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REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

A health insurance claim must be paid, denied, or settled within 30 days after receipt by the carrier if submitted electronically, and within 45 days if submitted by other means. C.R.S. § 10-16-106.5(4)(a). A claim requiring additional information shall not be considered a “clean” claim. *See* C.R.S. § 10-16-106.3 (Uniform claims-billing codes-electronic claim forms) and Amended Insurance Regulation 4-2-24 (Concerning Clean Claim Requirements for Health Carriers). A “clean claim” means a claim for payment of health care expenses that is submitted to a carrier on the uniform claim form adopted pursuant to C.R.S. § 10-16-106.3 with all required fields completed with correct and complete information, including all required documents. If additional information is required to process the claim, the carrier must provide the insured with a complete written explanation of the information required including any additional medical or other information related to the claim within 30 days after receipt of the claim. C.R.S. § 10-16-106.5(4)(b); Amended Insurance Regulation 4-2-24.

The minimum standards, including time limits, for handling grievances involving utilization review determinations are set forth by Insurance Regulation. *See* Insurance Regulation 4-2-17, “Prompt Investigation of Health Claims Involving Utilization Review and Denial of Benefits and Rules Related to Internal Claims and Appeals Processes.”

The Colorado Division of Insurance Amended Regulation 5-1-14 establishes requirements and penalties for failure to promptly address first party property and casualty claims. *See*, Colo. Code Regs. 702-5:5-1-14 (2012). The regulation requires that all insurers authorized to write property and casualty insurance policies in Colorado make a decision on claims and/or pay benefits under the policy sixty (60) days after receipt of a valid and complete claim, unless there is a reasonable dispute between the parties concerning such claim, and provided the insured has complied with the terms and conditions of the policy of insurance. *See* 3 Colo. Code Regs. 702-5:5-1-14, § 4(A)(1). A valid and complete claim is deemed received by the insurer when all information and documents necessary to prove the insured’s claim have been received by the insurer, there are no indicators on the claim requiring additional investigation before a decision can be made, or any litigation on the claim has been finally and fully adjudicated. For a complete list regarding what constitutes a valid and complete claim, *See* 3 Colo. Code Reg. 702-5:5-1-14 § 4(A)(2)(a). A reasonable dispute between parties includes information necessary to make a decision on the claim has not been submitted or obtained, conflicting information is submitted or obtained and additional investigation is necessary, or litigation is commenced on the claim. For a complete list regarding what constitutes a reasonable dispute *See* 3 Colo. Code Regs. 702-5:5-1-14(4)(A)(2)(b). If an insurer fails to make a decision and/or pay benefits within sixty (60) days, the Commissioner of Insurance may impose penalties. *See* Colo. Code Reg. 702-5:5-1-14 § 4(A)(1)(a)-(c).

Insurers must notify additional insureds by endorsement on a general liability policy, whose interests are affected by a liability claim, of the results of an insurer's investigation of such claim and the status of the claim within a reasonable period of time (generally within 90 calendar days). Insurance Regulation 5-1-15 §§ 4(C), 5(A).

Standards for Determination and Settlements

Under C.R.S. § 10-3-1115(1)(a), “[a] person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant.” Under C.R.S. § 10-3-1116(1), “[a] first-party claimant as defined in section 10-3-1115 whose claim for payment of benefits has been unreasonably delayed or denied may bring an action in a district court to recover reasonable attorney fees and court costs and two times the covered benefit.” These statutory provisions are discussed further below in Section IV(A).

Claim handling standards are set forth in the Unfair Claims Practices Act, C.R.S. § 10-3-1101 *et seq.* The Act does not create a private cause of action for violation of its provisions or abrogate any common law contract or tort causes of action (C.R.S. § 10-3-1114), but it does create standards of care in claims handling that may be admissible in civil actions for bad faith breach of insurance contract. C.R.S. § 10-3-1113; *Dale v. Guar. Nat’l Ins. Co.*, 948 P.2d 545, 553 (Colo. 1997).

The statute identifies a number of unfair claim settlement practices, including a failure to adopt and implement reasonable standards for the prompt investigation of claims, refusing to pay claims without a reasonable investigation, failing to affirm or deny coverage within a reasonable period of time, misrepresenting pertinent facts or insurance policy provisions, not attempting in good faith to effect prompt, fair, and equitable settlements of claims, and attempting to settle a claim for less than a reasonable amount. C.R.S. § 10-3-1104(1)(h)(VI), (VIII).

Since persons under 18 cannot enter into a legally binding contract, a petition must be made to the Court to approve any settlement with a minor. C.R.S. § 13-22-101(1)(a); C.R.P.P. 62. A petition may be made to the appropriate probate court to approve a settlement with a minor and ensure that the minor is bound by the agreement. C.R.P.P. 62. The procedure for petitioning approval of a settlement with a minor is outlined in Colorado Probate Procedure Rule 62.

PRINCIPLES OF CONTRACT INTERPRETATION

An insurance policy is merely a contract that courts should interpret in line with well-settled principles of contract interpretation. *Shelter Mut. Ins., Co., v. Mid-Century Ins. Co.*, 246 P.3d 651, 662 (Colo. 2011); *Cyprus Amex Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 299 (Colo. 2003). *See also* *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 613 (Colo. 1999); *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 750 (Colo. 1990). A court's interpretation of an insurance contract is a matter of law, subject to de novo review. *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002); *Compass*, 984 P.2d at 613. When interpreting insurance contracts, courts attempt to carry out the parties' intent and reasonable expectations when they drafted the policies. *Thompson v. Md. Cas. Co.*, 84 P.3d 496, 501 (Colo. 2004); *State Farm Mut. Auto. Ins. Co. v. Nissen*, 851 P.2d 165, 166-67 (Colo. 1993). Courts read the provisions of the policy as a whole, rather than reading them in isolation. *Simon v. Shelter Gen. Ins. Co.*, 842 P.2d 236, 239 (Colo. 1992). In all manner of insurance contracts, courts first review the clause to determine whether it is ambiguous. *O'Connor v. Proprietors Ins. Co.*, 696 P.2d 282, 285 (Colo. 1985). Where the language of the policy is clear and unambiguous, it cannot be construed to mean other than what it says, and must be given the plain and ordinary meaning of the terms used. *See Wota v. Blue Cross & Blue Shield*, 831 P.2d 1307, 1309 (Colo. 1992); *Mass. Mut. Life Ins. Co. v. DeSalvo*, 482 P.2d 380, 383 (Colo. 1971). “Courts may neither add provisions to extend coverage beyond that contracted for, nor delete them to limit coverage.” *Cyprus Amex*

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Minerals Co. v. Lexington Ins. Co., 74 P.3d 294, 299 (Colo. 2003).

In undertaking the interpretation of an insurance contract, Colorado courts are wary of rewriting provisions, and give the words contained in the contract their plain and ordinary meaning, unless contrary intent is evidenced in the policy. *Chacon*, 788 P.2d at 750. Courts may neither add provisions to extend coverage beyond that contracted for, nor delete them to limit coverage. *Cyprus*, 74 P.3d at 299. Because of the unique nature of insurance contracts and the relationship between the insurer and insured, courts construe ambiguous provisions against the insurer and in favor of providing coverage to the insured. *Chacon*, 788 P.2d at 750. *See also Thompson*, 84 P.3d at 501 (“We also recognize that unlike a negotiated contract, an insurance policy is often imposed on a take-it-or-leave-it basis,” and therefore, “we assume a heightened responsibility in reviewing insurance policy terms to ensure that they comply with public policy and principles of fairness.”)(quotations and citations omitted). Undefined contract terms are ambiguous when they are susceptible to more than one reasonable interpretation. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1086-87 (Colo. 1991).

A policy term is ambiguous where it is reasonably susceptible of more than one meaning. *Thompson v. State Farm Fire & Cas. Co.*, 165 P.3d 900, 901 (Colo. App. 2007). “However, mere disagreement between the parties concerning the meaning of terms does not create an ambiguity.” *Id.* at 902. Ambiguous policy language will be construed in favor of coverage. *Hecla*, 811 P.2d at 1090.

Exclusionary clauses must be drafted in clear and specific language. *Am. Family Mut. Ins. Co. v. Johnson*, 816 P.2d 952, 953 (Colo. 1991). Exclusions in an insurance policy must be strictly construed against the insurer, and a forfeiture of coverage based on technical violations is a result not favored in the law. *See O’Connor*, 696 P.2d at 284; *Grooms v. Rice*, 429 P.2d 298, 300 (Colo. 1967). Coverage provisions are to be liberally construed in favor of the insured and, thus, in favor of coverage at the earliest possible date. *Jarnagin v. Banker’s Life & Cas. Co.*, 824 P.2d 11, 14 (Colo. App. 1991).

CONTRACT INTERPRETATION

Common Issues

1. Faulty Workmanship as an “Occurrence”

Commercial general liability (“CGL”) policies provide indemnification when three threshold inquiries are satisfied: (1) that the claim arises within the policy definitions, (2) that coverage is triggered by the type of damage and the policy’s effective dates, and (3) the basis of the claim is not specifically excluded by the policy.

In Colorado, there is a split of authority on whether property damage caused by a construction defect is an “occurrence.” Generally, damage for the insured’s own faulty work is excluded under the “business risk doctrine.” *See McGowan v. State Farm Fire & Cas. Co.*, 100 P.3d 521, 525 (Colo. App. 2004). However, if property damage to third parties results from faulty workmanship, CGL policies will often cover the loss, and Colorado appellate courts are trending towards finding coverage for construction defects as covered “occurrences.” *See, e.g., Colard v. Am. Family Mut. Ins. Co.*, 709 P.2d 11 (Colo. App. 1985); *Hoang v. Assurance Co. of Am.*, 149 P.3d 798 (Colo. 2007). The wide breadth of these cases and their contradictory conclusions demonstrate that the particular facts of each case should be carefully examined.

In addition to qualifying as an “occurrence,” damage resulting from poor workmanship must also be “property

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damage.” CGL policies define “property damage” as “physical injury to tangible property, including all resulting loss of use thereof, or loss of use of tangible property which has not been physically injured.” Only third-party property damage is intended to be covered. Various exclusions preclude the insured’s own work from being considered covered “property damage,” and the insured’s own property is always excluded. Moreover, the definition of “property damage” does not include purely economic losses. *See, e.g., Lamar Truck Plaza, Inc. v. Sentry Ins.*, 757 P.2d 1143 (Colo. App. 1988), *partially overruled by, Hoang*, 149 P.3d 798.

2. Does Your State Have an Anti-Indemnity Statute? [And if so, does it have any notable peculiarities?]

Colorado no longer allows contractual provisions intended to protect parties from their own negligence in construction. C.R.S. § 13-21-111.5(6). Colorado law voids any provision in a construction agreement that requires a person to indemnify, insure or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the indemnitee’s control or supervision. C.R.S. § 13-21-111.5(6)(b).

This anti-indemnification statute includes a number of qualifications. C.R.S. § 13-21-111.5(6)(c)-(f). For example, it does not affect any provision in a construction agreement that requires a person to indemnify and insure another person for an amount which is no greater than the “degree or percentage of negligence or fault attributable to the indemnitor or the indemnitor’s agents, representatives, subcontractors or suppliers.” C.R.S. § 13-21-111.5(6)(c). Nor does it affect the doctrine of *respondereat superior*, vicarious liability or other nondelegable duties, or affect the liability for the negligence of an at-fault party. C.R.S. § 13-21-111.5(6)(f)(I), (II). It also does not affect the exclusive remedy provided within the workers’ compensation statute. C.R.S. § 13-21-111.5(6)(f)(III). Additional express exceptions found in C.R.S. § 13-21-111.5(6) include agreements concerning builder’s risk insurance, C.R.S. § 13-21-111.5(6)(d)(II), property owned or operated by railroad, sanitation district, water district, water and sanitation district, municipal water enterprise, water conservancy district, water conservation district or metropolitan sewage disposal district, C.R.S. § 13-21-111.5(6)(e)(II)(A), and leased or rented property, C.R.S. § 13-21-111.5(6)(e)(II)(B).

The statute does not void or prohibit provisions requiring additional insured insurance for the indemnitee to the extent it provides “coverage to the indemnitee for liability due to the acts or omissions of the indemnitor.” C.R.S. § 13-21-111.5(6)(d)(I). However, any provision that requires the purchase of additional insured insurance for damage not caused by the fault of the party providing such insurance is void. *Id.*

CHOICE OF LAW

In Colorado, the Restatement (Second) of Conflict of Laws (1971) has been adopted and is applied to choice of law issues in both tort and contract actions. *Wood Bros. Homes, Inc. v. Walker Adjustment Bureau*, 601 P.2d 1369 (Colo. 1979). If an insurance policy contains a choice of law clause, it will generally be enforceable. *TerraMatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483, 490 (Colo. App. 1997) (citing *Hansen v. GAB Bus. Servs., Inc.*, 876 P.2d 112 (Colo. App. 1994)).

Pursuant to the Restatement, § 187, the forum state should apply the choice of law chosen by the parties “unless there is no reasonable basis for their choice or unless applying the law of the state so chosen would be contrary to the fundamental policy of a state whose law would otherwise govern.” *Hansen*, 876 P.2d at 113. The policy at issue must be a substantial one to make a showing that the chosen law contravenes a fundamental policy of the forum state. *Id.* (citing *Pirkey v. Hosp. Corp. of Am.*, 483 F.Supp. 770 (D. Colo. 1980)) (where Court declined to apply Saudi Arabian law, finding that application of the chosen law would have raised fundamental due process

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problems). Not recognizing a claim or theory of recovery is not a substantial conflict warranting rejection of the parties' choice of law. *Hansen*, 876 P.2d at 113.

When an insurance policy or other contract does not contain a choice of law provision, Colorado applies the "most significant relationship" test of the Restatement. *ITT Specialty Risk Servs. v. Avis Rent A Car Sys., Inc.*, 985 P.2d 43 (Colo. App. 1998). To make the determination, the Court will evaluate various contacts, including the place the contract was made and residence of the parties, and determine "which state has the most significant relationship to the occurrence or transaction and to the parties under the principles stated in Restatement [§] 6." *ITT*, 985 P.2d at 47. The Restatement, § 188, provides that the place of contracting, place of negotiation, place of performance, location of the subject matter of the contract and residence/place of business of the parties "are to be evaluated according to their relative importance with respect to the particular issue." Restatement (Second) of Conflict of Laws § 188 (1971).

The case law models the Restatement, holding that an insurance policy is a contract and is construed according to the law for the construction of contracts. *State Farm Mut. Auto. Ins. Co. v. Mendiola*, 865 P.2d 909, 912 (Colo. App. 1993). In the absence of an effective choice of law provision in a policy, a Colorado court will apply the most significant relationship test when determining which state's law should govern an insurance policy dispute. Under that test, a court will consider the following factors to determine which state bears the most significant relationship to the contract: (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile or residence of the parties. *Id.* at 911.

In a case where a homeowner's insurance policy did not contain a choice of law provision, but the policy was issued to a resident of Colorado, the Court found that "all significant contacts" were in Colorado, despite the fact that the claim involved the insured's son, a college student in Florida who was sued in Florida and sought coverage for defense. *Fire Ins. Exch. v. Bentley*, 953 P.2d 1297, 1300 (Colo. App. 1998). In *Hawks v. Agri Sales, Inc.*, 60 P.3d 714, 715 (Colo. App. 2001), plaintiff was a resident of Kansas, but was injured while working in Colorado for his Kansas employer. The Court applied the "most significant relationship" approach of the Restatement and found that Colorado had the most significant relationship, because the injury occurred in Colorado and the defendant place of business was located in Colorado. *Id.* Therefore, the determination of which law applies will be case-specific.

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

The Colorado Supreme Court has consistently held that an insurer's duty to defend arises solely from the complaint in the underlying action. *Thompson*, 84 P.3d at 502 (court looks initially to the claims expressly covered and excluded by the policy and compares those to the claims alleged in the complaint); *Cyprus Amax Minerals*, 74 P.3d at 299. A duty to defend exists when a complaint includes any allegations that, "if sustained, would impose a liability covered by the policy." *Hecla*, 811 P.2d at 1089; *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 827 (Colo. 2004). Stated differently, "an insurer has a duty to defend where a complaint against its insured 'alleges any facts that might fall within the coverage of the policy,' even if allegations

only ‘potentially or arguably’ fall within the policy’s coverage.” Thompson, 84 P.3d at 502 (quoting Hecla, 811 P.2d at 1092); Compass Ins., 984 P.2d at 613 (Colo. 1999); Constitution Assocs. v. N.H. Ins. Co., 930 P.2d 556, 563 (Colo. 1997) (duty to defend arises where the alleged facts even potentially fall within the scope of coverage, but the duty to indemnify does not arise unless the policy actually covers the alleged harm). Under Colorado law, an insurer seeking to avoid a duty to defend bears a “heavy burden,” as the duty to defend is construed “with a view toward affording the greatest possible protection to the insured.” Thompson, 84 P.3d at 502 (internal quotation marks omitted). Therefore, the Court has described the duty to defend as broader than the duty to indemnify, which depends on the ultimate determination of coverage as decided by the trier of fact. Cotter Corp., 90 P.3d at 827. If the underlying complaint asserts more than one claim, the insurer must defend the insured on all claims so long as any one of them is arguably a risk covered by the subject policy. Fire Ins. Exch. v. Bentley, 953 P.2d 1297, 1300 (Colo. App. 1998).

The duty owed to an insured by an insurer to act in good faith when handling third-party liability claims requires the insurer to act reasonably—that is, to act non-negligently. Farmers Grp., Inc. v. Trimble, 691 P.2d 1138, 1142 (Colo. 1984). This duty is discussed in more detail below.

Although Colorado follows a strict four-corners approach to assess the duty to defend, the Tenth Circuit Court of Appeals has recognized two exceptions based upon its interpretation of Colorado law. “The Colorado Supreme Court has consistently held that an insurer’s duty to defend arises solely from the complaint in the underlying action.” United Fire & Cas. Co. v. Boulder Plaza Residential, LLC, 533 F.3d 951, 960 (10th Cir. 2011) (emphasis in original; internal quotations and citations omitted). In the first case finding an exception to the “Complaint Rule,” the Tenth Circuit predicted that the Colorado Supreme Court would recognize an exception to consider “allegations contained in separate but factually related complaints.” Apt. Inv. & Mgmt. Co. v. Nutmeg Ins. Co., 593 F.3d 1188 (2010). The second exception recognizes that an insurer should not have a duty to defend “when the facts alleged in the complaint ostensibly bring the case within the policy’s coverage, but other facts that are not reflected in the complaint and are unrelated to the merits of the plaintiff’s action plainly take the case outside the policy coverage. Pompa v. Am. Family Mut. Ins. Co., 520 F.3d 1139 (2008) (court recognized a prior criminal conviction as a public record though it was not pleaded in the complaint). No Colorado appellate court has either adopted or rejected these exceptions.

Under Colorado’s statutory scheme governing Construction Defect Actions, “in interpreting a liability insurance policy issued to a construction professional, a court shall presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured.” Colo. Rev. Stat. § 13-20-808(3). However, this provision does not require coverage for damage to an insured’s own work unless otherwise provided in the insurance policy. *Id.* The provision also does not create insurance coverage that is not included in the insurance policy. *Id.* Moreover, the duty to defend a construction professional is triggered upon the receipt of a Notice of Claim pursuant to C.R.S. § 13-20-803.5 or filing of a complaint, cross-claim, counterclaim, or third-party claim. Colo. Rev. Stat. § 13-20-808(7).

2. Issues with Reserving Rights

An insurer may discharge its duty to defend yet still contest disputed coverage issues by providing

a defense under a reservation of its rights to seek reimbursement, or in filing a declaratory judgment action after the underlying case had been adjudicated. *Hecla*, 811 P.2d at 1089. A reservation of rights notice should be sent to the insured prior to commencement of the defense. See *Church Mut. Ins. Co. v. Klein*, 940 P.2d 1001, 1003 (Colo. App. 1996).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

Amended Insurance Regulation 6-4-1 provides privacy protections of nonpublic personal financial and health information of persons who obtain products or services from insurance companies. Insurance Regulation 6-4-2 establishes standards for developing and implementing administrative, technical and physical safeguards to protect the security, confidentiality and integrity of customer information pursuant to Sections 501, 505(b), and 507 of the *Gramm-Leach-Bliley Act*, codified at 15 U.S.C. §§ 6801, 6805(b) and 6807

1. Criminal Sanctions

Colorado imposes civil liability as opposed to criminal sanctions for violation of privacy laws. Article II, Section 7 of the Colorado Constitution affords persons a reasonable expectation of privacy in their personal telephone toll records and banking transaction records. *People v. Mason*, 989 P.2d 757, 759 (Colo. 1999). Colorado law also prohibits wiretapping under C.R.S. § 18-9-303, and eavesdropping under C.R.S. § 18-9-304. Each governmental entity of the state must create a privacy policy for the purpose of standardizing within such governmental entity the collection, storage, transfer, and use of personally identifiable information by such governmental entity. C.R.S. § 24-72-502.

Colorado recognizes civil tort claims for invasion of privacy in the nature of unreasonable publicity given to one's private life, *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 377 (Colo. 1997) (employee sued employer for privacy violation upon learning entire firm knew of his medical condition which he had not disclosed publicly); unreasonable intrusion upon the seclusion of another, *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060, 1065 (Colo. App. 1998) (medical student disclosed privately he was HIV positive and then forced to take HIV test which was disclosed publicly); appropriation of another's name or likeness, *Joe Dickerson & Assocs., L.L.C. v. Dittmar*, 34 P.3d 995, 1001 (Colo. 2001) (investigator published article detailing how a named-individual stole bearer bonds and used for personal use). In all of these cases, the courts relied heavily on the analysis contained in the Restatement (Second) of Torts (1977) for guidance. *Id.* Colorado does not recognize false light as a viable invasion of privacy tort finding that it places a chilling effect on the First Amendment protections of freedom of speech. *Denver Publ. Co. v. Bueno*, 54 P.3d 893, 904 (Colo. 2002).

2. The Standards for Compensatory and Punitive Damages

An insured suing under the tort of bad faith breach of an insurance contract is entitled to recover damages based upon traditional tort principles of compensation for injuries actually suffered, including emotional distress damages. *Herod v. Colo. Farm Bur. Mut. Ins. Co.*, 928 P.2d 834, 837 (Colo. App. 1996); see *Lira v. Shelter Ins. Co.*, 913 P.2d 514, 517 (Colo. 1996); *Ballow*, 878 P.2d at 677. Damages may include economic loss, mental distress, loss of income or job, impairment of credit rating, worsening of physical condition, and various economic losses, including attorney's fees and costs. *Lira v. Shelter Ins. Co.*, 903 P.2d 1147, 1150 (Colo. App. 1994). The fact that an insured's proof is sufficient to support an award for bad faith breach of insurance contract does not alone establish a claim for punitive damages. *Farmers Group, Inc. v. Trimble*, 768 P.2d 1243 (Colo. App. 1988),

overruled on other grounds, *Goodson v. Am. Std. Ins. Co.*, 89 P.3d 409 (Colo. 2004).

The insured must, as with all claims for punitive damages, establish the requisite circumstances of fraud, malice, or willful and wanton conduct before a claim for punitive damages may be properly submitted to the factfinder. *Ballow*, 878 P.2d at 682. Further, even if a plaintiff has established the requisite elements for recovery of punitive damages, a punitive damages award remains discretionary with the trier of fact. *Id.*; cf. *Harvey v. Farmers Ins. Exch.*, 983 P.2d 34, 40 (Colo. App. 1998), *aff'd* on other grounds *sub nom. Slack v. Farmers Ins. Exch.*, 5 P.3d 280 (Colo. 2000) (statutory language regarding enhancement of punitive damages, C.R.S. § 13-21-102(3), is permissive rather than mandatory and decision is entrusted to trial court's sound discretion).

An insurer's failure to conduct a reasonable investigation in its handling of a claim may be sufficient to support a punitive damages claim. See *Giampapa v. Am. Family Mut. Ins. Co.*, 919 P.2d 838, 842 (Colo. App. 1995) (punitive damages award affirmed where insurer failed to conduct any investigation into medical necessity of claim and violated statutory requirements); *Burgess v. Mid-Century Ins. Co.*, 841 P.2d 325, 329 (Colo. App. 1992) (insurer's deviation from industry standards and failure to follow its own investigative procedures sufficient to support punitive damage award); *Brewer v. Am. & Foreign Ins. Co.*, 837 P.2d 236, 238 (Colo. App. 1992).

The insured must bear the cost of attorney fees incurred in bringing a common law bad faith breach of insurance contract action, but a prevailing insured may recover attorney fees in a statutory bad faith action under C.R.S. §§ 10-3-1115, -1116. See *Bernhard v. Farmers Ins. Exch.*, 915 P.2d 1285, 1291 (Colo. 1996); cf. *Estate of Casper v. Guar. Trust Life Ins. Co.*, 2016 COA 167, ¶¶ 49-54 (distinguishing *Bernhard* and C.R.S. §§ 10-3-1115, -1116), *rev'd* in part on other grounds, 2018 CO 43. Again, under C.R.S. § 10-3-1116, a first-party claimant, as defined in C.R.S. § 10-3-1115(1)(b)(I), may recover attorney fees, court costs and two times the covered benefit. If the court deems the claim frivolous, though, it must award costs and attorney fees to the defendant insurer. C.R.S. § 10-3-1116. A plaintiff may seek damages for emotional distress without proving substantial property loss or economic loss in a common law bad faith claim. See *Goodson*, 89 P.3d 409.

Damages for bad faith breach of an insurance contract are not limited to the policy limits. *Tait v. Hartford Underwriters Ins. Co.*, 49 P.3d 337, 341 (Colo. App. 2001). Punitive damages may also be recovered when it is shown that the insurer's actions were willful and wanton, or in reckless disregard of the insured's rights and feelings. See *id.* Further, attorney fees and costs may be awarded as an element of damages to be paid by the insurer under a statutory bad faith claim pursuant to C.R.S. § 10-3-1116. *Estate of Casper*, ¶ 45.

3. Insurance Regulations to Watch

The Colorado Division Insurance promulgated Emergency Regulation 22-E-21, effective December 29, 2022, in response to federally designated disaster events arising from fires in Colorado. The Regulation requires insurers to extend policy deadlines for claims of Additional Living Expense(ALE) coverage and recoverable depreciation, under certain circumstances. The stated purpose of this Regulation is to "protect homeowner policyholders who have suffered a loss during a catastrophic disaster..." by preventing delays in claim handling that in turn may delay rebuilding property. For purposes of this regulation, a catastrophic disaster is defined as:

[A]n event, as declared by the president of the United States or the governor, or both, which results in large numbers of deaths or injuries; causes extensive damage or destruction of

property or facilities that provide and sustain human needs; produces an overwhelming demand on state and local response resources and mechanisms; causes a severe long-term effect on general economic activity; or severely affects state, local, and private sector capabilities to begin and sustain response activities.

Colorado Revised Statute § 10-2-103(1).

Importantly, pursuant to Emergency Regulation 22-E-21, in the event of a catastrophic disaster affecting a policy holder's residence, "an insurer shall waive any waiting periods related to ALE benefits" and must consider "circumstances beyond the insured's control that may require maintaining and extending policy holder benefits beyond" the underlying insurance policy. The Emergency Regulation also expresses concern about time limits on repair or replacement for recoverable depreciation coverage. So long as the insured acted in good faith with reasonable diligence, the insurer must also act in good faith to "maintain or toll policy time limits where necessary to protect policyholders." The Emergency Regulation requires an insurer who "causes an unreasonable delay in the settlement of a claim" to extend time limits for payment of ALE benefits and replacement cost value (RCV) beyond the limitations and requirements provided in the homeowners' policy. This directive from the Division of Insurance remains in effect until further notice.

4. State Arbitration and Mediation Procedures

There is no requirement to mediate before filing an action in district court. If the parties voluntarily elect to mediate before filing an action, they may do so. A contract provision requiring mediation before filing an action is enforceable. Many courts require that the parties engage in alternative dispute resolution before setting trial. This requirement depends on the jurisdiction. Mediation is non-binding unless the parties agree to a resolution at mediation in writing.

The Colorado Uniform Arbitration Act serves the strong public policy of encouraging settlement of disputes through the arbitration process. *Sopko v. Clear Channel Satellite Servs., Inc.*, 151 P.3d 663, 666 (Colo. App. 2006). It is well settled that a valid and enforceable arbitration provision divests the Court of jurisdiction over all arbitrable issues. E.g., *Eychner v. Van Vleet*, 870 P.2d 486, 489 (Colo. App. 1993). An arbitration agreement "is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract." C.R.S. § 13-22-206(1). The court must decide "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." C.R.S. § 13-22-206(2). However, "[a]n arbitrator must decide 'whether a condition precedent to arbitrability has been fulfilled' and whether a contract with a valid agreement to arbitrate is enforceable." C.R.S. § 13-22-206(3).

5. State Administrative Entity Rule-Making Authority

The Colorado Division of Insurance issues notice pursuant to C.R.S. § 24-4-103(3)(b), that a public rule making hearing will be held before the Colorado Commissioner of Insurance. The Division of Insurance is required to open a written comment period after a public hearing. C.R.S. § 24-4-103. These written comments are available for public inspection at the Division of Insurance. Within one hundred eighty days after the last public hearing on the proposed rule, Division of Insurance shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in

the Colorado Register.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

Colorado recognizes the tort of bad faith breach of an insurance contract, which arises from an insurer's implied duty of good faith and fair dealing to its insured. *Farmers Grp., Inc. v. Trimble*, 691 P.2d 1138, 1141-42 (Colo. 1984). Evidence of intent, such as intentional misconduct, dishonesty, fraud, or concealment is not a prerequisite to an action for bad faith breach of insurance contract. See *id.* at 1142. Bad faith claims are not subject to the time limit for claims set forth in the insurance policy. *Pham v. State Farm Mut. Auto. Ins. Co.*, 70 P.3d 567, 571 (Colo. App. 2003).

"[R]esort to a judicial forum is not necessarily bad faith or unfair dealing on the part of an insurer regardless of the outcome of the suit..." *Brennan v. Farmers Alliance Mut. Ins. Co.*, 961 P.2d 550, 557 (Colo. App. 1998). "Under Colorado law, it is reasonable for an insurer to challenge claims that are 'fairly debatable.'" *Zolman v. Pinnacol Assur.*, 261 P.3d 490, 496 (Colo. App. 2011) (internal citation omitted). "Indeed, even if an insurer possesses a mistaken belief that a claim is not compensable, it may be within the scope of permissible challenge." *Id.* at 497. However, "fair debatability" is not a threshold determination; in other words, an insurer may still act unreasonably in handling a fairly debatable claim. *Vaccaro v. Am. Family Ins. Grp.*, 275 P.3d 750, 759 (Colo. App. 2012); *Sanderson v. Am. Family Mut. Ins. Co.*, 251 P.3d 1213, 1218 (Colo. App. 2010) ("[w]hile it is clear that an insurer may defend a fairly debatable claim, all that means is that it may not defend one that is not fairly debatable. But in defending a fairly debatable claim, an insurer must exercise reasonable care and good faith.").

Nevertheless, if "reasonable minds" could disagree as to the coverage-determining facts or law, which is the core principle of "fairly debatable," such a circumstance weighs against a finding that the insurer acted unreasonably. *Fisher v. State Farm Mut. Auto. Ins. Co.*, 419 P.3d 985, 990 (Colo. App. 2015), *aff'd*, 418 P.3d 501 (Colo. 2018); *Chateau Vill. N. Condo. Ass'n v. Am. Family Mut. Ins. Co.*, 170 F. Supp. 3d 1349, 1360 (D. Colo. 2016) (same); *cf. Am. Family Mut. Ins. Co. v. Hansen*, 375 P.3d 115, 122 (Colo. 2016) (insurer's denial of claim in reliance on plain language of unambiguous insurance contract was reasonable). However, at least in the context of an uninsured motorist claim, an insurer can be liable for treble damages under C.R.S. § 10-3-1115 if it refuses to pay a covered benefit that is not in dispute, even though the payment would not settle the entire claim. *State Farm Mut. Auto. Ins. Co. v. Fisher*, 418 P.3d 501, 506 (Colo. 2018).

The duty of good faith and fair dealing has been applied not only to insurance companies, but also to self-insured companies. *Scott Wetzel Serv., Inc. v. Johnson*, 821 P.2d 804, 811 (Colo. 1991). This duty has even been applied to insurers in the absence of a contractual relationship with an insured. In *Ballow v. PHICO Ins. Co.*, 875 P.2d 1354 (Colo. 1993), the Colorado Supreme Court completely undermined the existence of a contractual relationship between an insurer and insured as the theoretical underpinning of a bad faith claim. The Court held that an insurer owed a duty to act in good faith in the negotiation and renewal of insurance contracts.

After the *Ballow* case, the Colorado Supreme Court further expanded the scope of the duty of good faith and fair dealing to third-party administrators. *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 469 (Colo. 2003). In *Cary*, an insured employee and spouse brought an action against the self-insured employer, the administrator of the health insurance plan, and certain third-party administrators to recover for breach of contract and bad faith. The Colorado Supreme Court held that third-party administrators who ran a self-funded health insurance program on behalf of a municipal entity owed a duty of good faith and fair dealing to the insured in the investigation and servicing of the insurance claim. *Id.* at 469. The Court reasoned that the third-party administrators had this duty based on the fact that they performed "virtually all of the functions normally performed by an insurance company" and bore financial risk for the claims. *Id.* However, "absent a financial incentive to deny an insured's claims or coerce a reduced settlement, a third party that investigates and processes an insurance claim does not owe a duty of good faith and fair dealing to the insured." *Riccato v. Colo. Choice Health Plans*, 315 P.3d 203, 207 (Colo. App. 2013).

Finally, bad faith breach of insurance claims may be brought in the context of workers' compensation claims and are not barred by the Workmen's Compensation Act. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1271 (Colo. 1985).

3. First Party

In the direct or first party context (where an insured sues his or her own insurance company for acting in bad faith), "[t]he insured must prove that (1) the insurer's conduct was unreasonable under the circumstances, and (2) the insurer either knowingly or recklessly disregarded the validity of the insured's claim." *Zolman*, 261 P.3d at 496. The claimant bears the burden of establishing the insurer's knowledge or reckless disregard of the fact that a valid claim has been submitted. *Pham*, 70 P.3d at 572.

There is a Colorado statute that specifically addresses the improper denial of claims. C.R.S. § 10-3-1115. C.R.S. § 10-4-609 governs UM/UIM insurance and requires coverage for damages the insured is "legally entitled to collect" from the tortfeasor that caused the accident. Those damages are collectible only via settlement or trial. On the other hand, C.R.S. § 10-3-1115 provides penalties for unreasonable delay or denial of payment of a "covered benefit" owed to the insured under the insurance contract's terms. The statute mandates a person engaged in the business of insurance "shall not unreasonably delay or deny payment of a claim for benefits owned to or on behalf of any first-party claimant." C.R.S. § 10-3-1115(1)(a). Further, a first-party claimant under section 10-3-1115 whose claim for payment of benefits is unreasonably delayed or denied can bring an action in a district court to recover reasonable attorney fees and court costs and two times the covered benefit." C.R.S. § 10-3-1116(1). Based on this definition, Colorado courts apply this statute to third-party claims and liability policies too.

Despite efforts to sue adjusters personally under C.R.S. §§ 10-3-1115 and 1116, the Colorado Supreme Court has determined that because insurers and insureds, not adjusters, are the parties to an insurance policy, "an action for unreasonably delayed or denied insurance benefits proceeds against an insurer, not an individual adjuster." *Skillett v. Allstate Fire & Cas. Ins. Co.*, 2022 CO 12, ¶ 19, 505 P.3d 664, 668. This ruling protects insurance adjusters from personal liability in insurance bad faith litigation.

4. Third-Party

In the third-party context (where a third party makes a claim against the insured's policy, and the insured alleges that its insurance company acted in bad faith), "[t]he question of whether an insurer has breached its duties of good faith and fair dealing with its insured is one of reasonableness under the circumstances. The relevant inquiry is whether the facts pleaded show the absence of any reasonable basis for denying the claim, 'i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.'" *Trimble*, 691 P.2d at 1142 (quoting *Anderson v. Cont'l Ins. Co.*, 271 N.W.2d 368, 377 (Wis. 1978)). "In the third-party context, an insurance company stands in a position of trust with regard to its insured; a quasi-fiduciary relationship exists between the insurer and the insured." *Bankr. Estate of Morris v. COPIC Ins. Co.*, 192 P.3d 519, 523 (Colo. App. 2008). However, this type of claim may only be brought by the insured, and not by the injured third party, who has no contractual relationship with the insurance company. See *Schnacker v. State Farm Mut. Auto. Ins. Co.*, 843 P.2d 102, 104 (Colo. App. 1992).

Fraud

To establish a *prima facie* case of fraud against an insurer, a plaintiff must present evidence that the insurer made a false or misleading representation of material fact, either with knowledge of its untruth or recklessly and willfully and with an intent to mislead or deceive the plaintiff, which induces the plaintiff to act or refrain from acting. *Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 153 (Colo. 2007). All averments of fraud or mistake, including the circumstances constituting fraud or mistake must be pled with particularity, regardless of the label affixed to the claim. C.R.C.P. 9; statutory, tort, contractual, or fiduciary." *State Farm Mut. Auto. Ins. Co. v. Parrish*, 899 P.2d 285, 289 (Colo. App. 1994).

The term "false representation" is defined at Colorado Jury Instructions – Civil 4th 19:3 (hereafter "CJI-Civ.4th") to mean "any oral or written words, conduct, or combination of words and conduct that creates an untrue or misleading impression in the mind of another." CJI-Civ.4th 19:4 provides, in part, that "[a] fact is material if a reasonable person under the circumstances would regard it as important in deciding what to do."

Intentional or Negligent Infliction of Emotional Distress

The Colorado Supreme Court has recognized a cause of action for severe emotional distress even without accompanying physical injury. *See Rugg v. McCarty*, 476 P.2d 753, 756 (Colo. 1970). The Court in *Rugg* adopted the formulation for this cause of action set out in the Restatement (Second) of Torts § 46 (1965): "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Id.* "Extreme and outrageous conduct" is defined at CJI-Civ. 4th 23:2 as follows:

[C]onduct that is so outrageous in character, and so extreme in degree, that a reasonable member of the community would regard the conduct as atrocious, going beyond all possible bounds of decency and utterly intolerable in a civilized community. . . . The extreme and outrageous character of conduct may arise from a person's knowledge that another is peculiarly susceptible to emotional distress because of some physical or mental condition or peculiarity.

Courts assessing whether outrageous conduct exists apply a three-part test: "(1) the defendant engaged in extreme and outrageous conduct; (2) the defendant engaged in the conduct recklessly or with the intent of causing the plaintiff severe emotional distress; and (3) the plaintiff incurred severe emotional distress which was caused by the defendant's conduct." *Culpepper v. Pearl St. Bldg.*, 877 P.2d 877, 882 (Colo. 1994). "A person acts recklessly in causing severe emotional distress in another if, at the time of the conduct, he knew or reasonably should have known that there was a substantial probability that his conduct would cause severe emotional distress to the other person." *Id.* at 882-83. Although the question of whether conduct is extreme and outrageous under these tests is generally one for the jury, the trial court must make the threshold determination of whether reasonable persons could differ on the question. *Id.* at 883.

Colorado also recognizes a cause of action for negligent infliction of emotional distress. *See Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978) (adopting Restatement (Second) of Torts, § 436A (1965)). "Under that provision of the Restatement, recovery of damages is limited to a plaintiff who suffers emotional distress because he is personally subjected to an unreasonable risk of bodily harm by virtue of the negligence of another." *Hale v. Morris*, 725 P.2d 26, 28-29 (Colo. App. 1986). To establish a *prima facie* case of negligent infliction of emotional distress, a plaintiff must present evidence from which a jury could reasonably conclude that "defendant's negligence subjected her to an unreasonable risk of bodily harm and caused her to be put in fear for her own safety, that plaintiff's fear was shown by physical consequences or long-continued emotional disturbance, and that plaintiff's fear was the cause

of the damages she claimed.” *Scharrel v. Wal-Mart Stores*, 949 P.2d 89, 93 (Colo. App. 1997).

This claim requires proof that the plaintiff either sustained physical injury or was in the “zone of danger,” meaning that he or she was close enough to the injurious event to have been subject to physical harm. *Colwell v. Mentzer Invs., Inc.*, 973 P.2d 631, 638 (Colo. App. 1998). A plaintiff who was not in the zone of danger cannot recover for emotional distress resulting solely from the observation of injury to a family member. *Hale*, 725 P.2d at 28-29.

State Consumer Protection Laws, Rules and Regulations

The statutes regulating insurance in Colorado are found in Title 10 of the Colorado Revised Statutes. Section 10-1-103, C.R.S., establishes the Division of Insurance, which is responsible for executing the laws relating to insurance and for supervising the business of insurance in the state. The Commissioner of Insurance, who is responsible for investigating violations of the insurance laws, heads the Division of Insurance and determines which violations should be presented to the district attorney or attorney general for prosecution. C.R.S. § 10-1-108(5).

Unfair methods of competition and unfair or deceptive acts or trade practices in the business of insurance are prohibited by the Colorado Unfair Claims – Deceptive Trade Practices Act (“UCDPA”), C.R.S. §§ 10-3-1101 to 1116. The UCDPA defines certain specified acts as unfair methods of competition and unfair or deceptive acts or practices, and the Commissioner of Insurance is authorized to promulgate regulations identifying specific methods of competition or acts or practices that violate the statute. C.R.S. §§ 10-3-1104; 10-3-1110(2). The UCDPA vests in the Commissioner of Insurance the authority to investigate violations of the statute and to impose regulatory penalties, but there is no private right of action under the statute. *See* C.R.S. §§ 10-3-1106 to 1109.

The Colorado Supreme Court has held that the UCDPA does not preempt a claim by an insured against an insurer pursuant to the Colorado Consumer Protection Act (“CCPA”), C.R.S. §§ 6-1-101 to 908. *Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 55 (Colo. 2001). In *Showpiece Homes*, 38 P.3d at 58, the Colorado Supreme Court determined that the sale of insurance can be classified as a sale of goods, services or property and is thus subject to the CCPA. *See also, Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59 (Colo. 2005) (discussing CCPA claim by insured against insurer).

The CCPA is available in a civil action for any claim against any person who has engaged in or caused another to engage in any deceptive trade practice. C.R.S. § 6-1-113(1); *See Crowe v. Tull*, 126 P.3d 196 (Colo. 2006). The CCPA contains a list of actions considered to be deceptive trade practices, *see* C.R.S. § 6-1-105, but this list is not exhaustive and other actions not specifically described in the statute may be determined to be deceptive trade practices. *Showpiece Homes*, 38 P.3d at 54. The attorney general or a district attorney may bring an action in the district court to enforce the CCPA. C.R.S. § 6-1-110. In addition, in contrast to the UCDPA, the CCPA expressly provides for a private cause of action against a party accused of violating its terms. C.R.S. § 6-1-113. However, prior to filing a claim under the CCPA, a party may need to exhaust administrative remedies. *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1081-82 (Colo. App. 2006).

In a private civil action, a party found guilty of violating the CCPA may be liable for the greater of (1) the actual amount of damages, (2) \$500, or (3) three times the actual amount of damages if it is established by clear and convincing evidence that the party acted in bad faith. C.R.S. § 6-1-113(2)(a). The party bringing the action may also recover its costs and attorney’s fees in a successful enforcement action. C.R.S. § 6-1-113(2)(b).

In 2020, the Colorado State Legislature enacted Colo. Rev. Stat. § 10-3-1117 which requires an insurer that issues a commercial automobile or personal automobile policy of insurance to provide certain information within thirty

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(30) days of receiving a written request from the claimant or claimant's attorney. To trigger the duty to provide information, the claimant or claimant's attorney must send written notice requesting such information to the insurance company's registered agent. Colo. Rev. Stat. § 10-3-1117. Once notice is received, the insurer must provide "a statement setting forth the following with regard to each known policy of insurance of the named insured, including excess or umbrella insurance, that is or may be relevant to the claim: (I) the name of the insurer; (II) the name of each insured party, as the name appears on the declarations page of the policy; (III) the limits of the liability coverage; and (IV) a copy of the policy. Colo. Rev. Stat. § 10-3-1117(2). An insurer is prohibited under the terms of the statute and the regulation implementing it, Regulation 5-2-3, from providing a copy of the declarations page to anyone other than the named insured. Failure to provide the information above within the thirty (30) day timeframe subjects the insurer to damages in the amount of one-hundred dollars (\$100) per day. *Id.*

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

C.R.C.P. 26(b)(3) shields from disclosure attorney work product prepared "in anticipation of litigation" absent a showing of "substantial need" and "undue hardship." Rule 26 does not protect materials prepared in the ordinary course of business, and the standard is whether the party resisting discovery demonstrates the document was prepared in contemplation of specific litigation. *Hawkins v. Dist. Ct.*, 638 P.2d 1372, 1377 (Colo. 1982). Rule 26(b)(3) does not insulate insurers' investigations merely because they deal with potential claims. *Id.* In fact, because a substantial part of an insurer's business is investigation of claims, it is presumed that such investigations are part of the normal business activity of the company and that they are ordinary business records as distinguished from trial preparation materials. *Lazar v. Riggs*, 79 P.3d 105, 107 (Colo. 2003). Insurance adjuster's investigative reports are prepared in the ordinary course of business, and are, therefore, discoverable. *Id.*; see also *Western Nat'l Bank v. Employers Ins. of Wausau*, 109 F.R.D. 55, 57 (D. Colo. 1985). Claims files not prepared in contemplation of specific litigation are ordinarily considered relevant and discoverable and the insurer has the burden of demonstrating that a document was prepared to defend the specific claim, and that there was a substantial probability of imminent litigation over the claim, or a lawsuit had already been filed. *Lazar*, 79 P.3d at 107; *Hawkins*, 638 P.2d 1379.

The scope of discovery of insurance information, such as claims files, is considerably broader in an action by an insured against its insurer for bad faith in contrast to a claim by a third-party against the insured. *Lazar*, 79 P.3d at 107. For instance, insurance information may be relevant in an action by an insured against its insurer for bad faith even though the same information might not be relevant in a personal injury claim by a third-party against the insured. *Id.*; *Silva v. Basin W., Inc.*, 47 P.3d 1184, 1187 (Colo. 2002).

Discoverability of Reserves

Reserves are the funds insurers set aside to cover future expenses, losses, claims, or liabilities. By statute, Colorado requires insurers to maintain reserves to assure the insurer's ability to satisfy potential obligations under its policies. C.R.S. § 10-3-201. Reserves are subject to the same relevancy standard for discovery as other information. *Silva*, 47 P.3d at 1189. However, as a general rule, in third-party personal injury tort claims, reserves are not reasonably calculated to lead to discoverable evidence and are therefore not subject to discovery. *Id.* at 1190-93. The reserve requirement therefore reflects a desire on the part of the states and the insurance companies themselves to ensure that resources are available to cover the insurer's future liabilities. Thus, a

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particular reserve amount does not necessarily reflect the insurer's valuation of a particular claim. *Id.* In the context of a first-party claim between an insured and his insurer, however, the scope of discovery is broader and courts are more likely to find reserves discoverable. *Id.* It is standard practice for defense counsel in both first-party and third-party cases to object to such discovery and put the burden on plaintiff to move for production.

Likewise, under Colorado law the production of settlement authority is not reasonably calculated to lead to the discovery of admissible evidence in a third-party personal injury tort claim. *Silva*, 47 P.3d at 1189-93. In the context of a first-party claim between an insured and his insurer, however, the insurance company owes a duty to its insured to adjust a claim in good faith that the insurance company does not owe to the plaintiff in a third-party personal injury claim. As such, courts are more likely to find settlement authority discoverable in the context of a first-party claim between an insured and his insurer. *Id.*

While the scope of discovery with respect to first-party claims is generally broader, the Colorado Supreme Court held although an action brought by an insured against its insurer for underinsured motorist ("UIM") benefits constitutes a first-party claim, such an action is unlike bad faith and declaratory judgment first-party claims "because, rather than defending its own actions, an insurance company in a UIM action must essentially defend the tortfeasor's behavior." *Sunahara v. State Farm Mut. Auto. Ins. Co.*, 2012 CO 30M, ¶ 29. Accordingly, an insurer's reserves and settlement authority in first-party UIM actions are not reasonably calculated to lead to the discovery of admissible evidence just as they are not reasonably calculated to lead to admissible evidence in third-party actions. *Id.* Moreover, even the "liability assessments and similar cursory fault evaluations used by an insurance company to develop reserves and settlement authority" now are deemed not reasonably calculated to lead to the discovery of admissible evidence. *Id.*, ¶¶ 25-26.

Discoverability of Existence of Reinsurance and Communications with Reinsurers

Although Colorado courts have not specifically addressed discoverability of reinsurance information and communications between carrier and reinsurer, Colorado case law indicates that such information and communications may be relevant and discoverable in a bad faith action to the extent it addresses liability, exposure, the likelihood of a verdict in excess of policy limits or coverage issues. *Silva*, 47 P.3d 1184; *see also MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co.*, No. 05-cv-01948-PSF-PAC, 2007 U.S. Dist. LEXIS 3037, at *6-7 (D. Colo. Jan. 10, 2007).

Attorney/Client Communications

The attorney-client privilege is codified at C.R.S. § 13-90-107(1)(b) and provides that an attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment. The attorney-client privilege protects communications between attorney and client relating to legal advice. *Wesp v. Everson*, 33 P.3d 191, 196 (Colo. 2001). Documents made for an insurer acting as the agent of an attorney are covered by the privilege, but the attorney-client relationship between the insurer and its lawyer must exist at the time the documents are created for the privilege to apply. *Kay Labs., Inc. v. Dist. Court*, 653 P.2d 721, 723 (Colo. 1982). Where a lawyer is acting in an investigative capacity and not as a legal counselor with reference to whether an insurance claim should be paid, then the privilege does not protect the communications from a lawyer to an insurance carrier. *Munoz v. State Farm Mut. Auto. Ins. Co.*, 968 P.2d 126, 130 (Colo. App. 1998). An informational memo to insurer's general counsel prepared by outside counsel acting as a claims investigator is not exempt from discovery under the attorney-client privilege or the work product doctrine. *Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court*, 718 P.2d 1044, 1048 (Colo. 1986).

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Cancellations of policies are valid if based on the following: nonpayment of premium; a false statement knowingly made by the insured on the application for insurance; or a substantial change in the exposure or risk other than that indicated in the application and underwritten as of the effective date of the policy unless the insured has notified the insurer and the insurer accepts such change. See C.R.S. §§ 10-4-109.7(2), 10-4-110, 10-4-110.5, 10-4-110.7, 10-4-110.9.

Failure to Comply with Conditions

An insurance policy is a contract and the same rules of construction that are applicable to other contracts are applicable to insurance policies. *Union Ins. Co. v. Houtz*, 883 P.2d 1057, 1061 (Colo. 1994). Breach by the insured of a condition of the policy (i.e., cooperation clause, notice of claim or suit clause, and consent to settle clauses) is a valid defense. Coverage may be properly denied through a “failure to cooperate” defense when an insured fails to respond to communications in a material and substantial way. *Hall v. Allstate Fire & Cas. Ins. Co.*, 20 F.4th 1319, 1325 (10th Cir. 2021). However, an insurer’s opportunity to rely upon a failure to cooperate defense is limited by the terms of C.R.S. §10-3-1118. The statute establishes the steps and timelines an insurer must follow, including allowing the insured an opportunity to cure, before the insurer may assert a failure to cooperate defense.

The express provisions in a policy requiring that the insured give notice of the accident and forward suit papers to the insurer as a condition precedent to coverage are enforceable. *Leadville Corp. v. United States Fidelity & Guar. Co.*, 55 F.3d 537, 540 (10th Cir. 1995). However, delayed notice to insurer is not a breach of contract if the insured has a justifiable excuse. *Id.* at 541; *Hansen v. Barmore*, 779 P.3d 1360, 1362 (Colo. App. 1989) (notice can be provided by a third-party other than an insured); *Noyes Supervision Inc. v. Canadian Indem.*, 487 F. Supp. 433, 436 (D. Colo. 1980) (a reasonable belief in non-liability and that no claim would be asserted are excuses for delayed notice).

Colorado follows a “notice prejudice rule” with respect to notice of claims under uninsured or underinsured motorist policies and comprehensive general liability insurance policies. *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 231-32 (Colo. 2001) (UIM policy); *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 641-42 (Colo. 2005) (liability policy). Colorado courts have declined to extend application of the notice-prejudice rule to homeowners’ insurance policies and an insurance coverage dispute arising out of medical malpractice. *Gregory v. Safeco Ins. Co. of Am.*, 2022 COA 45, ¶ 14, 514 P.3d 971, 974 (homeowners’ policies); *Nat’l Union Fire Ins. Co. of Pittsburgh v. Estate of Calendine*, Civil Action No. 21-cv-01541-NYW-MDB, 2022 U.S. Dist. LEXIS 220682, at *45 (D. Colo. Dec. 7, 2022) (medical malpractice). This rule requires an insurer to show actual prejudice resulting from untimely notice in the context of UM and UIM claims. *Id.* The insurer bears the burden to prove by preponderance of evidence that it was prejudiced by delay and delay does not create a presumption of prejudice. *Id.* An insurer is prejudiced by a delayed notice only when its ability to investigate or defend the insured’s claim is compromised by the insured’s failure to provide timely notice. *Id.* However, in cases where notice is provided *after* the insured has already settled the underlying liability claim, the late notice is presumed to have prejudiced the insurer. *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 647-649 (Colo. 2005). In such cases, the insured must go forward with evidence rebutting the presumption of prejudice in order to place back on the insurer the responsibility of proving prejudice. *Id.*

Challenging Stipulated Judgments: Consent and/or No-Action Clause

Most liability policies seek to bar collusive settlements by prohibiting action against the insurer until there has been a judgment or a settlement approved by the carrier. For example, in *Crowley v. Hardman Bros.*, 223 P.2d 1045 (Colo. 1950), an insurer could not be joined as a party defendant in the action against the insured until there was a judgment entered against the insured that caused the contractual provisions of the policy to ripen. *Id.* at 1050. Therefore, because the policy contained a “no action” clause, under the provisions of the policy it was necessary for the injured person to obtain a judgment against the insured judicially determining that the insured was guilty of negligence. *Id.* After such judgment was unsatisfied for a period specified in the policy, and only then, the injured person could maintain an action against the insurer. *Id.*

When dealing with consent judgments, courts should ensure that there are circumstantial guarantees of trustworthiness concerning the genuineness of underlying judgments. *Miller v. Byrne*, 916 P.2d 566, 581 (Colo. App. 1995). The real concern in this type of case is that the settlement between the claimant and the insured may not actually represent an arm's length determination of the worth of the plaintiff's claim. *Id.* In a situation where the insured actually pays for the settlement of the claim against him or where the case is fully litigated at trial before the entry of a judgment, the amount of the settlement or judgment can be assumed to be realistic, however, in a case involving a consent judgment with a covenant not to execute, the settlement figure is more suspect. *Id.*

In *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116 (Colo. 2010), the Court addressed a situation involving an agreement not to execute a judgment between the plaintiff and the insured. Nunn, the plaintiff, alleged that she offered to settle the case for an amount within the \$100,000 policy limits, which the insurer denied. 244 P.3d at 118. She and the insured then entered into their own settlement agreement, in which the insured stipulated to a judgment of \$4,000,000. *Id.* As consideration, Nunn agreed not to execute on the judgment. *Id.* Nunn, acting as assignee of the insured, then filed a bad faith claim against the insurer, asserting that it breached its duty of good faith by rejecting her settlement demand. *Id.* The Court held that the stipulated judgment entered in excess of policy limits was sufficient to establish damages to the insured, and thus to assign to a third party. *Id.* at 122-23. Therefore, Nunn, the third-party assignee, could bring a bad faith claim against the insurer, even though the insurer was not a party to the settlement agreement. *See Id.* at 124.

The Colorado Court of Appeals clarified in *State Farm Mutual Auto Ins. Co. v. Goddard*, 2021COA15 (Feb. 11, 2021), when an insured may enter into an enforceable *Nunn* agreement. Specifically, the court stated that “before an insured is justified in stipulating to a judgment and assigning its claims against the insurer to a third-party claimant, it must first appear that the insurer has unreasonably refused to defend the insured or to settle the claim within policy limits.” *Id.* at 17. The opinion affirmed that an insured need only to establish that the insurer *appeared to act* unreasonably in denying a defense or rejecting a policy limit demand. Further, the Court observed that it is possible that an insurer may appear to have acted unreasonably in rejecting a policy-limits offer, but not actually acted unreasonably in settling the claim, which would not result in the insured breaching the insurance contract and the insurer would have not acted in bad faith. *Id.* at 18. Because of the limited circumstances under which an insured may enter into a *Nunn* agreement, State Farm prevailed on its claim that the *insured* breached its duties under the insurance contract by entering into such an agreement.

Under Colorado Rule of Civil Procedure 24(a)(2), a non-party “may intervene as a matter of right if [it] has an interest relating to the transaction that is the subject of the action, [its] ability to protect that interest is impaired or impeded, and [its] interest is not adequately represented by the parties to the action.” *Feigin v. Alexa Grp., Ltd.*, 19 P.3d 23, 28 (Colo. 2001). The Colorado Supreme Court held that even if an insurer can satisfy the first prong of this test, showing that it has an interest in the action, a valid *Nunn* agreement does not impair or impede

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an insurer's ability to adequately protect its interest. *Auto-Owners Ins. Co. v. Bolt Factory Lofts Owners Ass'n*, 2021 CO 32, ¶ 28, 487 P.3d 276, 284. This decision limits an insurer's ability to intervene as of right pursuant to C.R.C.P. 24(a)(2).

PREEXISTING ILLNESS OR DISEASE CLAUSES

Statutes

A carrier offering an individual or small employer health benefit plan shall not impose any preexisting condition exclusion with respect to coverage under the plan. C.R.S. § 10-16-118.

Additional restrictions on all policies of insurance, which are defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance include the following:

- Making adverse underwriting decisions because an applicant or an insured has demonstrated concerns related to AIDS by seeking counseling from health care professionals. C.R.S. § 10-3-1104(1)(f)(IX). However, under C.R.S. § 10-3-1104(2)(d), it is not a violation of the statute for a person to request that an applicant or insured take an HIV related test when such request has been prompted by either the health history or current condition of the applicant or insured or by threshold coverage amounts which are applied to all persons within the risk class, as long as such test is conducted in accordance with the provisions of C.R.S. § 10-3-1104.5;
- Making adverse underwriting decisions on the basis of the existence of nonspecific blood code information received from the medical information bureau, but this prohibition shall not bar investigation in response to the existence of such nonspecific blood code as long as the investigation is conducted in accordance with the provisions of section 10-3-1104.5, C.R.S. § 10-3-1104(1)(f)(X);
- Reducing benefits under a health insurance policy by the addition of an exclusionary rider, unless such rider only excludes conditions which have been documented in the original underwriting application, original underwriting medical examination, or medical history of the insured, or which can be shown with clear and convincing evidence to have been caused by the medically documented excluded condition. C.R.S. § 10-3-1104(1)(f)(XI).

Any entity that receives "genetic information" may not seek, use, or keep the information for any nontherapeutic purpose or for any underwriting purpose connected with the provision of health care insurance or Medicare supplement insurance coverage. C.R.S. § 10-3-1104.6(3)(b)(I). Any entity that receives information derived from genetic testing may not seek, use, or keep information derived from "genetic testing" for any nontherapeutic purpose or for any underwriting purpose connected with the provision of group disability insurance or long-term care insurance coverage. C.R.S. § 10-3-1104.7(3)(b). Effective July 1, 2013, "health care insurance" is now included in this limitation.

Case Law

Usick v. Am. Family Mut. Ins. Co., 131 P.3d 1195 (Colo. App. 2006): The plaintiff purchased an individual health insurance policy from defendant insurer, disclosing a history of endometriosis in her application. The declarations page of her policy waived coverage for "endometriosis or complications" for a minimum period of 24 months and required that the insured request removal of the waiver following the 24-month period. The plaintiff sought reimbursement for treatment for endometriosis, arguing that C.R.S. § 10-16-118(1)(a)(II) unambiguously

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proscribed the exclusion of a particular preexisting condition. The Court of Appeals disagreed, finding the statute applied only to the general category of preexisting conditions, and did not prohibit the exclusion of a specifically identified condition such as endometriosis. The Court of Appeals found that the specific exclusion for endometriosis neither diluted statutory coverage nor violated public policy. However, the Court of Appeals distinguished the statutory provision relating to group plans, which incorporated the broader definition of a pre-existing condition found in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Court of Appeals further rejected the plaintiff's argument that the requirement to request removal of the waiver was ambiguous, and upheld the trial court's finding of no coverage under the policy.

Carroll v. Cuna Mut. Ins. Soc'y, 894 P.2d 746 (Colo. 1995): The Colorado Supreme Court held that language in an accidental death and dismemberment policy, which stated that coverage was provided for bodily injury caused by an accident and "resulting directly and independently of all other causes," meant that the accident must be the predominant cause of injury in order for the injury to be compensable if the policy was in a limited coverage clause. The court rejected the Court of Appeals' ruling that the phrase "directly and independently of all other causes" meant that coverage was precluded where injury or death was due, even in part, to a preexisting bodily infirmity. See generally *Sylvester v. Liberty Life Ins. Co.*, 42 P.3d 38 (Colo App. 2001)(exclusionary clauses are more restrictive than limited coverage clauses and insurers can deny coverage when an injury is caused wholly or in part, directly or indirectly by certain actions).

Bumpers v. Guar. Trust Life Ins. Co., 826 P.2d 358 (Colo. App. 1991): The Court addressed policy language in five successive health insurance policies, which contained a limitation for pre-existing conditions for which treatment or expense was incurred within six months immediately preceding the effective date of coverage. The policies provided that "[b]enefits are payable for covered expenses incurred within 52 weeks from the date of first medical treatment/expense for an injury or sickness which is the basis of the claim." In 1984, while the initial policy was in effect, the plaintiff sustained facial injuries. Apparent complications necessitated subsequent surgical and medical treatments in 1985, 1986, 1987 and 1988. In 1989, the insured sought reimbursement for these expenses under her various annual policies. The insurer denied reimbursement, arguing that the expenses the insured incurred in the policy years 1985-86 and 1986-87 were not covered based on the initial 1984 policy's 52-week provision. In rejecting this argument, the Court explained that each policy was a separate annual policy and that, as a matter of law, the 52-week provision must be interpreted to provide fifty-two weeks of prospective coverage for any sickness or injury which occurs and is the basis for a claim during the annual policy period, unless such sickness or injury falls within the express preexisting condition of the applicable annual policy.

Statutes of Limitations and Repose

The statute of limitations in an insurance coverage action depends upon whether the plaintiff asserts a cause of action based upon contract or tort theories. Actions based upon breach of contract and motor vehicle accidents are subject to a three-year limitations period. C.R.S. § 13-80-101. Actions based upon tort are subject to a two-year limitations period. C.R.S. § 13-80-102(1)(a).

"A cause of action for breach of contract accrues on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence." *Daugherty v. Allstate Ins. Co.*, 55 P.3d 224, 226 (Colo. App. 2002). A claim for bad faith breach of an insurance contract sounds in tort and accrues from the date on which both the injury and its cause are known or should have been known through the exercise of reasonable diligence. *Id.*

The standard is objective, and "[t]he focus is on a plaintiff's knowledge of facts that would put a reasonable

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person on notice of the general nature of damage and that the damage was caused by the wrongful conduct of [the defendant].” *Peltz v. Shidler*, 952 P.2d 793, 796 (Colo. App. 1997). “Each bad faith act constitutes a separate and distinct tortious act, on which the statute of limitation begins to run anew when the plaintiff becomes aware of the injury and its cause.” *Cork*, 194 P.3d at 427. The existence of an ongoing relationship between insurer and insured does not provide a basis for tolling the statute of limitations for a bad faith claim. *Harmon v. Fred S. James & Co.*, 899 P.2d 258, 261 (Colo. App. 1994).

Causes of action for fraud or misrepresentation accrue on the date the “claimant has knowledge of facts which would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another.” *Jones v. Cox*, 828 P.2d 218, 223-24 (Colo. 1992). The standard is objective and “[t]he focus is on a plaintiff’s knowledge of facts that would put a reasonable person on notice of the general nature of damage and that the damage was caused by the wrongful conduct of [the defendant].” *Peltz v. Shidler*, 952 P.2d 793, 796 (Colo. App. 1997).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

Coverage is triggered in “per occurrence” policies only when actual damage is suffered within the policy period. *Browder v. U.S. Fid & Guar. Co.*, 893 P.2d 132, 134 (Colo. 1995), *overruled on other grounds*. The time of the occurrence is not when the wrongful act was committed, but the time the complaining party was actually damaged. *Leprino v. Nationwide Prop. and Cas. Ins. Co.*, 89 P.3d 487, 490 (Colo. App. 2003). In environmental damage claims, or those involving continuous or progressive damage from ongoing conditions, coverage is triggered in every policy in effect while the damaging condition is in existence. *Am. Emp’rs Ins. Co v. Pinkard Const. Co.*, 806 P.2d 954, 956 (Colo. App. 1990).

Allocation Among Insurers

Colorado has adopted the “time-on-the-risk” method for apportionment of loss among multiple insurers when the injury spans many years and policies and it would be “virtually impossible” to assess said injury at particular points in time. *Pub. Serv. Co. of Colo. v. Wallis and Cos.*, 986 P.2d 924, 941 (Colo. 1999). When damages are not reasonably divisible and cannot be precisely attributed to successive insurance policies, the total amount of the damages should be divided by the total number of years, to yield the amount of damage that is fairly attributable to each year. *Id.* at 941.

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

Generally, contribution claims in Colorado are governed by Colorado’s Uniform Contribution Among Tortfeasors Act, C.R.S. § 13-50.5-102 (2014), *et seq.* (“UCATA”). UCATA allows recovery between two or more tortfeasors for the “same injury to person or property or for the same wrongful death.” C.R.S. § 13-50.5-102(1). Such relief may be sought after judgment is entered against multiple tortfeasors (and in some circumstances before a judgment enters), and permits a tortfeasor who has paid in excess of his pro rata share of the common liability to collect the

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excess paid from the other joint tortfeasors. C.R.S. § 13-50.5-104(2).

Although UCATA generally controls contribution claims, in the insurance context Colorado also recognizes the common law claim of equitable contribution. *Republic Ins. Co. v. United States Fire Ins. Co.*, 444 P.2d 868 (Colo. 1968). “Contribution is a principal sanctioned in equity, and arises between co-insurers only, *permitting one who has paid the whole loss to obtain reimbursement from other insurers who are also liable therefor.*” *Id.* at 870 (emphasis in original). An equitable contribution claim requires proof that the insurer or insurers from which contribution is sought are liable. See *Bituminous Cas. Corp. v. Trinity Universal Ins. Co.*, No. 12-cv-01802-REB-KLM, 2014 U.S. Dist. LEXIS 14844, at *19-20 (D.Colo. Feb. 6, 2014) (citing *Midwest Mut. Ins. Co. v. Murray*, 971 P.2d 295, 299 (Colo. App. 1998)). Such a claim exists when there is a joint and several obligations of two or more insurers, such as when two carriers owe a duty to defend. See *Travelers Indem. Co. of Am. v. AAA Waterproofing, Inc.*, No. 10-cv-02826-WJM-KMT, 2014 U.S. Dist. Lexis 6334, at *7 (D. Colo. Jan. 17, 2014) (“A liability insurer’s duty to defend is a joint and several duty, such that an insurer who breaches this duty can be found liable for the entire amount of defense fees and costs, and that insurer can then seek equitable contribution from any co-insurers owing the same duty to defend.”).

ELEMENTS

UCATA Claims

Colorado’s UCATA provides for contribution among tortfeasors who have become jointly or severally liable in tort for the same injury, even where there is not a judgment entered against them. § 13-50.5-102(1). In order to recover under the UCATA, a tortfeasor must have paid more than its pro rata share of the common liability; further, tortfeasors’ total recovery will be limited to the amount paid above their *pro rata* share of liability. C.R.S. § 13-50.5-102(2). Correspondingly, any joint tortfeasor against whom a contribution claim is brought will only be liable for their *pro rata* share of the common liability. *Id.*

Insurers who have paid claims on their insureds behalf are subrogated to their insureds under the UCATA; however, in such an action, an insurer’s recovery is limited to its insured’s *pro rata* share of the total common liability. C.R.S. § 13-50.5-102(5).¹

Tortfeasors may also pursue contribution where no judgment has entered, such as where one defendant reaches a settlement with the plaintiff, leaving other defendants remaining in the suit. C.R.S. § 13-50.5-102(4). However, such a recovery is only permitted where the settlement extinguishes the liability attributable to the party from whom contribution is sought. *Id.* Further, to permit recovery for portions of a settlement above a tortfeasor’s pro rata share, the settlement must not have exceeded “what was reasonable.” *Id.*

In construction defect actions, contribution claims against joint tortfeasors arise when the settling tortfeasor settles with some third party. C.R.S. § 13-80-104(1)(b)(II). Significantly, all contribution claims in construction defect actions must be brought within ninety (90) days after the claims “arise,” making contribution an important issue to keep in mind during settlement negotiations, particularly in cases involving a multitude of parties. C.R.S. § 13-80-104(1)(b)(II)(B). A line of cases from the Court of Appeals held this provision essentially tolls the two-year statute of limitations for contribution claims in construction defect suits, but it does not prevent the running of the six-year statute of repose. See *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166, 1170 (Colo. 2008)(overturned in part). Under C.R.S. § 13-80-104(1)(b)(II), third-party claims are timely irrespective of both

¹ UCATA explicitly does not impact any rights of indemnity between tortfeasors or insurers.

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the two-year statute of limitations and the six-year statute of repose as long as the claim are brought either during litigation or within ninety days of judgment or settlement. *Goodman v. Heritage Builders, Inc.*, 390 P.3d 398 (Colo. 2017).

Equitable contribution between insurers

Concerning claims for equitable contribution between insurers whose policies may both apply to a loss, the requirements are somewhat different. To recover in equity on a claim for contribution, the insurer seeking contribution must establish that “double” or “concurrent” insurance policies exist; that is, they must establish that the policies “cover the same interest in the same property in favor of the same parties against the same casualty or risk.” *Republic Ins. Co. v. United States Fire Ins. Co.*, 444 P.2d 868, 870 (Colo. 1968) (quoting *Couch on Insurance* 2d §). In other words, these claims arise where two insurers share joint and several obligations, such as on a duty to defend. See *Nat’l Cas. Co. v. Great Sw. Fire Ins. Co.*, 833 P.2d 741, 747-48 (Colo. 1992).

DUTY TO SETTLE

The duty owed to an insured by an insurer to act in good faith when handling third-party liability claims requires the insurer to act reasonably—that is, to act non-negligently. *Farmers Grp., Inc. v. Trimble*, 691 P.2d 1138, 1142 (Colo. 1984). That is, “would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.” *Id.* (internal quotation marks omitted). Breach of that duty will give rise to a tort claim for bad faith breach of insurance contract. In a trial for bad faith, the jury may be instructed that the duty of good faith and fair dealing “is breached if the insurer delays or denies payment without a reasonable basis for its delay or denial.” C.R.S. § 10-3-1113(1). The determination of reasonableness in assessing delay or denial of payment is whether the insurer’s behavior was negligent. C.R.S. § 10-3-1113(2).

It is the affirmative act of the insurer in unreasonably refusing to pay a claim or act in good faith that forms the basis for liability, and therefore, an actual judgment in excess of policy limits is not a necessary prerequisite to liability. *Trimble*, 691 P.2d at 1142. Moreover, it is not necessary for a jury to find that there had even been a bona fide offer to settle within liability limits as an element of a claim for unreasonable breach of insurance contract. *Miller*, 916 P.2d at 575. An insured who has suffered a judgment in excess of policy limits has suffered actual damages and will be permitted to maintain an action against its insurer for bad faith breach of the duty to settle—even if the judgment is confessed and the insured is protected by a covenant not to execute. *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116 (Colo. 2010).

If, however, the insured instructs the insurer not to settle, a claim for bad faith failure to settle may not be brought. *Eklund v. Safeco Ins. Co. of Am.*, 579 P.2d 1185, 1187 (Colo. App. 1978). Additionally, there is no absolute duty to settle claims that fall outside policy coverage, such as claims for punitive damages. *Lira*, 913 P.2d at 518.

LH&D BENEFICIARY ISSUES

Colorado’s Designated Beneficiary Agreement Act is codified at C.R.S. § 15-22-104 et seq. It provides that a designated beneficiary agreement shall be legally recognized if the parties to the designated beneficiary agreement satisfy five criteria: (1) both parties are 18 years of age or older, (2) both parties are competent to enter into a contract, (3) neither party is married to another person or a party to a Civil Union, (4) neither party is a party to another designated beneficiary agreement, and (5) both parties enter into the designated beneficiary

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agreement without force, fraud, or duress. C.R.S. § 15-22-104(1)(a)(I)–(V). Moreover, the designated beneficiary agreement is legally sufficient if the agreement is properly completed and signed, acknowledged, and recorded with the county clerk and recorder. C.R.S. § 15-22-104(2)(a)–(d).

Colorado recognizes life, health, and death benefits that are duly entered into pursuant to a designated beneficiary agreement. C.R.S. § 15-22-101 et seq. Colorado’s Designated Beneficiary Agreement Act allows two people to execute a designated beneficiary agreement (DBA), which is an agreement by two people for the purpose of designating each person as the beneficiary of the other person and for the purpose of ensuring that each person has certain rights and financial protections based upon the designation. C.R.S. § 15-22-103(2). A DBA can be negated by various “superseding legal documents,” one of which is a beneficiary designation in an insurance policy or policy of health care coverage—unless the superseding legal document is found to be invalid or unenforceable, in which case the DBA will control. C.R.S. §§ 15-22-103(3)(f); 15-22-105(7).

All benefits under any blanket sickness and accident policy must be paid to the insured; to the insured’s agent; to the insured’s designated beneficiary; or to the insured’s estate, but if the insured is a minor, such benefits may be paid to the minor insured’s parent or guardian, or other person actually supporting the minor insured. C.R.S. § 10-16-215(3).

Change of Beneficiary

With respect to funds owing under life insurance policies, every change of beneficiary form issued by an insurance company under any life or endowment insurance policy or annuity contract to an insured or owner who is a resident of this state must request the following information: (a) the name of each beneficiary, or if a class of beneficiaries is named, the name of each current beneficiary in the class; (b) the address of each beneficiary; and (c) the relationship of each beneficiary to the insured. C.R.S. § 38-13-109.5(7). In addition, if the life insurance company learns of the death of the insured or annuitant and the beneficiary has not communicated with the insurer within four months after such death, the company is required to take reasonable steps to pay the proceeds to the beneficiary. C.R.S. § 38-13-109.5(6).

Effect of Divorce on Beneficiary Designation

Designated beneficiaries survive divorce unless revoked or a party becomes remarried. Either party can revoke the Designated Beneficiary Agreement by filing a notarized Revocation of Designated Beneficiary Agreement in the same County Clerk and Recorder office that recorded the Designated Beneficiary Agreement. The revocation must follow the format in C.R.S. § 15-22-111(4). The revocation does not become effective until the date and time it is received by the County Clerk and Recorder. In addition, a designated beneficiary agreement shall be deemed revoked upon the marriage or the Civil Union of either party. C.R.S. § 15-22-111(3). In the case of a common law marriage, a designated beneficiary agreement shall be deemed revoked as of the date the court determines that a valid common law marriage exists. *Id.*

Other Considerations Respecting Beneficiaries

Where insurers distribute settlement proceeds to the surviving spouse in a wrongful death action, the insurers satisfy their statutory duty under the Colorado wrongful death law and are not required under some sort of common law duty to monitor the distribution of the proceeds to all potential beneficiaries. *Campbell v. Shankle*, 680 P.2d 1352, 1354 (Colo. App. 1984).

Colorado recently outlawed Stranger-Originated Life Insurance (STOLI). STOLI consists of transactions where investors entice seniors or other at-risk individuals to take out policies, with the intent of all the parties to the

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transaction being to transfer most of the policy benefits to those investors. The sooner the policyholder dies, the greater the investor's profit. The seniors and other at-risk individuals purchase the policies in their own names but agree to an arrangement where the investors, after a period of time (usually the expiration of a two-year contestability period) end up with beneficial ownership of the policy. The applicable statute outlawing such practices provides, "a person shall not procure or cause to be procured or effected a policy upon the life of another individual unless the benefits under the policy are payable to the insured, to the personal representative of the insured's estate, or to a person having, at the time the policy is issued, an insurable interest in the individual insured." C.R.S. § 10-7-703. Effective January 1, 2019, "insurable interest" is defined to limit insureds to those with "substantial interest engendered by love and affection in the continuation of the life of the insured" who are either related within the fifth degree or closer, stepchildren of the insured or their descendants, or individuals designated as beneficiaries under life insurance policies. C.R.S. § 15-5-114.

INTERPLEADER ACTIONS

Interpleader is a procedural device designed to settle conflicting claims to property usually (though not always) held by a non-claimant without exposing the possessor to multiple or inconsistent judgments.

Availability of Fee Recovery

Neither the text of C.R.C.P. 22, Colorado's interpleader rule, nor the cases interpreting it, allow for recovery of fees incurred in bringing the action. Indeed, not even statutory interest is available in interpleader actions, because there is no right to obtain interest where the funds must be paid into the registry of the court. *Ritter v. Wysowatcky*, 514 P.2d 333, 334 (Colo. App. 1973); see C.R.S. § 10-7-112(1) ("If the claim [for life insurance benefits or proceeds] is denied and a judgment is rendered against the insurer, the annual rate of interest from the date the action was filed until payment of the claim shall be four percentage points above the federal discount rate, except to the extent such proceeds were deposited with the court in an interpleader action.").

Instead, in the limited situation where a power of attorney (below, "agency instrument") purports to be in effect, if an insurer is faced with a dispute between two parties over life insurance proceeds, and the insurer has reasonable cause to question the authenticity, validity, or authority of an agency instrument or agency may make prompt and reasonable inquiry of the agent, the principal, or other persons involved for additional information and may submit an interpleader action to the district court or the probate court of the county in which the principal resides by depositing any funds or other assets that may be affected by the agency instrument with the appropriate court. In such an interpleader action, if the court finds that the third party had reasonable cause to commence the action, the third party shall be entitled to all reasonable expenses and costs incurred by the third party in bringing the interpleader action. C.R.S. § 15-14-607(3).

Differences in State vs. Federal

The primary difference between Colorado interpleader and 10th Circuit Interpleader is that Colorado interpleader does not allow recovery of fees incurred by the insurer in interpleading the funds, as indicated above, but recovery of such fees is permitted under Fed. R. Civ. P. 22 in the Tenth Circuit. See, e.g., *United States Fid. & Guar. Co. v. Sidwell*, 525 F.2d 472, 475 (10th Cir. 1975); *United States v. Chapman*, 281 F.2d 862, 870 (10th Cir. 1960); *John Hancock Mut. Life Ins. Co. v. Jordan*, 836 F. Supp. 743, 749 (D. Colo. 1993); see also *Combined Ins. Co. of Am. v. Glass*, 2015 U.S. Dist. LEXIS 25499, at *28 (D. Colo. Mar. 3, 2015).

State Interpleader Rules

The Colorado rule on interpleader states, “In any civil action of interpleader, a district court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of this state affecting the property, instrument, or obligation involved in the interpleader action until further order of the court. Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.” C.R.C.P. 22(2). No such language appears in the federal rule.

Insurers are able to initiate interpleader actions to determine the proper beneficiaries of proceeds of insurance policies pursuant to C.R.C.P. 22. As set forth in C.R.C.P. 22, “[p]ersons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability.” C.R.C.P. 22(1). Colorado courts have held that interpleader should be allowed “liberally” due to the important state and private interests it serves “by efficiently resolving potential multiple actions in the same lawsuit, thereby conserving judicial and party resources.” *Benton v. Adams*, 56 P.3d 81, 86 (Colo. 2002).

Interpleader is proper where “[t]he person asserting interpleader. . . allege[s] facts sufficient to support a reasonable belief that exposure to double or multiple liability may exist.” *Benton*, 56 P.3d at 87. “Certainty of exposure to double or multiple liability is not the test; rather, the allegations must meet a ‘minimal threshold of substantiality.’” *Id.* at 87-88 (quoting *Equitable Life Assur. Soc’y v. Porter-Englehart*, 867 F.2d 79, 84 (1st Cir. 1989)). In such cases, the interpleading party “should be discharged from any and all liability arising out of or based on the policies involved, except to pay the proceeds of such policies to the party or parties ultimately adjusted to be entitled thereto.” *CNA Surety v. Barnett*, No. 06-cv-01159, 2008 WL 1930644, at *3 (D. Colo. May 1, 2008) (quoting *American Home Life Ins. Co. v. Barber*, 2003 WL 21289986, at *2 (D. Kan. May 16, 2003)); see also *Mund v. Rehaume*, 117 P. 159 (Colo. 1911).

In addition, C.R.C.P. 22 states, “In any civil action of interpleader, a district court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of this state affecting the property, instrument, or obligation involved in the interpleader action until further order of the court. Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.” C.R.C.P. 22(2). No such language appears in the federal rule.

Federal Interpleader Rules

A Federal court is permitted to hear an interpleader action pursuant to F.R.C.P. 22, so long as the case does not run afoul of the probate exception, the *Younger Abstention Doctrine*, and the *Colorado River Abstention Doctrine*.

In *Life Insurance Company of North America v. Wagner*, 2016 U.S. Dist. LEXIS 50902 (D. Utah 2016), the Federal district court allowed an interpleader to proceed regarding life insurance death benefits because the state court lacked “custody” and “jurisdiction” over interpled funds. Although this is a Utah case, the same analysis applies in Colorado and the Tenth Circuit.

The underlying dispute was between the surviving husband of the deceased, Mr. Truman, and the mother of the deceased, Ms. Wagner. Truman was the named beneficiary on the policy. Truman was found guilty of murdering the deceased, which would disqualify him from receiving death benefits pursuant to Utah’s slayer statute. Wagner claimed the death benefits should instead be payable to her. The insurance company filed an interpleader action in Federal court, so as to allow the court to determine who should

receive the death benefits and to avoid potential exposure to having to pay the death benefits twice to the two claimants.

Truman raised three defenses to the Federal court hearing the dispute: the “probate exception,” the *Younger* Abstention Doctrine, and the *Colorado River* Abstention Doctrine. All three defenses were rejected, as follows.

- o Probate Exception

The Court heard the case under Federal diversity jurisdiction, which requires that the parties in the dispute be in different states. The probate exception is a doctrine that precludes a federal court from hearing a dispute that it would otherwise hear under diversity jurisdiction if the action interferes with the traditional jurisdiction of state probate courts.

The probate exception was clarified in 1946 by the Supreme Court in *Markham v. Allen*, 326 U.S. 490 (1946), as set forth in the *Wagner* case:

[W]hile a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, ... it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to *interfere* with the state court’s possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.

The probate exception was further clarified in the seminal case of *Marshall v. Marshall*, 547 U.S. 293 (2006), as relied upon by the *Wagner* case:

[W]e comprehend the “interference” language in *Markham* as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*. ... Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent’s estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

In rejecting the argument that the probate exception precluded the Federal court from hearing the present case, the court explained as follows:

Because the insurance proceeds are not in the custody of a state probate court, the Court reads *Markham*, as well as *Marshall’s* narrow definition of “interference”, as permitting *Wagner’s* federal pursuit of the interpled insurance proceeds. . As *Wagner* notes, her cross-claim seeks a ruling that Truman committed a disqualifying homicide in the context of determining her rights to the insurance proceeds. There is no will at issue. The court is not being asked to administer the estate. And the probate court does not have custody of the insurance proceeds. Therefore, Truman’s position that the probate exception bars federal jurisdiction is rejected.

- *Younger Abstention Doctrine*

The *Younger Abstention Doctrine* precludes a Federal court from hearing a dispute if being litigated by state authorities and the state forum is adequate:

[a] federal court must abstain from exercising jurisdiction when: (1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies.

In rejecting the application of the *Younger Abstention Doctrine*, the court explained:

Because the state court does not have custody over the interpled funds, there is not an ongoing state proceeding regarding that property. Likewise, because the state has no control of the interpled funds, the state court is not an adequate forum to hear the claims raised in the federal complaint. Lastly, the Court is not persuaded by Truman's position that the policies involved in this interpleader action are such that abstention is warranted.

- *Colorado River Abstention Doctrine*

The *Colorado River Abstention Doctrine* precludes a Federal court from hearing a dispute, if necessary, to avoid duplicative litigation. As relied upon in *Wagner*:

The Supreme Court in *Colorado River* identified four factors to consider in determining whether the doctrine should be invoked. "These four factors are: (1) whether the state or federal court first assumed jurisdiction over the same res; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which jurisdiction was obtained by the concurrent forums."

In rejecting the application of the *Colorado River* abstention doctrine, the Court explained as follows:

The Court agrees with *Wagner* that the *Colorado River* Doctrine is inapplicable. There is no duplicative or parallel litigation because the state court does not have custody of the interpled insurance proceeds. However, even if the doctrine were applicable, after considering the foregoing factors, the Court concludes that abstention is not warranted. The state court does not have jurisdiction over the insurance proceeds. There has been no satisfactory showing that the federal forum is inconvenient or that hearing this interpleader action and accompanying cross-claim will result in piecemeal litigation. The state probate action seeking appointment of a special administrator and this interpleader action are not concurrent cases and the order of when jurisdiction was obtained is not determinative. The Court acknowledges that Utah law will be referenced in determining the rights of the parties. This lone factor, however, does not warrant the Court's abstention from hearing this matter. The final consideration is not determinative

because, as Wagner notes, her rights would only be protected in the state court proceedings if the state court had custody over the interpled funds, which it does not.