I. Regulatory Limits on Claims Handling

A. Timing for Responses and Determinations

Section 10-3-1104(1)(h)(III), C.R.S., the Unfair Methods of Competition and Unfair or Deceptive Acts or Practices statute, requires insurers to adopt and implement reasonable standards for the prompt investigation of claims. All insurers authorized to write property and casualty insurance policies in Colorado, must make a decision on claims and/or pay benefits due under the policy within sixty (60) days after receipt of a valid and complete claim unless there is a reasonable dispute between the parties concerning the claim, and provided the insured has complied with the terms and conditions of the policy of insurance. If an insurer fails to make a decision and/or pay benefits within sixty (60) days, the Commissioner of Insurance may impose penalties. Insurance Regulation 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).

B. Standards for Determinations and Settlements

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).
The Colorado Division of Insurance has adopted a regulation that sets out rules for handling first party property and casualty claims, and defines penalties that may be imposed on insurers in the event the Commissioner of Insurance determines there has been a violation of those rules. Amended Insurance Regulation 5-1-14.

C. **Privacy Protections (In addition to Federal Gramm-Leach-Bliley Act)**

Standards for the handling of nonpublic personal financial and health information about individuals who obtain or are claimants or beneficiaries of products or services primarily for personal, family or household purposes from licensees of the Division of Insurance are found in Amended Insurance Regulation 6-4-1. 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.


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.

Privacy of medical information pertaining to certain diseases and conditions is addressed to a certain extent by C.R.S. § 25-1-122. Privacy concerning developmental disabilities is provided for in C.R.S. § 25.5-10-201. Privacy safeguards restricting the use or disclosure of information concerning applicants, recipients, and former and potential recipients of federally aided public assistance and welfare are addressed in C.R.S. § 26-1-114. See also, Lincoln v. Denver Post, 501 P.2d 152 (Colo. App. 1972). Privacy safeguards concerning child support are set forth in C.R.S. § 26-1-114(3)(a), adoption in C.R.S. § 25-2-113.5, and abortion in C.R.S. §§ 25.5-3-106 and 12-37.5-104. Privacy of student data is protected under C.R.S. § 22-1-123.

II. **Principles of Contract Interpretation**


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).

III. Choice of Law


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 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 Srvcs. 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).

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.

IV. Duties Imposed by State Law

A. Duty to Defend

1. Standard for Determining Duty to Defend


It has been held that 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).

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).

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).

B. 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), overruled on other grounds. It is discussed in more detail below.

V. Extracontractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

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), overruled on other grounds. 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. Group, 275 P.3d 750, 759-60 (Colo. App. 2012).

1. 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. The statute states that, “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 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.” C.R.S. § 10-3-1116(1). Based on this definition, Colorado courts apply this statute to third-party claims and liability policies, as well.

2. 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).

3. 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 Bureau of Mutual Ins. Co., 928 P.2d 83 (Colo. App. 1996); Lira v. Shelter Ins. Co., 913 P.2d 514 (Colo. 1996); Ballow v. PHICO Ins. Co., 878 P.2d 672 (Colo. 1994). Damages may include economic loss, mental distress, loss of income or job, impairment of credit rating, and worsening of physical condition. Lira, 903 P.2d at 1150. Notably, in Goodson v. Am. Standard Ins. Co. of Wis., 89 P.3d 409 (Colo. 2004), the Colorado Supreme Court determined that a plaintiff can recover damages for emotional distress without proving substantial property or economic loss.

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’s fees and costs may be awarded as an element of damages to be paid by the insurer. Estate of Casper v. Guar. Trust Life Ins. Co., 2016 COA 167, ¶¶ 45-58 (Colo. App. Nov. 17, 2016) (awarding attorney’s fees as a component of damages under C.R.S. 10-3-1116 and distinguishing Bernhard v. Farmers Ins. Exch., 915 P.2d 1285 (Colo. 1996)).

B. 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).

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.”

**C. Intentional or Negligent Infliction of Emotional Distress (IIED or NIED)**

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.

The Colorado Supreme Court has fashioned the Restatement rule into 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 reasonably 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.

D. State Consumer Protection Laws

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. Ct. 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 attorneys fees in a successful enforcement action. C.R.S. § 6-1-113(2)(b).

VI. **Discovery Issues in Actions Against Insurers**

A. **Discoverability of Claims Files Generally**

C.R.C.P. Rule 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 P.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 in order 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. Lazar, 79 P.3d at 107; Silva v. Basin W., Inc., 47 P.3d 1184, 1187 (Colo. 2002).

B. **Discoverability of Reserves and Settlement Authority**

Reserves are the funds insurers set aside to cover future expenses, losses, claims, or liabilities. 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 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- 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 recently held in **Sunahara v. State Farm Mut. Auto. Ins. Co.**, 280 P.3d 649, 657-58 (Colo. 2012) that 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." 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.**

In **Sunahara**, the Colorado Supreme Court also extended the protection afforded to an insurer’s reserves and settlement authority in the context of third-party and first-party UIM actions. The Court determined that the “liability assessments and similar cursory fault evaluations used by an insurance company to develop reserves and settlement authority” also are not reasonably calculated to lead to the discovery of admissible evidence. **Sunahara**, 280 P.3d at 657.

### C. 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-FSP-PAC, 2007 U.S. Dist. LEXIS 3037 at *6-7 (D. Colo. January 10, 2007).
D. 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 Lab., Inc. v. Dist. Ct. of Pueblo Cnty., 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. Farmers Union Prop. & Cas. v. Dist. Ct., 718 P.2d 1044, 1048 (Colo. 1986).

VII. Defenses in Actions Against Insurers

A. 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.

B. 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. 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 Indemn., 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. Clementi v. Nationwide Mut., 16 P.3d 223, 231-232 (Colo. 2001). 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 (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.

C. Challenging Stipulated Judgments: Consent and/or No-Action Clauses

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. It was held in Crowley v. Hardman Bros., 223 P.2d 1045 (Colo. 1950), that 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 had the right to maintain an action against the insurer. Id.

When dealing with consent judgments, courts must be on guard to 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.

D. Statutes of Limitation

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.
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).

VIII. Trigger and Allocation Issues for Long-Tail Claims

A. 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).

B. Allocation Among Insurers

Colorado has adopted the “time-on-the-risk” method for apportionment of loss among multiple insurers when environmental pollution spans many years and policies. 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.

IX. Contribution Actions in Colorado

A. Statutory vs. Equitable Claims

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 excess paid from the other joint tortfeasors. § 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(s) from whom contribution is sought is 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)). Colorado recognizes such a claim when there is a joint and several obligation 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.”).

B. Elements

1. 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. § 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. § 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. § 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. § 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. § 13-80-104(1)(b)(II)(B). A line of cases from the Court of Appeals held this provision essentially tolls the 2-year statute of limitations for contribution claims in construction defect suits, but 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). However, a recent Colorado Supreme Court case held that the provision tolls both the 2-year statute of limitations and the 6-year statute

\(^1\) UCATA explicitly does not impact any rights of indemnity between tortfeasors or insurers.

2. **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).

X. **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), overruled on other grounds. 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 v. Byrne, 916 P.2d 566, 575 (Colo. App. 1995). 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 v. Shelter Ins. Co., 913 P.2d 514, 518 (Colo. 1996).

In Nunn, 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 he would pay over the $100,000 policy limits and stipulate 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 offer. 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.