I. Regulatory Limits on Claims Handling

A. Timing for Responses and Determinations

With the exception of residential property insurers, Florida statutes related to the handling of claims for property damage or personal injury liability do not contain specified time limitations within which the claims must be paid or denied. Claims must be settled or paid “promptly” or within a “reasonable” time. Baxter v. Royal Indemnity Co., 285 So. 2d 652 (Fla. 1st DCA 1973) (Superseded by statute, as stated in Talat Enterprises, Inc. v. Aetna Cas. and Sur. Co., 753 So. 2d 1278 (Fla. 2000); State Farm Mutual Automobile Ins. Co. v. Laforet, 658 So. 2d 55 (Fla. 1995). While Fla. Stat. § 627.70131 does mandate certain time requirements for residential property insurers to provide responses, conduct an investigation, and pay or deny a claim within 90 days of the notice of claim, this statute expressly does not authorize a private cause of action against an insurer for a violation thereof. QBE Ins. Corp. v. Dome Condo. Ass’n, 577 F. Supp. 2d 1256 (S.D. Fla. 2008).

Additionally, Fla. Stat. § 627.4137 requires that liability insurers disclose policy limits, a statement of any policy or coverage defense, and/or a copy of the policy within 30 days of the written request from a claimant. Fla. Stat. § 627.4137. There is no private cause of action for an insurer’s violation of Fla. Stat. § 627.4137. However, an insurer’s failure to comply with the Fla. Stat. § 627.4137 may operate to bar the insurer’s affirmative defense that the insured/claimant failed to satisfy all conditions precedent in the policy. Porceli v. Onebeacon Ins. Co., 635 F. Supp. 2d 1312 (M.D. Fla. 2008); but see Dominion Bus. Fin., LLC v. Nationwide Prop. & Cas. Ins. Co., 2010 U.S. Dist. LEXIS 60697 (M.D. Fla. 2010); see also Contreras v. 21st Century Ins. Co., 2011 Fla. App. LEXIS 1569 (Fla. 5th DCA 2011).

B. Standards for Determinations and Settlements

The standard for the handling of a claim under a liability policy is that the insurer “owes a duty to the insured to exercise the utmost good faith and a reasonable discretion in evaluating the claim made against him and in negotiating for a settlement of that claim with the policy limits if such is possible.” Baxter v. Royal Indemnity Co., 285 So.2d 652, 655 (Fla. 1st DCA 1973) (Superseded by statute, as stated in Talat Enterprises, Inc. v. Aetna Cas. and Sur. Co., 753 So. 2d 1278 (Fla. 2000). The standard for
first- or third-party statutory actions for bad faith is set forth in §624.155(1)(b), Fla. Stat. An insurer acts in bad faith when “not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests.” State Farm Mutual Automobile Ins. Co. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995). The standard is “the totality of circumstances,” and while bad faith claims are potentially implicated in any discussion of the standards for settlement, they are examined in detail below.

The insured has the reciprocal obligation to allow the insurer to control the defense and to cooperate with the insurer. Doe ex rel. Doe v. Allstate Ins. Co., 653 So. 2d 371, 374 (Fla. 1995).

C. Privacy Protections

Florida has no specific statutory provisions governing privacy in the insurance context. However, an attorney representing an insured and insurer, in the absence of conflict between them, has dual clients, the insurer and the insured. The insured’s interest must be paramount, and the primary client is the insured.

II. Principles of Contract Interpretation

An insurance contract must be construed in accordance with the plain language of the policy. Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co., 913 So. 2d 528, 532 (Fla. 2005) (quoting Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 165 (Fla. 2003)). The policy terms should be given their plain and unambiguous meaning as understood by the man-on-the-street. State Farm Fire & Cas. Co. v. Castillo, 829 So. 2d 242, 244 (Fla. 3d DCA 2002). A court may resort to construction of a contract of insurance only when the language of the policy in its ordinary meaning is indefinite, ambiguous or equivocal. If the language employed in the policy is clear and unambiguous, there is no occasion for construction or the exercise of a choice of interpretations. In the absence of ambiguity, it is the function of the court to give effect to and enforce the contract as it is written. Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 735 (Fla. 2002).

If the language is ambiguous, the contract should be construed in favor of the insured; but if it is unambiguous, it must be given effect as written. Courts may not rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties. Harrington v. Citizens Prop. Ins. Corp., 54 So. 3d 999, 1002 (Fla. 4th DCA 2010). Because insurance policies are often adhesion contracts, the ambiguities are construed against the insurer who prepared the policy.

Florida courts apply an objective theory of contractual intent when interpreting insurance policies: The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not the parties having meant the same thing but on their having said the same thing. State Farm Fire & Cas. Ins. Co. v. Deni Assocs., 678 So. 2d 397 (Fla. 4th DCA 1996). Thus, meaning is derived from the parties' unambiguous language, not from their subjective understandings.

If an insurer does not define a policy term, the insurer cannot take the position that there should be a narrow, restrictive interpretation of the coverage provided. State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So.
Strict construction does not mean that a court must always find coverage. Strict construction does not mean that clear words may be tortured into uncertainty so that new meanings can be added. Where the insurer has defined a term used in the policy in clear, simple, nontechnical language, strict construction does not mean that judges are empowered to give the defined term a different meaning deemed more socially responsible or desirable to the insured. State Farm Fire & Cas. Ins. Co. v. Deni Assocs., 678 So. 2d 397 (Fla. 4th DCA 1996).

If more than one interpretation could be given to an insurance policy provision, an ambiguity results. State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1076 (Fla. 1998). If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage, the insurance policy is considered ambiguous. Garcia v. Fed. Ins. Co., 969 So. 2d 288, 291 (Fla. 2007). To find in favor of the insured on this basis, however, the policy must actually be ambiguous. A provision is not ambiguous simply because it is complex or requires analysis. If a policy provision is clear and unambiguous, it should be enforced according to its terms.

The lack of a definition of an operative term in a policy does not necessarily render the term ambiguous and in need of interpretation by the courts. Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161 (Fla. 2003). Insurance policy terms must be given their everyday meaning and should be read with regards to ordinary people's skill and experience. Watson v. Prudential Prop. & Cas. Ins. Co., 696 So. 2d 394, 396 (Fla. 3d DCA 1997). Florida courts will often use legal and nonlegal dictionaries to ascertain the plain meaning of words that appear in insurance policies. Harrington v. Citizens Prop. Ins. Corp., 54 So. 3d 999, 1002 (Fla. 4th DCA 2010) (citing Brill v. Indianapolis Life Ins. Co., 784 F.2d 1511, 1513 (11th Cir. 1986)).

When courts construe insurance policies, they should read the policies as a whole, thereby giving every provision its full meaning and operative effect. Gen. Star Indem. Co. v. W. Fla. Vill. Inn, Inc., 874 So. 2d 26, 30 (Fla. 2d DCA 2004) (citing Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 34, 34 (Fla. 2000)). Additionally, a single policy provision should not be considered in isolation, but rather, the contract shall be construed according to the entirety of its terms as set forth in the policy and as amplified by the policy application, endorsements, or riders. Harrington, 54 So. 3d 999, 1002 (Fla. 4th DCA 2010). Like other contracts, a court should only resort to rules of construction in interpreting an insurance contract when the language is ambiguous; otherwise, it should apply the plain and unambiguous meaning of the policy's language. Sunshine State Ins. Co. v. Jones, 77 So. 3d 254 (Fla. 4th DCA 2012).

III. Choice of Law

In determining which state's law applies to contracts, the Supreme Court of Florida has long adhered to the rule of lex loci contractus. That rule, as applied to insurance contracts, provides that the law of the jurisdiction where a contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage. State Farm Mut. Auto. Ins. Co. v. Roach, 945 So. 2d 1160 (Fla. 2006). When parties come to terms in an agreement, they do so with the implied acknowledgment that the laws of that jurisdiction will control absent some provision to the contrary. The doctrine of lex loci contractus directs that,

Absent a choice-of-law provision in the insurance contract, the laws of the place in which a contract was made govern matters concerning its execution, interpretation, and validity, unless public policy requires the assertion of Florida's paramount interest in protecting its citizens from inequitable insurance contracts. Florida courts have carved out this narrow exception to the lex loci rule known as the "public policy exception," which outside the coverage of the policy, the insurer is obligated to defend the entire suit. Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299, 1306-07 (Fla. 1st DCA 1992). All doubts as to whether a duty to defend exists in a particular case must be resolved against the insurer and in favor of the insured results in application of Florida law. The exception requires both a Florida citizen in need of protection, a paramount Florida public policy, and the insurer must be on reasonable notice that its insured is a Florida citizen. State Farm Mut. Auto. Ins. Co. v. Roach, 945 So. 2d 1160 (Fla. 2006).

Contract choice-of-law principles apply to bad faith actions. While questions bearing on the interpretation, validity, and obligation of contracts are substantive and governed by the rule of lex loci contractus, matters concerning performance of the obligations, i.e. to provide insured a good faith defense to the action, are determined by the law of the place of performance. Gov't Emfs. Ins. Co. v. Grounds, 332 So. 2d 13, 14 (Fla. 1976) (third-party bad faith claim brought by the insured tortfeasor against the insurer for failing to defend the insured in Florida in good faith; the place of performance was Florida, where the cause of action against the insured was maintained and was defended in bad-faith by the insurer); but see Higgins v. W. Bend Mut. Ins. Co., 85 So. 3d 1156, 1158 (Fla. 5th DCA 2012) (insurer's refusal to tender UM benefit limits presented a substantive question in first-party bad faith action, rather than a performance-based issue, thus the law to be applied was the law of Minnesota, where the insurance contract was executed).

IV. Duties Imposed By State Law

A. Duty to Defend

1. Standard for Determining Duty to Defend

An insurer’s duty to defend is broader than its duty to pay or indemnify the insured, as the insurer is required to defend the suit even if the true facts later show that there is no coverage. Allstate Insurance Co. v. RJT Enterprises, Inc., 692 So. 2d 142, 144 (Fla. 1997); MCO Environmental, Inc. v. Agricultural Excess & Surplus Ins. Co., 689 So. 2d 1114 (Fla. 3d DCA 1997). The duty to defend is to be determined solely from the allegations in the complaint against the insured. Farrer v. U.S Fidelity & Guaranty Co., 809 So. 2d 85, 88 (Fla. 4th DCA 2002). The insurer must defend if the allegations in the complaint could bring the insured within the policy provisions of coverage. Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299, 1307 (Fla. 1st DCA 1992). The duty to defend arises when the complaint alleges facts that fairly and potentially bring the suit
within policy coverage even if the facts alleged are actually untrue or the legal theories are unsound. Category 5 Mgmt. Group, LLC v. Companion Prop. & Cas. Ins. Co., 76 So. 3d 20, 23 (Fla. 1st DCA 2011). If the complaint alleges facts partially within and partially. Marr Investments, Inc. v. Greco, 621 So. 2d 447, 449 (Fla. 4th DCA 1993).

2. Issues with Reserving Rights

An insurer may provide a defense to its insured while reserving the right to later challenge coverage, if timely notice of such reservation is given to the insured. Giffen Roofing Co., Inc. v. DHS Developers, Inc., 442 So. 2d 396, 397 (Fla. 5th DCA 1983). The reservation by the insurer of the right to contest its liability under the policy relinquishes to the insured, at his election, control of the litigation. BellSouth Telecomms., Inc. v. Church & Tower of Fla., Inc., 930 So. 2d 668, 672 (Fla. 3d DCA 2006). Where the insurer refuses to defend and coverage is found, the insured will be entitled to full reimbursement of the insured’s litigation costs. Mid-Continent Cas. Co. v. Am. Pride Bldg. Co., LLC, 601 F.3d 1143 (11th Cir. Fla. 2010) (an insured may reject a conditional defense after accepting the defense if the insurer changes the terms of the conditional defense in a material way).

There is a split of authority on the issue of whether an insurer who defends while reserving the right to be reimbursed for litigation cost is entitled to recover defense costs if no coverage is found. Certain Interested Underwriters at Lloyd's v. Halikoytakis, 2011 U.S. Dist. LEXIS 152752, 4-5 (M.D. Fla. Dec. 21, 2011). The majority rule is that an insurer, having properly sent its insured a reservation of rights letter, is entitled to reimbursement of fees and costs incurred in the defense of the insured if there was no duty to defend or indemnify. Jim Black & Assocs., Inc. v. Transcontinental Ins. Co., 932 So.2d 516 (Fla. 2d DCA 2006) and Colony Ins. Co. v. G&E Tires & Service, Inc., 777 So.2d 1034 (Fla. 1st DCA 2000). These cases conclude that an insured "necessarily agree[s] to the terms on which [the insurer] extend[ed] the offer" when it accepts the defense. Colony Ins. Co. v. G&E Tires & Service, Inc., supra, 777 So.2d at 1036; Jim Black & Assocs., Inc. v. Transcontinental Ins. Co., supra. In other words, a contract was formed when the insurer agreed to provide a defense on the condition that, if it were later determined that it had no duty to provide a defense, it could recoup what it had paid for the defense, and the insured accepted that conditional offer by allowing the defense to be presented on its behalf.

Conversely, in Nationwide Mutual Fire Insurance Co. v. Royall, 2008 U.S. Dist. Lexis 91352; 21 Fla. L. Weekly Fed. D 444 (M.D. Fla. 2008), the Court held that, where the policy is silent, an insurer can recover defense fees and cost only if the insurer gives the insured a specific, reasonable time (e.g., fifteen days) within which to accept or reject a written offer of a defense conditioned upon the reimbursement of fees and costs. Additionally, in Pa. Lumbermens Mut. Ins. Co. v. Ind. Lumbermens Mut. Ins. Co., 43 So. 3d 182 (Fla. 4th DCA 2010), despite the insured agreeing to the Insurer's reservation of rights provision for reimbursement of defense cost in the event of a determination of no coverage and the insurer's assignment of its claim to the insurer against a second insurer for wrongfully refusing to provide a defense, the Court still held there was no right to reimbursement of defense costs through equitable subrogation between the two insurers. Although coverage was eventually determined to rest with the second insurer that wrongfully refused to provide a defense, the Court found
both insurers had a duty to defend, thus no right to reimbursement of defense costs was awarded.

Pursuant to the Claims Administration Statute, notice of an insurer’s reservation of rights to assert a coverage defense must be provided to the insured in writing within 30 days after the insurer knew or should have known of the defense. See Fla. Stat. § 627.426(2)(a). If the insurer provides a defense under reservation of rights, it must either obtain from the insured a non-waiver agreement after a full disclosure of the coverage defenses it seeks to preserve or retain independent counsel who is mutually agreeable to the parties. Fla. Stat. § 627.426(2)(b)(3). Reasonable fees for the counsel may be agreed upon between the parties or, if no agreement is reached, shall be set by the court.

An insurer's failure to comply with the requirements of Fla. Stat. § 627.426(2) will not bar an insurer from disclaiming liability where a policy or endorsement has expired or where the coverage sought is expressly excluded or otherwise unavailable under the policy or under existing law. AIU Ins. Co. v. Block Marina Invest., Inc., 544 So. 2d 998 (Fla. 1989).

Surplus-lines insurance is regulated by Fla. Stat. § 627.426 if a legal action predicated on a violation of the statute was filed on or before May 15, 2009. Shopping Ctr. Mgmt. v. Arch Specialty Ins. Co., 2010 U.S. Dist. LEXIS 31196 (S.D. Fla. 2010). If the action was filed after May 15, 2009, Fla. Stat. § 627.426 does not regulate surplus-lines insurance. Id.; Fla. Stat. § 626.913(4) ("Except as may be specifically stated to apply to surplus lines insurers, the provisions of chapter 627 do not apply to surplus lines insurance authorized under ss. 626.913-626.937, the Surplus Lines Law").

B. **Duty to Settle**

An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his or her own business, which amounts to a fiduciary duty requiring the exercise of good faith. Doe v. Allstate Ins. Co., 653 So. 2d 371, 374 (Fla. 1995). In executing its good faith duty of diligence, the insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonable prudent person, faced with the prospect of paying the total recovery, would do so. Berges v. Infinity Ins. Co., 896 So. 2d 665 (Fla. 2004). Furthermore, the insurer has a continuous duty to negotiate and settle in good faith and to advise the insured of settlement opportunities and possible outcomes of the litigation, including the possibility of an excess judgment, as well as any steps which may be taken to avoid such excess judgment. Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980); Contreras v. U.S. Sec. Ins. Co., 927 So. 2d 16 (Fla. 4th DCA 2006). Tort liability is imposed on an insurer for not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests. See Fla. Stat. §624.155(1)(b)(1); see also Aboy v. State Farm Mut. Auto. Ins. Co., 394 Fed. Appx. 655 (11th Cir. Fla. 2010); Gutierrez v. Yochim, 23 So. 3d 1221 (Fla. 2d DCA 2009). When the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions
in good faith and with due regard for the interests of the insured. United Auto. Ins. Co. v. Estate of Levine, 87 So. 3d 782 (Fla. 3d DCA 2011).

Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause. Goheagan v. Am. Vehicle Ins. Co., 2012 Fla. App. LEXIS 9573 (Fla. 4th DCA June 13, 2012). Where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations. Id.

V. **Extracontractual Claims Against Insurers: Elements and Remedies**

A. **Bad Faith**

There are three major types of bad faith claims recognized in Florida: (1) a common law third-party bad faith claim, (2) a statutory third-party bad faith claim, and (3) a statutory first-party bad faith claim. Although the term is used differently in some other jurisdictions, a “first-party” bad faith action, as that term is used in Florida, refers to one arising out of the handling of a claim in which the insured was the party seeking to receive monetary benefits under the policy, such as medical payments benefits under a homeowner’s policy or uninsured motorist benefits under an automobile policy. In contrast, a “third-party” bad faith action arises from a claim in which a third-party was seeking benefits, usually under liability coverage of the policy, as a result of the insured’s tortious conduct. McLeod v. Continental Ins. Co., 591 So. 2d 621 (Fla. 1992) (Superseded by statute, as stated in Fridman v. Safeco Ins. Co. of Illinois, 185 So.3d 1214 (Fla. 2016). Third-party bad faith claims can be brought either under the common law or pursuant to statute. First party bad faith claims are purely a creation of statute. Section 624.155(1)(b)(1), Fla. Stat. (2009) create a statutory first-party bad-faith cause of action and codifies prior decisions authorizing a third party to bring a bad-faith action under the common law. Therefore, the same obligations of good faith that existed for insurers dealing with their insureds in the third-party context are extended by statute to the first-party context. QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n, 94 So. 3d 541 (Fla. 2012).

B. **First Party Common Law Claim**

There is no common law first-party bad-faith action in Florida. QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n, 94 So. 3d 541 (Fla. 2012). First-party claims for breach of the implied warranty of good faith and fair dealing are actually statutory bad-faith claims that must be brought under § 624.155, Fla. Stat.

C. **Third Party Common Law Claim**

In Auto Mutual Indemnity Co. v. Shaw, 184 So. 852 (Fla. 1938), the Florida Supreme Court for the first time recognized that in a third-party liability setting, an implied covenant of good faith and fair dealing exists between the insured and its liability insurer. The insurer, in settling claims and conducting a defense, has a duty to exercise that degree of care which a person of ordinary care and prudence would exercise in the management of his own business. This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a
settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980). A cause of action for an insurer's bad faith failure to settle a third party claim may not be maintained until a judgment in excess of the policy limits has been entered against the insured. GEICO Gen. Ins. Co. v. Harvey, 2013 Fla. App. LEXIS 935 (Fla. 4th DCA Jan. 23, 2013).

A common law third-party bad faith claim may be brought either by the insured or by a third-party judgment creditor standing in the insured’s shoes. See Travelers Indemnity Co. v. Butchikas, 313 So. 2d 101 (Fla. 1st DCA 1975; Thompson v. Commercial Union Co. of N.Y., 250 So. 2d 259 (Fla. 1971). The third-party judgment creditor’s action is derivative of the insured’s and is not a separate claim. Fidelity & Cas. Co. of New York v. Cope, 462 So. 2d 459 (Fla. 1985).

Third-party bad faith claims often arise from an excess judgment entered against an insured. In such cases, the issue is whether the insurance company should have resolved the case within policy limits if it had acted fairly and honestly towards its insured with due regard for his or her interest. In North American Van Lines, Inc. v. Lexington Ins. Co., 678 So. 2d 1325 (Fla. 4th DCA 1996), the court noted that an insurance carrier must evaluate settlement proposals as though it alone carried the entire risk of loss. Insurance companies have to fulfill their fiduciary obligation to an insured by making decisions that are in the insured’s best interest. Insurers should be careful to evaluate settlement offers from the perspective of whether an insured with unlimited assets would have tried to resolve the case for an amount within the applicable policy limits. If so, the insurance company in good faith should resolve the case within policy limits. See Campbell v. Government Employees Ins. Co., 306 So. 2d 525 (Fla. 1974).

In Perera v. United States Fid. & Guar. Co., 35 So. 3d 893 (Fla. 2010) the Florida Supreme Court analyzed four basic scenarios that can result in a common law third-party bad faith claim against an insurer for damages sustained as a result of the insurer's bad faith: (1) the classic bad-faith situation where an excess judgment is entered against the insured; (2) stipulations known as Cunningham agreements, which have been held to be the "functional equivalent" of an excess judgment; (3) Coblentz agreements, and (4) where the primary insurer refuses to settle and the excess carrier brings a bad-faith claim against a primary insurer by virtue of equitable subrogation. Id. See also Vigilant Ins. Co. v. Cont'l Cas. Co., 33 So. 3d 734 (Fla. 4th DCA 2010).

The nonjoinder statute, § 627.4136(1), Fla. Stat. (2006), prevents a third party from pursuing a direct action against an insurer for a cause of action covered by liability insurance unless the third party has first obtained a settlement or jury verdict against the insured. Once a settlement or verdict has been obtained against an insured, § 627.4136(4), Fla. Stat. (2006) permits joinder of the insurer solely for the purposes of entering final judgment or enforcing the settlement. Section 627.4136(4), Fla. Stat. (2006) expressly excludes joinder of an insurer as a party defendant when the insurer has denied coverage.

D. Statutory Bad Faith (Fla. Stat. § 624.155)
In addition to common law bad faith, § 624.155, Florida Statutes specifically provides that any person damaged by certain enumerated acts of an insurer may bring a civil action against that insurer. As to third-party claims, the statute provides a “cumulative and supplemental remedy.” Hollar v. Int’l Bankers, Ins. Co., 572 So. 2d 937, 939 (Fla. 3d DCA 1990). Actions brought under Fla. Stat. § 624.155 are referred to as “statutory bad faith actions,” and the enumerated acts include violations of certain statutes, principally §§ 626.9541, 626.9551; 626.9705; 626.9706; 626.9707 or 627.7283. Moreover, Fla. Stat. § 624.155 allows a civil remedy for bad faith failure to settle, making claim payments without stating the coverage under which payments are made, and failing to promptly settle claims under one portion of an insurance policy to influence settlements under other portions of the insurance policy. These are set forth more specifically in the discussion of the consumer protection statutes below. Fla. Stat. § 624.155 establishes certain procedural conditions precedent to bringing an action for statutory bad faith.

The legal duty created under Fla. Stat. § 624.155 is separate and independent of the contractual obligation. Opperman v. Nationwide Mutual Fire Ins. Co., 515 So. 2d 263, 267 (Fla. 5th DCA 1987). The statutory civil remedy does not preempt other statutory or common law remedies. Fla. Stat. § 624.155(7). However, it also does not create any new common law remedies. No person may obtain a judgment under both the common law remedy and the statutory remedy. Fla. Stat. § 624.155(7); Dunn v. National Security Fire & Casualty Co., 631 So. 2d 1103 (Fla. 5th DCA 1993) (Receded from by Boozer v. Stalley, 146 So.3d 139 (Fla. 5th DCA 2014).

In statutory bad faith actions, an insurer has 60 days to cure the wrongful conduct. The party seeking relief is required to file a notice of violation, commonly referred to as a “civil remedy notice,” with the Florida Department of Financial Services. The insurer is required to respond within 60 days after the notice is accepted by the Department of Financial Services. The insurer has the opportunity to “cure” the circumstances giving rise to the violation within the 60 day period. If the insurer does not respond within the 60-day period, a presumption of bad faith arises that shifts the burden to the insurer to show why it did not respond. Imhof v. Nationwide Mutual Ins. Co., 643 So. 2d 617, 619 (Fla. 1994). No statutory bad faith action may be brought if the insurer “cures” the circumstances giving rise to the violation within 60 days. Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co., 753 So. 2d at 1278 (Fla. 2000); Franklin v. Minnesota Mutual Life Ins. Co., 97 F. Supp 2d 1324, 1327 (S.D. Fla. 2000).

Florida courts are undecided as to the specificity required in the Civil Remedy Notice. In Heritage Corp. v. National Union Fire Insurance Company, 580 F. Supp. 1294 (S.D. Fla. 2008), the Court held that a Civil Remedy Notice was fatally defective due to the absence of a specific claim for relief. The opposite result was reached in Porcelli v. OneBeacon Insurance Company, 2008 U.S. Dist. Lexis 75415 (M.D. Fla. 2008); See also O'Leary v. First Liberty Ins. Corp., 2010 U.S. Dist. LEXIS 100766 (M.D. Fla. 2010). In Rousso v. Liberty Surplus Ins. Corp., 2010 U.S. Dist. LEXIS 82328 (S.D. Fla. 2010), the Court found that common allegations such as "claim delay," "claim denial," "unfair trade practice," "unsatisfactory settlement offer," are uninformative recitations and do not meet the requirements of Fla. Stat. § 624.155. The allegations do not specifically inform the insurer of the facts underlying the alleged violations or the corrective action that the insurer needed to take to remedy the alleged violation. Id.
The Supreme Court clarified application of the “cure provision” in 624.155, Fla. Stat., in Macola v. Gov’t Employees. Ins. Co., 2006 Fla. LEXIS 2532 (Fla. 2006). There the Supreme Court held that tender of the policy limits to an insured in response to the filing of a civil remedy notice under Fla. Stat. § 624.155 by the insured, after the initiation of a lawsuit against the insured but before entry of an excess judgment, did not preclude a common law cause of action against the insurer for third-party bad faith. Id. at *20.

In a case of first impression for the state, the Fourth District Court of Appeal in Contreras v. U.S. Sec. Ins. Co., 927 So. 2d 16 (Fla. 4th DCA 2006), underscored that the actions of the insurer in fulfilling its obligation to the insured, not that of the claimant, are the focus in a bad faith claim. The court found bad faith where an insurer refused to settle with a claimant who offered to release one insured and not the other. Id. at 22.

E. Determination of Coverage and Damages & Appellate Review

Before a claim for statutory first-party bad faith accrues, the coverage and damage must be finally established. Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So. 2d 1289 (Fla. 1991); Imhof v. Nationwide Mutual Ins. Co., 643 So. 2d 617, 618 (Fla. 1994). In Cunningham v. Standard Guaranty Ins. Co., 630 So. 2d 179 (Fla. 1994), the Florida Supreme Court directly ruled that the Blanchard analysis applies to a third-party bad faith action. XL Specialty Insurance Company v. Skystream, Inc., 988 So. 2d 96 (Fla. 3rd DCA, 2008)(Receded from by State Farm Florida Ins. Co. v. Seville Place Condominium Ass'n, Inc., 74 So. 3d 105 (Fla. 3rd DCA 2011)).

An insurance bad faith action does not accrue until the issue of coverage under the policy has been determined. Where causes of action for both the underlying damages and bad faith are brought in the same action, the appropriate step is to abate the bad faith action until coverage and damages have been determined. When it is in the interest of judicial economy, a trial court has discretion to abate a bad faith claim that is brought in a coverage action; however, the trial court also has discretion to dismiss the claim without prejudice. GEICO Gen. Ins. Co. v. Harvey, 2013 Fla. App. LEXIS 935 (Fla. 4th DCA Jan. 23, 2013).

A statutory first-party bad faith action is premature until two conditions have been satisfied: (1) the insurer raises no defense which would defeat coverage, or any such defense has been adjudicated adversely to the insurer; and, (2) the actual extent of the insured's loss must have been determined. An insured's underlying first-party action for insurance benefits against an insurer necessarily must be resolved favorably to the insured before a cause of action for bad faith in settlement negotiations can accrue. Once a determination has been made as to liability and the extent of damages, there is no impediment to pursuing a bad faith claim. While it is necessary that there be a determination of an insured's damages, there is no requirement that the insured's underlying claim be by a trial or arbitration. Rather, all that is required is a resolution of some kind in favor of the insured. A judgment on a breach of contract action is not the only way of obtaining a favorable resolution. An arbitration award establishing the validity of an insured's claim satisfies the condition precedent required to bring a bad faith action. Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co., 100 So. 3d 1155 (Fla. 4th DCA 2012).
A majority of the state courts and federal courts, including the 11th Circuit, have held the appellate process must be exhausted before a claim for bad faith can proceed.

In Leitstein v. QBE Ins. Corp., 2009 U.S. Dist. LEXIS 36898 (S.D. Fla. 2009), the insurer was still appealing an underlying judgment in favor of the insured for breach of an insurance policy, and the Court held the insured's subsequently filed bad faith action was premature. The bad faith claim might never mature if the judgment was vacated or reversed on appeal. Dismissal, rather than abatement, was proper given bad faith was the only claim filed in the subsequent action. Id. The Florida Supreme Court has not definitively addressed the question of whether the appellate process must be final before a bad faith claim can mature. The Second and Fourth District Courts of Appeal interpreting the Florida Supreme Court in Vest v. Travelers Ins. Co., 753 So. 2d 1270 (Fla. 2000) have held a bad faith claim is premature pending the outcome of the appellate process. See United Auto Ins. Co. v. Tienna, 780 So.2d 1010 (Fla. 4th DCA 2001) (the determination of liability and damages referred to in Vest "must also include the appellate process."); State Farm Mut. Auto Ins. Co. v. O'Hearn, 975 So. 2d 633 (Fla. 2d DCA 2008) (Vest requires a "final determination of both the insurer's liability and the amount of damages owed by the insurer" for a bad faith claim to mature); See also Barnes v. Allstate Ins. Co., 2010 U.S. Dist. LEXIS 138340 (M.D. Fla. 2010) ("the appellate process must be complete before the cause of action for bad faith insurance practice is ripe"); Chalfonte Condo. Apt. Ass'n v. QBE Ins. Corp., 734 F. Supp. 2d 1302 (S.D. Fla. 2010) ("Florida and Southern District of Florida case law weighs in favor dismissing without prejudice or abatement, and that the reasoning behind them is stronger than that for ruling that bad faith claims are ripe before appellate remedies are exhausted"); Denis v. Commerce Ins. Co., 2010 U.S. Dist. LEXIS 8926 (S.D. Fla. 2010); Page v. QBE Ins. Corp., 2009 U.S. Dist. LEXIS 34310 (S.D. Fla. 2009); Romano v. Am. Cas. Co. of Reading, Pa., 834 F.2d 968, 970 (11th Cir. 1987).

However, the Third District Court of Appeal rejected the insurer's argument that before the bad faith claim could proceed, the insurer had to exhausted all appellate remedies as to liability and loss amount. State Farm Fla. Ins. Co. v. Seville Place Condo. Ass'n, 2009 Fla. App. LEXIS 15529 (Fla. 3rd DCA 2009). The Seville Court, relying on the Florida Supreme Court's opinion in Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216 (Fla. 2006), discussed in more detail below, found the appraisal award determining liability and the extent of damages was a sufficient basis for the commencement of a bad faith claim, and the insurer had waived its policy defenses. Id. Accordingly, the insured was not required to obtain a final judgment in the breach of contract action, or await appellate review, before proceeding with a bad faith claim, especially when the binding nature of the appraisal award was a provision bargained for by the insurer in its form of policy. Id. See also Tropical Paradise Resorts, LLC v. Clarendon American Insurance Company I, 2008 U.S. Dist. Lexis 66496 (S. D. Fla. 2008) (An appraisal award has been held to be a final determination in favor of an insured where the insurer does not intend to contest coverage).

Additionally, in a bad faith claim by the obligee of a surety, the Florida Supreme Court in Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 2006 Fla. LEXIS 2953 (Fla. 2006), held that (1) an obligee of a surety is considered an "insured" for purposes of filing a claim under Fla. Stat. § 624.155, (2) the language in Fla. Stat. § 624.155 eliminates the proof of
general business practice requirement of Fla. Stat. § 626.941, when the plaintiff pursues a Fla. Stat § 626.941 claim through a right of action provided by Fla. Stat. § 624.155; (3) an arbitration panel’s finding that the principal of a surety bond has breached its duty to the obligee and that the surety bond satisfies the requirement of adjudication finding liability and damages condition precedent to filing a bad faith claim; and (4) denial of the defendant’s affirmative defenses by the arbitration panel serves to collaterally estop the defendant from relitigating the same defenses in a bad faith proceeding; however, the defendant may present the factual bases for its defenses in support of its reliance on those defenses as reasonable. Id. The Court reaffirmed that a cause of action for bad faith is separate and independent of a claim for breach of contract and held that the arbitration panel’s award did not constitute res judicata but instead satisfied the condition precedent to filing of a bad faith claim. Id. at *54.

F. Attorney’s Fees & Punitive Damages

In circumstances in which bad faith is found, plaintiffs may be entitled to both compensatory and punitive damages. Punitive damages will be allowed when the conduct at issue is wanton or outrageous, or based upon moral turpitude or malice. Campbell, 306 So. 2d at 532; see Winn & Lovett Grocery Co. v. Archer, 171 So. 214 (Fla. 1936). Where an Insurer’s conduct involves concealment or misrepresentation, punitive damages may be awarded. Id.; see also Fla. Stats. §§ 768.72 & 426.155(5) (authorizing punitive damages). In Hogan v. Provident Life & Accident Ins. Co., 665 F. Supp. 2d 1273 (M.D. Fla. 2009), the insured pled punitive damages using Fla. Stat. § 768.72 for its common law claims and Fla. Stat. § 426.155 for the bad faith claims. The Hogan Court did not find the pleading of both statutory and common law claims were duplicative. Rather, Fla. Stat. § 624.155(8) was interpreted to only prevent a plaintiff from obtaining judgments under both common law and statutory remedies for the same injury. Id.

Attorney fees are authorized under Fla. Stat. § 624.155(4). See Allstate Ins. Co. v. Jenkins, 32 So. 3d 163, 2010 Fla. App. LEXIS 3624 (Fla. 5th DCA 2010). The insured in Jenkins attempted to recover attorney fees arising from the underlying action under Fla. Stat. 768.79, which conditions recovery upon receiving a judgment sufficiently exceeding the amount of a party’s demand for settlement by 25%, and attorney fees pursuant to Fla. Stat. § 624.155(4) for a bad faith claim filed in a subsequent supplemental proceeding to the underlying action. Id.

Attorney fees may also be awarded under Fla. Stat. § 627.428 in the insured’s breach of contract action if it was reasonably necessary for the insured to file a court action in order to have the insurer comply with its policy obligations. See Travelers of Fla. v. Stormont, 43 So. 3d 941 (Fla. 3rd DCA. 2010). The insured in Stormont prematurely filed its complaint when the insurer was still in compliance with the policy. However, as litigation progressed, the insurer subsequently failed to comply with the policy, and the lawsuit became necessary to compel the insurer for appraisal. Consequently, upon final judgment in favor of the insured, the Court awarded attorney fees pursuant to Fla. Stat. § 627.428 only for the phase of the litigation where the lawsuit was actually necessary to compel the insurer to comply with the policy. Id.; see also Clifton v. United Cas. Ins. Co. of Am., 31 So. 3d 826 (Fla. 2d DCA 2010)(disagreed with by Johnson v. Omega Inc. Co., 200 So. 3d 1207 (Fla. 2016)); Hill v. State Farm Fla. Ins. Co., 35 So. 3d 956 (Fla. 2d DCA 2010); Beverly v. State Farm Fla. Ins. Co., 50 So.
Where an insurer pays policy proceeds after suit has been filed but before judgment has been rendered, the payment of the claim constitutes the functional equivalent of a confession of judgment or verdict in favor of the insured, thereby entitling the insured to attorney's fees. Barreto v. United Servs. Auto. Ass'n, 82 So. 3d 159 (Fla. 4th DCA 2012). A trial court should award attorney's fees to an insured pursuant to § 627.428, Fla. Stat. when it appears as though the insurer would not have paid the insured the proper amount of the loss without judicial intervention. Id.

The fact that an insurer is the party seeking attorney's fees under § 627.428, Fla. Stat. does not, by itself, preclude recovery. Despite the express limitations in § 627.428 as to the class of designated entities entitled to recover attorney's fees, the Supreme Court of Florida has previously approved an award of attorney's fees to an insurer in situations where policy coverage was obtained through an assignment from an insured. Ind. Lumbermens Mut. Ins. Co. v. Pa. Lumbermens Mut. Ins. Co., 2013 Fla. App. LEXIS 3533 (Fla. 4th DCA Mar. 6, 2013).

In Grider-Garcia v. State Farm Mut. Auto., Etc., 14 So. 3d 1120 (Fla. 5th DCA 2009), the Court declined to award attorney fees under Fla. Stat. § 627.428 to the insured for the certiorari proceeding relating to the ultimate determination whether the insured was the prevailing party in the breach of contract action against the insurer. Id.

G. Fraud

The essential elements of a fraud claim in Florida are: (a) a false representation of fact, known by the party making it to be false at the time it was made; (b) that the representation was made for the purpose of inducing another to act in reliance on it; (c) actual reliance on the representation; and (d) resulting damage to the plaintiff. Essex Ins. Co. v. Universal Entertainment & Skating Ctr., 665 So. 2d 360, 362 (Fla. 5th DCA 1995); Ball v. Ball, 160 Fla. 601, 36 So. 2d 172 (Fla. 1948); S.H. Inv. & Dev. Corp. v. Kincaid, 495 So. 2d 768 (Fla. 5th DCA 1986), rev. denied, 504 So. 2d 767 (Fla. 1987); Poliakoff v. National Emblem Insurance Co., 249 So. 2d 477 (Fla. 3d DCA), cert. denied, 254 So. 2d 790 (Fla. 1971).

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

Florida has adopted the Restatement (Second) of Torts’ definition of a claim for intentional infliction of emotional distress. Eastern Airlines, Inc. v. King, 557 So. 2d 574 (Fla. 1990); Metropolitan Life Insurance Co. v. McCarson, 467 So. 2d 277 (Fla. 1985). The elements of the cause of action are: (1) the wrongdoer’s conduct was intentional or reckless, that is, he intended his behavior or should have known that emotional distress would likely result; 2) the conduct was outrageous, that is, it went beyond all bounds of decency, and to be regarded as odious and utterly intolerable in civilized communities; (3) the conduct caused emotional distress; and (4) the emotional distress was severe. LeGrande v. Emmanuel, 889 So. 2d 991, 994
A plaintiff need not have suffered any physical injury to succeed in a claim for intentional infliction of emotional distress. R.J. v. Humana of Florida, Inc., 652 So. 2d 360 (Fla. 1995).

In claims of negligent infliction of emotional distress, Florida’s “impact rule” provides that a plaintiff’s emotional distress suffered must be in conjunction with or flow from physical injuries sustained by the plaintiff. R.J. v. Humana of Florida, Inc., 652 So. 2d 360 (Fla. 1995). The elements of the cause of action are: (1) The plaintiff must suffer physical injury; (2) The plaintiff’s physical injury must be caused by the psychological trauma; (3) The plaintiff must be involved in the event causing the negligent injury to another; and (4) The plaintiff must have a close personal relationship to the directly injured person. Zell v. Meeks, 665 So. 2d 1048, 1054 (Fla. 1996).

Florida’s Supreme Court has held, however, that in cases of claims against health insurers, the common law impact requirement has been superseded by Fla. Stat. § 624.155, which allows for various statutory claims against insurers. Time Insurance Co. v. Burger, 712 So. 2d 389 (Fla. 1998). However, because the statute is in derogation of common law and must therefore be strictly construed, and because the statute does not provide specific standards for recovery on such claims, the court has set forth standards by which a plaintiff may recover. In cases where proof of bad faith by an insurer is evident, and where the insurer’s conduct results in an insured not receiving health care, an insured may recover for emotional distress if the insured can prove the following: (1) that the bad faith conduct resulted in the insured’s failure to receive necessary or timely health care; (2) that, based upon a reasonable medical probability, this failure caused or aggravated the insured’s medical or psychiatric condition; and (3) that the insured suffered mental distress related to the condition or the aggravation of the condition. The plaintiff/insured must additionally substantiate these allegations with the testimony of a qualified health care provider, not a mere lay witness. Id. at 393.

I. State Consumer Protection Laws, Rules and Regulations

As noted in the discussion of bad faith claims above, Florida provides a first party, statutory cause of action against insurers. Any person may bring a civil action against an insurer who violates the following statutes: 626.9541(1)(i), (o) or (x); 626.9551; 626.9705; 626.9706; 626.9707; 627.7283. See Fla. Stat. §624.155(1)(a).

1. 626.9541 -- Unfair methods of competition and unfair or deceptive acts or practices:

   a) 626.9541(1)(i): Unfair claim settlement practices.

      This section includes as violations attempts to settle claims based on documents altered without the knowledge or consent of the insured, material misrepresentations made to the insured with the intent to settle at terms less favorable to the insured, or committing or performing with such frequency as to indicate a general business practice any of the following:

      a. Failing to adopt and implement standards for the proper investigation of claims;
b. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

c. Failing to acknowledge and act promptly upon communications with respect to claims;

d. Denying claims without conducting reasonable investigations based upon available information;

e. Failing to affirm or deny full or partial coverage of claims, and, as to partial coverage, the dollar amount or extent of coverage, or failing to provide a written statement that the claim is being investigated, upon the written request of the insured within 30 days after proof-of-loss statements have been completed;

f. Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement;

g. Failing to promptly notify the insured of any additional information necessary for the processing of a claim; or

h. Failing to clearly explain the nature of the requested information and the reasons why such information is necessary.

b) 626.9541(1)(o): Illegal dealings in premiums; excess or reduced charges for insurance

An insurer violates this section by charging reduced or excess rates for insurance. Further provisions within this section relate to motor vehicle insurance, not applicable here.

c) 626.9541(1)(x): Refusal to insure

1. An insurer who refuses to insure an individual based upon race, color, creed, marital status, sex, or national origin violates this section. Further prohibited reasons for a refusal to insure include the fact that the individual is a public official, has previously been refused insurance coverage, fails to purchase non-insurance service or commodities or services from the insurer, or the individual’s age, residence, or lawful occupation.

2. Section 626.9551: Prohibits favoring insurers or carriers or coercing debtors.

3. Section 626.9705: Prohibits refusal to provide life or disability insurance to an individual on the basis that the individual suffers from a severe disability.
4. Section 626.9706: Prohibits the denial of life insurance coverage to an individual on the basis of the sickle cell trait.

5. Section 626.9707: Prohibits the denial of disability insurance to an individual on the basis of the sickle cell trait.

6. Section 627.7283: Relates to return of premiums for canceled motor vehicle insurance.

VI. Discovery Issues in Actions Against Insurers

A. Discoverability of Claims Files & Attorney/Client Communications

In actions seeking benefits under an insurance contract, the insurer’s claim file is not subject to discovery as it is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. See State Farm Florida Ins. Co. v. Gallmon, 835 So. 2d 389 (Fla. 2d DCA 2003) (claim file irrelevant and protected work product in action seeking additional payment under homeowner’s policy). The holding in Gallmon as to relevance is a bright line ruling that does not differentiate among the various items that might be contained in a claim file. See also, State Farm Fire & Casualty Co. v. Valido, 662 So. 2d 1012 (Fla. 3d DCA 1995) and Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana de Los Estados Unidos, Inc., 813 So. 2d 250 (Fla. 3d DCA 2002).

The Florida Supreme Court applied a different rule as to the discoverability of claim files in bad faith claims. Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005). In Florida all claim files and materials involved in claims processing, which are created up to and including the date of the resolution of the underlying claim pertaining in any way to coverage, benefits, liability or damages, are now discoverable in both first-party and third-party bad faith claims. Id. at 1129-1130. Notwithstanding, a party is not entitled to discovery of an insurer's claim file or documents relating to the insurer's business policies or practices regarding the handling of claims in an action for insurance benefits combined with a bad faith action until the insurer's obligation to provide coverage has been established. Liberty Mut. Ins. Co. v. Farm, Inc., 754 So. 2d 865 (Fla. 3d DCA 2000) (holding that a discovery order in a bad faith action requiring disclosure of the insurer's business practices was premature without a determination of the coverage issue); American Bankers Ins. Co. of Fla. v. Wheeler, 711 So. 2d 1347 (Fla. 5th DCA 1998) (holding that in a bad faith action, when the issue of coverage has not been determined, it is a departure from the essential requirements of the law to order disclosure of the insurer's claims file and the insurer's claims handling manuals and materials); State Farm Fire & Cas. Co. v. Martin, 673 So. 2d 518 (Fla. 5th DCA 1996); see also Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So. 2d 1289 (Fla. 1991).

Where both the coverage and bad faith claims are filed simultaneously, the appropriate step is to abate the bad faith action until coverage and damages have been determined, and use in-camera inspection to ensure full and fair discovery. See State Farm Mut. Auto. Ins. Co. v. Tranchese, 49 So. 3d 809 (Fla. 4th DCA 2010) (When the bad faith claim is abated pending the determination of coverage and damages, a party is not entitled to discovery
related to the claims files or to the insurer's business policies or practices regarding handling of claims).

Although a District Court will not review denial of a motion to dismiss a bad faith claim based on arguments that the same is premature, it can review a discovery order requiring production of the claim file. In such a case, an order compelling discovery is a departure from the essential requirements of the law and is properly quashed. State Farm Mutual Automobile Insurance Company v. O’Hearn, 975 So. 2d 633 (Fla 2d DCA 2008).

An attorney representing an insured and insurer, in the absence of conflict between them, has dual clients, the insurer and the insured. The insured’s interest must be paramount, and the primary client is the insured. Where an insurer retains counsel to represent its insured, communications between the insured and his counsel that pertain to the common interest held by the insured and the insurer—i.e., the defense of the claim—are available to the insurer, even after the insured and the insurer’s interests become adverse. Springer v. United Services Auto. Ass’n, 846 So. 2d 1234, 1235 (Fla. 5th DCA 2003). By the same token, communications concerning matters not pertaining to the defense or resolution of the liability case, such as a discussion of coverage issues or how to proceed if the case could not be settled within the policy limits, may be privileged. Springer, 846 So. 2d at 1235. Prior to a lawyer’s representation of an insured at the expense of an insurer, the insured shall be provided with the Statement of Insured Client’s Rights, which sets forth the insured’s rights with respect to the representation and explains that certain information may be shared with the insurer. Rule 4-1.8 of Rules Regulating the Florida Bar.

In Genovese v. Provident Life & Accident Ins. Co., 2011 Fla. LEXIS 621 (Fla. 2011), the Florida Supreme Court held an insured (first party) asserting a bad faith claim against its insurer generally may not discover the privileged communications that occurred between the insurer and its counsel during the underlying action. Id. Nevertheless, the Court cautioned there may be circumstances where an insurer hires an attorney to investigate both the underlying claim and render legal advice. Id. Consequently, the materials requested by the opposing party may implicate both the work product doctrine and the attorney-client privilege, and the trial court should conduct an in-camera inspection to determine whether the sought-after materials are truly protected by the attorney-client privilege. Id. If the trial court determines that the investigation performed by the attorney resulted in the preparation of materials that are required to be disclosed pursuant to Ruiz and did not involve the rendering of legal advice, then that material is discoverable. Id. Lastly, Genovese also contemplated that discovery of attorney-client privileged communications between an insurer and its counsel is permitted when the insurer raises the advice of its counsel as a defense in the action and the communication is necessary to establish the defense. Id.; See also State Farm Fla. Ins. Co. v. Puig, 2011 Fla. App. LEXIS 3902 (Fla. 3d DCA 2011).

In Eller Media Co. v. Nat’l Union Fire Ins. Co., 2008 U.S. Dist. LEXIS 68910 (S.D. Fla. 2008), aff’d Eller Media Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA, 355 Fed. Appx. 340 (11th Cir. Fla. 2009), the 11th Circuit addressed a claim for unjust enrichment and breach of contract alleged by the insured against the insurer because the insurer refused to compensate the insured for work product that was generated by the insured for the criminal defense, which was subsequently used by the insurer for the
B. Discoverability of Reserves

While no Florida cases directly discuss the discoverability of reserve information, case law suggests that such information is not discoverable in first party cases because it is immaterial to the analysis of coverage. See U.S. v. Pepper’s Steel & Alloys, Inc., 132 F.R.D. 695, 700 n. 4 (S.D. Fla. 1990); Gallmon, 835 So. 2d 389. This is consistent with the law of other jurisdictions as to the discoverability of reserve information in first party cases. See American Protection Ins. Co. v. Helm Concentrates, Inc., 140 F.R.D. 448 (E.D. Cal. 1991); Independent Petrochemical v. Aetna Cas. & Sur. Co., 117 F.R.D. 283 (D. D.C. 1986). However, other jurisdictions suggest that reserve information is relevant in third party actions with respect to the issue of whether the insurer acted in bad faith in failing to settle a claim against its insured. See American Protection Ins. Co. v. Helm Concentrates, Inc., 140 F.R.D. 448 (E.D. Cal. 1991).

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

A reinsurance contract provides that one insurer (the “ceding insurer” or “reinsured”) cedes all or part of the risk it underwrites, pursuant to a policy or group of policies, to another insurer. American Bankers Ins. Co. of Florida v. Northwestern Nat. Ins. Co., 198 F.3d 1332, 1333 (11th Cir.). Pursuant to the contract, the reinsurer agrees to indemnify the ceding insurer on the transferred risk. American Bankers Ins. Co. of Florida, 198 F.3d at 1333. Reinsurance information is relevant and discoverable in a third party bad faith action. American Fidelity & Cas. Co. v. Greyhound Corp., 258 F.2d 709, 712 (5th Cir. 1958). In Simon v. ProNational Ins. Co., 2007 U.S. Dist. LEXIS 96318 (S.D. Fla. Nov. 1, 2007), the court in a first-party statutory bad faith action granted an order compelling the insurer to identify its reinsurer so that plaintiff could subpoena the communications between the reinsurer and the insurer regarding the insurer’s “evaluation of the claim” and its “decision to proceed in a course of conduct that injured its insured.” Id. However, in Emplr. Reinsurance Corp. v. Laurier Indem. Co., 2006 U.S. Dist. LEXIS 10943 (M.D. Fla. Mar. 3, 2006), the court denied a motion to compel communications between the insurer and reinsurer in a declaratory judgment action on the basis of the work-product and/or attorney-client privilege.

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

Fla. Stat. § 627.409(1) provides the following:

627.409 Representations in applications; warranties.--

(1) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment
of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:

(a) They are fraudulent;

(b) They are material either to the acceptance of the risk or to the hazard assumed by the insurer; or

(c) The insurer in good faith would either not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

Materiality is more than a subjective question of whether the insured would have issued the policy, as that scenario is adequately addressed in Fla. Stat. § 627.409(1)(c). Singer v. Nationwide Mutual Fire Insurance Co., 512 So. 2d 1125, 1128 (Fla. 4th DCA 1987). A misrepresentation is considered material if it “does not enable a reasonable insurer to adequately estimate the nature of the risk in determining whether to assume the risk.” Id. at 1129; see Mutual Life Insurance Co. v. Denton, 112 So. 53 (Fla. 1927). Materiality under Fla. Stat. § §627.409(1)(b) is considered an objective test, and therefore a question of law. Id.

The materiality of a misrepresentation is a question of fact where a dispute exists as to questions asked by an agent, the accuracy of answers provided, and the nature of the insured’s misrepresentation. Cox v. American Pioneer Life Insurance Co., 626 So. 2d 243 (Fla. 5th DCA 1993); Patterson v. Cincinnati Ins. Co., 564 So. 2d 1149 (Fla. 1st DCA 1990); Preferred Risk Life Ins. Co. v. Sande, 421 So. 2d 566 (Fla. 5th DCA 1982); Beneby v. Midland Nat. Life Ins. Co., 402 So. 2d 1193 (Fla. 3d DCA 1981); Travelers Ins. Co. v. Zimmerman, 309 So. 2d 569 (Fla. 3d DCA 1975).

If an insurer is on notice that it should investigate further, the insurer is bound by what a reasonable investigation would have uncovered. Misrepresentations on an application by an insured, therefore, may not provide grounds for denial of coverage where the insured has provided an agent with information that placed the insurer on notice. Cox, 626 So. 2d at 246.

An insurer is not required to investigate the condition of the property insured. Where a policy contains a warranty that the property complies with all applicable laws, a building code violation increases the hazard insured and constitutes a breach of the warranty. Clarendon American Insurance Company v. Bayside Restaurant, LLC, 567 F. Supp. 2d. 1379 (M.D. Fla. 2008)

Where questions in an insurance contract contain prefatory language that states “to the best of my knowledge and belief” in regard to answers by the insured, the insurer will be bound by that lower standard of accuracy and cannot be protected by the more stringent statutory requirements regarding misrepresentations. Green v. Life & Health of America, 704 So. 2d 1386 (Fla. 1998).
If the insured's conduct is a material misrepresentation pursuant to Fla. Stat. § 627.409, then the insurer's failure to rescind a policy in accordance with Fla. Stat. § 627.728 does not preclude or abrogate the insurer's ability to void the policy ab initio pursuant to § 627.409. United Auto. Ins. Co. v. Salgado, 22 So. 3d 594 (Fla. 3d DCA 2009).

B. Failure to Comply with Conditions

The prevailing rule in Florida is that compliance with the various clauses in an insurance policy will be considered a condition precedent to the insurer's liability, even if the policy does not contain an express statement to this effect. American Fire and Cas. Co. v. Collura, 163 So. 2d 784, 791 (Fla. 2d DCA 1964). Therefore, an insurer is relieved of all liability under an insurance policy where the insured fails to comply with a notice of claim provision contained within the policy and the insurer has been prejudiced by such failure. Liberty Mut. Ins. Group v. Cifuentes, 760 So. 2d 230, 231 (Fla. 3d DCA 2000).

As a presumption exists that the insurer has been prejudiced by the insured’s failure to provide timely notice, the burden is on the insured to show that his late notice did not cause prejudice. Holinda v. Title and Trust Co. of Florida, 438 So. 2d 56, 57 (Fla. 5th DCA 1983). In addition, the failure of an insured to cooperate with his insurer in its investigation will release the insurer from liability if the failure constitutes material breach and substantially prejudices the rights of the insurer in defense of the cause. Ramos v. Northwestern Mut. Ins. Co., 336 So. 2d 71, 75 (Fla. 1976). Contrary to the law governing the condition precedent of notice, however, the insurer bears the burden to prove that it was prejudiced by an insured’s breach of his duty to cooperate. Robinson v. Auto Owners Ins. Co., 718 So. 2d 1283, 1285 (Fla. 2d DCA 1998).

An insured is not entitled to indemnification when it enters into a settlement agreement with a claimant without insurer’s consent where insurer has not violated its duty to defend. United States Fire Insurance Co. v. Freedom Village of Sun City Center, 279 Fed. Appx. 879 (M.D. Fla. 2008). An insured who settles a claim without the consent of an insurer who is defending under a reservation of rights has been found to violate the cooperation obligation under a policy, relieving the insurer of the obligation to indemnify. Continental Casualty Co. v. City of Jacksonville, 283 Fed. Appx 686 (M.D. Fla. 2008).

In Rolyn Cos. v. R & J Sales of Tex., Inc., 2011 U.S. App. LEXIS 2131 (11th Cir. Fla. 2011), the 11th Circuit held that the policy’s voluntary-payment provision precluded the insured from indemnity for repair costs because the insured did not seek the insurer's consent before voluntarily incurring the costs. The Court ruled that the action of the insured was a failure to cooperate, which substantially prejudiced the rights of the insurer in defense of the cause and released the insurer of its obligation to pay.

Florida Statute §627.727(6)(a) requires prior notice to a UM carrier of an intent to settle. Failure to give notice creates a rebuttable presumption of prejudice. Muth v. Allstate Insurance Company, 982 So. 2d 749 (Fla 4th DCA 2008).

C. Challenging Stipulated Judgments: Consent and/or No-Action Clause
Insurance policies commonly provide that a claim is not payable for a stated period of time after a proper claim is made. Blue Cross and Blue Shield of Florida, Inc. v. Ming, 579 So. 2d 771, 772 (Fla. 5th DCA 1991). Such “no action” clauses customarily provide that no action may lie against the insurer until the insured’s obligation to pay has finally been determined, either by judgment against him after trial or by written agreement entered into by the insurer. Steil v. Florida Physicians’ Ins. Reciprocal, 448 So. 2d 589, 590 (Fla. 2d DCA 1984). Accordingly, where the insurer has not declined to provide a defense to a suit, the insured is ordinarily not free to independently engage in settlements without the insurer’s consent. American Reliance Ins. Co. v. Perez, 712 So. 2d 1211, 1212-1213 (Fla. 3d DCA 1998). Indeed, violation of a settlement provision voids coverage unless the insured can conclusively overcome a presumption of prejudice to the insurer. New Hampshire Ins. Co. v. Knight, 506 So. 2d 75, 78 (Fla. 5th DCA 1987).

D. Statutes of Limitation

When a claim against an insurer is based on a written contract, an insured has a five-year period in which to bring suit. Fla. Stat. § 95.11(2)(b). When a claim sounds in tort, is based upon statutory liability, or is a contract action not founded on a written instrument, Florida provides a four-year statute of limitations for the action. Fla. Stat. § 95.11(3). In any event, in claims against insurers, the limitations period begins to run from the date of the alleged breach. Saenz v. State Farm Fire & Cas. Co., 2003 Fla. App. LEXIS 15078 (Fla. 3d DCA 2003); see State Farm Mut. Auto. Ins. Co. v. Lee, 678 So. 2d 818, 821 (Fla. 1996).

E. Delivery of Policy

Fla. Stats. §§ 626.922 (requires delivery of policy for surplus lines insurance) and 627.421 (requires delivery of policy for insurers regulated under Chapter 627) require delivery of the policy to an insured. Failure to properly deliver the policy may preclude an insurer from asserting lack of coverage as a defense. In answering a certified question from the 11th Circuit, 466 F.3d 981 (11th Cir. 2006), the Florida Supreme Court held that neither statute has altered the common-law presumption that an insurance representative, serving as an independent insurance broker, acts on behalf of the insured for purposes of procuring insurance coverage. Essex Insurance Company v. Zota, 985 So. 2d 1036 (Fla. 2008). Under Essex, an insurer that delivers a copy of the policy "to the insured or to the person entitled thereto," by delivering a copy of the policy to the insured's undisputed, independent representative-broker complies with Fla. Stats. 627.421 or 626.922. Id.; See also Lloyds Underwriters at London v. Keystone Equip. Fin. Corp., 25 So. 3d 89 (Fla. 4th DCA. 2009) (garaging warranty was a provision of forfeiture, not one of coverage, and the insurer could be estopped from denying the claim for failure to provide the insured a binder, a copy of the policy, or any other notice of the garaging warranty in compliance with statute).

VIII. Trigger and Allocation Issues for Long-Tail Claims

A. Trigger of Coverage

“Claims-made” policies trigger coverage if the negligent act or omission is discovered and brought to the attention of the insurer within the policy term. Gulf Ins. Co. v. Dolan, Fertig & Curtis, 433 So. 2d 512,
“Occurrence” policies, on the other hand, trigger the insurer's liability if the negligent act or omission occurs during the period of policy coverage, regardless of the date of discovery or the date the claim is made or asserted. Gulf Ins. Co., 433 So. 2d at 514.

B. Allocation Among Insurers

Most insurance policies contain "other insurance" clauses that attempt to limit the insurer's liability to the extent that the other insurance covers the same risk. Such clauses attempt to control the manner in which each insurer contributes to or shares a covered loss. St. Paul Fire and Marine Insurance Company v. Lexington Insurance Company, 2006 U.S. Dist. LEXIS 31397 (S.D. Fla. 2006), see generally Twin City Fire Ins. Co. v. Fireman's Fund Ins. Co., 386 F.Supp.2d 1272 (S.D. Fla. 2005).

Florida adheres to the rule of "mutual repugnancy." See Am. Cas. Co. of Reading, Pa. v. Health Care Indem., Inc., 613 F. Supp. 2d 1310 (M.D. Fla. 2009) ("[W]here two policies cover the same occurrence and both contain other insurance clauses, the excess insurance provisions are mutually repugnant and must be disregarded. Each insurer is then liable for a pro rata share of the settlement or judgment"); see also Allstate Ins. Co. v. Executive Car & Truck Leasing, Inc., 494 So.2d 487, 489 (Fla. 1986). Florida law does not recognize a "super excess" other insurance clause. See Am. Cas. Co. of Reading, Pa. v. Health Care Indem., Inc., 613 F. Supp. 2d 1310 (M.D. Fla. 2009).

As a general proposition, where each of two liability insurance policies issued by different carriers provides primary coverage to the same insured and the policies contain mutually consistent 'other insurance' provisions similar to those found in the policies at issue here, the insurer paying more than its share of the claim is ordinarily entitled to recover from the other insurer for the excess so paid." St. Paul Fire, 2006 U.S. Dist. LEXIS 31397 at *17. However, this general rule is subject to an exception where a right of indemnification exists between the parties insured under the respective policies of insurance. In this circumstance, Florida courts give controlling effect to the indemnity obligation of one insured to the other insured over the "other insurance" or similar clauses in the policies of insurance. Continental Casualty Co. v. City of South Daytona Florida, 807 So.2d 91 (Fla. 5th DCA 2002) (little league association's specific and contractual obligation of indemnification in favor of city shifted entire exposure of loss from city's own liability insurer to association's liability insurer, such that association's insurer had primary obligation to defend city in tort action arising out of use of association's use of city facilities); see also Emplrs. Ins. Co. of Wausau v. Nat'l Union Fire Ins. Co., 2008 U.S. Dist. LEXIS 32312 (M.D. Fla. 2008).

IX. Contribution Actions

A. Claim in Equity vs. Statutory

There is no common law or statutory right for contribution between primary or co-insurers for defense costs and attorneys' fees expended on a mutual insured. Argonaut Ins. Co. v. Md. Casualty Co., 372 So. 2d 960 (Fla. 3d DCA 1979). The duty to defend is personal to the particular insurer. The primary or co-insurers are not entitled to divide that duty with or require contribution from each other. Cont'l Casualty Co. v. United Pac. Ins. Co., 637 So. 2d 270 (Fla. 5th DCA 1994); See also Pennsylvania Lumbermens Mut.
Ins. Co. v. Indiana Lumbermens Mut. Ins. Co., 43 So. 3d 182, 186 (Fla. 4th DCA 2010) ("[T]here is no right of reimbursement to defense costs between primary insurers of a common insured."); Am. Cas. Co. of Reading Pennsylvania v. Health Care Indem., Inc., 613 F. Supp. 2d 1310, 1322 (M.D. Fla. 2009) (same). If an insurance company refuses to defend or provide contractual coverage to its insured, then it may expose its policy limits to a third party and faces a breach of contract suit with other statutory remedies by the insured, such as Fla. Stat. § 624.155. Thus, Florida courts and the legislature have reasoned it is unnecessary to provide the right of contribution between insurers for defense costs of a mutual insured. Argonaut Ins. Co. v. Md. Casualty Co., 372 So. 2d 960 (Fla. 3d DCA 1979). The Legislature has not seen fit to allow statutory contribution for costs or attorney fees between primary or co-insurers on the basis that if contribution for costs were allowed between primary or co-insurers, then there would be multiple claims and law suits and the insurance companies would have no incentive to settle and protect the interest of the insured since another law suit would be forthcoming to resolve the coverage dispute between the insurance companies. Pa. Lumbermens Mut. Ins. Co. v. Ind. Lumbermens Mut. Ins. Co., 43 So. 3d 182 (Fla. 4th DCA 2010) (insurer was not entitled to reimbursement of attorney's fees and costs from co-insurer expended in defense even though it was eventually determined that the claim was not covered by its own policy).

With respect to indemnity payments made by an insurer, a common law cause of action for contribution exists against another co-insurer where the policies each contain similar “other insurance” clauses and proration according to the policy limits is the proper method of determining the liability of the respective insurers. Gulf Ins. Corp. v. Continental Casualty Co., 464 So. 2d 207 (Fla. 3d DCA 1985).

Fla. Stat. 768.31 also provides that an insurer may subrogate for contribution against a joint tortfeasor for payments made by the insurer to discharge the liability of its insured-tortfeasor: “a liability insurer who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer is subrogated to the tortfeasor’s right of contribution to the extent of the amount it has paid in excess of the tortfeasor’s pro rata share of the common liability.” Fla. Stat. 768.31.

B. Elements

However, Florida courts do recognize a right of equitable subrogation between primary and excess insurers for defense costs and attorneys’ fees expended on a mutual insured. See Am. & Foreign Ins. Co. v. Avis Rent-A-Car Sys., 401 So. 2d 855 (Fla. 1st DCA 1981) (expenses incurred by a secondarily liable carrier in the defense of its insured have been universally awarded when that company sues a primary insurer of the same insured, which should have undertaken that defense); Phoenix Ins. Co. v. Fla. Farm Bureau Mut. Ins. Co., 558 So.2d 1048 (Fla. 2d DCA 1990)(same); Galen Health Care, Inc. v. Am. Cas. of Reading Pa., 913 F. Supp. 1525, 1534 (M.D. Fla. 1996)(same). Moreover, In Cont'l Cas. Co. v. City of S. Daytona, 807 So. 2d 91 (Fla. 5th DCA 2002), the indemnity agreement between the insureds designated whose insurance should provide primary coverage and the court upheld an award recovering defense attorneys’ fees and costs for the designated excess insurer that provided the only defense to the insured; the language of both policies provided for primary coverage. Id. Accordingly, an insured’s indemnity agreement and the policies’ “other insurance” clauses are key

X. Duty to Settle

Florida insurers have a duty to settle claims when, under all circumstance, it could and should have done so. Fla. Stat. §624.155(1). This "good-faith" obligation to settle claims is relatively straightforward and applies to both first and third parties. State Farm Fire & Cas. Co. v. Zebrowski, 706 So. 2d 275 (Fla. 1997)

"[A]n insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business. Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980.

When the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. Id. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith." Id.

Florida also impose additional duties upon insurers when settling claims where multiple claims are involved. When faced with multiple, competing claims, insurers must exercise extreme caution. Indeed, insurers can be found liable for prematurely settle some claims and leaving others with no coverage. Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555 (Fla. 4th DCA 2003), rev. denied, (Fla. Mar. 17, 2004).

In Farinas, the court determined that the insurer has three specific duties. First, the insurer is required to “fully investigate all the claims at hand to determine how to best limit the insured’s liability.” Id. at 560. The court noted, however, that an insurer does have some “discretion in how it elects to settle claims, and may even choose to settle certain claims to the exclusion of others, provided this decision is reasonable and in keeping with its good faith duty.” Id. at 561.

Second, the insurer should seek “to settle as many claims as possible within the policy limits.” Id. at 560. Finally, the insurer has a “duty to avoid indiscriminately settling selected claims and leaving the insured at risk of excess judgments that could have been minimized by wiser settlement practice.” Id. Whether these duties have been breached are jury questions. Id.
Accordingly, when faced with multiple claims, insurers should (among other things) request specific information from each claimant, attempt to settle claims on a global basis, and allow claimants to negotiate amongst themselves regarding distribution of policy limits.