I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

Alabama Insurance Regulation Chapter 482-1-125 sets forth the relevant time requirements for handling property and casualty insurance claims. Some of the highlights of this regulation are as follows:

- Every insurer shall acknowledge receipt of a first party claim within 15 days.
- Claim forms and instructions shall be provided to a claimant within 15 days after the insurer receives first notice of a claim.
- The insurer shall reply within 15 days to any written communication from an insured which requests a response.
- After receiving a properly executed proof of loss, an insurer shall within 30 days (or other time as specified in the policy) advise the claimant of the status of the acceptance or denial of a claim by the insurer.
- If an insurer needs more time to investigate before making a decision, the claimant shall be so notified within 30 days (or other time as specified in the policy) after submission of proofs of loss, including the reason(s) why more time is needed.
- Every 45 days thereafter until a determination is made, the insurer must notify the claimant of the reason(s) why additional time is needed to investigate.
- If a written denial is requested, the insurer must mail a written denial within a reasonable time.
- Payment must be tendered by the insurer within 30 days (or other time as is stated in the policy) after acceptance of liability, reaching an agreement on the amount of the claim, and receipt of all documents necessary to consummate the settlement.
In addition to the above regulatory requirements, Alabama’s common law recognizes that an unreasonable delay in the decision-making on a submitted claim may constitute a constructive denial for purposes of a breach of contract or bad faith action brought by the insured. Congress Life Ins. Co. v. Barstow, 799 So. 2d 931, 938 (Ala. 2001). The Southern District of Alabama has reaffirmed that an insurer’s unreasonable delay in making a claim determination may constitute a constructive denial for purposes of a breach of contract or bad faith action. Oliver v. M/V Barbary Coast, 901 F. Supp. 2d 1340, 1348 (S.D. Ala. 2012). The court clarified that, “a plaintiff may establish a constructive denial by showing a passage of time so great the delay alone creates a denial or, a sufficient delay in payment coupled with some wrongful intent by the insurance company.” Id.

B. Standards for Determination and Settlements

Alabama Insurance Regulation Chapter 482-1-125 also requires that denials “include a reference to the policy provision, exclusion, or condition relied upon in denying the claim.” Ala. Ins. Reg. 482-1-125-.07.

Special regulations also apply to automobile policies and fire policies on residential structures in Alabama. Ala. Ins. Reg. 482-1-125-.08, -.09. The automobile policy regulation provides that an insurer issuing an automobile policy providing for adjustment of losses on an actual cash value or replacement basis can apply one of the following methods: 1) offer a replacement automobile that is at least comparable; or 2) elect a cash settlement based upon actual cost, less any applicable deductible. Ala. Ins. Reg. 482-1-125-.08. The fire policy regulation provides that an insurer issuing a fire policy providing for adjustment of losses on an actual cash value basis can determine this cash value as the replacement cost of the property less depreciation. Ala. Ins. Reg. 482-1-125-.09. The insurer shall provide, upon request of the insured, a copy of all claim file worksheets detailing any and all deductions for depreciation. Id.

In most other areas, Alabama has left the policing of insurers and their claim handling practices to the common law currently embodied in the tort of bad faith first recognized in Chavers v. National Security Fire & Casualty Co., 405 So. 2d 1 (Ala. 1981).

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

Alabama recognizes that an insurance company’s list of policyholders is confidential, proprietary information to which a litigant has no right except through court-ordered discovery. Ex parte Nat’l Sec. Ins. Co., 773 So. 2d 461, 464 (Ala. 2000). Alabama does allow the discovery of the identity of other insureds in a proper case. See Ex parte John Alden Life Ins. Co., 999 So. 2d 476, 484-86 (Ala. 2008) (finding that although the identity of an insurer’s policyholders is confidential and proprietary information, the identity of other insureds is discoverable in actions alleging fraud provided that the discovery request is narrowly tailored to the fraud allegation). In some instances, restrictions have been placed upon the manner in which counsel may contact these other customers. See id. at 487 (restricting the method by which counsel could contact customers); Ex parte Henry, 770 So. 2d 76, 81-82 (Ala. 2000) (same).
Alabama has promulgated regulations largely mirroring the protections of the federal Gramm-Leach-Bliley Act. See Ala. Ins. Reg. 482-1-122; Ala. Ins. Reg. 482-1-126. These regulations protect against the unauthorized disclosure of non-public personal information and personally identifiable financial information, as well as require initial and periodic privacy notices to an insurer’s customers.

II. PRINCIPLES OF CONTRACT INTERPRETATION

"Any ambiguities in an insurance contract must be construed liberally in favor of the insured." Nationwide Mut. Ins. Co. v. Thomas, 103 So. 3d 795, 803 (Ala. 2012) (quoting Johnson v. Allstate Ins. Co., 505 So. 2d 362, 365 (Ala. 1987)). "A corollary to this rule is that exceptions to coverage must be interpreted as narrowly as possible in order to provide maximum coverage to the insured." Johnson, 505 So. 2d at 365. However, courts are not at liberty to rewrite policies to provide coverage not intended by the parties. Id. (citing Newman v. St. Paul Fire & Marine Ins. Co., 456 So. 2d 40, 41 (Ala. 1984)). In the absence of statutory provisions to the contrary, insurance companies have the right to limit their liability and write policies with narrow coverage. Id. (citing United States Fidelity & Guaranty Co. v. Bonitz Insulation Co. of Alabama, 424 So. 2d 669, 573 (Ala. 1982)). If there is no ambiguity, courts must enforce insurance contracts as written and cannot defeat express provisions in a policy, including exclusions from coverage, by making a new contract for the parties. Id. (citing Turner v. United States Fidelity & Guaranty Co., 440 So. 2d 1026, 1028 (Ala. 1983)).

If an insurance policy is clear and unambiguous in its terms, then there is no question of interpretation. American & Foreign Ins. Co. v. Tee Jays Mfg. Co., 699 So. 2d 1226 (Ala. 1997). The fact that parties interpret the insurance policy differently does not make the insurance policy ambiguous. Tate v. Allstate Ins. Co., 692 So. 2d 822 (Ala. 1997). While ambiguities or uncertainties in an insurance policy should be resolved against the insurer, ambiguities are not to be inserted by strained or twisted reasoning. Kelley v. Royal Globe Ins. Co., 349 So. 2d 561 (Ala. 1977). Where the parties disagree on whether the language in an insurance contract is ambiguous, a court should construe language according to the meaning that a person of ordinary intelligence would reasonably give it. Western World Ins. Co. v. City of Tuscumbia, 612 So. 2d 1159 (Ala. 1992); see also Progressive Specialty Ins. Co. v. Naramore, 950 So. 2d 1138, 1141 (Ala. 2006) ("The words are given the meaning that persons with a usual and ordinary understanding would place on the words."). The issue of whether a contract is ambiguous or unambiguous is a question of law for the court to decide. Phillips v. National Sec. Fire & Casualty Co., 59 So. 3d 711, 714 (Ala. 2010).

Where an insurance policy defines certain words or phrases, a court must defer to the definition provided by the policy. St. Paul Fire & Marine Ins. Co. v. Edge Mem’l Hosp., 584 So. 2d 1316 (Ala. 1991). If certain words or phrases are not defined by the policy, courts must determine the meaning. An undefined word or phrase in an insurance policy does not create an inherent ambiguity. To the contrary, where questions arise as to the meaning of an undefined word or phrase, the court should simply give the undefined word or phrase the same meaning that a person of ordinary intelligence would give it. Carpet Installation & Supplies of Glenco v. Alfa Mut. Ins. Co., 628 So. 2d 560 (Ala. 1993). The terms of an insurance policy should be given a rational and practical construction. Green v. Merrill, 308 So. 2d 702 (Ala.
A court must consider the policy as a whole and not consider the language in question in isolation. Phillips, 59 So. 3d at 714.

III. CHOICE OF LAW

Alabama law follows the traditional conflict-of-law principles of lex loci contractus and lex loci delicti. Lifestar Response of Ala., Inc. v. Admiral Ins. Co., 17 So. 3d 200, 213 (Ala. 2009) (citing Liberty Mut. Ins. Co. v. Wheelwright Trucking Co., 851 So. 2d 466 (Ala. 2002)). Under the principles of lex loci contractus, a contract is governed by the law of the jurisdiction within which the contract is made. Id. (citing Cherry, Bekaert & Holland v. Brown, 582 So. 2d 502 (Ala. 1991)). The substantive rights of the parties under the contract, including the issue of damages, are controlled by the law of the state where the contract is executed. Shelter Mut. Ins. Co. v. Barton, 822 So. 2d 1149, 1159 (Ala. 2001). Under the principle of lex loci delicti, an Alabama court will determine the substantive rights of an injured party according to the law of the state where the injury occurred. Lifestar Response of Ala., Inc., 17 So. 3d at 213 (citing Pitts v. Minnesota Mining & Mfg. Co., 581 So. 2d 819 (Ala. 1991)). Alabama has long recognized the right of parties to an agreement to choose the law of a particular state to govern the agreement. Id. at 213, n.3. A contractual choice-of-law provision may be broad enough to apply to both contract claims and tort claims in certain circumstances. Id.

IV. DUTY TO DEFEND IMPOSED BY STATE LAW

A. Standard for Determining Duty to Defend

If the complaint against the insured alleges a covered accident or occurrence, then the insurer owes the insured a duty to defend even though the evidence may eventually prove that the gravamen of the complaint was not a covered accident or occurrence. Tanner v. State Farm Fire & Cas. Co., 874 So. 2d 1058, 1065 (Ala. 2003). If the complaint against the insured does not allege on its face a covered accident or occurrence, but the evidence proves one, then the insurer likewise owes the duty to defend. Id.; see also Penn. Nat’l Mut. Cas. Ins. Co. v. Roberts Bros., Inc., 550 F. Supp. 2d 1295, 1304 (S.D. Ala. 2008) (stating that a district court is not constrained to the allegations of the underlying complaint and may look to additional facts if they are proven by admissible evidence); Gunnin v. State Farm and Cas. Co., 508 F. Supp. 2d 998, 1002 (M.D. Ala. 2007) (same). The insurer owes a duty to defend unless (a) the complaint against the insured alleges neither a covered accident or occurrence or (b) the evidence in litigation against the insured proves a covered accident or occurrence. Roberts Bros., 550 F. Supp. 2d at 1304. If there “is any uncertainty as to whether the complaint alleges facts that would invoke the duty to defend, the insurer must investigate the facts surrounding the incident that gave rise to the complaint in order to determine whether” it has such a duty. Blackburn v. Fid. & Deposit Co. of Maryland, 667 So. 2d 661, 668 (Ala. 1995). When a complaint alleges both acts covered under the policy and acts not covered, the insurer is under a duty to at least defend the allegations covered by the policy. Id. at 670.

When an insurer elects not to defend, it does so at its peril. Insurers should be mindful that if a plaintiff changes its theory of liability from that contained in the original complaint and asserts a claim against the insured that is covered by the policy, it is very possible that the insurer will have to step in and defend the insured and/or pay the
B. Issues with Reserving Rights

Generally, an insurer is obligated to indemnify an insured if it undertakes to defend the insured without first reserving the right to deny coverage. Shelby Steel Fabricators, Inc. v. United States Fid. & Guar. Ins. Co., 569 So. 2d 309, 311 (Ala. 1990). This general rule is limited as an insurer may avoid operation of the rule by giving notice that the assumption of the defense is not a waiver of its right to deny coverage. Id.

Where the insurer assumes the defense of an insured under a reservation of rights, the insurer does so under an enhanced obligation of good faith toward its insured. L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co., 521 So. 2d 1298, 1303-04 (Ala. 1987). The enhanced duty of good faith has implications both for the insurer and for defense counsel retained by the insurer. First, the insurer’s conduct must meet four specific criteria: 1) a thorough investigation of the accident and the claimed injuries and damages; 2) the retention of competent defense counsel of the insured, with the understanding that the insured is defense counsel’s only client; 3) fully informing the insured of the reservation-of-rights defense, of the progress of the suit, of developments relevant to the insured’s coverage, and of all settlement offers made by the insurer; and 4) refraining from any action demonstrating greater concern for the insurer’s monetary interest than for the insured’s financial risk. Id. at 1303. Similarly, defense counsel must understand that he/she only represents the insured, and owes a duty of full and ongoing disclosure to the insured, including disclosure of potential conflicts of interest, information relevant to the lawsuit’s defense, and all offers of settlement as they are presented. Id.

Where an insurer fails to meet the obligations imposed by the enhanced duty of good faith, the insurer may be obligated to indemnify the insured for any liability in the underlying action. See Shelby Steel Fabricators, 569 So. 2d 309 at 312.


V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A. Bad Faith

1. First Party

Coverage of the underlying claim is an absolute prerequisite to a claim for bad faith. State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 317-318 (Ala. 1999). An insured “who cannot prove [that it is] entitled to benefits under an insurance policy cannot recover on a bad-faith claim.” Barstow, 799 So. 2d at 937.

Alabama allows insurers “a broad range of freedom to thoroughly evaluate claims and to decline payment in non-meritorious cases.” Attorneys
Ins. Mut. of Ala., Inc. v. Smith, Blocker & Lowther, P.C., 703 So. 2d 866, 871 (Ala. 1996). Bad faith is limited to those instances where the insurer, "without debatable excuse, either fails to process a claim or, on processing, fails to pay a claim for benefits as provided by the policy." Waldon v. Cotton States Mut. Ins. Co., 481 So. 2d 340, 341 (Ala. 1985).

"The plaintiff asserting a bad-faith claim bears a heavy burden." Barton, 822 So. 2d at 1154; see also LeFevre v. Westberry, 590 So. 2d 154, 158-59 (Ala. 1991). An insurer is not liable in bad faith "simply because it has exercised poor judgment or has been negligent"; rather, bad faith "must be supported by evidence showing that the insurer had no reasonably arguable ground for disputing the insured’s claim or that it acted with an intent to injure." Aplin v. Am. Sec. Ins., Co., 568 So. 2d 757, 760 (Ala. 1990).

The tort of bad faith in Alabama originated in Chavers v. National Security Fire & Casualty Co., 405 So. 2d 1 (Ala. 1981). Shortly after Chavers was decided, the Alabama Supreme Court summarized the elements of a bad faith refusal case as: 1) "an insurance contract between the parties and a breach thereof by the defendant;" 2) "an intentional refusal to pay the insured’s claim;" 3) "the absence of any reasonably legitimate or arguable reason for that refusal;" 4) "the insurer’s actual knowledge of the absence of any legitimate or arguable reason;" and 5) "if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer’s intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim." Nat’l Sec. Fire & Cas. Co. v. Bowen, 417 So. 2d 179, 183 (Ala. 1982).

Bad faith cases diverged into two categories: normal or ordinary bad faith cases, and the unusual or extraordinary bad faith cases. Slade, 747 So. 2d at 306. The plaintiff must prove the first four elements for a "normal" case; the fifth element only applies to the "abnormal" bad faith case. State Farm & Cas. Co. v. Brechbill, 144 So. 3d 248, 257-58 (Ala. 2013). The Alabama Supreme Court has made it clear that the "normal" and "abnormal" types refer solely to the methods of establishing a bad faith refusal to pay an insurance claim, not to two separate torts. Id.

In either type of case, the plaintiff must prove that the claim was covered under the contract of insurance in order to maintain a claim for bad faith. Id. at 317-18. In order to prevail on a "normal" bad faith refusal to pay claim, a plaintiff "must be entitled to a directed verdict on the underlying contract claim." Hilley v. Allstate Ins. Co., 562 So. 2d 184, 190 (Ala. 1990). In other words, "the underlying contract claim must be so strong that the plaintiff would be entitled to a pre-verdict judgment as a matter of law." Barton, 822 So. 2d at 1155. If evidence produced by either the insured or the insurer "creates a fact issue with regard to the contract claim, the bad faith claim must fail." Kizziah v. Golden Rule Ins. Co., 536 So. 2d 943, 946 (Ala. 1988).

In the "abnormal" case, a plaintiff must show: "(1) that the insurer failed to properly investigate the claim or to subject the results of the investigation to a cognitive evaluation and review; and (2) that the insurer breached the contract for insurance coverage with the insured when it refused to pay the insured’s claim." Barstow, 799 So. 2d at 936-37. In recent years, the Alabama Supreme Court has reduced the burden on the insured in the "abnormal" case. Instead of requiring proof of an insurer’s intentional failure to investigate the claim to determine its validity, courts merely require proof that the insurer recklessly failed to conduct an adequate
investigation of the facts and to submit those facts to a thorough review. See Employees’ Benefit Ass’n v. Grissett, 732 So. 2d 968, 976 (Ala. 1998). Direct proof of such reckless bad faith is unnecessary; instead, bad faith can be inferred from evidence that the insurer showed reckless indifference to facts submitted in the claim investigation. Id. Still, the insured “must prove that a proper investigation would have revealed that the insured’s loss was covered under the terms of the contract.” Slade, 747 So. 2d at 318.

In Singleton v. State Farm Fire & Cas. Co., the Alabama Supreme Court once again articulated the distinction between “normal” and “abnormal” bad faith cases. 928 So. 2d 280, 283 (Ala. 2005). In “normal” bad faith cases, the insured must show the absence of any reasonably legitimate or arguable reason for denial of a claim; in “abnormal” cases, by contrast, bad faith can consist of: 1) “intentional or reckless failure to investigate a claim”; 2) “intentional or reckless failure to properly subject a claim to a cognitive evaluation or review”; 3) “the manufacture of a debatable reason to deny a claim”; or 4) “reliance on an ambiguous portion of a policy as a lawful basis for denying a claim.” Id; see also White v. State Farm Fire & Cas. Co., 953 So. 2d 340, 347-49 (Ala. 2006). However, the Alabama Supreme Court subsequently clarified that “[t]he existence of an insurer’s lawful basis for denying a claim is a sufficient condition for defeating a claim that relies upon the fifth element of the insurer’s intentional or reckless failure to investigate.” Brechbill, 144 So.3d at 258.

2. **Third-Party** Alabama does not recognize a right of an underlying third-party to assert a claim for bad faith in the handling of a third-party insurance claim. Stewart v. State Farm Ins. Co., 454 So. 2d 513, 514 (Ala. 1984) (affirming lower court’s judgment that the third-party beneficiary of an insurance contract cannot maintain a direct action against the tortfeasor’s insurer). “[T]he tort of bad faith refusal to pay is that refusal to pay valid claims made by the insured of his insurance carrier.” Id. Once a third-party obtains a judgment against the insured, however, the third-party stands in the shoes of the insured and may bring an action against the insurer as a judgment creditor under Alabama’s direct action statute. See Ala. Code § 27-23-2 (1975).

B. **Fraud**

The four elements of fraud are: 1) “a misrepresentation of a material fact”; 2) “made willfully to deceive, recklessly, without knowledge or mistakenly”; 3) “which was reasonably relied on by the plaintiff under the circumstances”; and 4) “which caused damage as a proximate consequence.” Bryant Bank v. Talmage Kirkland & Co., 155 So.3d 231, 238 (Ala. 2014) (citing Foremost Ins. Co. v. Parham, 693 So. 2d 409, 422 (Ala. 1997)); see also Ala. Code § 6-5-101 (1975).

Suppression is fraud by silence or breach of a defendant’s duty to disclose. An actionable claim of fraudulent suppression requires proof that: “(1) that the defendant had a duty to disclose the existing material fact; (2) that the defendant suppressed that existing material fact; (3) that the defendant had actual knowledge of the fact; (4) that the defendant’s suppression of the fact induced the plaintiff to act or refrain from acting; and (5) that the plaintiff suffered actual damage as a proximate result.” Ex parte Hugine, No. 1130428, -- So.3d --, 2017 WL 1034467, at *21 (Ala. Mar. 17, 2017) (internal quotations omitted); see also State Farm Fire & Cas. Co. v. Owen, 729 So. 2d 834, 837 (Ala. 1998). The Alabama Supreme Court’s decision in Owen discusses in detail the duty to disclose. Id.
C. **Intentional or Negligent Infliction of Emotional Distress**

Alabama does not recognize a claim for negligent or wanton handling of first-party insurance claims. Kervin v. Southern Guar. Ins. Co., 667 So. 2d 704, 706 (Ala. 1995). Alabama also does not recognize a cause of action for negligent infliction of emotional distress absent physical injury or threat thereof, or unless the negligent conduct is accompanied by insult or contumely. Wal-Mart Stores, Inc., v. Bowers, 752 So. 2d 1201, 1204 (Ala. 1999). While a plaintiff cannot bring a bad faith claim against a worker’s compensation insurer, a claim for intentional infliction of emotional distress (also known as the tort of outrage) will lie in a proper case. Cont’l Cas. Ins. Co. v. McDonald, 567 So. 2d 1208, 1211 (Ala. 1990); see also Soti v. Lowe’s Home Centers, Inc., 906 So. 2d 916, 919-20 (Ala. 2005). “[O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress. The emotional distress thereunder must be so severe that no reasonable person could be expected to endure it. Any recovery must be reasonable and justified under the circumstances, liability ensuing only when the conduct is extreme.” McDonald, 567 So. 2d at 1211.

D. **State Consumer Protection Laws, Rules and Regulations**

The insurance section of the Alabama Code, Title 27, contains a chapter entitled “Trade Practices Law.” Ala. Code § 27-12-1, et seq. Section 27-12-18 sets forth a procedure through which the Insurance Commissioner may issue a cease and desist order concerning “any unfair method of competition or any unfair or deceptive act or practice expressly prohibited in this trade practices law.” Ala. Code § 27-12-18(a). In certain instances, the Commissioner’s findings can be appealed to circuit court. Ala. Code § 27-12-22.

VI. **DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS**

A. **Discoverability of Claims Files Generally**

In the ordinary case filed against an insured, materials in the insurer’s claim file that were prepared in anticipation of litigation or that otherwise constitute work product are not discoverable. Ex parte State Farm Mut. Auto Ins. Co., 386 So. 2d 1133, 1135-37 (Ala. 1980); see also Ex parte Flowers, 991 So. 2d 218, 221-22 (Ala. 2008); Ex parte Nationwide Mut. Fire Ins. Co., 898 So. 2d 720, 723 (Ala. 2004). Once the issue is raised, the burden is on the insurer to establish the privilege or protection. Flowers, 991 So. 2d at 221. Alabama does, however, allow discovery of available insurance coverage and its limits. Ala. R. Civ. P. 26(b)(3); Ex parte Badham, 730 So. 2d 135, 137 (Ala. 1999).

Because of the “heavy burden” imposed on a plaintiff in a fraud or bad faith action, and “because the defendant in a fraud or bad faith action is usually the sole possessor of the information needed to meet the burden of proof, wider latitude is given to a fraud plaintiff or a bad faith plaintiff during the discovery process.” Ex parte O’Neal, 713 So. 2d 956, 959 (Ala. 1998).

B. **Discoverability of Reserves**
Few Alabama courts have considered the discoverability of an insurer’s reserve information. "The discoverability of reserve information depends on the particular facts of the case and the purpose for which it is sought." Multi-Marketing, Inc. v. Travelers Indem. Co. of America, No. 7:08-CV-00268-LSC, Doc. 47 at 2 (N.D. Ala., order entered Jan. 15, 2009) (order granting insured’s motion to compel reserve information to the extent it was not otherwise privileged). "As a general matter, if reserve information is sought for the purpose of establishing the value of a claim, then it is not discoverable. ... However, when reserve information goes to a party’s subjective state of mind, as in a bad faith claim for instance, it generally is discoverable." Id. Therefore, “as with most discovery matters, the court will look to the justifications given supporting the request for this information as well as whether the discovery of reserves is likely to lead to admissible evidence.” Id.; but see Graham & Co. v. Liberty Mut. Fire Ins. Co., No. 2:14-cv-02148, Doc. 50 at 9-10 (N.D. Ala., order entered Apr. 5, 2016) (order denying motion to compel reserve information because such information “is outside the scope of discovery”).

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

In the ordinary case filed against an insured, the existence of reinsurance and communications with reinsurers will not ordinarily be discoverable. Ex parte Badham, 730 So. 2d at 136. Alabama courts will allow discovery of available insurance coverage and its limits. Id. In a first-party bad faith action for failure-to-defend, this information will likely be discoverable given the broad latitude of discovery afforded in such cases. Id.

D. Attorney/Client Communications

The mere fact that an insured settles an underlying lawsuit against it and then sues an insurer for bad faith will not operate as a blanket waiver of the attorney-client privilege in the underlying litigation, even where attorney’s fees are claimed as an item of damages. Ex parte State Farm Fire & Cas. Co., 794 So. 2d 368, 372-76 (Ala. 2001). Nor will an opinion letter from counsel to an insurer be automatically discoverable. Ex parte Great Am. Surplus Lines, Ins. Co., 540 So. 2d 1357, 1361 (Ala. 1989).

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

“[A]n insurer has the right to expect applicants for insurance policies to tell the truth.” Am. Gen. Life and Accident Ins. Co. v. Lyles, 540 So. 2d 696, 699 (Ala. 1988). An Alabama statute allows an insurer to avoid a policy due to a misrepresentation by the insured during the application process. Ala. Code § 27-14-7. This statute provides that a policy will not be voided based on the insured’s misrepresentation or incorrect statement, unless those statements were: 1) “fraudulent”; 2) "material to the acceptance of the risk or to the hazard assumed by the insurer"; or 3) such that “the insurer in good faith would not have issued the policy at all, would not have issued the policy at the premium rate, would not have issued a policy as large as that which was issued, or would not have provided coverage for the hazard resulting in the loss if the true facts had been made known to the insurer.” Id.
B. **Failure to Comply with Conditions**

A condition requiring reasonable notice of claims will be enforceable. See **Pharr v. Cont’l Cas. Co.**, 429 So. 2d 1018, 1019 (Ala. 1983). To determine the reasonableness of a delay in giving notice to an insurer, the court traditionally considers the length of, and reasons for, the delay. Id. The question of whether there was prejudice as a result of the delay is immaterial to this determination, where, as in this case, the giving of reasonably timely notice is made a condition precedent to any action against the insurer. Id. at 1020; see also **Nationwide Mut. Fire Ins. Co. v. Estate of Files**, 10 So. 3d 533, 535 (Ala. 2008).

Further, a condition requiring an insured’s cooperation is also enforceable. “[A]n insurer’s obligation to pay or to evaluate the validity of an insured’s claim does not arise until the insured has complied with the terms of the contract with respect to submitting claims.” **Nationwide Ins. Co. v. Nilsen**, 745 So. 2d 264, 266 (Ala. 1998).

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

When an insurer who could defend under a reservation of rights instead denies coverage and absolutely refuses to defend an action against an insured when it could do so under a reservation of rights, the legal consequence of such refusal is that it waives the provisions of the policy against a settlement by the insured and becomes bound to pay the amount of any settlement made in good faith, plus expenses and attorneys’ fees. **Wheelwright Trucking Co.**, 851 So. 2d at 475-76; **Stone Building Co. v. Star Elec. Contractors, Inc.**, 796 So. 2d 1076, 1091-92 (Ala. 2000).

D. **Statutes of Limitation**


A fraud action accrues when the victim has been injured and knows or reasonably should know of the injury, under an objective standard. See, e.g., **Bryant Bank**, 155 So.3d at 236. A fraud action must be commenced within two years of the date that the plaintiff discovers or should have discovered the fraud. Ala. Code § 6-2-3; Ala. Code § 6-2-38.

VIII. **TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS**

A. **Trigger of Coverage**

Triggers are discussed extensively in **Attorneys Mut. Ins. of Alabama v. Smith, Blocker & Lowther, P.C.**, 703 So. 2d 866 (Ala. 1996). In a claims-made policy, a carrier agrees to assume liability for any errors, including those made before the inception of the policy, as long as the claim is made during the policy period. Id. at 869. An occurrence policy provides coverage for any acts or omissions that arise during the policy period, even though the
claim is made after the policy has expired.  Id. While the event that triggers coverage under a claims-made policy is transmission of notice of the claim, an occurrence policy can be triggered in several ways. Id.

As a general rule, “the time of an occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act is committed, but is instead the time the complaining party was actually damaged.” Wheelwright Trucking Co., 851 So. 2d at 481.

A condition can persist for such a length of time that it no longer constitutes an occurrence. See United States Fidelity and Guar. Co. v. Bonitz Insulation, 424 So. 2d 569, 573 (Ala. 1982) (policy issued to roofing contractor after roof had already leaked for four years did not cover damage from leaks).

B. Allocation Among Insurers

Allocation among insurers at the same coverage level will be on a pro rata basis based upon the proportion of the limits of each insurer to the total available insurance at that level. Nationwide Mut. Ins. Co. v. Hall, 643 So. 2d 551, 561 (Ala. 1994).

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

Alabama law recognizes no statutory right of action for contribution.

B. Elements

In general, where several insurance policies insure the same property, the insurance is concurrent and each insurer is liable for its proportionate amount. State Farm Mut. Auto Ins. Co. v. Gen. Mut. Ins. Co., 210 So. 2d 688, 695 (Ala. 1968). This is the rule whether or not the policies contain pro rata or proportionate clauses. Id. at 695-96. An insurer generally should not be required to contribute more than the policy limits. Nationwide Mut. Ins. Co. v. Hall, 643 So. 2d 551, 562 (Ala. 1994). However, “when ... an insurer insures two or more parties for the same insurable interest, subject matter, and risk and when it pays the limits of its policy to one of its insureds with notice of an adverse claim by another, the insurer does so at its own risk and may be liable to another insurer of its insured for a pro rata contribution, notwithstanding the limits of its policy.” Id.

Alabama law also recognizes the pro tanto settlement doctrine. “An injured party may obtain but one satisfaction against joint tort-feasors for a single injury; and, where the settlement is not by judgment and satisfaction thereof, one joint tort-feasor may invoke equity jurisdiction to force disclosure of any settlement arrangement with other joint tort-feasors, or impose sanctions for nondisclosure.” Wylam Ice Co. v. King, 293 Ala. 359, 362 (Ala. 1974). This gives the plaintiff the opportunity to settle with one defendant and collect the full amount against the other, while allowing the defendant against whom a judgment is rendered to obtain a setoff from the defendant who settled and was released from the case. Id. "This entitlement to set off the pro tanto settlement as a defense must be interposed at the first opportunity, i.e., during the trial; and any subsequent attempt to collaterally attack the judgment at law regular on its face in the absence of grounds upon which equitable relief can be predicated comes too late.” Id.
See also Ex parte Barnett, 978 So. 2d 729, 733 (Ala. 2007) ("The policy in favor of the pro tanto satisfaction for joint tort-feasors is well established in Alabama law upon the theory that the right of action against joint tortfeasors is one and indivisible.") (quoting Hardman v. Freeman, 337 So.2d 325, 326 (Ala. 1976)).

X. DUTY TO SETTLE IMPOSED BY STATE LAW

Alabama recognizes tort actions for bad faith and negligence arising out of an insurer’s wrongful failure to settle a claim against its insured. Waters v. Am. Cas. Co. of Reading, Pa., 73 So. 2d 524, 529-30 (Ala. 1954). When an opportunity to settle within policy limits is presented, the law imposes a duty on the insurer to use ordinary care to ascertain the facts on which its performance depends (if it has not already). Id. The cause of action arising out of a failure to settle a third-party claim made against the insured does not accrue unless and until the claimant obtains a final judgment in excess of the policy limits. Evans v. Mut. Assurance, Inc., 727 So. 2d 66, 67 (Ala. 1999).

To succeed on a claim alleging negligent failure to settle, a plaintiff must establish that, considering all the circumstances, the insurer, in deciding not to settle the claim, failed to exercise reasonable or ordinary care, i.e., such care as a reasonably prudent insurer would have exercised under the same or similar circumstances. Mut. Assurance, Inc. v. Schulte, 970 So. 2d 292, 296 (Ala. 2007). To succeed on a claim alleging bad-faith failure to settle, a plaintiff must establish that the insurer had no “lawful basis” for failing to do so, i.e., no “legitimate or arguable reason for failing to pay the claim.” Id.