

In cases where mediation is ordered, the parties are free to schedule the mediation with an agreed upon mediator of their choosing. If a mediator cannot be agreed upon, the Court will select a mediator.

Wyoming

1. Comparative Fault

a. Wyoming follows a modified comparative fault rule where a plaintiff may recover as long as she is not more than 50% at fault.
b. Fault includes negligence, breach of warranty in tort, strict liability and intentional misconduct.
c. Joint and several liability among tortfeasors has been abolished.
d. Non-party actors, including those who enjoy immunity (such as an employer of the plaintiff) go on the verdict form if there is evidence of fault. Plaintiff bears the risk of an allocation of fault to non-parties.

2. Insurance Minimum Limits

Wyoming has minimum insurance requirements for motor vehicles in the follow amounts:
$25,000 for bodily injury/death of one person in any one accident;
$50,000 for bodily injury/death of two or more persons in any one accident; and
$20,000 for property damage of others in any one accident.
Wyo. Stat. 31-9-405(b).

All motor vehicles that must be registered must also have liability insurance, Wyo. Stat. 31-4-103(a), and any motor vehicle that will be operated or driven upon any highway must be registered, unless otherwise exempted. Wyo. Stat. 31-2-204(a). Vehicles exempted from registration, and therefore from the insurance requirements, include mopeds, pedestrian vehicles, and off-road recreational vehicles. Wyo. Stat. 31-2-225.

3. Statute of Limitations

a. Negligence: 4 years for bodily injury and property damage, 2 years for professional liability and wrongful death
b. Negligent Construction: 4 years for negligence although the contract statute of limitations will often apply.
c. Product Liability: 4 years for bodily injury and property damage, 2 years for wrongful death
d. Wrongful Death: 2 years
e. Breach of Contract: 10 years for written contracts and 8 years for oral.
f. Unlawful Trade Practices: within 1 year of initial discovery of the unlawful trade practice or 2 years of the consumer transaction, whichever occurs first. Wyo. Stat. 40-12-109.

4. Punitive Damages and Damages Caps

Punitive Damages: Punitive damages are allowed for willful and wanton misconduct. when the conduct in question constitutes willful and wanton misconduct. *See Weaver v. Mitchell*, 715 P.2d 1361, 1369-70 (Wyo. 1986); *Thunder Hawk By and Through Jensen v. Union Pac. R.R. Co.*, 844 P.2d 1045, 1051 (Wyo. 1992); *see also*, *Farmers Ins. Exchange v. Shirley*, 958 P.2d 1040, 1052 (Wyo. 1998). Willful and wanton misconduct is the "intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know that such conduct would, in a high degree of probability, result in harm to another. *Weaver*, 715 P.2d at 1370. Punitive damages are not allowed where an insured's conduct is only inattentive, inadvertent, thoughtless, by mistake, or even negligent or grossly negligent. *Id.* at 1369-70.

Non-Economic Damages Cap: Wyoming does not have any caps on non-economic damages.

5. Collateral Source Rules: Wyoming applies the typical collateral source rule. The Wyoming Supreme Court has not decided whether the collateral source rule applies to bar evidence of the amount actually paid for medical specials; although, USDC Wyoming has decided that it does apply. Many individual trial courts also apply the rule.

6. Expert Admissibility Standard – Daubert v. Frye-Wyoming uses the Daubert standard.

7. First Party Notice Requirements-Upon request, an insurer must provide forms for proof of loss. There is very little law on whether an insurer must show prejudice to prevail on a late notice claim. Disability insurance is governed by statute, Wyo. Stat. § 26-18-11, which provides a 90 day time limit that can be extended to 1 year. Wyoming typically follows provisions in a contract, but also prefers to resolve cases on the merits. Therefore, we suspect an insurer will most likely either have to show prejudice or a lengthy delay for no good reason to prevail on late notice.

8. Insurer Duty to Defend— An insurer's duty to defend is broader than its duty to provide coverage. "The insurer is obligated to afford a defense as long as the alleged claim rationally falls within the policy coverage. The obligation to defend is an independent consideration in liability insurance, and it is invoke by any claim alleged in the complaint that is potentially covered under the policy." *Lawrence v. State Farm Fire & Cas. Co.*, 133 P.3d 976, 980 (Wyo. 2006). If the policy potentially covers one or more claims, there is a duty to defend all claims, and any doubts about coverage should be resolved against the insurer. *Id.* To determine whether a claim is covered by the duty to defend, the Court will look to the policy language and the allegations in the Complaint. *Id.*

9. Bad Faith Claims against Insurers

a. First Party bad faith –Wyoming awards extra-contractual (tort) damages and employs an objective standard. A plaintiff must show 1) the absence of any reasonable basis for denying a claim for benefits; and 2) the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim for benefits. If a realistic question of liability exists, the insurer is entitled to reasonably pursue its defenses without exposure to a bad faith claim. For example, an insurer can rely on expert opinions regarding causation unless here was collusion or the experts knowingly made false reports. Only a showing of bad faith at the time of denial is required; subsequent payment of the claim will not absolve the insurer.

UM coverage is viewed as first party coverage and can give rise to a first-party bad faith claim. Wyoming does not follow the hybrid view of UM bad faith used in some states.

"An action for 'first party' bad faith will also lie when an insurer fails to inform its insured of first-party policy benefits where the insured brings a third-party liability claim against another of the insurer's insureds and 'it is apparent to the insurer that (1) there is a strong likelihood that its insured only can be compensated fully under her own policy and (2) the insured has no basis to believe that [she] must rely upon [her] policy for coverage.'" *State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d 813, 826 (Wyo. 1994).

A claim for bad faith also exists even in the absence of breach of contract. If the insurer's investigation, handling or denial of the claim violated the duty of good faith and fair dealing, it may be held liable for bad faith even if denial of the claim was proper under a fairly debatable standard.

NOTE—first party claims for benefits under life, accident, health, property, and casualty policies must be rejected or accepted and paid within 45 days of proof of loss. Wyo. Stat. § 26-15-124.

b. Third party bad faith requires proof of a bad faith refusal to settle a third-party claim within policy limits. Wyoming case law requires an excess judgment be entered before a claim is viable. "While an insurer has a duty to enter into good faith negotiations "where reasonable and feasible" to settle a claim within policy limits, * * * there is no requirement that it "rush to the settlement of a claim" against an insured to avoid an excess judgment." *Jarvis v. Famer's Ins. Exch.*, 948 P.2d 898, 901 (Wyo. 1997). The duty is to exercise intelligence, good faith, and honest and conscientious fidelity to the common interest of the insured as well as of the insurer and give at least equal consideration to the interest of the insured.

10. Mandatory Arbitration Rules

Wyoming's insurance regulations prohibit an uninsured motorist policy from containing a mandatory arbitration clause. Wyoming Insurance Department Rules and Regulations, Ch. XXIII, § 9. Otherwise, Wyoming does not have any statutes or rules compelling or prohibiting mandatory arbitration.

Canada / Ontario

1. **Comparative Fault**

Canadian jurisdiction have adopted the concept of comparative fault, which means that fault in a tort action is apportioned between the responsible parties. This includes any contributory negligence on the part of the plaintiff(s).

Despite an assignment of fault, the majority of jurisdictions also have statutes which impose joint-and-several liability. This is known as the 1% rule; in the event a defendant is 1% liable, the plaintiff(s) may seek 100% of its damages from that defendant. That defendant is left with an action for contribution/indemnity as against any other responsible parties.

In the province of Ontario, the joint and several provisions of the *Negligence Act,* R.S.O. 1990, c N.1*,* state the following: "[w]here damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligence, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence."

In addition to Ontario, other Canadian provinces and territories with the joint and several liability in their statutes include Alberta, British Columbia, Manitoba, New Brunswick, Prince Edward Island, Nova Scotia, Newfoundland, Northwest Territories, Nunavut and Yukon.

An exception to the above is the jurisdiction of Quebec, governed by a civil law system which traces its origins back to France.

2. Insurance Minimum Limits

As insurance falls to the jurisdiction of the provincial governments, minimum limits differ from province to province should they so choose to regulate that area of insurance. Typically, minimum limits exist only with respect to automobile insurance.

In Ontario, the standard Ontario Automobile Policy 1 (OAP 1) sets forth the rights and obligations of the parties, as detailed by the *Insurance Act*, R.S.O. 1990, c. I.8. Third party liability limits can be no lower than $200,000.00, and the policy must provide for first-party statutory accident benefits.

In addition, the OAP 1 provides for uninsured and unidentified automobile coverage and as such, this coverage is mandatory. Optional, though typically added to the OAP 1 is the OPCF-44R endorsement, which provides for *under*insured automobile coverage.

Automobile insurance is, in some cases, provided by the provincial governments, such as Saskatchewan, Manitoba, and British Columbia.

3. Statute of Limitations

In Ontario, the basic limitation period is two years from the earlier of the day on which the essential elements of the claim are known to the claimant and the day on which they are discoverable: *Limitations Act, 2002*, S.O. 2002, c. 24, Sch B. This Act consolidated many of the other limitation periods found in other acts, and brought much-needed consistency (for example, the limitation period for medical malpractice prior to 2002 was 1 year).

Furthermore, there is an ultimate limitation period of 15 years from the day on which the act or omission takes place, regardless of whether the essential elements of the claim become known to the claimant or were discoverable during the 15-year period and whether any other limitation period has not run.

Note that limitation periods are not deemed to run while a plaintiff is under disability, which includes minors.

In British Columbia, the provincial government brought into force the new limitations act on June 1, 2013, which sets the limitation period to 2 years, and is substantially similar to the Ontario Act.

4. Punitive Damages

Punitive Damages: Punitive Damages are a class of damages which are intended to punish. They are not compensatory in nature. The leading decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance*, [2002] 1 S.C.R., it was held that the trial judge's charge to the jury with respect to punitive damages should include words to convey an understanding of the following points:

1) Punitive damages are very much the exception rather than the rule,
2) Imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.
3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant,
4) Having regard to any other fines or penalties suffered by the defendant for the misconduct in question.
5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation.
6) Their purpose is not to compensate the plaintiff, but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened.
7) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and
8) They are given in an amount that is no greater than necessary to rationally accomplish their purpose.
9) The jury should be told that while normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages.
10) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

5. Collateral Source Rules

The Canadian Black's Law Dictionary defines the collateral source-rule as "the doctrine that if an injured party receives compensation for the injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay."

Over time, this rule has evolved to allow tortfeasors and/or their insurers to deduct certain amounts already received by the plaintiff in order to ensure that the plaintiff does not receive double recovery. In determining which amounts are deductible, the court must balance the principles of compensating the plaintiff, while also avoiding overcompensation or double recovery.

One of the leading cases on this issue in Canada is the Supreme Court of Canada decision in *Cunningham v. Wheeler,* [1994] S.C.R. 359 (S.C.C.). In this decision, Cory J. held that the

compensation of the injured party must carefully be weighed with the concept that the plaintiff is not entitled to double recovery for any loss that results from the injury.

6. Expert Admissibility Standard

To qualify an expert, the trial judge must first find the expert to possess some unique knowledge, skill, experience or other quality which enables the witness to be of assistance to the trier-of-fact. The witness' expertise must therefore be relevant to the cause in dispute, and be of such a nature that a person of ordinary experience and intelligence would not be able to form a similar opinion based on the same set of circumstances.

The Supreme Court of Canada, in its 1992 decision of *R. v. Mohan*, [1992] 2 S.C.R. 9, stated that the admissibility of expert evidence is governed by the following four factors:

1) Relevance;
2) Necessity in assisting the trier of fact;
3) Absence of any exclusionary rule (i.e. hearsay); and
4) The proper qualification of the expert.

Like all evidence to be admitted to the Court, the Court has an inherent jurisdiction to exclude any evidence which it finds will be more prejudicial than probative to the trier of fact.

7. First Party Notice Requirements

Ontario's *Insurance Act*, R.S.O. 1990, c. I.8 imposes several first-party notice requirements on insureds in regulated areas of insurance.

For example, with respect to fire insurance, Statutory Condition 6 requires notice be given to the insurer "forthwith" in writing following a loss (see section 148).

With respect to automobile insurance, section 258.1(1) requires an insured to give the insurer notice of an accident within 7 days if they intent to make a claim.

Section 258.3(2) specifically states that an insured who receives a notice regarding an action for loss or damage from bodily injury or death arising directly from the use or operation of an automobile shall give a copy of the notice to the insurer within seven (7) days of receiving the notice. However, if the insured is unable because of incapacity to comply with the notice requirement within seven (7) days of receiving the notice, the insured shall comply as soon as possible thereafter.

Section 258.4 of the *Insurance Act* indicates that an insurer that receives a notice under clause 258.3 (above) shall promptly inform the plaintiff whether there is a motor vehicle liability policy issued by the insurer to the defendant and, if so,

(a) The liability limits under the policy; and
(b) Whether the insurer will respond under the policy to the claim.

8. Insurer's Duty to Defend

When pleadings allege facts that, if true, require the insurer to indemnify the insured, the insurer is obliged to defend the claim: *Monenco v. Commonwealth,* 2001 SCC 49 (CanLII), [2001] 2 S.C.R. 699, at para. 28. The mere possibility that a claim may fall within the policy is sufficient to trigger the duty to defend: *Monenco,* at para. 29.

In examining the pleadings to determine whether the claims fall within the scope of coverage, the parties to the insurance contract are not bound by the labels selected by the plaintiff (*Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 (CanLII), [2000] 1 S.C.R. 551, at paras. 79 and 81). The use or absence of a particular term will not determine whether the duty to defend arises. What is determinative is the true nature or the substance of the claim (*Scalera*, at para. 79; *Monenco*, at para. 35).

9. Bad Faith Claim Against Insurers

According to the decision in *Adams v. Confederation Life Insurance Company,* [1994] 18 Alta. L.R. (3d) 324 (Q.B.), it is confirmed that an insurer's obligations to its insured are those imposed by the express terms of its policy, in addition to an implied obligation of good faith and fair dealing. One component of the obligation of good faith and fair dealing is the duty to act both promptly and fairly when investigating, assessing and negotiating the settlement of claims. The case law states that during the settlement of claims the insurers are to afford the insured's interests priority equal to their own.

In *Shea v. Manitoba Public Insurance Corp.,* [1991], 55 B.C.L.R. (2d) 15 (S.C.), Finch J. ruled that insurers are bound by a positive duty to consider the insured's interests on equal footing with their own where settlement is concerned. In addition, Finch J. further established the existence of a duty to make the policy limits available in settlement where the risks warrant. Therefore, it appears that insurers can be held liable in situations where they refuse to settle an offer that is within the policy limits and thus expose the insured party to liability beyond policy limits.

In the *Introduction to Canadian Insurance Law*, 2nd Edit., (Markham, Ont.: LexisNexis Butterworths, 2006), the author explained the essence of the duty of good faith and fair dealing by stating:

> "[The] right to control the litigation from the defence point of view carries with it certain obligations. In particular, the insurer must conduct itself in accordance with a duty of good faith and fair dealing in relation to its customer. In addition to the general obligation to treat its customer fairly,…good faith imposes an additional requirement on a liability insurer. If the person bringing the lawsuit makes an offer of settlement within the policy limits, the insurer may not reject it without taking account of its customer's interest. … The test is, did the insurer give at least equal consideration to the customer's interest as it did its own interest?" (at p. 85)

Finally, it should be noted that "good" or "bad" faith on the part of an insurer with respect to the handling and settlement of claims remains dependent upon the facts of each particular case.

10. Mandatory Arbitration Rules

Mandatory arbitration exists only for several types of disputes between insurers, such as priority for payment of no-fault statutory accident benefits, and loss transfer arbitrations between heavy commercial and non-heavy commercial vehicles.

Arbitration remains one of the options for claimants to resolve disputes with respect to Ontario's no-fault statutory accident benefits.

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