I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

The state of Idaho does not have any express statements regarding definitive times for an insurer to respond and/or make a determination with respect to a submitted claim. The only direction given in this regard can be found in the Unfair Claims Settlement Practices Act, I.C. § 41-1329. This statute provides that an insurer shall be deemed to be committing an unfair method of competition or an unfair or deceptive act or practice in the business of insurance if it, among other acts, fails to "acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies"; fails to "adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies"; refuses "to pay claims without conducting a reasonable investigation based upon all available information"; fails "to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed"; does not attempt "in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear"; and/or attempts "to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application". I.C. § 41-1329(2), (3), (4), (5), (6), and (8).

It must also be noted that Idaho Code Section 41-1839 provides any insurer who fails to pay the amount "justly due" under a policy of insurance within thirty days of the submission of a proof of loss statement from the insured, will be liable for attorneys fees in the event of litigation. I.C. § 41-1839(1).

B. Standards for Determinations and Settlements

There is no specific direction regarding the standards for determinations and settlements by insurers other than the general language of Idaho Unfair Claims Settlement Practices Act, as quoted above. The statute in this regard provides that an insurer will be deemed to be committing an unfair method of competition or an unfair or deceptive act or practice in the business of insurance if it, among other acts, if it fails "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.” I.C. § 41-1329(14).

If a settlement involves a minor, the settlement must be approved by court order by the filing of a verified petition before such settlement is deemed to be valid or of any effect. I.C. § 15-5-409a.

C. Private Protections (In Addition to Federal Gramm-Leach-Bailey Act)


I.C. § 41-1334 empowers the Director of Insurance to adopt rules necessary to carry out the provisions the Gramm-Leach-Bliley Act related to privacy and protection of non-public personal information. The rules adopted by the Director of Insurance are required to be consistent with Title V of the Gramm-Leach-Bliley Act. However, I.C. § 41-1334 does not create a private cause of action.

II. Principles of Contract Interpretation

When interpreting insurance policies, Idaho applies the general rules of contract law subject to certain special canons of construction. Clark v. Prudential Prop. & Cas. Ins. Co., 138 Idaho 538, 540, 66 P.3d 242, 244 (2003). In Idaho, the general rule is that, because insurance contracts are adhesion contracts, typically not subject to negotiation between the parties, any ambiguity that exists in the contract "must be construed against the insurer.” Arreguin v. Farmers Ins. Co. of Idaho, 145 Idaho 459 180 P.3d 498.

Whether an insurance policy is ambiguous is a question of law. Mut. Of Enumclaw Ins. Co. v. Roberts, 128 Idaho 232, 912 P.3d 119, 122 (1996). When determining whether a policy is ambiguous, Idaho courts ask “whether the
policy ‘is reasonably subject to conflicting interpretation.’” Id. A provision that seeks to exclude the insurer’s coverage must be strictly construed in favor of the insured. Moss v. Mid-America Fire & Marine Ins. Co., 103 Idaho 298, 300, 647 P.2d 754, 756 (1982). The burden is on the insurer to use clear and precise language if it wishes to restrict the scope of its coverage. Id. "When interpreting their insurance policies, we do not expect policyholders to know how most courts around the country have construed certain words or to have the knowledge of those who have spent their careers working in or with the insurance industry. Unless contrary intent is shown, common, non-technical words are given the meaning applied by laymen in daily usage—as opposed to the meaning derived from legal usage—in order to effectuate the intent of the parties." Weinstein v. Prudential Prop. & Cas. Ins. Co., 149 Idaho 299, 320-21, 233 P.3d 1221, 1242-43 (2010); see also Gearhart v. Mut. of Enumclaw Ins. Co., 160 Idaho 664, 378 P.3d 454 (2016) (rejecting anti-stacking language that was confusing).

An insurer cannot seek to apply policy limitations and exclusions in a way to defeat the precise purpose for which the insurance is purchased. See Martinez v. Idaho Counties Reciprocal Mgmt. Program, 134 Idaho 247, 999 P.2d 902, 907 (Idaho 2000) (“Upon review of these requirements and exclusions, it appears that if any actual coverage does exist it is extremely minimal and affords no realistic protection to any group or class of injured persons. The declarations page of the policy contains language and words of coverage, then by definition and exclusion takes away the coverage. The fact that there might be some small circumstance where coverage could arguably exist does not change the reality that, when the policy is considered in its entirety, the City was receiving only an illusion of coverage for its premiums. This Court will not allow policy limitations and exclusions to defeat the precise purpose for which the insurance is purchased.”).

III. Choice of Law

Idaho follows the Restatement (Second) of Conflict of Laws’ rules governing choice of law provisions. Ward v. Puregro, 128 Idaho 366, 368-69, 913 P.2d 582, 584-85 (1996). The Restatement provides that “[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.” See Restatement (Second) of Conflict of Laws § 187(1) (1971). Typically, choice-of-law provisions are given their full effect and the court will apply the laws of another state. Carroll v. MBNA America Bank, 148 Idaho 261 (2009). However, the procedural law of the Idaho court will still apply. Id.

Even if an issue could not be resolved by an explicit provision in the contract, the chosen law will apply unless: (1) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice; or (2) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of a particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties. Restatement (Second) of Conflict of Laws § 187 (2).
An Idaho court will then determine whether the chose state's law recognizes the choice-of-law clause. Cerami-Kote, Inc. v. Energywave Corp., 116 Idaho 56, 58 n. 1, 773 P.2d 1143, 1145 n. 1 (1989). Further, the chosen law will apply as long as there is no contrary Idaho public policy. The key consideration in making a public policy determination is whether some policy of the forum state is contravened by applying the rules of the selected state. Restatement (Second) of Conflict of Laws § 6 cmt. e. (1971).

IV. Duties Imposed by State Law

A. Duty to Defend

1. Standard for Determining Duty to Defend

The duty to defend arises upon the filing of a complaint containing allegations that, in whole or in part and read broadly, reveal a potential for liability that would be covered by the insured's policy. AMCO Ins. Co. v. Tri-Spur Inv. Co., 140 Idaho 733, 101 P.3d 226 (2004). "Where there is doubt as to whether a theory of recovery within the policy coverage has been pleaded in the underlying complaint, or which is potentially included in the underlying complaint, the insurer must defend regardless of potential defenses arising under the policy or potential defenses arising under the substantive law under which the claim is brought against the insured. It is a misconception of the duty to defend, however, if the insurer refuses to defend and seeks a determination of the duty while the underlying case progresses against the insured, and then if found obligated under its duty, the insurer merely steps in and defends and pays defense fees that have accumulated. The proper procedure for the insurer to take is to evaluate the claims and determine whether an arguable potential exists for a claim covered by the policy; if so, then the insurer must immediately step in and defend the suit." Id.; see also Kootenai County v. W. Cas. and Sur. Co., 113 Idaho 908, 910, 750 P.2d 87, 89 (1988). "[T]he duty to defend clearly exists so long as there is a genuine dispute over facts bearing on coverage under the policy or over the application of the policy's language to the facts." Deluna v. State Farm Fire & Cas. Co., 149 Idaho 81, 84, 233 P.3d 12, 15 (2008).

An insurer that denies its duty to defend is not required to file a declaratory judgment action, but does so at its own peril. Hoyle v. Utica Mut. Ins. Co., 137 Idaho 367, 48 P.3d 1256 (2002). "If the insurer breaches its duty to defend and the insured settles a claim covered by the policy, the insurer has a duty to indemnify its insured for the amount of that settlement so long as potential liability for the insured existed which resulted in a reasonable settlement in view of the size of possible recovery and the probability of the claimant’s success against the insured.” City of Idaho Falls v. Home Indem. Co., 126 Idaho 604, 888 P.2d 383 (1995).

The duty to defend and the duty to indemnify are separate duties. General Sec. Indem. Co. of Arizona v. Great Northern Ins. Co., 2007 WL 845857 (D. Idaho 2007); Esterovich v. City of Kellogg, 139 Idaho 439, 80 P.3d 1040 (2003). If an insurer breaches a duty to defend, then the insurer will be "liable for the reasonable costs and attorney fees incurred by the insured in the defense and settlement of a claim that revealed 'potential' liability." Deluna v. State Farm Fire & Cas. Co., 149 Idaho 81, 86, 233 P.3d 12, 17 (2008). However, the insurer will still be able to contest whether it
ultimately had liability under the terms of the policy. Id. It may attempt to show that liability is not covered by the policy in a subsequent action on the policy. Deluna v. State Farm Fire and Casualty Co., 149 Idaho 81, 233 P.3d 12 (2008).

"Thus, there is a difference between the duty to defend and the duty to indemnify. The duty to defend is separate from, independent of, and broader than the duty to indemnify. Although an insured must prove that the damages for which it seeks indemnification are covered by the policy, it does not need to prove coverage to invoke the insurer's duty to defend." Huntsman Advanced Materials LLC v. Onebeacon Am. Ins. Co., No. 1:08-cv-00229-BLW, 2012 U.S. Dist. LEXIS 19053, at *8-9 (D. Idaho Feb. 13, 2012)

2. Issues with Reserving Rights

Coverage defenses may be preserved by a reservation of rights agreement. Mutual of Enumclaw v. Harvey, 115 Idaho 1009, 772 P.2d 216 (1989). However, a reservation of rights does not dissipate an insurer’s obligation to pay the costs of litigation. Id. (insurer who entered into a reservation of rights agreement required to pay the costs of litigation taxed against insured).

V. Extracontractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

1. First Party

A plaintiff establishes a claim for the tort of bad faith where it shows "(1) the insurer intentionally and unreasonably denied or withheld payment, (2) the claim was not fairly debatable, (3) the denial or failure to pay was not the result of a good faith mistake, and (4) the resulting harm is not fully compensable by contract damages." Seiniger Law Office, P.A. v. North Pacific Ins., 145 Idaho 241, 179 P.3d 606 (2008); Robinson v. State Farm Mut. Auto. Ins. Co., 137 Idaho 173, 45 P.3d 829 (Idaho 2002) (citing White v. Unigard Mut. Ins. Co., 112 Idaho 94, 730 P.2d 1014). The Idaho Supreme Court has acknowledged "'[i]n White, we adopted the standard set by the Arizona Supreme Court in Rawlings v. Apodaca, ..., 726 P.2d 565 (Ariz. 1986), for determining whether an insurer has acted in bad faith ...." Truck Ins. Exch. v. Bishara, 128 Idaho 550, 554, 916 P.2d 1275, 1279 (1996).

In essence, a bad faith claim turns upon two fundamental issues: (1) whether the denial or delay of payment by the insurer is "unreasonable;" and (2) whether such denial or delay is "intentional." Whether a claim is "fairly debatable" is an issue inherent in the determination of whether the insured’s conduct was "unreasonable," as opposed to being a distinct element. Additionally, as Rawlings explains, "[a] failure to pay a claim is unreasonable unless the claim’s validity is ‘fairly debatable’ after an adequate investigation." 726 P.2d at 572. The Idaho Supreme Court has consistently held that the insured has the burden of showing that the claim was not fairly debatable. Robinson v. State Farm Mut. Auto. Ins. Co., 137 Idaho 173, 45 P.3d 829.

2. Third Party
Idaho has recognized a third-party bad faith action in tort where an insurer has unreasonably, intentionally or negligently denied or delayed settlement of a claim. Robinson v. State Farm Mut. Ins. Co., 137 Idaho at 178, 45 P.3d at 834; Reynolds v. American Hardware Mut. Ins. Co., 115 Idaho 362, 365, 766 P.2d 1243, 1246 (1988); McKinley v. Guaranty National Ins. Co., 144 Idaho 247, 251, 159 P.3d 884, 888 (2007). In determining whether a liability insurer has acted in bad faith in failing to settle or in delaying settlement of a claim against the insured, the trier of fact must consider the following factors, within emphasis on the first two: (1) the insurer’s failure to communicate with the insured, including particularly informing the insured of any compromise offer; (2) the amount of financial risk to which each party will be exposed in the event an offer is refused; (3) the strength of the injured claimant’s case on the issues of liability and damages; (4) insurer’s thorough investigation of the claim; (5) the failure of the insurer to follow the legal advise of its own attorney; (6) any representations by the insured which misled the insurer in its settlement negotiation; and (7) any other factors which may weigh toward establishing or negating the bad faith of the insurer. McKinley, 144 Idaho at 251, 159 P.3d at 889, citing Bishara, 916 P.2d at 1280.

In order to avoid liability for bad faith failure to settle when the insured’s potential liability is in excess of the policy limits, the insurer, at a minimum, must make a diligent effort to ascertain the facts, communicate the results of such investigation to the insured and “must inform him of any settlement offers that may affect him, so that the insured may take proper steps to protect his own interests.” McKinley v. Guaranty National Ins. Co., 144 Idaho at 252, 159 P.3d at 889, citing Bishara, 916 P.2d at 1280.

B. Fraud

A claim for fraud requires that the plaintiff prove “(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity; (5) the speaker’s intent that the representation be acted upon by the hearer; (6) the hearer’s ignorance of the falsity; (7) the hearer’s reliance that the statement was true; (8) the hearer’s right to rely on the truthfulness; and (9) the hearer’s proximate injury.” Thomas v. Medical Center Physicians, PA, 138 Idaho 200, 207, 61 P.3d 557, 564 (2002). The party alleging fraud has the burden of proving each element by clear and convincing evidence. Lindberg v. Roseth, 137 Idaho 222, 225, 46 P.3d 518, 521 (2002).

Misrepresentations about the insurance being purchased can result in “out-of-pocket” damages —limits the recovery of damages to the difference between the real value of the property purchased and the price paid or contracted for— or “benefit of the bargain” damages —the difference between the real value of the property purchased and the value which it would have had had the representations been true. Walston v. Monumental Life Ins. Co., 129 Idaho 211, 216-18, 923 P.2d 456, 461-63 (1996).

In addition, the law is well settled that a claim for fraud must be predicated upon statements of fact and not of opinion. Mitchell v. Barendregt, 120 Idaho 837, 820 P.2d 707 (Ct. App. 1991); Bodine v. Bodine, 114 Idaho 163, 754 P.2d 1200 (Ct.App. 1988). “The law requires the plaintiff
to have formed his or her own conclusions as to such future events, and will not justify or remedy the plaintiff’s reliance and change of position based on another’s prediction or opinion.” Mitchell, 120 Idaho at 713, 820 P.2d at 843.

”[C]onstructive fraud usually arises from a breach of duty where a relation of trust and confidence exists; such relationship may be said to exist whenever trust or confidence is reposed by one person in the integrity and fidelity of another. Examples of relationships from which the law will impose fiduciary obligations on the parties include when the parties are: members of the same family, partners, attorney and client, executor and beneficiary of an estate, principal and agent, insurer and insured, or close friends. ... The gist of a constructive fraud finding is to avoid the need to prove intent (i.e., knowledge of falsity or intent to induce reliance) [under the elements required to prove actual fraud], since it is inferred directly from the relationship and the breach. In sum, if a plaintiff establishes that there has been a breach of duty arising from a relationship of trust and confidence, the plaintiff is not required to prove (1) the speaker's knowledge of the falsity regarding the statement or representation of fact, or (2) the speaker's intent that the hearer rely on the statement or representation of fact, to sustain a claim of constructive fraud. However, the party is still required to prove the remaining seven elements of actual fraud.” Doe v. BSA, 159 Idaho 103, 109, 356 P.3d 1049, 1055 (2015) (emphasis added).

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

1. Intentional Infliction of Emotional Distress

In order to prove a claim for intentional infliction of emotional distress, the claimant must prove “(1) the conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress was severe.” Nation v. State Dept. of Corrections, 144 Idaho 177, 192, 158 P.3d 953, 968 (2007); Edmonson v. Shearer Lumber Products, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003); Roper v. State Farm Mut. Auto. Ins. Co., 131 Idaho 459, 463, 958 P.2d 1145, 1149 (1998).

In order to be actionable, the emotional distress suffered by the claimant must be severe. Jeremiah v. Yanke Machine Shop, 131 Idaho 242, 248, 953 P.2d 992, 998 (1998). In explaining the requisite level of proof of severity necessary to support the claim, the Idaho Courts have favorably quoted from the RESTATEMENT (SECOND) OF TORTS § 46. Evans v. Twin Falls County, 118 Idaho 210, 220, 796 P.2d 87, 97 (1990) (quoting RESTATEMENT (SECOND) OF TORTS § 46, comment j (1965).

Idaho Courts require competent evidence that the plaintiff incurred physical damage, was hampered in the performance of his or her daily functions, or suffered a severely disabling emotional response to the defendants conduct. See Davis v. Gage, 106 Idaho 735, 741, 682 P.2d 1282, 1288 (1984) (testimony of the plaintiffs they were upset, embarrassed, angered, bothered and depressed insufficient to support a claim for intentional infliction of emotional distress).
Severe emotional distress may be shown either by physical manifestation of the distress or subjective testimony. Davis, 106 Idaho at 741, 682 P.2d at 1288.

To qualify as “extreme and outrageous,” the defendant’s conduct must be more than merely objectionable or unreasonable. “Even if a defendant’s conduct is unjustifiable, it does not necessarily rise to the level of ‘atrocious’ and ‘beyond all possible bounds of decency’ that would cause an average person of the community to believe it was ‘outrageous’.” Alderson v. Bonner, 142 Idaho 733, 740, 132 P.3d 1261, 1268 (2006), citing Edmonson v. Shearer Lumber Products, 139 Idaho 172, 180, 75 P.3d 733, 744 (2003). Whether a defendant’s conduct is so extreme and outrageous as to permit recovery for intentional infliction of emotional distress is a matter of law for the court to decide. Edmonson, 139 Idaho at 180, 75 P.3d at 741; Nation v. Idaho Dept. of Corrections, 144 Idaho 177, 192, 158 P.3d 953, 968 (2007).

2. Negligent Infliction of Emotional Distress

“Negligent infliction of emotional distress requires a showing of (1) a legally recognized duty; (2) a breach of that duty; (3) a causal connection between the defendant’s conduct and the breach; and (4) actual loss or damage. Bollinger v. Fall River Rural Elec. Co-op., Inc., 152 Idaho 632, 642, 272 P.3d 1263, 1273 (2012). Additionally, the plaintiff must demonstrate physical manifestation of the alleged emotional injury.” Wright v. Ada Cnty., 160 Idaho 491, 501, 376 P.3d 58, 68 (2016). See also Waiston v. Monumental Life Ins. Co., 129 Idaho 211, 219, 923 P.2d 456, 554 (1996) (stating, “[f]or a claim of negligent infliction of emotional distress to arise, there must be physical injury to the plaintiff.”); Czaplicki v. Gooding Joint School Dist. 231, 116 Idaho 326, 333, 775 P.2d 640, 647 (1989) (noting that “[i]t is beyond dispute that in Idaho no cause of action for negligent infliction of emotional distress will arise where there is no physical injury to the plaintiff.”).

“The ‘physical injury’ requirement is designed to provide some guarantee of the genuineness of the claim in the face of the danger that claims of mental harm will be falsified or imagined.” Czaplicki, 116 Idaho at 333, 775 P.2d at 647.

Thus, “[w]here the defendant’s negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, and in the absence of some other independent basis for tort liability, the great majority of courts still hold that in the ordinary case there can be no recovery.” Brown v. Matthews Mortuary, Inc., 118 Idaho 830, 836, 801 P.2d 37, 43 (1990) (quoting Prosser and Keeton, The Law of Torts § 54, p. 361 (1984)). See Black County Racquetball Club, Inc. v. Idaho First Nat’l Bank, 119 Idaho 171, 177, 804 P.2d 900, 906 (1991) (allegation of humiliation and severe emotional distress insufficient allegations to support claim for negligent infliction of emotional distress); Summers v. Western Idaho Potato Processing Co., 94 Idaho 1, 479 P.2d 292 (1970) (where plaintiff had her clothes ripped off in front of her co-workers, allegations of pain, suffering, mental anguish and nervous shock insufficient to state a claim of a physical manifestation for a claim of negligent infliction of emotional distress); Herrera v. Conner, 111 Idaho 1012, 1023, 729 P.2d 1075, 1085 (Ct.
(allegations of mental pain and anguish, even “great mental pain and anguish” insufficient to state a claim for negligent infliction of emotional distress).

However, Idaho Courts have recognized that allegations of loss of sleep, headaches, and stomach pains are sufficient to prove an accompanying physical injury sufficient to assert a claim for negligent infliction of emotional distress. Brown, 118 Idaho at 837, 801 P.2d at 44. Likewise, in the case of Czaplicki, it was held that allegations of physical symptoms such as severe headaches, occasional suicidal thoughts, sleep disorders, reduced libido, fatigue, stomach pains and loss of appetite sufficient to withstand summary judgment on negligent infliction of emotional distress claim. Czaplicki, 116 Idaho at 333, 775 P.2d at 647.

To the extent that alleged physical manifestations of emotional distress constitute medical conditions, expert testimony was required to establish causation. Cook v. Skyline Corp., 135 Idaho 26, 13 P.3d 857 (2000).

D. State Consumer Protection Laws, Rules and Regulations

Idaho’s Consumer Protection Act (“ICPA”) prohibits “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” I.C. § 48-603. While the ICPA enumerates and declares unlawful “certain unfair and deceptive acts or practices in the conduct of any trade or commerce” (see I.C. § 48-603), it specifically excludes from its provisions any “unfair or deceptive acts or practices in the business of insurance” as defined in Idaho Code § 41-1301-1327. I.C. §48-605(3); see e.g., Irwin Rogers Ins. Agency, Inc. v. Murphy, 122 Idaho 270, 833 P.2d 128 (Idaho App. 1992) (holding that § 48-603 prevented insured from maintaining consumer protection action against insurer even though allegations related to a promissory note entered into between insurer and insured and not conduct related to the insurance policy).

VI. Discovery Issues in Actions Against Insurers

A. Discoverability of Claims Files Generally

The Idaho Courts have not addressed the discoverability of claims files generally. See however, Holmgren v. State Farm Mut. Auto. Ins. Co., 976 P.2d 573, 576 (9th Cir. 1992) (recognizing that insurance adjuster’s memorandum reflecting his analysis of values for plaintiffs claims, including aggravation, medical expenses, lost earnings, pain and suffering, loss of course of life and loss of home which fixed the range of potential liability as from $78,000 to $145,000 protected by the work product privilege).

A. Discoverability of Reserves

The Idaho Courts have not addressed this issue.
B. Discoverability of Existence of Reinsurance and Communications With Reinsurers

Idaho courts have not addressed the discoverability of the existence of reinsurance generally. However, in General Fire & Cas. Co. v. Guy Carpenter & Co., Inc., 2007 WL 683793 (D. Idaho 2007), the United District Court for the District of Idaho ordered that the defendant insurer answer certain interrogatories and produce certain documents relating to reinsurance contracts where plaintiffs sought such information to “explore the relationships between the plaintiff’s reinsurers and the defendant’s and/or its affiliates… in order to determine the existence of undisclosed incentives or other conflicts of interest which induced the defendant to steer the plaintiff’s reinsurance business to such reinsurers in breach of the defendant’s fiduciary duties to the plaintiff.” Id.

C. Attorney/Client Communications

The attorney client privilege is contained within Idaho Rule of Evidence 502. The Idaho Courts have not addressed the application of the attorney client privilege in the context of communications between an insurer and its attorney other than an inference given in the case of Vaught v. Dairyland Ins. Co., 131 Idaho 357, 956 P.2d 674 (1998) where it was found that the attorney client privilege had not been waived.

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

Idaho Code § 41–1811 has codified the common law defense of fraud and misrepresentation in the insurance contract context and has limited its application. Idaho Code § 41–1811 describes the only circumstances in which a contract for insurance is voidable.

Idaho Code Section 41-1811 provides:

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 either:

(a) Fraudulent; or

(b) 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, or would not have issued it at the same premium rate, or 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.

A "[m]aterial misrepresentation permits the defrauded party to elect from three possible remedies: damages, rescission, or enforcement of the bargain against the fraudulent party according to the fraudulent party's representation of the bargain.” Robinson v. State Farm Mut. Auto. Ins. Co., 137 Idaho 173, 181, 45 P.3d 829, 837 (2002). I.C. § 41-1811 does not abrogate the common law requirement that the party seeking rescission must tender back any consideration received under the contract. Id. An insurer is required to make a tender of premiums back to the insured within a reasonable time after it discovers the potential of a misrepresentation defense. Robinson, 137 Idaho at 181, 45 P.3d at 837. Since the insurance company frames application questions, the insurance company must keep them free from misleading interpretations and a consequence of its failure to do so is that all ambiguities in the insurance application will be construed against the insurer. Wardle v. International Health & Life Ins. Co., 97 Idaho 668, 671, 551 P.2d 623, 626 (1976). An ambiguous question in an insurance application is to be interpreted as an ordinary person standing in the position of the insured reasonably would have interpreted it. Wardle, 97 Idaho at 673, 551 P.2d at 628. An insurance applicant must act in good faith to truthfully answer direct questions on an insurance application that call for information within the applicant’s knowledge. Wardle, 97 Idaho at 672, 551 P.2d at 623.

B. Failure to Comply with Conditions

In Idaho, the courts, while requiring strict compliance with conditions in insurance contracts, will not exact performance beyond its terms. Theriault v. California Ins. Co. of San Francisco, 27 Idaho 476, 149 P.719 (1915); see also Bantz v. Bongard, 124 Idaho 780, 786, 864 P.2d 618, 624 (1993) ("This Court has long held that only substantial compliance with a contractual notice provision is required.").

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

Idaho courts have ruled that consent-to-settle clauses are enforceable and are not void as against public policy and will even be enforced against a third party beneficiary of the policy. Bantz v. Bongard, 124 Idaho 780, 864 P.2d 618 (1993). Violating a consent provision does not mean that the insurance coverage has been forfeited. Id. The insurer must prove that that it was materially prejudiced by the unauthorized settlement agreements entered into before the consent clause will be enforced. Id.

D. Statutes of Limitations

Under Idaho law, a claim for breach of written contract must be commenced within five years. I.C. § 5-217. While there is no express holding by the Idaho Supreme Court on the issue, it is generally believed that a claim for bad faith tort falls under the catch-all provision of the statute of limitations and as such must be commenced within four years of its accrual. I.C. § 5-224.
VIII. Trigger and Allocation Issues for Long-Tail Claims

A. Trigger of Coverage

In Idaho, the manifestation theory is often used as a trigger for insurance coverage. Gravatt v. Regence Blueshield of Idaho, 136 Idaho 899, 42 P.3d 692 (2002).

B. Allocation Among Insurers

In Aetna Cas. & Sur. Co. v. Mutual of Enumclaw Ins. Co., 121 Idaho 603, 826 P.2d 1315 (1992), the Idaho Supreme Court addressed the issue of a situation involving multiple insurers. Discussing issues related to contribution, the Supreme Court reaffirmed that "[t]he proper procedure for the insurer to take is to evaluate the claims and determine whether an arguable potential exists for a claim covered by the policy; if so, then the insurer must immediately step in and defend the suit." When two or more insurers have a duty to defend, they must all share the costs of the defense equally, regardless of the actual limits in their respective policies. General Sec. Indem. Co. of Arizona v. Great Northern Ins. Co., 2007 WL 845857 (D.Idaho 2007) (citing Viani v. Aetna Ins. Co., 95 Idaho 22, 37 (1972) and Aetna Cas. & Sur. Co. v. Mut. of Enumclaw Co., 121 Idaho 603, 605 (1992).

IX. Contribution Actions

When one insurer breaches the duty to defend and the other insurer pays all costs of defense, the defending insurer has a contribution claim against the other insurer for half of the costs and attorneys' fees associated with the defense. See Viani v. Aetna Ins. Co., 95 Idaho 22, 37, 501 P.2d 706 (1972); Aetna Cas. & Sur. Co. v. Mut. of Enumclaw Co., 121 Idaho 603, 605, 826 P.2d 1315 (1992). Where both do defend, then there is no right of contribution even if their defense costs are unequal. See Aetna Cas. & Sur. Co. v. Mut. of Enumclaw Ins. Co., 121 Idaho 603, 607, 826 P.2d 1315, 1319 (1992) ("Both insurance companies, having fulfilled their duty to defend, although adopting different strategy and tactics, shall pay for their own defense costs.").

A. Claim in Equity vs. Statutory

A contribution plaintiff is entitled to contribution from a tortfeasor whose liability was extinguished by a settlement, either in main action or separate action. See I.C. §§ 6-803, 6-805, 6-806; Horner v. Sani-Top, Inc., 141 P.3d 1099 (Idaho 2006). Contribution, however, may only be obtained among defendants who would have been liable to the original third party. Hydraulic & Air Equip. Co. v. Mobil Oil Corp., 117 Idaho 130 (1989). Furthermore, "[a] release by the injured person of one (1) joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors. This [statute] shall apply only if the issue of proportionate
fault is litigated between joint tortfeasors in the same action." I.C. § 6-806.

B. Elements

In addition to the foregoing, Idaho courts have recognized that a cause of action for contribution is distinct from the underlying cause of action at issue, and, as such, a contribution cause of action accrues when an underlying claim, judgment, or settlement is paid or discharged. Schiess v. Bates, 107 Idaho 794.

X. Duty to Settle

Unlike the duty to defend, the duty to act in good faith exists at all times. "[E]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.’ . . . Such a duty is beyond that which the policy imposes by itself--the duty to defend, settle, and pay-- but is a duty imposed by law on an insurer to act fairly and in good faith in discharging its contractual responsibilities.” White v. Unigard Mut. Ins. Co., 112 Idaho 94, 96, 730 P.2d 1014, 1016 (1986). An insurer is under a duty to exercise good faith in considering offers of compromise an injured party’s claim against the insured for an amount within insured’s policy limits. McKinley v. Guaranty National Ins. Co., 144 Idaho 247, 251, 159 P.3d 884, 888 (2007). Accordingly, the Idaho courts recognize a tort cause of action against an insurer who unreasonably denies or delays the settlement of an insurance claim. Reynolds v. American Hardware Mut. Ins. Co., 115 Idaho 362, 364, 766 P.2d 1243, 1245 (1988); McKinley, 159 P.3d at 888.