I. **Regulatory Limits on Claims-Handling**

A. **Timing for Responses and Determinations**

Chapter 507B of the Iowa Code ("Insurance Trade Practices") was enacted with the stated intent to define and prohibit unfair methods of competition and unfair or deceptive acts and practices related to the issuance of insurance policies and the handling of claims within the State of Iowa. Iowa Code § 507B.1 (2017). Specific time limits for responses to requests for coverage and rendering coverage determinations are set forth in Chapter 191-15 of the Iowa Administrative Code. For example: an insurer has 15 days to acknowledge receipt of claim (Iowa Admin. Code r. 191-15.42(1) (2017)); 30 days after proof of loss to accept or deny claim, or notify the insured that more information is required (Iowa Admin. Code r. 191-15.41(2) (2017)); and 30 days after affirmation of liability to tender payment for a claim not in dispute (Iowa Admin. Code r. 191-15.41(6) (2017)).

B. **Standards for Determinations and Settlements**

If an insurer denies a claim pursuant to a specific policy provision, condition or exclusion, the particular basis for the denial must be included in a written denial letter sent to the insured. Iowa Admin. Code r. 191-15.41(2) (2017).

Iowa Code section 507B.3 prohibits any person from engaging in unfair methods of competition, and unfair or deceptive acts or practices, but relies on Iowa Code section 570B.4, among others, to define unfair methods of competition and unfair and/or deceptive acts or practices. Iowa Code section 507B.4(3)(j), specifically, enumerates claim settlement practices that the Iowa legislature has deemed unlawful. Those prohibited practices include:

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages of issue.

b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information.
e. Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear, or failing to include interest on the payment of claims when required under subsection “p” or section 511.38.

g. Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.

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

i. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured.

j. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made.

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

l. Delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

m. Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

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

o. Failing to comply with the procedures for auditing claims submitted by health care providers as set forth by rule of the commissioner. However, this paragraph shall have no applicability to liability insurance, workers' compensation or similar insurance, automobile or homeowners' medical payment insurance, disability income or long-term care insurance.
There are no specific provisions in Chapter 507B permitting a private cause of action for unfair claims practices, and, as such, the Iowa Supreme Court has explicitly found that no private cause of action exists under Chapter 507B. See generally Mueller v. Wellmark, Inc., 818 N.W.2d 244 (Iowa 2012) (citing Seeman v. Liberty Mutual Ins. Co., 322 N.W.2d 35, 42-43 (Iowa 1982) (affirming that no private cause of action is provided for in Chapter 507B). The insurance commissioner, however, is granted extensive authority to enforce its provisions. See Iowa Code §§ 507B.6-8 (2017).

The insurance commissioner may issue a notice of hearing and conduct a hearing wherein the commissioner has the authority to administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, as well as having the power to subpoena witnesses or records. See Iowa Code §§ 507B.6(1), (4) (2017).

The insurance commissioner may issue cease and desist orders. See Iowa Code §§ 507B.6A(1); 507B.7(1) (2017).

The insurance commissioner may impose monetary penalties for violating Iowa’s insurance trade practices. See Iowa Code § 507B.7(1)(a) (2017).

The insurance commissioner may suspend or revoke an insurance company’s license to sell insurance based upon violations of the Act. See Iowa Code § 507B.7(1)(b) (2017).


As noted above, although the Iowa Supreme Court has recognized the validity of administrative sanctions imposed for violations of Chapter 507B, the court has repeatedly declined to adopt a private cause of action for alleged violations. See e.g., Mueller, 818 N.W.2d 244. Instead, the court has found that the intent and purpose of the Insurance Trade Practices Act is to provide regulatory guidance. Seeman, 322 N.W.2d at 42. As such, the legislature “intended only to invest the insurance commissioner with administrative enforcement powers and that the chapter not be expanded in the exercise of administrative or judicial discretion.” Id. Consequently, based on legislative intent, the insurance commissioner is the sole repository of authority to enforce the requirements of Chapter 507B. Id.


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

Iowa Code section 505.17 governs the handling of and protection afforded to a customer’s confidential information obtained by the Insurance Division in the course of an investigation or examination. The statute provides that information, records and documents obtained by the Insurance Division are not public records and shall be treated as confidential. However, Iowa Code section 505.17 can cause information, records and
documents accompanying an application for a rate increase filed by a health insurance carrier to become public record unless the health insurance carrier submits a written request to keep confidential certain details of an application or accompanying information, records and documents. Iowa Code §§ 505.17(2)-(2)(a) (2017). For the documents to maintain their confidentiality, the request must sufficiently explain why public disclosure of such detail would give competitors an unfair advantage. Iowa Code § 505.17(2)(a) (2017).

The Financial and Health Information Regulations set forth in Iowa Administrative Code rule 191-90 create a right of privacy for insureds and claimants relating to information maintained by insurance companies, including claims filed. Generally, insurers are required to provide a clear and conspicuous notice to their customers that accurately states privacy policies and practices related to financial information. Iowa Admin. Code r. 191-90.3 (2017). The information that must be included in the privacy notice as set forth in Iowa Administrative Code rule 191-90.5. During the lifetime of the customer relationship, an insurer must annually provide a copy of its financial privacy policy to insureds. Iowa Admin. Code § 191-90.4 (2017). In addition, an insurer must obtain a valid authorization to disclose nonpublic personal health information related to its insured. Iowa Admin. Code § 191-90.18 (2017). The regulations also require an insurer to implement a security program to safeguard customer’s confidential health information. Iowa Admin. Code § 191-90.37 (2017).

II. Principles of Contract Interpretation

When construing or interpreting the meaning of insurance policy provisions, Iowa courts strive to ascertain the intent of the parties at the time the policy was sold. Ferguson v. Allied Mut. Ins. Co., 512 N.W.2d 296, 299 (Iowa 1994) (citations omitted).

Importantly, Iowa courts distinguish between “interpretation” and “construction” of an insurance contract. Interpretation, which calls for the court to determine the meaning of contractual words, is a legal question unless the meaning of the language “depends on the extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence.” Ferguson, 512 N.W.2d at 299 (quoting Connie’s Constr. Co. v. Fireman’s Fund Ins. Co., 227 N.W.2d 207, 210 (Iowa 1975)). Construing a contract, however, requires the court to determine its legal effect, which is always an issue of law for the court to resolve. Ferguson, 512 N.W.2d at 299 (citing Connie’s Constr. Co., 227 N.W.2d at 210).

“[I]nsurance contracts are construed in the light most favorable to the insured.” Id. Similarly, exclusions are strictly construed against the insurer. Ferguson, 512 N.W.2d at 299 (citing Bankers Life Co. v. Aetna Cas. & Sur. Co., 366 N.W.2d 166, 169 (Iowa 1985)). “When construing insurance policies ‘the objective reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.’” Ferguson, 512 N.W.2d at 299 (quoting Grinnell Mut. Reins. Co., 431 N.W.2d 783, 786 (Iowa 2008)). Accordingly, the principle of reasonable expectations “undergirds the congeries of rules applicable to construction of insurance contracts in Iowa.” Ferguson, 512 N.W.2d at 299 (quoting Rodman v. State Farm Mut. Auto. Ins. Co., 208 N.W.2d 903, 906 (Iowa 1973)).
Finally, when construing insurance policies, Iowa courts consider the effect of the policy as a whole, in light of all attached declarations, riders and endorsements. Ferguson, 512 N.W.2d at 299 (citations omitted).

III. Choice of Law

When a choice of law issue exists, Iowa courts apply the rules set forth in the Restatement (Second) Conflict of Laws to determine the applicable state law to govern a dispute. Cole v. State Auto. & Cas. Underwriters, 296 N.W.2d 779, 781 (Iowa 1980). Iowa courts select the governing law in insurance policy cases by the intent of the parties or the most significant relationship test. Gabe's Constr. Co., Inc. v. United Capitol Ins. Co., 539 N.W.2d 144, 146 (Iowa 1995) (citing Cole v. State Auto. & Cas. Underwriters, 296 N.W.2d 779, 781 (Iowa 1980)). A choice of the governing law by the parties, if reasonable, will be enforced based on the provisions of section 187 of the Restatement (Second). Cole, 296 N.W.2d at 781. Absent a choice of the governing law in the policy, the parties' rights are determined by the law of the state which "has the most significant relationship to the transaction and the parties." Gabe's Constr. Co., Inc., 539 N.W.2d at 146 (quoting Restatement (Second) of Conflicts of Law § 188(1) (1971)).

IV. Duties Imposed by State Law

A. Duty to Defend

1. Standard for Determining Duty to Defend

The Iowa Supreme Court has found that "[a]n insurer’s duty to defend is separate from its duty to indemnify; the duty to defend is broader than the duty to indemnify." Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d 639, 641 (Iowa 1996). The reason for this difference is because "it is impossible to determine the basis, if any, upon which the plaintiff will recover until the action is completed." First Newton Nat’l Bank v. General Cas. Co., 426 N.W.2d 618, 630 (Iowa 1988) (emphasis added).

The obligation to provide a defense arises "whenever there is potential or possible liability to indemnify the insured based on the facts appearing at the outset of the case." A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am., 475 N.W.2d 607, 627 (Iowa 1991) (quoting First Newton, 426 N.W.2d at 623) (emphasis added). Further, if any claim advanced in the petition or complaint is potentially covered by the policy, the insurer has an obligation to defend the entire action. A. Y. McDonald, 475 N.W.2d at 627; First Newton, 426 N.W.2d at 630. If there is any doubt as to whether the petition alleges a claim that falls within the policy coverage, that doubt is resolved in favor of the insured. A.Y. McDonald, 475 N.W.2d at 627 (citing First Newton, 426 N.W.2d at 628).

In determining whether there is a duty to defend, courts look to the petition to decide whether the facts alleged "bring the claim within the liability covered by the policy." Stine Seed Farm, Inc. v. Farm Bureau Mut. Ins. Co., 591 N.W.2d 17, 18 (Iowa 1999)(quoting Chipokas v. Travelers Indem. Co., 267 N.W.2d 393, 395 (Iowa 1978)). Moreover, the insurer must examine the operative facts alleged, rather than any labels attached to the claims by the plaintiff. It is "clear under Iowa law that an insurance company is to look at the allegations of fact in the third-party plaintiff’s petition against the insured and not the legal theories on which the third-party claims
The mere artful pleading of an excluded claim under an alternative theory which may be covered by a policy does not create coverage under a liability policy if the underlying basis for the claim is excluded by the insurance contract. See Stine Seed, 591 N.W.2d at 19; see also Continental Ins. Co. v. Bones, 596 N.W.2d 552, 559 (Iowa 1999) (stating that coverage is controlled and determined by the actual claim against the insured, rather than a label attached by the claimant); Essex Ins. Co. v. Fieldhouse, Inc., 506 N.W.2d 772, 775 (Iowa 1993) (same). This statement is limited by the fact that “[i]nsurance coverage is a contractual matter and is ultimately based on policy provisions.” Talen v. Emplrs. Mut. Cas. Co., 703 N.W.2d 395, 402 (Iowa 2005) (citing State Farm Auto. Ins. Co. v. Malcolm, 259 N.W.2d 833, 835 (Iowa 1977)).

2. Issues with Reserving Rights

A reservation of rights occurs when an insurer, though providing a defense for its insured, has expressly reserved the right to deny coverage for any judgment entered against the insured based on the belief that there is no coverage provided by the policy. See generally Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637 (Iowa 2000). An insurer does not breach the insurance policy simply because it provides a defense under a reservation of rights. Id. at 642 (citations omitted). While some courts have found that an insured may settle without an insurer’s consent when the insurer’s defense is provided under a reservation of rights, see i.e., Cay Divers, Inc. v. Raven, 812 F.2d 866, 870-71 (3rd Cir. 1987); Gates Formed Fibre Prods., Inc. v. Imperial Cas. & Indem. Co., 702 F. Supp. 343, 346 (D. Me. 1988), the Iowa Supreme Court has declined to follow these decisions because they “permit an insured to breach his duties under the policy without losing coverage, even though there has not been a breach of the contract by the insurance company.” Kelly, 620 N.W.2d at 642.

An insurer cannot, however, rely on the fact that it is providing a defense under a reservation of rights as justification for refusing to settle. Id. at 644. “At the point in time that the insurer is faced with a fair and reasonable settlement demand that a reasonable and prudent insurer would pay, the insurer must either abandon its coverage defense and pay the demand or lose its rights to control the conditions of settlement.” Id. (emphasis added). If the insurer facing this dilemma chooses to debate coverage rather than pay the settlement demand, “the insured is free to either pay the settlement demand or stipulate to the entry of judgment in the amount of the demand” and the insurer, if later found to have coverage, “will be liable for the insured’s settlement if the settlement is found to be fair and reasonable.” Id. at 645. The Iowa Supreme Court reasoned that under these circumstances the insurer, despite the absence of bad faith, has breached its contractual duty to settle cases where appropriate. Id.

B. Duty to Settle

When an insurer acts to defend an insured against a third party, the insurer has control over the defense and possible settlements. Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 32 (Iowa 1982). Based on the nature of the relationship, Iowa law imposes an implied covenant of good faith and fair dealing in this situation. Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637, 643 (Iowa 2000). “This covenant includes a duty to settle claims without litigation in appropriate cases.” Kooyman, 315 N.W.2d at 33.
“It is bad faith for an insurance company to act irresponsibly in settlement negotiations with respect to the insured’s risk in that part of the claim in excess of coverage.” Wierck v. Grinnell Mut. Reins. Co., 456 N.W.2d 191, 195 (Iowa 1990). The insurer also acts in bad faith if it factors the “limited amount between an offer and the policy limits” into its consideration of settlement offers. Id. Rather, the insurer should ignore the policy limits and consider only whether it would, but for the policy limits, settle the case for the offered amount. Id. If the insurer would settle without regard to its policy limits, it is obliged to do so and pay toward the settlement up to the policy limits. Id. If, on the other hand, the insurer would reject the settlement offer even if the policy limits would have covered the entire claim, it is free to do so without a finding that it acted in bad faith. Id.

As a general rule, Iowa law precludes an insurer from filing a subrogation action against a tortfeasor if the insured has waived a cause of action against the tortfeasor. See, e.g., Farm Bureau Mut. Ins. Co. v Allied Mut. Ins. Co., 580 N.W.2d 788 (Iowa 1998). In this situation, the insurer may file a breach of contract action against its insured that caused the insurer to lose its subrogation rights by releasing the tortfeasor from liability. See id. Iowa law, however, provides an exception to this general rule when the tortfeasor has knowledge of the insurer’s subrogation rights at the time of entering into the release with the insured. See Allied Mut. Ins. Co. v. Heiken, 675 N.W.2d 820 (Iowa 2004). In this situation, an insurer’s right to subrogation against the tortfeasor is not barred and, in fact, the insurer must pursue reimbursement from the tortfeasor instead of the indemnified insured. See id.

V. Extracontractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

1. First Party

In recognition of the contractual relationship between the insurer and insured, the Iowa Supreme Court has recognized first party bad faith claims “to provide the insured an adequate remedy for the insurer’s wrongful conduct.” Dolan v. Aids Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988). To establish a claim for first party bad faith, a plaintiff must prove that: (1) the insurer had no reasonable basis for denying benefits under the policy; and (2) the insurer knew, or had reason to know, that its denial was without basis. McIlravy v. North River Ins. Co., 653 N.W.2d 323, 329 (Iowa 2002); United Fire & Cas. Co. v. Shelly Funeral Home, Inc., 642 N.W.2d 648, 657 (Iowa 2002). The first element is objective, while the second element is subjective. Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 473 (Iowa 2005).

A reasonable basis for denying insurance benefits exists if the claim is “fairly debatable” as to either a matter of fact or law. Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388, 396 (Iowa 2001); see also Covia v. Robinson, 507 N.W.2d 411, 416 (Iowa 1993). “A claim is ‘fairly debatable’ when it is open to dispute on any logical basis.” Bellville, 702 N.W.2d at 473. Whether a claim is “fairly debatable” can generally be determined by the court as a matter of law. Id. (quoting Gardner v. Hartford Ins. Accident & Indem. Co., 659 N.W.2d 198, 206 (Iowa 2003)) (“That is because ‘[w]here an objectively reasonable basis for denial of a claim actually exists, the insurer cannot be held liable for bad faith as a matter of law.’”) (emphasis
added). If the court determines that the defendant had no reasonable basis upon which to deny a claim, it must then determine if the insurer knew, or should have known, that the basis for denying the claim was unreasonable. Rodda v. Vermeer Mfg., 734 N.W.2d 480, 483 (Iowa 2007). The standard for determining whether the decision to deny coverage was “fairly debatable” requires an evaluation of whether the decision to deny such coverage was based “on the exercise of honest and informed judgment” on the part of the insurer. Wells Dairy, 241 F. Supp.2d at 969 (citing Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 12 (Iowa 1990)).


Currently, there is considerable debate as to whether the Iowa Supreme Court significantly altered Iowa’s bad faith law in Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468 (Iowa 2005). Arguably, the Iowa Supreme Court adopted a “directed verdict” standard for bad faith claims in Bellville. Under this rule, “[u]nless the trial court is prepared to grant a directed verdict to the insured on his claim under the policy . . . it follows that reasonable minds could disagree about the insured’s entitlement to the policy proceeds[]” and, “[t]herefore, the insurer should be entitled to a directed verdict in its favor on the insured’s bad faith claim. . . .” Bellville, 702 N.W.2d at 474 (quoting Stephen S. Ashley, Bad Faith Actions Liability & Damages § 5:04 (2d ed. 1997)). Thus, the existence of a submissible jury question on the insured’s entitlement to policy benefits will generally, though not automatically, establish that the issue is fairly debatable. See Reuter v. State Farm Mut. Auto. Ins., 469 N.W.2d 250, 254 (Iowa 1991). While some courts have inferred that Bellville significantly limits bad faith claims in Iowa because most bad faith claims can now be determined as a matter of law, other courts have opined that Bellville did not significantly alter Iowa’s existing bad faith law. Compare generally Calvert v. American Family Ins. Group, No. 04-1074, 711 N.W.2d 733 (Table), 2006 WL 126635, at *3-5 (Iowa Ct. App. Jan. 19, 2006) (finding, based on Bellville, a bad faith case can almost always be decided as a matter of law) with Niver v. Travelers Indem. Co., 412 F. Supp.2d 966, 978-79 (N.D. Iowa 2006) (finding that Bellville did not significantly change Iowa’s existing bad faith law); Zimmer v. Travelers Ins. Co., 454 F. Supp. 2d 839, 867 (S.D. Iowa 2006) (same). Specifically, in Niver v. Travelers Indemnity Co., 412 F. Supp.2d 966 (N.D. Iowa 2006), the Federal District Court for the Northern District of Iowa found that Bellville did not significantly change bad faith law in Iowa because the Bellville decision “does not expressly reject or distinguish any statement of the applicable standards in any prior case; instead the formulation of the applicable standard in Bellville relies primarily on prior Iowa decisions.” Niver, 412 F. Supp.2d at 978-79. The Niver court opined that any contention that Bellville adopted a “directed verdict” rule is most undermined by the fact that the Court in Bellville cited, with approval, to its earlier decision in Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d 250, 254 (Iowa 1991) wherein the Iowa Supreme Court rejected a “directed verdict” rule. Id. at 979. Accordingly, there remains a debate in Iowa.
regarding the effect of the Bellville decision and, more specifically, whether the “directed verdict” rule applies to bad faith claims. This debate will likely continue until the Iowa Supreme Court clarifies the issue.

2. Third-Party

When an insurer undertakes to defend an insured, the insurer has control over both the defense and settlement negotiations. Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637, 643 (Iowa 2000) (referencing Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 32 (Iowa 1982)). The covenant of good faith and fair dealing in these circumstances includes a “duty to settle claims without litigation in appropriate cases.” Kooyman, 315 N.W.2d at 33. Third-party bad faith arises when the insurer’s failure to settle a third-party claim exposes the insured to monetary liability that exceeds the policy limits. Id. at 33-34. While the right to seek bad faith damages against the insurer resides with the insured, under certain circumstances an insured may assign its rights to a third-party claimant, usually in exchange for a covenant not to execute on an excess judgment. See, e.g., id. (allowing third-party claimant to bring insured’s bad faith claim against insurer, after third-party claimant and insured had entered into an agreement to not execute on the excess judgment).

3. Damages

A claimant may recover both actual and punitive damages in a bad faith tort action against an insurer. See e.g., Kiner v. Reliance Ins. Co., 463 N.W.2d 9 (Iowa 1990) (reviewing a district court’s remittitur action on a jury verdict awarding both compensatory and punitive damages). Punitive damages awards are governed by statutory law in Iowa. Iowa Code § 668A.1 (2017). To recover punitive damages under Iowa Code section 668A.1, two issues must be established. First, the plaintiff must prove, by a preponderance of clear, convincing and satisfactory evidence and, that the defendant’s conduct amounted to a willful and wanton disregard for the rights of another; and second, the Plaintiff must prove that the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant’s claim is derived, Iowa Code § 668A.1, or that the defendant exhibited intentional, outrageous conduct. See Vlotho v. Hardin County, 509 N.W.2d 350, 356 (Iowa 1993). Merely objectionable conduct is insufficient to satisfy the requirements of section 668A.1. See e.g. Beeman v. Manville Corp. Asbestos Disease Compensation Fund, 496 N.W.2d 247, 255 (Iowa 1993); Larson v. Great West Cas. Co., 482 N.W.2d 170 (Iowa Ct. App. 1992). Conduct is willful and wanton in the context of a punitive damage claim only when an actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (1994).

“[A]n insurer who refuses, contrary to its contractual obligation, to defend a third-party action against its insured on the ground the policy involved affords no coverage is liable for attorney fees incurred by the insured in defense of the action brought against him.” New Hampshire Ins. Co. v. Christy, 200 N.W.2d 834, 840 (Iowa 1972) (citations omitted). Attorney fees or expenses, however, are not awarded in an action to establish insurance coverage “unless there is a showing made in the declaratory judgment action that the insurance company has acted in bad faith or fraudulently or was stubbornly litigious.” Clark-Peterson Co. v. Independent Ins. Ass’n, 514 N.W.2d 912, 915-16 (Iowa 1994) (quoting Christy, 200 N.W.2d
at 845). The recovery of emotional distress damages or injury to reputation or credit rating on a claim that an insurer acted in bad faith by failing to exercise good faith in representing an insured against a third party is permitted on the basis that such a claim is a tort. Berglund v. State Farm Mut. Auto. Ins. Co., 121 F.3d 1225, 1229-1230 (8th Cir 1997). The recovery of such damages may require that an injury to property be shown. Id.

B. Fraud

Under Iowa common law, the essential elements for a fraud action are well established: 1) materiality; 2) falsity; 3) representation; 4) scienter; 5) intent to deceive; 6) justifiable reliance; and 7) resulting injury and damage. Plymouth Farmers Mut. Ins. Ass’n v. Armour, 584 N.W.2d 289, 291-92 (Iowa 1998)(citations omitted). An insurer’s conduct in purporting to represent an insured and making settlement offers to a complaining third-party claimant despite the insurer’s intent not to pay the claim may give rise, under Iowa law, to a fraudulent misrepresentation claim on behalf of the third-party claimant. Bradley v. West Bend Mut. Ins. Co., No. 3-735/02-1938, 2003 WL 22900373, at *4-5 (Iowa Ct. App. Dec. 10, 2003).

Iowa Code chapter 507E governs claims alleging insurance fraud. Under this chapter, a person commits a class “D” felony if:

[T]he person, with the intent to defraud an insurer, does any of the following:

a. Presents or causes to be presented to an insurer, any written document or oral statement, including a computer-generated document, as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that such document or statement contains any false information concerning a material fact.

b. Assists, abets, solicits or conspires with another to present or cause to be presented to an insurer, any written document or oral statement, including a computer-generated document, that is intended to be presented to any insurer in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy, knowing that such document or statement contains any false information concerning a material fact.

c. Presents or causes to be presented to an insurer, any written document or oral statement, including a computer-generated document, as part of, or in, an application for insurance coverage, knowing that such document or statement contains false information concerning a material fact.


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

To establish a prima facie claim for the tort of intentional infliction of emotional distress, the plaintiff must establish: (1) outrageous conduct by the defendant(s); (2) the defendant(s)’ intention of causing, or reckless disregard of the probability of causing, emotional distress; (3) the
plaintiff(s) suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant(s)' outrageous conduct. Millington v. Kuba, 532 N.W.2d 787, 793 (Iowa 1995) (citation omitted).

Iowa courts have noted that "[i]t is for the court to determine in the first instance, [sic] as a matter of law, whether the conduct complained about may reasonably be regarded as outrageous." Northrup v. Farmland Indus., Inc., 372 N.W.2d 193, 198 (Iowa 1985) (citing Vinson v. Linn-Mar Community Sch. Dist., 360 N.W.2d 108, 118 (Iowa 1984) and Roalson v. Chaney, 334 N.W.2d 754, 756 (Iowa 1983)). To be sufficiently outrageous within the meaning of this cause of action, the conduct must be "so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Vinson, 360 N.W.2d at 118 (citations omitted).

Iowa courts recognize the tort of negligent, or unintentional, infliction of emotional distress, which is separate and distinct from the tort of intentional infliction of emotion distress. Lawrence v. Grinde, 534 N.W.2d 414, 420 (Iowa 1995). Generally, to recover on a claim for negligent infliction of emotional distress, the plaintiff must establish that he or she sustained a physical injury as a result of the defendant's conduct. See e.g., Clark v. Estate of Rice, 653 N.W.2d 166, 170 (Iowa 2002); Roling v. Daily, 596 N.W.2d 72, 75 (Iowa 1999). There are, however, narrowly applied exceptions to the physical injury requirement.

We have recognized recovery for emotional distress damages in actions which did not involve an intentional tort when a party negligently performed an act which was 'so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from nature of the [obligation] that such suffering will result from its breach.' Lawrence, 534 N.W.2d at 420-21 (citation omitted). The Iowa Supreme Court has recognized only four circumstances which satisfy this requirement, all of which are based on a contractual relationship or a pre-existing relationship of trust between the parties. Clark, 653 N.W.2d at 169-74. First, emotional distress damages have been permitted absent a physical injury in the context of a medical malpractice action based on a physician's negligent examination and treatment of a pregnant woman that resulted in the death of her fetus. Oswald v. LeGrand, 453 N.W.2d 634, 639 (Iowa 1990). Second, emotional distress damages have been allowed when a family member views the death or injury of a close family member, also known as a "bystander" claim. Barnhill v. Davis, 300 N.W.2d 104, 105-08 (Iowa 1981). Third, emotional distress damages have been permitted for negligence in the delivery of a communication that announces the death of a family member. Cowan v. Western Union Telegraph Co., 98 N.W. 281, 282-84 (Iowa 1904); Mentzer v. Western Union Tel. Co., 62 N.W. 1, 6 (Iowa 1895). Finally, the negligent performance of a contract for funeral services has also been found to support emotional distress damages absent a physical injury. Meyer v. Nottger, 241 N.W.2d 911, 920 (Iowa 1976).

D. State Consumer Protection Laws
Chapter 507B of the Iowa Code governs insurance trade practices. Under this chapter, insurers are prohibited from engaging in unfair or deceptive acts or practices in the business of insurance. Iowa Code § 507B.3 (2017). Iowa Code section 507B.4(3)(j), defines unfair or deceptive claims settlement practices. In Seeman v. Liberty Mut. Ins. Co., the Iowa Supreme Court held that the statutory duties imposed under Chapter 507B of the Code do not create a private cause of action against insurers, but rather the legislature intended the state insurance commissioner’s powers to be the exclusive means of enforcing these statutory provisions. 322 N.W.2d 35, 42-43 (Iowa 1982).

VI. Discovery Issues in Actions Against Insurers

A. Discoverability of Claims Files Generally

Under Iowa law, an insurer’s investigation of a claim, even if performed in the ordinary course of business, can constitute non-discoverable work-product. In Wells Dairy, Inc. v. American Indus. Refrigeration, Inc., the Iowa Supreme Court adopted the Wright and Miller work-product test. 690 N.W.2d 38 (Iowa 2004). Under the Wright and Miller test, the proper inquiry when determining whether a document was prepared in anticipation of litigation, and thus work-product, is “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” Wells Dairy, Inc., 690 N.W.2d at 48 (citing 8 Charles Alan Wright et al., Federal Practice and Procedure § 2024, at 198-99 (2d ed. 1994)). “If the documents ‘would have been created in essentially similar form irrespective of litigation[,] . . . it [cannot] fairly be said that they were created ‘because of’ actual or impending litigation.” Wells Dairy, 690 N.W.2d at 48 (citing U.S. v. Aldman, 134 F.3d 1194, 1202 (2d Cir. 1998)). Accordingly, a claim file and/or documents in a claim file can be shielded from discovery by Iowa’s work-product rule to the extent that those documents can satisfy the Wright and Miller test.

Where bad faith is at issue, however, the scope of discovery to which the insured may be entitled is expanded. In particular, the Iowa Supreme Court has found that the claim file may be discoverable when a bad faith claim against the insurer is raised. See generally Squealer v. Pickering, 530 N.W.2d 678 (Iowa 1995), abrogated by Wells Dairy, Inc., 690 N.W.2d 678. In these instances, although materials generated subsequent to the denial of coverage are generally not discoverable, the court has allowed an in-camera inspection of such subsequent materials where additional information was provided to or came to the attention of the insurer and the case involves issues regarding whether the insurer acted in bad faith to continue to deny coverage after receiving the additional information. Id. at 683.

B. Discoverability of Reserves

The Eighth Circuit has recognized that although insurance company risk management documents are not typically prepared in anticipation of litigation, and, therefore, generally discoverable, they may be protected from discovery to the extent that they disclose individual case reserves calculated in anticipation of litigation. Simon v. G. D. Searle & Co., 816 F.2d 397, 401-02 (8th Cir. 1987). The court found that “individual case reserve figures reveal the mental impressions, thoughts and conclusions of an attorney in evaluating a legal claim[[]]” and, therefore, by their very nature, are prepared in anticipation of litigation. Id. Notably, however, the court held that when these individual reserves are combined in an aggregate form in
order to establish general risk management documents, they lose their individual value and significance and, therefore, become discoverable. Id.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

Neither Iowa state courts nor the Eighth Circuit Court of Appeals, when construing Iowa law, have directly addressed the discoverability of the existence of reinsurance and the discoverability of communications between an insurer and reinsurer. Recently, however, the United States District Court for the Northern District of Iowa confronted this issue. See Progressive Cas. Ins. Co. v. FDIC, 298 F.R.D. 417, 425 (N.D. Iowa 2014) (granting motion to compel communications with reinsurer); Progressive Cas. Ins. Co. v. FDIC, 302 F.R.D. 497, 501-04 (N.D. Iowa 2014) (upholding discovery of reinsurance information against privilege objections); Progressive Cas. Ins. Co. v. FDIC, 49 F. Supp. 3d 545 (N.D. Iowa Oct. 3, 2014) (denying privilege objections to production of communications with reinsurer). Most likely, Iowa courts would apply the general principles of discovery and look to determine whether the information sought in discovery is relevant, whether providing this information would place any undue hardship on the insurer, and lastly, whether this information may be obtained in any other way. The decisions by the Northern District of Iowa provide helpful guidance.

D. Attorney/Client Communications

An attorney retained by an insurer to satisfy its policy obligation to defend an insured against liability claims represents both the insurer and the insured. Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920 (Iowa 1958). As such, the insurer and insured are joint clients for attorney-client privilege purposes, yet such privilege will not extend in any later litigation between the insurer and insured. Id. Notably, under Iowa law, the joint-client exception to the attorney-client privilege and work product doctrine applies to permit discovery of privileged communications between outside counsel retained by an insurer to pursue a subrogation action and the insurer’s employees that were made in the course of the subrogation litigation, by the insured, in whose name the subrogation action was brought, in subsequent litigation stemming from the same facts giving rise to the subrogation action. Brandon v. West Bend Mut. Ins. Co., 681 N.W.2d 633, 639-40 (Iowa 2004). However, the scope of discovery in this situation is limited to communications made during the period of joint representation of the insured and the insurer by outside counsel retained by the insurer. Id. Furthermore, a person does not waive the attorney-client privilege by verifying or providing information for answers to interrogatories. Id.

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

The elements for an equitable claim of rescission of an insurance policy based on misrepresentation are: (1) representation; (2) falsity; (3) materiality; (4) intent to induce other to act or refrain from acting; and (5) justifiable reliance. Hyler v. Garner, 548 N.W.2d 864, 871 (Iowa 1996) (citation omitted). Because the remedy of rescission is seen by Iowa courts as less severe than an award of damages, the proof required for
rescission is less demanding than the proof required to establish the tort of misrepresentation. Id. (citation omitted).

Submission of a fraudulent claim may not prevent an insured’s recovery on the insurance policy if the violation or fraud with regard to the policy provisions did not contribute to the loss. Am. Family Mut. Ins. Co. v. Mill, 569 F. Supp. 2d 841, 854 (S.D. Iowa 2008). Iowa Code section 515.101 provides any condition or stipulation in an application, policy or contract of insurance making the policy void before the loss occurs shall not prevent recovery on the policy by the insured, if the plaintiff shows that the failure to observe such provisions or the violation thereof did not contribute to the loss. Id.

B. Failure to Comply with Conditions

In addressing the burden of proof in disputes over breach of insurance policy terms, the Iowa Supreme Court has consistently required the party seeking coverage to prove compliance with the applicable policy terms. American Guar. & Liability Ins. Co. v. Chandler, 467 N.W.2d 226, 228-29 (Iowa 1991) (citations omitted). The claiming party may satisfy this burden in one of three ways: (1) showing substantial compliance with the policy provision; (2) showing that the failure to comply was either excused or waived; or (3) showing that the failure to comply was not prejudicial to the insurer. Id. (citing Henderson v. Hawkeye Security Ins. Co., 106 N.W.2d 86, 92 (Iowa 1960)).

Iowa Code section 516A.1 establishes physical contact as a condition for coverage under a UM policy claim based on an accident caused by an unidentified motorist (i.e., a “hit-and-run” driver). Iowa Code § 516A.1 (2017). The Iowa Supreme Court has consistently found that the physical contact requirement in section 516A.1 does not violate the Equal Protection Clauses of the Iowa and Federal constitutions. Claude v. Guar. Nat’l Ins. Co., 679 N.W.2d 659, 665 (Iowa 2004); Mortiz v. Farm Bureau Mut. Ins. Co., 434 N.W.2d 624, 627 (Iowa 1989). Consequently, as a prerequisite to advancing a UM claim based on an accident with an unidentified motorist, the insured must first establish physical contact between the insured’s vehicle and the uninsured/unknown vehicle. Id. Failure to establish physical contact is grounds for denying a UIM claim even if multiple non-party witnesses testify that the uninsured/unknown vehicle was the cause of the accident. Claude, 679 N.W.2d at 665.

When an insurer seeks to void coverage because of an insured’s failure to cooperate, as required under an insurance policy, the insurer must first demonstrate that it exercised reasonable diligence in securing the insured’s cooperation. Bradley v. West Bend Mut. Ins. Co., 2003 WL 22900373, at *3-5. Additionally, the insured must show that it was prejudiced by the insured’s alleged lack of cooperation before denying a third-party beneficiary’s claim under the policy. Id.

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

“When an insurer defends an insured, it has control over the defense and over settlement.” Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637, 643 (Iowa 2000) (referencing Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 32 (Iowa 1982)). In situations where the insured and a third party settle or enter into a stipulated judgment because the insurer refuses to defend, the
insurer must plead and prove that the settlement was the result of fraud or collusion. Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524, 535 (Iowa 1995). If either defense is proven, the settlement is invalid and unenforceable against the insurer. Id. In this context, the injured plaintiff has the burden to prove by a preponderance of the evidence that (1) the underlying claim was covered by the policy, and (2) the settlement which resulted in judgment was reasonable and prudent. Id.

However, in situations where the insurance company breaches its duty of good faith and fair dealing to settle when faced with a fair and reasonable settlement demand that a reasonable and prudent insurer would pay, the insurer, if found to have coverage, may be liable for a settlement or stipulated judgment entered into between the insured and an injured third party. Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637, 643 (Iowa 2000).

Similarly, under Iowa law, a consent-to-be-bound provision in a UIM policy is valid “provided the insurer does not withhold or refuse its consent without a reasonable basis to do so.” Wilson v. Farm Bureau Mut. Ins. Co., 714 N.W.2d 250, 258 (Iowa 2006). When there is a consent-to-be-bound provision in the policy, the insured is obligated to comply with all the provisions of the policy and obtain a valid judgment against an underinsured motorist. Id. Thereafter, the insurer “has an implied reciprocal duty to refrain from withholding or refusing its consent to be bound by the judgment without a reasonable basis to do so.” Id. Where an insurer challenges consent to a judgment, the insurer has the burden to show it was prejudiced “when [the] insured has not secured the insurer’s consent to be bound.” Id. at 259.

D. Statutes of Limitations

The statute of limitations in an insurance coverage claim depends on whether the plaintiff asserts a cause of action based upon contract or tort theories. Actions based upon a breach of written contract are subject to a ten-year limitations period. Iowa Code § 614.1(5) (2017). Alternatively, actions based on tort theories are subject to a two-year limitations period. Iowa Code § 614.1(2) (2017). This two-year limitation period does not commence until the plaintiff discovers the injury, or by reasonable diligence should have discovered it. Nixon v. State, 704 N.W.2d 643, 646 (Iowa 2005) (citations omitted). Similarly, actions based on a medical malpractice claim are limited to two years after the date the claimant knew, or through reasonable diligence should have known, of the injury or death for which damages are sought. Iowa Code § 614.1(9) (2017).

Under common law, this exception to the two-year statute was referred to as the “discovery rule.” Chrischilles v. Griswold, 150 N.W.2d 94, 100 (Iowa 1967), superseded by statute as stated in Rathje v. Mercy Hosp., 745 N.W.2d 443 (Iowa 2008). Under the common law discovery rule, knowledge of the injury was imputed when a person gained knowledge sufficient to put the person on inquiry notice, triggering a duty to investigate even though the person might not possess knowledge or facts of the nature of the problem that caused the injury. Langner v. Simpson, 533 N.W.2d 511, 517 (Iowa 1995).

Iowa case law has raised the question, at least with respect to cancer, of whether the statutory language of Iowa Code section 614.1(9) has eliminated “inquiry notice” with respect to the common law discovery rule, and replaced it with the requirement that a claimant actually be diagnosed with the injury that forms the basis of the claim and have knowledge of its factual cause before the limitation commences. See Murtha v. Calahan, 745
N.W.2d 711 (Iowa 2008) (holding that an "injury" does not occur merely upon the existence of the continuing undiagnosed condition, but rather occurs when the problem grows into a more serious condition which poses greater danger to the patient or which requires more extensive treatment); Rathje v. Mercy Hospital, 745 N.W.2d 443 (Iowa 2008) (holding the limitations period under 614.1 (9) does not begin until discovery of both the injury and its factual cause); see also Rock v. Warhank, 757 N.W.2d 670 (Iowa 2008) (holding that plaintiff could not, and should not, have known of her injury until the day of diagnosis and that common law notions of inquiry notice should not be incorporated into the statute). Iowa courts continue to cite these cases with approval. Accordingly, it is unclear whether, or to what extent, the elimination of inquiry notice with regard to medical malpractice claims will impact tort actions generally.

Additionally, the Iowa Supreme Court has recognized that reduced contractual limitations periods, established within an insurance policy, are enforceable if the period is reasonable. Nicodemus v. Milwaukee Mut. Ins. Co., 612 N.W.2d 785, 787 (Iowa 2000). An insurance policy-established limitation period “must provide a reasonable period of time for filing actions to recover under the insurance contract.” Id. (citation omitted). Notably, in a case where the Iowa Supreme Court found a contractual limitation period to be clearly unreasonable and, therefore, invalid, the court adopted the standard ten-year limitations period for written contracts under Iowa Code section 614.2 as the applicable limitations period. Faeth v. State Farm Mut. Auto. Ins. Co., 707 N.W.2d 328, 334-35 (Iowa 2005).

Where an insurance policy is ambiguous as to when the limitations period begins to run, the “general rule is that the contract statute of limitations commences upon the date the contract is breached.” Hamm v. Allied Mut. Ins. Co., 612 N.W.2d 775, 784 (Iowa 2000) (referencing Diggan v. Cycle Sat, Inc., 576 N.W.2d 99, 102 (Iowa 1998)). A breach occurs when an insurer denies an insured’s request for benefits. Hamm, 612 N.W.2d at 784.

VIII. Trigger and Allocation Issues for Long-Tail Claims

A. Trigger of Coverage

When coverage becomes triggered under the policy depends largely upon whether the insurance contract is to indemnify against a loss or to indemnify against a liability. Central Nat’l Ins. Co. v. Ins. Co. of N. Am., 522 N.W.2d 39, 42 (Iowa 1994). Under a policy designed to indemnify against a loss, coverage is not triggered until the insured has suffered a proven loss. Id. For instance, the Iowa Supreme Court has recognized that a claim for UM benefits in the aftermath of a self-insurer’s insolvency would not accrue until the insolvency. Faeth v. State Farm Mut. Auto. Ins. Co., 707 N.W.2d 328, 334-35 (Iowa 2005). Under a policy designed to indemnify against a liability, the obligation of the insurer becomes fixed when the liability attaches to the insured. Central Nat’l Ins. Co., 522 N.W.2d at 42 (citation omitted).

An additional consideration for liability policies is whether the policy is an “occurrence” or a “claims made” policy. Occurrence policies, the most common type of liability policies, generally provide coverage for any covered occurrence that arises during the policy period, regardless of when the claim is actually made. Tacker v. American Family Mut. Ins. Co., 530 N.W.2d 674, 675-76 (Iowa 1995). Whereas, a claims made policy covers any claim, possibly including claims which occurred prior to the effective date.
of the policy, so long as the claim is made within the policy period. Hasbrouck v. St. Paul Fire & Marine Ins., 511 N.W.2d 364, 366 (Iowa 1993). Some policies, however, limit prior acts coverage to those incidents that the insured had no knowledge of prior to the effective policy date nor that the insured had any reasonable way to foresee that the claim may be brought. Lewis v. St. Paul Fire & Marine Ins., 452 N.W.2d 386, 388 (Iowa 1990). These policies also typically include a retroactive date that precludes coverage for any acts prior to that date.

When multiple policies potentially cover a loss that occurred over a period of time, courts have promulgated several theories to determine if damage occurred during a policy's term: exposure; manifestation; discovery; actual damage; and multiple trigger. Village of Morrisville Water & Light Dept. v. USF&G, 775 F. Supp. 718, 729-31 (D. Vt. 1991). Under the exposure rule, damage transpires when the first exposure to the loss-causing event occurs. Id. at 730. The manifestation rule finds an occurrence when damages become apparent to the injured party or are manifested. Id. Under the actual damage or injury-in-fact rule, an occurrence transpires when the property is actually harmed by the exposure, but the injury need not have been apparent at the time. Id. at 731. Two commonly accepted multiple-trigger theories also exist. Under the double trigger rule, damage occurs when exposure first occurs and when it is manifested or apparent. Id. at 730. Conversely, under the triple or continuous trigger theory, an occurrence is found upon exposure, manifestation and all points in between. Id. at 730-31. Iowa Courts have not ruled on this issue, but based on the language of liability policies and analysis in other cases, would likely adopt an injury-in-fact or actual damage theory for trigger of coverage issues. See The Weitz Co., L.L.C. v. Travelers Cas. & Sur. Co., 266 F. Supp. 2d 984 (S.D. Iowa 2003). The operative language of the policy, however, would be the primary factor in making any ruling on the trigger of coverage issue by an Iowa Court.

B. Allocation Among Insurers

There are three primary types of other insurance clauses: (1) those providing that in the event of other insurance, the insurer issuing the policy in question is not liable at all (usually called "escape" clauses); (2) those providing that in the event of other insurance, the coverage offered by the policy in question shall be "excess" coverage, that is, the insurer is liable only if the loss is in excess of the limits of the other policy or policies (usually called "excess" clauses); and (3) those providing that in the event of other insurance, the insurer issuing the policy in question shall be liable only for the proportion of the loss that represents the ratio between the limit of liability stated therein and the total limit of liability of all valid and collectible insurance covering the loss (usually called "pro rata" clauses). Grinnell Mut. Reinsurance Co. v. Globe Am. Cas., 426 N.W.2d 635, 637 (Iowa 1988) (citation omitted).

The general rule in Iowa is that where one of the policies contains an "excess" coverage clause and the other contains a "pro rata" clause, effect is generally given to the excess coverage clause. Id. (citation omitted). Thus, the excess carrier pays only to the extent that the "pro rata" insurance policy fails to satisfy the claim. Id. (citations omitted).

IX. Contribution Actions

Under Iowa law, contribution rights and remedies are found at Iowa Code §§ 668.5 and 668.6. The basis for contribution is each person’s equitable
share of the overall liability, including the share of fault of claimant, as determined in accordance with Iowa Code section 668.3. See Iowa Code § 668.5(1)(2017). For contribution to be available, the tortfeasors must have common liability to the injured party. See Rees v. Dallas County, 372 N.W.2d 503, 504 (Iowa 1985) (citations omitted). Common liability, however, need not be based on the same legal theory to give rise to contribution. See Allied Mut. Ins. Co. v. State, 473 N.W.2d 24, 27 (Iowa 1991) (citing Schreier v. Sonderleiter, 420 N.W.2d 821, 824 (Iowa 1988)).

Contribution is available to a person who enters a settlement with a claimant only if the liability of the person against whom contribution is sought has been extinguished and only to the extent that the amount paid in settlement was reasonable. See Iowa Code § 668.5(2) (2017).

Iowa Code section 668.5(3) also set forth rules for subrogation payment restrictions.

A. Claim in Equity v. Statutory

The provisions for enforcement of a contribution claim are found in Iowa Code § 668.6. Contribution may be enforced either in the original action or in a separate action. See Iowa Code § 668.5(1)(2017). An action for contribution must be commenced within one year after the judgment becomes final, if a judgment has been entered. See Iowa Code § 668.3 (2017). If a judgment has not been entered, a claim for contribution is only enforceable by satisfying one of the following two conditions:

(1) The person bringing the action for contribution must have discharged the liability of the person from whom contribution is sought by payment made within the period of the statute of limitations applicable to the claimant’s right of action and must have commenced the action for contribution within one year after the date of that payment.

(2) The person seeking contribution must have agreed while the action was pending to discharge the liability of the person from whom contribution is sought and within one year after the date of the agreement must have discharged that liability and commenced the action for contribution.


Please note, however, there can be no independent cause of action for contribution without the underlying liability. See generally Blair v. Werner Enters., 675 N.W.2d 533 (Iowa 2004). In Blair, the Iowa Supreme Court upheld the Iowa district court’s dismissal of a tortfeasor’s contribution claims that sought contribution through counterclaims against the plaintiffs and cross-claims against the other defendants where the plaintiffs had voluntarily dismissed the Iowa state court action to file in federal court in Texas. See id.

A petition filed under Iowa Code Chapter 668 tolls the statute of limitations against all parties “who may be assessed any percentage of fault under this chapter.” However, the person must have “party” status, as defined in Iowa Code § 668.2 (2017).
B. Elements

As noted, the elements of contribution are fact and situation dependent. The elements of a particular claim will depend on the existing facts and the tort cause of action that permits liability under those facts. When pleading contribution claims, Iowa Code §§ 668.5 provides a general guide regarding the required statutory procedures.

X. Duty to Settle

As noted above, when an insurer defends and insured, it has control over the defense and over settlement. See Kelly, 620 N.W.2d 637, 643. The Iowa Supreme Court has recognized that in those situations, the insurer is subject to an implied covenant of good faith and fair dealing, which includes a duty to settle claims without litigation in appropriate cases. See Kelly, 620 N.W.2d at 643 (citations omitted). Insurers who fail to exercise good faith when determining whether to settle a claim can be subject to bad faith litigation. The Iowa Supreme Court has summarized the legal principles governing when an insurance company has breached its duty of good faith by failing to settle within policy limits as follows:

We begin with the simple assumption that an insured buys an agreed amount of liability protection for a set premium. The insured, in the first instance, is at risk for the amounts in excess of the protection which has been purchased. The policy limits, however, set a boundary which the insurer cannot misuse to the detriment of the insured. It is bad faith for an insurance company to act irresponsibly in settlement negotiations with respect to the insured's risk in that part of the claim in excess of coverage. It is bad faith for the company to factor in its consideration of settlement offers the limited amount between an offer and the policy limits.

The best standard for good faith in a specific negotiation is to ignore the policy limits. If, but for the policy limits, the insurer would settle for an offered amount, it is obliged to do so (and pay toward settlement up to the policy limits). But the insurer is free to reject the offer if it would have rejected the same offer under policy limits covering the whole claim.

See Kelly, 620 N.W.2d at 644 (quoting Wierck, 456 N.W.2d at 194-95. In sum, the test in Iowa for excess liability has been established as one of bad faith, not negligence. See Kelly, 620 N.W.2d at 644(citing Ferris v. Employers Mut. Cas., 122 N.W.2d 263, 266 (Iowa 1963)).

An insurer also has a duty to settle in situations where the insurer has reserved its rights to deny coverage, but the insurer's liability for failure to settle changes. In those situations, "where the insured may ultimately be

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1 An insurer does not act in bad faith when it refuses to settle a case based on a coverage dispute. See Kelly, 620 N.W.2d at 644 n.5 (citing Cay Divers, Inc., 812 F.2d at 871 (holding the carrier’s “refusal to consent to settlement in the face of a genuine concern over coverage does not constitute bad faith.”); Associated Wholesale Grocers, Inc.
responsible for a judgment if coverage is found not to exist, it is extremely important that the insurance company, who is controlling the defense, fulfill its contractual obligation to settle were appropriate.” See Kelly, 620 N.W.2d at 645. In Kelly v. Iowa Mut. Ins. Co., the Iowa Supreme Court concluded

An insurance company cannot use its erroneous belief that it has no coverage to justify a refusal to settle. At the point in time that the insurer is faced with a fair and reasonable settlement demand that a reasonable and prudent insurer would pay, the insurer must either abandon its coverage defense and pay the demand or lose its right to control the conditions of settlement. If the insurer prefers to debate coverage and, accordingly, refuses to pay the settlement demand, the insured is free to either pay the settlement demand or stipulate to the entry of judgment in the amount of the demand. The insurer, if found to have coverage, will be liable for the insured's settlement if the settlement is found to be fair and reasonable.

See 620 N.W.2d at 645-46 (internal citations omitted). Accordingly, the standard is “when an insurer provides a defense under a reservation of rights and rejects a fair and reasonable settlement demand that a reasonable and prudent insurer would pay, the insured is free to consummate the settlement on those terms that protect the insured from any personal exposures.” See Kelly, 630 N.W.2d at 646.

v. Americold Corp., 934 P.2d 65, 90 (Kan. 1997) (holding that an insurer is not subject to excess liability where it refuses to settle a claim based on a good faith question as to coverage)).