I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

The South Carolina Claims Practices Act governs responses to and determinations of insurance claims for property and casualty insurance and other types of insurance. See S.C. Code Ann. § 38-59-10 et seq. A provision in the Claims Practices Act provides a ninety-day limit in which to pay insurance claims after a demand has been made. S.C. Code Ann. § 38-59-40. If the refusal to pay is made without reasonable cause or in bad faith, the insured is liable for actual damages and attorneys’ fees and costs. Id.

B. Standards for Determinations and Settlements


The South Carolina Insurance Trade Practices Act (“ITPA”) also is applicable to some claims handling activities. See S.C. Code Ann. § 38-57-10 et seq. For example, the ITPA prohibits misrepresentations to insureds in connection with adjusting any claims or losses. S.C. Code Ann. § 38-57-70. There is no private right of action under the ITPA. Masterclean, 347 S.C. 405, 556 S.E. 2d 371.

The South Carolina Department of Insurance has promulgated numerous regulations which should be consulted as some may impact claims handling. See S.C. Code Regs. §§ 69-1 et seq. Note, however, that Reg. § 69-19 addressing improper claims practices has been repealed.

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

The South Carolina Department of Insurance has promulgated regulations for protecting nonpublic personal health and finance information of insureds. See S.C. Code Regs. § 69-58. The Family Privacy Protection Act of 2002 prevents private entities from using personal information obtained from a state agency (e.g., Department of Insurance) for use in commercial solicitation. S.C. Code Ann. § 30-2-50.

South Carolina law also provides privacy protection for insureds in addition to those provided by the GLBA with respect to medical and health related information. Privacy protection is provided for an insured’s genetic information acquired by an insurer in conjunction with the issuing or reissuing of an accident and health insurance policy. S.C. Code Ann. § 38-93-30. If the confidentiality statute is violated, an insured may bring a cause of action to recover actual damages, equitable relief, and attorneys’ fees. S.C. Code Ann. § 38-93-90(D).

Other general privacy laws that could be applicable to insurers include S.C. Code Ann. §§ 16-3-730 (Rape Shield Law); 16-16-10 et seq. (Computer Crime Act); 30-4-165 (prohibiting use of information obtained from driver’s license records); 30-4-165 (prohibiting sale of social security numbers); 44-117-310 et seq. (Prescription Information Privacy Act); § 56-5-1275 (prohibiting disclosure of automobile accident information for commercial solicitation purposes).
II. **Principles of Contract Interpretation**


III. **Choice of Law**

South Carolina has a specific statute that governs choice of law principles for insurance contracts. S.C. Code Ann. § 38-61-10. Under Section 38-61-10, “[a]ll contracts of insurance on property, lives, or interest in this State are considered to be made in this State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State.” Id. If under section 38-61-10 an insurance contract is deemed to have been made in South Carolina, then South Carolina law will govern the court’s interpretation of that contract. See Sangamo Weston, Inc. v. Nat’l Sur. Corp., 307 S.C. 143, 147, 414 S.E.2d 127, 130 (1992); see also Kapp v. Empire Fire & Marine Ins. Co., No. 3:12-cv-904, 2013 WL 310357, at *4 (D.S.C. Jan. 25, 2013) (“Generally, in South Carolina contracts are subject to interpretation based on the law of the state where the contract was made.”).

IV. **Duties Imposed by State Law**

A. **Duty to Defend**
1. **Standard for Determining Duty to Defend**


2. **Issues with Reserving Rights**

An insurer may unilaterally reserve its rights to pursue coverage defenses and to seek reimbursement of defense costs spent on claims not potentially covered under the policy. See Laidlaw Envtl. Serv. (TOC), Inc. v. Aetna Cas. & Sur. Co., 338 S.C. 43, 52-53, 524 S.E.2d 847, 852 (Ct. App. 1999). The reservation of rights must provide the insured “sufficient information to understand the reasons the insurer believes the policy may not provide coverage” and must give “fair notice to the insured that the insurer intends to assert defenses to coverage or to pursue a declaratory relief action at a later date.” Harleysville Grp. Ins. v. Heritage Communities, Inc., Op. No. 27698, 2017 WL 105021, at *5 (S.C. Sup. Ct. filed Jan. 11, 2017) (Shearouse Adv. Sh. No. 2 at 31) (quotation omitted). The South Carolina appellate courts have not specifically addressed the duty of insurers to provide the insured with independent counsel where the insurer reserves rights under the policy.

B. **Duty to Settle**

insurer’s part to accept an offer of compromise settlement has been held to render it liable in tort to the insured for the amount of the judgment against the insured in excess of policy limits.” Trimper, 540 F. Supp. at 1193. An insurer’s unreasonable refusal to settle a matter within policy limits will subject the insurer to liability. Tyger River, 170 S.C. 286, 170 S.E. 346.

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

A. **Bad Faith**

1. **First Party**

   To recover for bad faith refusal to pay, an insured must show: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) the insurer’s refusal to pay benefits or meet any obligation owed by the insured under the contract; (3) the insurer’s refusal is a result of bad faith or unreasonable action in breach of an implied covenant of good faith or fair dealing arising on the contract; and (4) damages resulting from the refusal to pay. Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 398, 562 S.E.2d 659, 661 (Ct. App. 2002); see also Carolina Bank & Trust Co. v. St. Paul Fire & Marine Co., 279 S.C. 576, 580, 310 S.E.2d 163, 165 (Ct. App. 1983) (recognizing that bad faith claim may result from unreasonable refusal to pay or process claim as well as any other obligation undertaken by insurer for the insured such as an insurer’s contractual obligations to pay third parties). An insurer acts in bad faith where there is no reasonable basis to support the insurer’s decision. See American Fire & Cas. Co. v. Johnson, 332 S.C. 307, 311, 504 S.E.2d 356, 358 (Ct. App. 1998) (“Bad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim.”). “Bad faith” is a separate tort cause of action under South Carolina law and is not merely a contract remedy. Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 7-8, 437 S.E.2d 6, 9-10 (1993).

   “[A]n insurer cannot be liable for bad faith refusal to pay proceeds . . . if there exists an objectively reasonable basis for denying the insured’s claim.” State Farm Fire & Cas. Co. v. Barton, 897 F.2d 729, 731 (4th Cir. 1990); see also Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004). “Whether such an objectively reasonable basis for denial exists depends on the circumstances existing at the time of the denial.” Id. An insurer is not insulated from liability for bad faith merely because there is a lack of clear precedent resolving a coverage issue raised under the particular facts of the case. Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 400, 562 S.E.2d 659, 662 (Ct. App. 2002).

2. **Third Party**

   Generally, South Carolina law does not recognize a third-party tort action for bad faith refusal to pay benefits. See Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 617-18, 586 S.E.2d 586, 588 (2003) (“In South Carolina, although the insurer owes the insured a duty of good faith and fair dealing, this duty of good faith arising under the contract does not extend to a person who is not a party to the insurance contract. Thus, no bad faith claim can be brought against an independent adjuster or independent adjusting company.”) (internal citations omitted). A very narrow exception has been created for a spouse who sues based on the


"An insurer is liable to the policy holder for all reasonable attorneys’ fees for the prosecution of the case against the insurer if the trial judge finds the refusal to pay the policyholder’s claim was without reasonable cause or in bad faith." Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 400-01, 562 S.E.2d 659, 663 (Ct. App. 2002) (citing S.C. Code Ann. § 38-59-40, but recognizing the statutory claim for attorneys’ fees as an alternative to the bad faith tort action); cf. Nichols at 342, 306 S.E.2d at 620 (holding that attorneys’ fees under former Code section 38-9-320 (now 38-59-40(1)) are recoverable only under breach of contract). The Claims Practices Act allows for the recovery of attorneys’ fees when an insurer refuses to pay proceeds without reasonable cause or if the refusal was in bad faith. S.C. Code Ann. § 38-59-40.

In addition, if the insured demonstrates by clear and convincing evidence that the insurer’s actions were willful or in reckless disregard of the insured’s rights, then the insured may recover punitive damages. Nichols, 279 S.C. at 340, 306 S.E.2d at 619; see also James v. Horace Mann Ins. Co., 371 S.C. 187, 638 S.E.2d 667 (2006).

B. Fraud

In South Carolina, an insured may bring a variety of fraud-type actions against an insurer, including actual or constructive fraud, fraudulent concealment, or negligent misrepresentation or omission. To recover for actual fraud, a plaintiff must prove nine essential elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity;
the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent and proximate injury. Pitts v. Jackson Nat’l Life Ins. Co., 352 S.C. 319, 334, 574 S.E.2d 502, 509 (Ct. App. 2002). To establish constructive fraud, a plaintiff must prove all the elements of actual fraud except the element of intent. Id. at 333, 574 S.E.2d at 509. South Carolina courts have held as to constructive fraud claims, however, that there is no right to rely on a false representation, where the parties are mature and educated, have conducted an arm’s length transaction, and do not share a confidential or fiduciary relationship. Id. at 334, 574 S.E.2d at 509.

To establish a claim of fraudulent concealment, a plaintiff must prove all nine elements of actual fraud with the following variations. As to the first two elements, the plaintiff must show that the defendant had a duty to disclose and failed to do so. Id. at 335, 574 S.E.2d at 510. The duty to disclose arises in three distinct circumstances: (1) where a preexisting, definite fiduciary relationship exists between the parties; (2) where one party expressly creates a trust and confidence in the other with reference to the particular transaction, or else such a trust and confidence is implied from the circumstances of the case, or the nature of the parties’ dealings or position towards each other; and (3) where the contract in question is of such a nature the parties are necessarily fiduciaries. Id. at 335, 574 S.E.2d at 510. South Carolina courts have held that a fiduciary relationship does not arise by the mere relationship of the insurer and insured. Id. at 336, 574 S.E.2d at 510-11.

To state a claim for negligent misrepresentation or omission, the plaintiff must allege: (1) the defendant made a false representation to or failed to advise the plaintiff; (2) the defendant had a pecuniary interest in making or omitting the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation or omission; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation. Kelly v. South Carolina Farm Bureau Mut. Ins. Co., 316 S.C. 319, 323-24, 450 S.E.2d 59, 62 (Ct. App. 1994); Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988) (addressing an omission).

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

No South Carolina cases address an insured’s claim against an insurer for intentional or negligent infliction of emotional distress in the context of settlement practices. Generally, to establish a claim for the intentional infliction of emotional distress, a plaintiff must show: “(1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff’s emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.” Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions, 388 S.C. 394, 401-02, 697 S.E.2d 551, 555 (2010); see also Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 401, 596 S.E.2d 42,
South Carolina law recognizes that bystanders may recover for NIED. The elements of an NIED claim are: (1) the negligence of the defendant must cause death or serious physical injury to another; (2) the plaintiff bystander must be in close proximity to the accident; (3) the plaintiff and the victim must be closely related; (4) the plaintiff must contemporaneously perceive the accident; and (5) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony. Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 582-83, 336 S.E.2d 465, 467 (1985).

D. State Consumer Protection Laws, Rules and Regulations


VI. Discovery Issues in Actions Against Insurers

A. Discovery of Claims Files Generally

There are no reported South Carolina cases addressing the discovery of the claim files of insurers. In a bad faith action relating to an insurer’s failure to settle a prior suit against its insured, the insurer’s files in the former action, including all correspondence between the insurer and counsel employed by the insurer, have been held to be relevant and discoverable. Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D. 37 (E.D.S.C. 1964). Additionally, recent decisions by federal district courts in South Carolina have allowed discovery of communications between an insurer and outside counsel regarding the decision to deny coverage where the insurer later raises the affirmative defenses of reasonableness and good faith to an insured’s bad faith claim. See, e.g., ContraVest Inc. v. Mt. Hawley Ins. Co., No. 9:15-CV-00304, 2017 WL 1190880, at *1 (D.S.C. Mar. 31, 2017); Graham v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA, No. 0:16-CV-01153, 2017 WL 116798, at *4 (D.S.C. Jan. 12, 2017); State Farm Fire & Cas. Co. v. Admiral Ins. Co., No. 4:15-cv-2745, 2016 WL 4051271, at *4 (D.S.C. July 25, 2016).

B. Discoverability of Reserves

There are no reported cases from the South Carolina appellate courts addressing the discoverability of reserves set by insurers. However, at least one federal district court case has held that reserve information is irrelevant and undiscoverable in bad faith claims based on a denial of coverage. Imperial Textiles Supplies, Inc. v. Hartford Fire Ins. Co., No. 6:09-CV-03103, 2011 WL 1743751, at *4 (D.S.C. May 5, 2011). The same court also suggested that reserve information may be relevant and discoverable in bad faith claims based on an insurer’s refusal to settle. Id. at *9-10 (“The
fact that the insurance company established a reserve may be probative on the issue of whether there is a potential for liability in considering a third-party bad faith claim, and thus reserve information may be relevant to the issue of bad faith.”). A decision relying on Imperial Textiles found that reserve information was relevant on the issues of the insurer’s participation in settlement negotiations in the underlying action, as well as the insurer’s determination of the insured’s potential for liability. E. Bridge Lofts Prop. Owners Ass’n, Inc. v. Crum & Forster Specialty Ins. Co., No. 2:14-CV-2567, 2015 WL 12831727, at *2 (D.S.C. June 18, 2015); see also ContraVest Inc. v. Mt. Hawley Ins. Co., No. 9:15-CV-00304, 2017 WL 1190880, at *11 (D.S.C. Mar. 31, 2017) (finding reserve information relevant); McCray v. Allstate Ins. Co., No. 3:14-CV-02623, 2015 WL 6408048, at *6 (D.S.C. Oct. 22, 2015) (denying motion to compel production of reserve information because insured had not demonstrated that reserve information was relevant to bad faith denial of coverage).

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

There are no reported cases from the South Carolina appellate courts addressing the discoverability of reinsurance information and communications. One recent federal district court decision found that reinsurance information and communications were relevant and discoverable on the issue of why the insurer changed its coverage position over time. ContraVest, 2017 WL 1190880, at *10.

D. Attorney/Client Communications

A non-absolute privilege may exist, depending on the circumstances of the specific situation, between an insured and an attorney employed by an insurance company to represent both the company and the insured. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1975). In a bad faith action by an insured against an insurer relating to the failure to settle a prior suit, it has been held that the insurer’s files in the former action, including all correspondence between the insurer and counsel employed by insurer to represent the insured in the former action, are not privileged. Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D. 37 (E.D.S.C. 1964).

An attorney-client relationship does not exist between an underinsured motorist coverage (UIM) carrier’s attorney and the named defendant in an action, and, therefore, it was held that a UIM carrier’s attorney could not assert the attorney-client privilege to protect communications with the named insured. Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003).

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

“In order to rescind an insurance policy on the ground of fraudulent misrepresentation, the insurer must show by clear and convincing evidence: (1) the statement was false; (2) the falsity was known to the applicant; (3) the statement was material to the risk; (4) the statement was made with the intent to defraud the insurer; and (5) the insurer relied on the statement when issuing the policy.” Primerica Life Ins. Co. v. Ingram, 365 S.C. 264, 616 S.E.2d 737 (Ct. App. 2005) (citing Strickland v. Prudential Ins. Co., 278 S.C. 82, 86, 292 S.E.2d 301, 304 (1982)). “Answers to oral questions asked
of the insured by insurer’s agent when applying for insurance are only representations and such answers even if false are not sufficient to avoid the policy unless they are material to the risk, known to the applicant to be false, made with intent to mislead and defraud the insurer and are relied upon by the insurer as a basis for the issuance of the policy.” Graham v. Aetna Ins. Co., 243 S.C. 108, 111, 132 S.E.2d 273, 274 (1963).

B. Failure to Comply with Conditions


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

A liability policy may impose a condition precedent to the commencement of an action by the insured by barring suit against the insurer until there has been a judgment against the insured or a settlement approved by the insurer. See Sexton v. Harleysville Mut. Cas. Co., 242 S.C. 182, 130 S.E.2d 475 (1963). Pursuant to a “no action” clause, the insured has no right of action against the insurer in the absence of a judgment against him or an agreement entered into by all parties fixing the amount of damages. Id. at 188, 130 S.E.2d at 478.

D. Statutes of Limitations

Actions on a policy of fire insurance and actions on contract or tort are subject to a three-year limitations period. See S.C. Code Ann. § 15-3-530(1), (8). The action must be commenced within three years after the insured knew or by the exercise of reasonable diligence should have known that he had a cause of action. See S.C. Code Ann. § 15-3-535. It has been held that the limitations period begins to run once the insurer has denied the insured’s claim. Bennett v. New York Life Ins. Co., 197 S.C. 498, 15 S.E.2d 743 (1941). However, the insurer may be estopped from asserting the statute of limitations as a defense if the insured’s delay in bringing suit was induced by the insurer’s conduct. Kleckley v. Nw. Nat. Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000). “Such inducement may consist of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary. The [insurer’s] conduct may also involve inducing the [insured] either to believe that an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue.” Id. at 136-37, 526 S.E.2d at 220.

VIII. Trigger and Allocation Issues for Long Tail Claims
A. Trigger of Coverage

The South Carolina Supreme Court has held that for commercial general liability policies, “coverage is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage.” Crossmann Cmtys. of N.C. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 56, 717 S.E.2d 589, 597 (2011).

B. Allocation Among Insurers

South Carolina has adopted the “time on risk” approach. Id. at 50, 717 S.E.2d at 594. Under this approach, “each triggered insurer must indemnify only for the portion of the loss attributable to property damage that occurred during its policy period.” Id. at 52, 717 S.E.2d at 595. “[T]he 'time on risk' approach requires a policyholder to bear a pro rata portion of the loss corresponding to any portion of the progressive damage period during which the policyholder was not insured or purchased insufficient insurance.” Id. at 50, 717 S.E.2d at 594.

If “it is impossible to know the exact measure of damages attributable to the injury that triggered each policy,” South Carolina has adopted the following “default rule” for applying the time on risk approach:

The basic formula consists of a numerator representing the number of years an insurer provided coverage and a denominator representing the total number of years during which the damage progressed. This fraction is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury.

Id. at 65, 717 S.E.2d at 602. This default rule “assumes the damage occurred in equal portions during each year that it progressed.” Id. However, “[i]f proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof.” Id.


IX. Contribution Actions

A. Claim in Equity vs. Statutory

Under South Carolina law, an insurer’s right of contribution from a co-insurer arises in equity. Canal Ins. Co. v. Ranger Ins. Co., 489 F. Supp. 492, 496 (D.S.C. 1980) (citing Cooper v. Georgia Cas. & Sur. Co., 244 S.C. 286, 292, 136 S.E.2d 774, 777 (1964) (“The rule of contribution is an equitable rule and is based on the fact that those who insure or become sureties for the same duty ought the share the results of the default.” (citation omitted))).

B. Elements
In order for a right of contribution to arise, the co-insurers must insure (1) the same interest against (2) the same casualty. Laurens Fed. Sav. & Loan Ass’n v. Home Ins. Co. of New York, 242 S.C. 226, 234, 130 S.E.2d 558, 561 (1963). The insurer seeking contribution must also have paid pursuant to the policy and must have had either an obligation to pay or uncertain obligations. Travelers Ins. Co. v. Allstate Ins. Co., 249 S.C. 592, 597, 155 S.E.2d 591, 593 (1967); see also Nat’l Grange Mut. Ins. Co. v. Firemen’s Ins. Co. of Newark, New Jersey, 310 S.C. 116, 119, 425 S.E.2d 754, 757 (Ct. App. 1992) (stating that insurer who paid full amount of loss was not a volunteer where its obligations were uncertain and it could have been exposed to a bad faith claim.

X. Duty to Settle