I. REGULATORY LIMITS ON CLAIMS-HANDLING


A. Timing for Responses and Determinations

State statutes governing timeliness or acknowledgement of claim and for determination of acceptance or denial of coverage

HRS Section 431:13-103(a)(11)(E) affirmations or denials of claims coverage must be determined “within a reasonable time after proof of loss statements have been completed.”

Under Hawaii law, certain practices committed by an insurer with respect to claims, if performed with such frequency as to indicate a general business practice, are defined as unfair and deceptive practices and are prohibited. HRS Section 431:13-103(a)(11).

One such practice is failing to acknowledge within 15 working days any communications with respect to claims arising under its policies from policyholders, the Insurance Commissioner or any other person. HRS Section 431:13-103(a)(11)(B).

The response from the insurer shall be more than an acknowledgement that such person’s communication was received, and shall adequately address the concerns stated in the communication. HRS Section 431:13-103(a)(11)(B).

B. Standards for Determinations and Settlements State

HRS Section 431:13-103, Unfair Methods of competition and unfair or deceptive acts or practices defined.

1. The following are defined in Hawaii as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:
(11) Unfair claim practice settlement practices. Committing or performing with such frequency as to indicate a general business practice any of the following:

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

(B) With respect to claims arising under its policies, failing to respond with reasonable promptness, in no case more than 15 working days, to communications received from:
   (i) The insurer’s policyholders;
   (ii) Any other persons, including the commissioner; or
   (iii) The insurer of a person involved in an incident in which the insurer’s policyholder is also involved.
   The response shall be more than an acknowledgement that such person’s communication has been received, and shall adequately address the concerns stated in the communication;

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

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

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

(F) Failing to offer payment within 30 calendar days of affirmation of liability, if the amount of the claim has been determined and is not in dispute;

(G) Failing to provide the insured, or when applicable the insured’s beneficiary, with a reasonable written explanation for any delay, on every claim remaining unresolved for thirty days from the dated it was reported;

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

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

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

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

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

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

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

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

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

(Q) Indicating to the insured on any payment draft, check, or in any accompanying letter that the payment is “final” or is “a release” of any claim if additional benefits relating to the claim are probable under coverages afforded by the policy; unless the policy limit has been paid or there is a bona fide dispute over either the coverage or the amount payable under the policy.

Of note, the Unfair Claims Act, HRS Section 431:13-103 applies to “the business of insurance”. It does not apply to self-insurers.

C. Privacy Protections

Not applicable; however, motions in limine are typically filed prior to trial in Hawaii to preclude referencing insurance at trial.

II. PRINCIPLES OF CONTRACT INTERPRETATION

Because an insurer’s duty to defend its insured is contractual in nature, one must look to the language of the policy involved to determine the scope of that duty. Hawaiian Holiday Macadamia Nut Co. v. Industrial Indemnity Co., 76 Haw. 166, 873 P.2d 230 (1994).

All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured. Sentinel Insurance Company, Ltd. v. First Insurance Company of Hawaii, Ltd., 76 Haw. 277, 875 P.2d 894 (1994).


When ambiguity exists, the rule of construction is applied, only when the policy taken as a whole is reasonably subject to differing interpretation. Hawaiian Ins. & Guar. Co., Ltd. v. Chief Clerk, 68 Haw. 336, 341, 713 P.2d 427, 431 (1986).

Absent an ambiguity, the terms of the policy should be interpreted according to their plain, ordinary, and accepted sense in common speech. HIG v. Chief Clerk, supra, 68 Haw. at 342.

Exclusion clauses found in insurance policies are narrowly construed against the insurer. Retherford v. Kama, 52 Haw. 91, 470 P. 2d 517

Lastly, the Hawaii Supreme Court recently held in Willis v. Swain, 2013 WL 2459880 (Hawaii) that an insurer’s extracontractual duty of good faith is owed even to a person to whom it did not issue an insurance policy.

III. CHOICE OF LAW

The choice of law in Hawaii requires a two-part inquiry. “The first part of the choice of law inquiry is best understood as determining if there is an actual or real conflict between the potentially applicable laws.” Hammersmith v. TIG Ins. Co., 480 F.3d220, 230(3d Cir.2007). “If two jurisdictions’ laws are the same, then there is no conflict at all, and a choice of law analysis is unnecessary.” Id. See also Hawaiian Telecom Comm’n, v. Tata Am. Int’l. Corp, 2010 WL 2594482, at *5 (D. Haw. May 24,2010)

Federal courts sitting in diversity must apply “the forum state’s choice of law rules to determine the controlling substantive law.” Patton v. Cox, 276 F.3d 493, 495 (9th Cir. 2002).

“Hawaii resolves its conflict of laws issues by deciding which State has the strongest interest in seeing its law applied to a particular case.” Lemen v. Allstate Ins. Co., 938 F. Supp. 640, 643(D. Haw. 1995) see also Mikelson, 107 Haw. at 198, 111 P.3d at 607 (“This court has moved away from the traditional and rigid conflicts-of-laws rules in favor of the modern trend towards a more flexible approach looking to the state with the most significant relationship to the parties and subject matter.”) “The interests of the states and applicable public policy reasons should determine whether Hawaii law or another state’s law should apply.” Mikelson, 107 Haw. at 198, 111 P.3d at 607. In making this determination, courts “look to factors such as (1)where relevant events occurred, (2) the residence of the parties, and (3) whether any of the parties had any particular ties to one jurisdiction or the other.” Kukui Gardens Corp. v. Holco Cap. Grp, 2010 WL 145284, at *5(D. Haw. Jan. 12, 2010). “Hawaii’s choice- of- law approach creates a presumption that Hawaii law applies unless another state’s law would best serve the interests of the states and persons involved.” Abrahamson v. Aetna Cas.& Sur. Co., 76 F.3d 304, 305(9th Cir 1996).

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

The insurer’s duty to defend is broader than the duty to pay and arises whenever there is the mere potential for coverage, i.e. indemnification liability of insurer to insured under the terms of the policy. Sentinel Insurance Company, Ltd., v. First

The duty to defend rests primarily on the possibility that coverage exists. The possibility may be remote, but if it exists, the insurer owes the insured a defense. Id. The possibility of coverage must be determined by a good faith analysis of all information known to the insurer or all information reasonably ascertainable by inquiry and investigation. Standard Oil Co. of California v. Hawaiian Insurance Guaranty Company, 65 Haw. 521 (1982), citing Spruill Motors, Inc. v. Universal Under Ins. Co., 512 P.2d 168 (1968).

Where a suit raises a potential for indemnification liability of the insurer to the insured, the insurer has the duty to accept the defense of the entire suit even though other claims of the complaint fall outside of the policy’s coverage. Commerce & Industry Insurance Company v. Bank of Hawaii, 73 Haw. 322 (1992).

Where the pleadings fail to allege any basis for recovery within the coverage clause, the insurer has no obligation to defend. Id.

1. Standard for Determining Duty to Defend
   See previous response

2. Issues with Reserving Rights

   Once the insurer receives information concerning the possible absence of coverage, the insurer must promptly serve upon the insured a reservation of rights. AIG Insurance Co., Inc. v. Smith, 78 Haw. 174, 891 P.2d 261 (1995).

   A reservation of rights agreement is notice by the insurer to the insured that the insurer will defend the insured but that the insurer is not waiving any defenses it may have under the policy. First Ins. Co. of Hawaii v. State, 66 Haw. 413, 665 P.2d 648 (1983).

   When the insurer begins the defense of its insured and then determines that it is not obligated to do so, it cannot withdraw if that action would prejudice the insured unless the insurer has expressly reserved its right to withdraw. Commerce & Industry Insurance Company v. Bank of Hawaii, 73 Haw. 322 (1992).

V. EXTRA CONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A. Bad Faith

   1. First Party

      Elements and remedies in claims against insurers for failure to pay benefits
Hawaii recognizes a cause of action for bad faith against a first-party insurer. *Best Place, Inc. v. Penn America Ins. Co.*, 920 P. 2d 334 (Haw. 1996). “Every contract contains an implied covenant of good faith and fair dealings (bad faith) that neither party will do anything that will deprive the other of the benefit of the agreement.” *Id.* While a breach of good faith results in a cause of action under contract principles, “[w]hether a breach of this duty will give rise to a cause of action in tort, depends on the duty or duties inherent in a contract....” *Id.*

An insured must show two things in order to maintain a bad faith claim under Hawaii law:

1. Benefits due under the policy were withheld; and;
2. The reason for withholding the benefits was unreasonable or without proper cause.

*Id.* At 347 (adopting California’s bad faith test articulated in *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973)).

An unreasonable delay in payment of benefits constitutes bad faith. *Id.* However, an insurer’s denial of benefits based on a reasonable interpretation of the insurance policy does not constitute bad faith. *Id.* Nor does an erroneous decision not to pay benefits constitute bad faith. *Id.*; see also *Enoka v. AIG Hawaii Insurance Company, Inc.*, 128 P.3d 850 (Haw. 2006). The determinative factor is whether the decision not to pay the claim was made in bad faith, i.e., based on unfair dealing rather than mistaken judgment. *Best Place, Inc.*, 920 P.2d 334.

An insured may recover compensatory damages in a bad faith action. An insured may also recover punitive damages if he/she establishes by clear and convincing evidence that the insurer acted “wantonly or oppressively,” “with such malice as implies a spirit of mischief or criminal indifference to civil obligations,” with “willful misconduct,” or with a “conscious indifference to consequences.” *Id.* At 348. See also HRS Ann. Section 663-1.2 regarding tort liability for breach of contract; punitive damages, which states that no person may recover damages, including punitive damages, in tort for a breach of contract in the absence of conduct that: (1) violated a duty that is independently recognized by principles of tort law; and (2) transcended the breach of the contract.

However, punitive damages are not covered by insurance policies. See *Francis v. Lee Enterprises, Inc.*, 971 P.2d 707 (Haw. 1999). See also HRS Ann. Section 431:10-240, which states that “coverage under any policy of insurance issued in this State shall not be construed to provide coverage for punitive or exemplary damages unless specifically included.”

A policyholder may be entitled to reasonable attorneys’ fees and the cost of suit. HRS Section 431:10-242.


An insurer’s potential liability is not restricted to common-law bad faith tort actions. Statutory restrictions on an insurer also serve as a source for potential liability. As previously set forth, HRS Section 431:13-103 outlines numerous specific examples that constitute unfair claims handling practices by an insurer. These include the failure to respond to a communication from an insured within 15 business days, misrepresenting the benefits of an insurance policy in advertising, and not attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become relatively clear, among others.

2. Third Party

Elements and remedies in claims against insurers for failure to defend or settle third party actions

Third parties cannot sue for bad faith on statutory grounds in Hawaii. However, there is a common law judicially created bad faith cause of action (i.e., the implied covenant of good faith) which is set forth in Best Place, which states that “there is a legal duty, implied in a first-and third-party insurance contract, that the insurer must act in good faith with its insured, and a breach of that duty gives rise to an independent tort cause of action.” “We note that that in the context of suits against an insurer for bad faith refusal to settle a third-party claim, courts [of other jurisdictions] have concluded that the plaintiff must show that the third-party claimant extended a reasonable settlement offer which the insurer then rejected. Wittig v. Allianz, A.G., 145 P.3d 738 (Haw. App. 2006).

A liability insurer does not owe a duty of good faith and fair dealing to the tort claimant. Young v. Allstate Ins. Co., 198 P.3d 666, 691 (Haw. 2008)) (“Absent a contract and because Young’s claim [for bad faith against Allstate] was premised upon the existence of a contract, her claim for breach of the assumed duty of good faith and fair dealing must fail.”)

B. Fraud

Elements and remedies in cause of action against insurers
C. Intentional or Negligent Infliction of Emotional Distress

Elements and remedies in causes of action against insurers

Tort damages, including emotional distress from a financial loss are recoverable in Hawaii pursuant to the California case of Gruenburg v. Aetna Insurance Co., 9 Cal 3d 566 (1973). The court in Gruenburg determined that it is settled that that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of. The seminal case regarding an emotional distress claim arising from a bad faith action against an insurer is Young v. Allstate Ins. Co., 119 Haw. 403, 406, 198 P.3d 666, 669 (2008).

The tort of intentional infliction of emotional distress consists of four elements: "1) that the act allegedly causing the harm was intentional or reckless, 2) that the act was outrageous, and 3) that the act caused 4) extreme emotional distress to another. The term "outrageous" has been construed to mean without just cause or excuse and beyond all bounds of decency. Enoka v. AIG Hawaii Ins. Co., Inc., 109 Haw 537, 559, 128 P.3d 850 872 (2006)."

In Hawaii, if a first-party insurer commits bad faith, an insured need not prove that the insured suffered economic or physical loss caused by the bad faith in order to recover emotional distress damages caused by the bad faith. Miller v. Hartford Life Insurance Company, 126 Haw. 165, 268 P.3d 418 (2011).

The Hawaii Supreme Court held in Miller that Best Place “and our subsequent case law evidence an intent to provide the insured with a vehicle for all damages incurred as a result of the insurer’s misconduct, including damages for emotional distress, without imposing a threshold requirement of economic or physical loss.” Id. at 430.

D. State Consumer Protection Laws, Rules and Regulations

State statutes, rules or regulations as a basis for cause of action against insurer including consumer protection and trade practices

The Department of Commerce and Consumer Affairs (“DCCA”) governs the insurance industry in Hawaii and serves as a conduit for consumers to file complaints against insurers.

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

There is very little case law in Hawaii regarding discovery issues in actions against insurers; however, the following mainland cases are instructive in litigating this issue.

A. Discoverability of Claims Files Generally

Underwriting files can be relevant because they may contain an insurer’s position on coverage, claims and relations with
policyholders. See Hoechst Celanese Corporation v. National Fire Insurance Company of Pittsburgh, Pennsylvania, 623 A.2d 1099, 1107 (Del. Super. 1991). The court in Hoechst allowed discovery of underwriting files and reinsurance materials reasoning that they were relevant because they may provide evidence as to how the insurance company intended to apply the insurance policy. Id at 1107.

In Open Software Foundation Inc. v. United States Fidelity & Guaranty Co., 191 F.R.D. 325 (D. Mass.), the court held that the underwriting file must be produced by the insurer if was non-privileged.

In Nestle Foods Corp. v. Aetna Casualty and Surety Co., 135 F.R.D. 101 (D. NJ. 1990), the court ruled that the underwriting files were discoverable and relevant because they may help with interpreting the policies and the intent of the drafters.

With regards to claims files, the law is clear that an insured may obtain the claims file maintained by the insurer. See Terrell v. Western Casualty Ins. Co., 427 S.W.2d 825, 828 (Ky. Ct. App. 1979).

In Hawaii, while claims files in general may be discoverable, certain documents may be protected under the work product doctrine: “For general guidance purposes only, the Court notes that the work product doctrine provides a qualified protection from discovery in a civil action when the documents materials are (1) document and tangible things otherwise discoverable, (2) prepared in anticipation of litigation, and (3) by or for another party or by that other party’s representative. American Savings Bank v. Pain Webber Inc., 210 F.R.D. 721, 723 (D. Hawaii 2001). To satisfy the second element of the work product doctrine, there must be some threat of litigation, and the document must have been generated after that threat had materialized. Id.

A minority of courts hold that an insurance company’s investigation of a claim is almost always done in anticipation of litigation. See Fireman’s Fund Ins. Co. v. McAlpine, 120 R.I. 744, 391 A. 2d 84 (1978) However, in Pete Rinaldi’s Fast Foods Inc., v. Great American Insurance Co., 123 F.R.D. 198, 202 (M.D.N.C. 1988), the court stated that “[a]n insurance company cannot reasonably argue that the entirety of its claims files are accumulated in anticipation of litigation when it has a duty to investigate, evaluate and make a decision with respect to claims made on it by its insured.” Furthermore, even if the documents are considered work product, the material may still be discoverable upon a showing of good cause, undue hardship, and need. National Farmers’ Union Property & Casualty Co. v. District Court, 718 P.2d 1044, 1047 (Colo. 1986).

B. Discoverability of Reserves

There are no specific Hawaii cases that address the discoverability of reserves; however, several mainland cases establish that the reserves may be relevant to establish a bad

While loss reserve files may be relevant in a bad faith claim, there are instances when they are not and thus not open to discovery. See In re Couch, 80 B.R. 512, 518 (Bankr.S.D.Cal. 1987) (Court ruled that, because reserve policy is established by legislature and the Insurance Commissioner, it cannot be fairly equated with an admission of liability or the value of any particular claim.)

However, other courts have ruled that if the reserves files were established as part of an attorney’s work or in expectation of litigation, then the reserve files would be protected by the attorney-client privilege or work product doctrine. Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987).

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

There is no case law in Hawaii about the discoverability regarding the existence of reinsurance and/or communications with reinsurers.

However, there are several California cases which are instructive on these issues. In Fireman’s Fund Ins. Co. v. Superior Court, 233 Cal.App.3d 1138, 1141 (Cal. App. 1st Dist. 1991), the court ruled that reinsurance documents may be relevant in the bad faith claim and decided that, before ruling on the relevancy of the documents, it would review the documents in camera to determine if any documents should be withheld from disclosure.

However, the court in Lipton v. Superior Court, 48 Cal. App.4th, 1599 (Cal. App. 2d 1996) stated that because the reinsurance contract does not alter the original contract between the insurer and insured, an argument can be made that reinsurance documents have no relevance and are unlikely to lead to the discovery of admissible information. The court added that correspondence between insurer and reinsurer that is not privileged and which discusses liability exposure, may be relevant and discoverable. Id.

As is evident, while mainland courts differ on this issue, ultimately, whether reinsurance documents are discoverable is largely dependent on their relevancy.

D. Attorney/Client Communications Issues Relating to Tripartite Relationship Advice of Counsel Defense

There is no Hawaii case law which specifically addresses these issues. However, there are several mainland cases which are instructive. In Moskovitz v. Mt. Sinai Medical Centre, 635 Ohio St. 3d 638, 635 N.E.2d 331 (1994), the court ruled that the only attorney-client communications that are protected from discovery are those that go to the theory of defense. In another Ohio case, Boone v. Vanliner Insurance Co., 91 Ohio St. 3d 209, 744 N.E.2d 154 (2001), the court allowed the discovery of a claims file created before the denial of coverage since the files may
show a lack of good faith and were unworthy of protection even though the files contained attorney-client and work product privileged information.

Yet even if the privilege is generally recognized, it only applies to an attorney furnishing legal advice. In other words, if the attorney is simply functioning as an adjuster, the privilege may not apply. See National Farmers’ Union Property & Casualty Co. v. District Court, 718 P.2d 1044 (Colo. 1986). The court stated that the attorneys performed the same work as a claims adjuster and, therefore, the resulting work was a business record and was discoverable.

It is also clear that if an insurer raises the “advice of counsel” defense, it waives the attorney-client privilege. See State Farm Mutual Auto Ins. Co. v. Lee, 4 P.3d 402, (1999)

Another exception to the attorney-client privilege is the crime-fraud exception. See Freedom Trust v. Chubb Group of Insurance Companies, 38 F.Supp.2d 1170 (C.D. Cal. 1999) The crime-fraud exception states that there is no attorney-client privilege if the services of the lawyer were used in order to perpetuate a crime or fraud. Id.

VII. DEFENSES IN ACTIONS AGAINST INSURERS


A “genuine dispute of fact” defense is also available since Hawaii follows Gruenburg v. Aenta Insurance Co., 9 Cal. 3d 566 (1973).

Denial of a first-party claim based upon an open question of law was not in bad faith. Enoka v. AIG Hawaii Ins. Co., 128 P.3d 850 (Haw. 2006).


A. Misrepresentations/Omissions: During Underwriting or During Claim

There are no specific Hawaii cases which address this issue. However, HRS Section 431:13-103 (13) specifically prohibits misrepresentations in insurance applications. However, Hawaii often follows California law. In Kirsh v. Unum Life Ins. Co. of America, No. B152445, 2002 WL 1293016 (Cal.Ct.App.2 Dist. June 12, 2002), the court held that with respect to medical or disability insurance, an insurer has a right to know all the applicant knows concerning the state of his or her health and medical history.
While the majority of courts have uniformly refused to impose a requirement on insurers to demonstrate a causal connection between a misrepresentation and the injury under which the claim was made, many courts have imposed the requirement that the misrepresentation be “material.” See, e.g., Peterson v. Mut. Life Ins. Co., 803 P.2d 406 (Alaska, 1990).

Incontestability provisions provide insurers a limited window of opportunity to contest misrepresentations made by the applicant. This provision protects insurers from providing coverage to individuals who attempt to procure insurance by concealing serious health issues that may cause death within the contestability period. The policy language affords the insurer two years to discovery and contest fraudulent or inaccurate representations in the application. John Hancock Mut. Life Ins. Co. v. Greer, M.D., 71 Cal.Rptr.2d 48, 51 (Ct.App. 1998).

An insurer may void a policy after the incontestability period provided the insurer’s misrepresentations were made with the purpose of deceiving the insurer. See Russell v. Royal Maccabees Life Ins. Co., 974 P.2d 443 (Ct.App.Div. 1998).

It is well settled in Hawaii and elsewhere that under contract law, a party to a contract can typically avoid its obligations if the contract was formed based upon material misrepresentations made by the other party. RESTATEMENT (SECOND) OF CONTRACTS Section 164(1)(1981).

As long as insureds continue to make material misrepresentations to either obtain benefits they would not be entitled to, or to obtain benefits at a lower premium rate, a charge of bad faith per se cannot stand since insurers will have a reasonable basis to challenge the availability of coverage.

B. Failure to Comply with Conditions Assistance and Cooperation

Late notice

There are no specific Hawaii cases which address this issue.

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

There are no specific Hawaii cases which address this issue.

D. Statutes of Limitations


VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS
There are no Hawaii cases regarding this issue

A. **Trigger of Coverage**
   There are no Hawaii cases regarding this issue

B. **Allocation Among Insurers**
   There are no Hawaii cases regarding this issue

IX. **CONTRIBUTION ACTIONS**

   In Hawaii, a contribution Plaintiff is entitled to contribution from a tortfeasor whose liability was extinguished by the settlement, either in the main action or a separate action. An independent action for contribution will not be allowed if the right can be enforced with a third-party action or cross-claim in the principal lawsuit. HRS Section 663-12 (1984) See also Gump v. Wal-Mart Stores, Inc., 5 P.3d 407 (Haw. 2000)

A. **Claim in Equity vs. Statutory**
   There are no Hawaii cases regarding this issue

B. **Elements**
   There are no Hawaii cases regarding this issue.

X. **DUTY TO SETTLE**

   The Hawaii Supreme Court in Taylor v. Government Employees Ins. Co., 90 Haw. 302, 978 P.2d 740 (1999) held that "it is unreasonable for a UIM carrier to precondition its refusal to consent to settle upon the failure of the insure to achieve a settlement exhausting the tortfeasor’s policy limits. In other words, by settling for less than the policy limits, the UIM insured agrees to forego compensation for the difference between the settlement amount and the tortfeasor’s liability policy limits. The UIM carrier will not be responsible for covering that “gap” as a component of its obligation to compensate its insured for injury and damage exceeding the tortfeasor’s policy limits. Accordingly, there is no legitimate reason for the UIM carrier to refuse to consent to a settlement on that basis.

   It is well settled that the duty to provide coverage and the duty to defend on the part of an insurer are separate and distinct. Sentinel Insurance Company, Ltd. v. First Insurance Company of Hawaii, Ltd., 76 Haw. 277, 875 P.2d 894 (1994).

Wrongful Death Claims

   Who can make a wrongful death claim?
   - The personal representative of the deceased person’s estate
   - The surviving spouse of the deceased person
• The “reciprocal beneficiary” of the deceased person (such as a couple in a same sex union)

• The deceased person’s children, father, or mother, and

• Anyone who was financially dependent upon the deceased person at the time of his or her death. In Hawaiʻi this can include a “hanai” child (a child raised by someone other than his or her birth parents but not officially or legally adopted).

Is there a cap on damages?

No, except in an instance where there is a “pain and suffering” component, that part of the claim is limited to $375,000. In other words, you could have a total jury award for pain and suffering in the amount of $1.5 in a medical malpractice case, but there would be a cap pf $375,000.

Statutes related to Wrongful Death Claims

Section 663-3 of the Hawaiʻi Revised Statutes concerns “Death by wrongful act.” A copy is attached for your reference.