I. Regulatory Limits on Claims Handling

A. Timing for Responses and Determinations

The relevant times are found in the Kentucky Administrative Regulations on Trade Practices and Frauds. 806 KAR 12:095. An insurer must acknowledge receipt of a claim within 15 days unless payment is made within that period of time. 806 KAR 12:095 §5. If an acknowledgement is made by means other than writing, an appropriate notation of the acknowledgement shall be made in the claim file of the insurer and dated. Notification given to an agent of an insurer shall be notification to the insurer. 806 KAR 12:095 §5(1). An insurer is required to respond to all other communications from a claimant within 15 days if a response is needed. 806 KAR 12:095 §5(3). An insurer must affirm or deny claims within a reasonable time, and the insurer must offer all payments due within 30 calendar days of receipt of proof of loss. 806 KAR 12:095 §6(1)(a). If the insurer needs more time to determine whether to accept or deny the claim, it must notify the insured within 30 calendar days after the receipt of proof of loss and give the reasons more time is needed. 806 KAR 12:095 §6(1)(b)(2)(a). If the investigation remains incomplete, the insurer shall, 45 calendar days from the date of the initial notification and every 45 calendar days thereafter, send to the first party claimant a letter stating the reasons additional time is needed for investigation. 806 KAR 12:095 §6(1)(b)(2)(b).

B. Standards for Determinations and Settlements


C. Privacy Protections (In addition to Federal Gramm-Leach-Bliley Act)
Kentucky administrative regulations provide that an insurer cannot disclose nonpublic personal health information about a customer without sufficient authorization. See 806 KAR 3:220 §3.

II. Principles of Contract Interpretation

The rules of contract interpretation in Kentucky are well established. Questions of contract interpretation are questions of law. Stilger v. Flint, 391 S.W.3d 751, 753 (Ky. 2013) (“it is well established that the construction as well as the meaning and legal effect of a written instrument … is a matter of law for the court.”) (Internal quotations omitted); see also Ky. Shakespeare Festival, Inc. v. Dunaway, 490 S.W.3d 691, 695 (Ky. 2016) (“The interpretation of a contract, including determining whether a contract is ambiguous, is a question of law to be determined de novo on appellate review.”) When interpreting a contract, such an agreement is construed as a whole and all writings that are part of the same transaction are interpreted together. Citizens Fidelity Bank & Trust Co. v. United States, 209 F.Supp. 254, 256 (W.D. Ky. 1962); see also Acro-Bramer, Inc. v. Markel Ins. Co., 55 S.W.3d 841, 845 (Ky. Ct. App. 2000) (“Under Kentucky law, a contract must be construed as a whole, and all writings that are part of the same agreement are construed together.”); City of Louisa v. Newland, 705 S.W. 2d 916, 919 (Ky. 1986) (“Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible.”) Likewise, provisions that are repugnant to a contract's obvious or essential purpose should be disregarded:

Where repugnancy is found between clauses, the one which essentially requires something to be done to effect the general purpose of the contract is entitled to greater consideration than the other. The whole agreement should, if possible, be construed so as to conform to an evident consistent purpose. Accordingly, a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent may be disregarded.

Int'l Union of Op. Eng. v. J.A. Jones Const. Co., 240 S.W.2d 49, 56 (Ky. 1951); see also Eastham v. Church, 219 S.W.2d 406, 409 (1949) (“Fairness, justice and common understanding must enter into the interpretation of any instrument, and an apparent mistake in the use of words will not be permitted to impair what was the real intention of the parties or to defeat their obvious purpose.”) Further, definite provisions prevail over less definite provisions. Id.

If the contract is a fully integrated agreement, then its interpretation is “directed to the meaning of the terms of the writing in light of the circumstances.” Cook United, Inc. v. Waits, 512 S.W.2d 493, 495 (Ky. 1974). Furthermore, the primary consideration during such interpretation is the determination of the intent of the makers from the language employed in the contract. Reynolds Metal Co. v. Glass, 195 S.W.2d 280, 283 (Ky. 1946) (citing Dep't of Revenue v. McIlvain, 195 S.W.2d 63 (Ky. 1946)); Wilcox v. Wilcox, 406 S.W.2d 152, 153 (Ky. 1966). "When no ambiguity exists in the contract, [the court will] look only as far as the four corners of the document to determine the parties' intentions." Hoheimer v. Hoheimer, 30 S.W.3d 176, 178 (Ky. 2000). If that language is plain and unambiguous, then its meaning should be upheld as expressed. Reynolds Metal Co., 195 S.W.2d at 284; O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891, 893 (Ky. 1966) (“In the absence of ambiguity a written instrument will be enforced strictly according to its terms.”) Courts give the words in a contract their "ordinary meaning
as persons with the ordinary and usual understanding would construe them.”

Any unusual result that might follow the enforcement of the express writing should not influence the effectiveness of that plain and unambiguous language. Reynolds Metal Co., 195 S.W.2d at 284. Courts often express this doctrine in the adage: “the intention to be gathered from employed language is the one that it plainly expresses, and not the one that may have been in the mind of the composer, but which he failed to express.” Id.; see also Frear v. P.T.A Industries, Inc., 103 S.W. 3d 99, 107 (Ky. 2003) (“[A]n otherwise unambiguous contract does not become ambiguous when a party asserts--especially post hoc, and after detrimental reliance by another party--that the terms of the agreement fail to state what it intended.”).

Where the parties reduce their agreement to a clear and definite writing which makes a complete contract, their rights and obligations are controlled by the contract language, and the contract must stand as written, absent a plea of fraud or mutual mistake. E.g., Bullock v. Young, 67 S.W.2d 941, 946 (Ky. 1934).

However, if the language of a document is deemed ambiguous, then parole evidence is admissible for the purpose of adding clarity to such obscure or ambiguous terms. In Gibson v. Sellars, 252 S.W.2d 911, 913 (Ky. 1952), the Kentucky Court of Appeals stated:

Extrinsic proof is competent and may be employed in construing language, the meaning of which is obscure or which is susceptible of two or more interpretations. However, because of the inherent danger of the rule, its use is permitted only in those cases where the language to be construed is so ambiguous or obscure in meaning as to defy interpretation otherwise. An extension of the rule would result in chaos and confusion, and it would be impossible to determine the rights of the parties to a contract without viewing all the circumstances surrounding the execution of the document in question.

Thus, the rule is applied fastidiously, only where a court cannot find a singular interpretation for a particular contract term. A contract is ambiguous only "if a reasonable person would find it susceptible to a different or inconsistent interpretation." See Cantrell Supply, Inc. v. Liberty Mutual Ins. Co., 94 S.W.3d 381, 385 (Ky. App. 2002). Where it is possible to interpret the language of the contract in more than one way, the interpretation which is consistent with the document as a whole prevails. Frear v. P.T.A Industries, Inc., 103 S.W. 3d 99, 106 (Ky. 2003). Moreover, "If an ambiguity exists, 'the court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written,' by evaluating extrinsic evidence as to the parties' intentions." Id.

Kentucky also follows the “ordinary meaning” and “construction against drafter” rules. The former posits that the words of a contract shall be given their ordinary and usual meaning unless the context in which they are used indicates that the parties to the agreement intended to assign a different meaning to the terms in question. Cook United, 512 S.W.2d at 495. The latter rule states that a contract must be construed more strictly against the party who prepared it. Pulliam v. Wiggins, 580 S.W.2d 228, 231 (Ky. Ct. App. 1978) (“it is axiomatic that a contract must be construed more strongly
against the party who prepared it.”) Further, “[I]n cases of doubtful construction, [courts] will resolve the doubt against the maker of the instrument in favor of the party thereto who did not take part in its preparation.” Fidelity & Deposit Co. of Maryland v. Lyon, 124 S.W.2d 74, 77 (Ky. 1939). See also, Home Folks Mobile Homes, Inc. v. Meridian Mut. Ins. Co., 744 S.W.2d 749, 750 (Ky. Ct. App. 1987) (“Generally, ambiguities in insurance policies, as with other contracts, are construed against the drafter.”); B. Perini & Sons v. Southern Ry. Co., 239 S.W.2d 964, 966 (Ky. 1951) (“No rule is better established than that, when a contract is susceptible of two meanings, it will be construed strongest against the party who drafted and prepared it.”).

An adhesion contract is one about which the individual has no choice regarding the terms and provisions. See General Electric Co. v. Martin, 574 S.W.2d 313, 317 (Ky. Ct. App. 1978). As to contracts of adhesion, the courts have held, “[i]f the contract has two constructions, the one most favorable to the [non-drafter] must be adopted” and “[i]f the contract language is ambiguous, it must be liberally construed to resolve any doubts in favor of the [non-drafter].” Wolford v. Wolford, 662 S.W.2d 835, 838 (Ky. 1984). In Kentucky, “[u]niformly, contracts of adhesion ... are construed against the party who formulated the terms and any doubt resolved in favor of the other party.” Kentucky Lottery Corp. v. Casey, 862 S.W.2d 888, 889 (Ky. 1993).

Under Kentucky law, “there is yet another rule which requires the construction to be applied to a written instrument which will give force and effect to each and all terms, if that can be done, and which will render it and all of the terms of the contract valid and enforceable.” Krausgill Piano Co. v. Federal Electric Co., 287 S.W. 962, 963 (Ky. 1927).

III. Choice of Law

In contract cases, Kentucky courts apply the law of the state which has the most significant relationship to the transaction and parties; and/or the greatest interest in the outcome of the litigation. Bonnlander v. Leader, 949 S.W.2d 618 (Ky. Ct. App. 1996); Lewis v. American Family Ins. Group, 555 S.W.2d 579, 582 (Ky. 1977) (citing with favor the "most significant relationship test" of the Second Restatement and, more specifically, that section of the Second Restatement applicable to insurance contracts.) For example, in an insurance policy dispute, the law of residence of the named insured determines scope of the insurance policy. Id. However, Kentucky courts are very "egocentric or protective" concerning choice of law questions. Paine v. La Quinta Motor Inns, Inc., 736 S.W.2d 355, 357 (Ky. Ct. App. 1987) (overruled on other grounds.) For example, in Breeding v. Massachusetts Indemnity and Life Insurance Co., the court applied Kentucky substantive law even though the insurance contract at issue specified that Delaware law would govern. 633 S.W.2d 717, 719 (Ky. 1982). This conclusion was reiterated in Harris Corp. v. Comair, Inc., where the court stated that Kentucky applies its own laws where there are "sufficient contacts and no overwhelming interests to the contrary, even if the parties have voluntarily agreed to apply the law of a different state.” 712 F.2d 1069, 1071 (6th Cir. 1983). See also Reichwein v. Jackson Purchase Energy Corp., 397 S.W.3d 413, 416 (Ky. Ct. App. 2012)("[In a] contract action, ... the law of the state with the greatest interest in the outcome of the litigation should be applied.")

Four primary factors guide a forum-selection provision analysis in Kentucky. First, forum-selection provisions are enforced as prima facie valid unless the opposing party can “demonstrate circumstances that would render the clause unfair or unreasonable.” Shafer Plaza, 2008 WL 4754877, at *3; see also Prezocki v. Bullock Garages, Inc., 938 S.W.2d 888, 889 (Ky. 1997) (reiterating same); Prudential Resources Corp. v. Plunkett, 583 S.W.2d 97, 99 (Ky. Ct. App. 1979) (seminal case establishing Kentucky's forum-selection interpretation). Additionally, a trial court must consider the inconvenience created by holding the trial in the specified forum, the disparity of bargaining power between the two parties, and whether the state in which the incident occurred has a minimal interest in the lawsuit. Shafer Plaza, 2008 WL 4754877, at *3-4; Prezocki, 938 S.W.2d at 889; Prudential, 583 S.W.2d at 99-100. The trial court should also factor in the rudimentary principle that contract ambiguities must be construed more strongly against the party who prepared it. Pulliam v. Wiggins, 580 S.W.2d 228, 231 (Ky. Ct. App. 1978).


IV. Duties Imposed by State Law

A. Duty to Defend

1. Standard for Determining Duty to Defend

Kentucky courts have recognized that the duty to defend is broader than the duty to indemnify. Ky. Farm Bureau Mut. Ins. Co. v. Blevins, 268 S.W.3d 368, 374 (Ky. Ct. App. 2008); James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 279 (Ky. 1991). An insurer has a duty to defend if there is an allegation which potentially, possibly, or might come within the coverage of the policy. O'Bannon v. Aetna Cas. & Sur. Co., 678 S.W.2d 390, 392 (Ky. 1984); Thompson v. West Am. Ins. Co., 839 S.W.2d 579, 581 (Ky. Ct. App. 1995). This duty arises regardless of the merits of the action. Wolford v. Wolford, 662 S.W.2d 835, 838 (Ky. 1984). If the claim clearly is not within the coverage of the policy, then no duty to defend arises. United States Fid. & Guar. Co. v. Star Fire Coals Co., 856 F.2d 31 (6th Cir. 1988). The determination of whether a duty to defend arises must be made at the outset of the litigation, and then, where it applies, the duty continues until it is established that the liability upon which the claimant is relying is in fact not covered by the policy. James Graham Brown
In Kentucky, the duty to defend may include a duty to appeal a judgment against an insured where there are reasonable grounds for an appeal. *Ursprung v. Safeco Ins. Co.*, 497 S.W.2d 726, 728-31 (Ky. 1973).

2. Issues with Reserving Rights

An insurer may provide a defense to an insured while reserving its right to contest its responsibility for any judgment that may be entered against the insured. See, e.g., *Hensley v. Hartford Accident & Indem. Co.*, 451 S.W.2d 415 (Ky. 1970). However, an insured is not required to accept a defense offered by the insurer under a reservation of rights. *Med. Protective Co. v. Davis*, 581 S.W.2d 25, 26 (Ky. Ct. App. 1979). This may require that the insurer make the difficult decision to defend the insured without the right to later contest coverage or to relinquish the defense to the insured and risk a later determination that coverage is provided by the policy.

V. Extra Contractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

All insurance companies have an obligation to exercise utmost good faith in dealing with their insureds, and violation of this duty is actionable. *O’Bannon v. Aetna Cas. & Sur. Co.*, 678 S.W.2d 390 (Ky. 1994). Kentucky law provides for both common-law and statutory bad faith claims. See *Guaranty Nat’l Ins. Co. v. George*, 953 S.W.2d 946, 950 (Ky. 1997). Policy coverage is a prerequisite to maintaining a bad faith claim. *Curry v. Fireman’s Fund Ins. Co.*, 784 S.W.2d 176 (Ky. 1989); *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993). An insured may recover consequential and punitive damages in tort when an insurance company acts in bad faith. *Curry*, 784 S.W.2d 176. A self-insured tortfeasor is not subject to the Kentucky UCSPA or to a suit for bad faith, because he is not engaged in the business of insurance. *Davidson v. American Freightways*, 25 S.W.3d 94 (Ky. 2000). A bad faith action brought by a claimant insured is a first-party claim, while a bad faith action brought by a claimant other than the insured is a third-party claim. A third-party claim is actually a first-party claim assigned to a third party.

1. Common-Law Bad Faith

Common-law bad faith may arise under a number of scenarios, including bad faith by a carrier for refusal to defend, settle, or indemnify a claim. *Feathers v. State Farm Fire & Cas. Co.*, 667 S.W.2d 693 (Ky. Ct. App. 1983), overruled on other grounds by *Federal Kemper Ins. Co. v. Hornback*, 711 S.W.2d 844 (Ky. 1986), recognized a common law first-party bad faith claim premised upon an insurer’s failure to settle a claim made by an insured under its own policy. *Manchester Insurance Company and Indemnity Co. v. Grundy*, 531 S.W.2d 493, 501 (Ky. 1975) recognized a cause of action based upon an insurer’s refusal to settle a third-party liability claim. The standard for determining whether an insurer has acted in bad faith for failing to tender policy limits to a third party is whether the insurer’s failure to settle exposed the insured to an unreasonable risk of having a judgment rendered against him in excess of the policy limits, by considering the following factors: (1) whether the claimant offered to settle the case within the policy limits; (2) whether the insured requested that the insurer settle; and (3) what the
probability of recovery in excess of the policy limits is, examining how clear liability is and how extensive damages are. See also Davidson, 25 S.W.3d 94.

A plaintiff must prove the following elements of a common-law bad faith claim by clear and convincing evidence:

(1) The insurer is obligated to pay the claim under the terms of the policy;
(2) The insurer lacks a reasonable basis in law or fact for denying the claim; and
(3) The insurer either knew or acted with reckless disregard for whether such a basis existed.

See Hollaway v. Direct Gen. Ins. Co. of Miss., 497 S.W.3d 733, 737-738 (Ky. 2016); Davidson, 25 S.W.3d 94; see also Shepherd v. UnumProvident Corp., 381 F. Supp. 2d 608, 612 (E.D. Ky. 2005). Note that element one is judged by an objective standard and elements two and three are judged by a subjective standard.

2. Statutory Bad Faith

The Kentucky Unfair Claims Settlement Practices Act ("UCSPA") applies to persons or entities engaged in the business of insurance by entering into contracts of insurance. The UCSPA does not create a cause of action for damages for violation of its provisions; however, a cause of action arises under the doctrine of negligence per se, which is codified at KRS § 446.070. Davidson, 25 S.W.3d at 99-100; State Farm Mut. Auto. Ins. Co. v. Reeder, 763 S.W.2d. 116 (Ky. 1988); cf. Phoenix Healthcare of Kentucky, L.L.C. v. Kentucky Farm Bureau Ins. Co., 120 S.W.3d 726, 727 (Ky. 2003) (KRS § 446.070 does not authorize a private cause of action for the violation of a statute if the statute itself specifies a civil remedy available to the aggrieved party).

The root of the UCSPA is that an insurance company is required to deal in good faith with a claimant with respect to a claim that the company is legally obligated to pay. Davidson, 25 S.W.3d at 100. The UCSPA provides that the following acts constitute unfair claims settlement practice:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
(4) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
(5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

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;

Attempting 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;

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

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

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;

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;

Failing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

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; or

Failing to comply with the decision of an independent review entity to provide coverage for a covered person as a result of an external review in accordance with KRS §§ 304.17A-621, 304.17A-623, and 304.17A-625.

Knowingly and willfully failing to comply with the provisions of KRS 304.17A-714 when collecting claim overpayments from providers; or

Knowingly and willfully failing to comply with the provisions of KRS 304.17A-708 on resolution of payment errors and retroactive denial of claims.
KRS §304.12-230. To prevail on a statutory bad faith claim premised on a violation of the UCSPA, a claimant must demonstrate that an insurer’s conduct was outrageous because of reckless indifference to the victim’s rights. See Wittmer, 864 S.W.2d 885; Hollaway, 497 S.W.3d 737-738. The UCSPA applies to the insurer’s conduct both before and during litigation. Knotts v. Zurich Ins. Co., 197 S.W.3d 512, 517 (Ky. 2006). However, only settlement conduct is admissible, not litigation conduct. Id.

3. Damages

A plaintiff is entitled to receive compensatory and punitive damages if a bad faith claim is established. See Wittmer, 864 S.W.2d at 890. In fact, to successfully prosecute a bad faith claim, a plaintiff must demonstrate evidence of intentional misconduct or reckless disregard of the plaintiff’s rights sufficient for a jury to award punitive damages. If there is such evidence, the jury should award consequential damages and may award punitive damages. The jury’s decision as to whether to award punitive damages remains discretionary because the nature of punitive damages is such that the decision is always a matter within the jury's discretion. Id.

B. Fraud

In Kentucky, a contract is voidable if it was induced by fraud. See Baxter v. Davis, 67 S.W.2d 678, 681 (1934); see also RESTATEMENT (SECOND) OF CONTRACTS § 164 (1979). The six elements of actionable fraud must be proven by clear and convincing evidence:

(a) a material representation
(b) which is false
(c) known to be false or made recklessly
(d) made with inducement to be acted upon
(e) acted in reliance thereon and
(f) causing injury.

United Parcel Service Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999); see also McGuffin v. Smith, 286 S.W. 884, 885 (Ky. 1926); Livermore v. Middlesborough Town-Lands Co., 50 S.W. 6 (Ky. 1899). Fraud may be established through circumstantial evidence; however, such evidence must provide a cohesive picture of the entire case through “the character of the testimony ... as well as the documents, circumstances and facts presented.” Rickert, 996 S.W.2d at 468.

A material fact must be “substantial or vital enough” as to place a duty on a party to disclose it. Kaze v. Compton, 283 S.W.2d 204, 208 (Ky. 1955); see also Faulkner Drilling Co., Inc. v. Gross, 943 S.W.2d 634, 638 (Ky. Ct. App. 1997) (“As to what constitutes a material fact, the question is whether it is likely to affect the conduct of a reasonable man and be an inducement of the contract.”) The determination of materiality necessarily folds into the duty analysis. The duty to disclose is dependent upon several variable factors including the “intelligence of the parties,” “the nature of the contract,” and the “nature of the fact not disclosed.” William S. Haynes, KENTUCKY JURISPRUDENCE, Torts, § 10-4 (1987) (citing Prosser and Keeton on Torts,
5th ed., ch. 18, § 106 (1984). Simply put, the more material the information, the greater the likelihood that there is a duty to disclose it.

The damaged party must also have relied upon the misrepresentation to his/her detriment. Rickert, 996 S.W.2d at 469. In particular, the false statement must cause the plaintiff’s detrimental action or inaction. Id. “The mere fact that one of the parties is less astute than the other does not justify him in relying on the other’s opinion.” Restatement (Second) of Contracts § 169 cmt. b (1979). To this end, when parties “have roughly equal skill and judgment each must form his own opinion and neither is justified in relying on the other’s.” Id. In fact, praise and mere “puffery” cannot form the basis for reliance. Id.; See also, Osborne v. Howard, 242 S.W. 852, 853 (Ky. 1922).

Finally, the non-disclosure of the material information must have induced the Plaintiffs to enter into the contract. See Restatement (2d) of Contracts § 164 cmt. c (1979) (“No legal effect flows from either a non-fraudulent or a fraudulent misrepresentation unless it induces action by the recipient, that is, unless he manifests his assent to the contract in reliance on it.”) To establish an actionable case of fraud based upon suppression of a fact, the plaintiff must demonstrate (1) that defendant had a duty to disclose a material fact, (2) that defendant failed to disclose same, (3) that defendant’s failure to disclose the material fact induced plaintiff to act, and (4) that plaintiff suffered actual damages therefrom. See Smith v. General Motors Corp., 979 S.W.2d 127 (Ky. Ct. App. 1998). It is well established that mere silence is not fraudulent absent a duty to disclose. Hall v. Carter, 324 S.W.2d 410 (Ky. 1959). A duty to disclose may arise from a fiduciary relationship, from a partial disclosure of information, or from particular circumstances such as where one party to a contract has superior knowledge and is relied upon to disclose same. See Smith, 979 S.W.2d at 129. See also Bryant v. Troutman, 287 S.W.2d 918 (Ky. 1956); Dennis v. Thomson, 240 Ky. 727, 43 S.W.2d 18 (1931); and Faulkner, 943 S.W.2d at 634.

C. Intentional or Negligent Infliction of Emotional Distress

Kentucky has adopted a strict standard for intentional infliction of emotional distress (IIED) that is “aimed at limiting frivolous suits and avoid[ing] litigation in situations where only bad manners and mere hurt feelings are involved.” Craft v. Rice, 671 S.W.2d 247, 249 (Ky. 1984). It is settled under Kentucky law that in order to establish a claim of IIED, a plaintiff must prove the following elements: (1) the wrongdoer's conduct must be intentional or reckless; (2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; (3) there must be a causal connection between the wrongdoer's conduct and the emotional distress and (4) the distress suffered must be severe. Miracle v. Bell County Emergency Medical Services, 237 S.W.3d 555, 560 (Ky. Ct. App. 2007). As noted in Kroger v. Willgruber, 920 S.W.2d 61, 65 (Ky. 1996), the tort is not available for “petty insults, unkind words and minor indignities.” Nor is it to compensate for behavior that is “cold, callous and lacking sensitivity.” Humana of Ky., Inc. v. Seitz, 796 S.W.2d 1, 4 (Ky. 1990). Rather, it is intended to redress behavior that is truly outrageous, intolerable and which results in bringing one to his knees. Willgruber, supra.

Kentucky also recognizes a cause of action for negligent infliction of emotional distress. Until 2012, the action would only succeed if the distress was accompanied by physical contact or injury, i.e., the “impact rule.”
Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980); Wilhoite v. Cobb, 761 S.W.2d 625 (Ky. App. 1988). However, the Kentucky Supreme Court abandoned the “impact rule” with its decision in Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012). The Osborne Court held that claims for negligent infliction of emotional distress should be “analyzed under general negligence principles.” Id. at 17. That is to say that the plaintiff must present evidence of the recognized elements of a common law negligence claim: (1) the defendant owed a duty of care to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury.” Id. Recognizing that “some degree of emotional harm is an unfortunate reality of living in a modern society,” the Osborne Court noted that “recovery should be provided only for ‘severe’ or ‘serious’ emotional injury.” Id. The Court went on to define a “severe” or “serious” emotional injury:

A "serious" or "severe" emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case. 59 Distress that does not significantly affect the plaintiff's everyday life or require significant treatment will not suffice. And a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment.

Id. at 17-18.

D. State Consumer Protection Laws, Rules and Regulations

Kentucky Revised Statute 367.170(1) mandates “[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” Individuals who purchase “services” have a private cause of action for injuries caused by a violation of KRS 367.170(1). KRS 367.220(1). In Kentucky, the purchase of an insurance contract is considered a “service”; therefore, the statute applies to insurance contracts. Stevens v. Motorists Mut. Ins. Co., 759 S.W.2d 819, 820 (Ky. 1988). However, the analysis for a violation of the Kentucky consumer protection law appears to have been subsumed by the bad faith analysis described above. See Davidson, 25 S.W.3d at 99-100; Wittmer, 864 S.W.2d at 889-92.

VI. Discovery Issues in Actions Against Insurers

A. Discoverability of Claims Files Generally

Generally, the claims file is not discoverable in Kentucky in suits determining whether the insurer owed coverage. See generally Asbury v. Beerbower, 589 S.W.2d 216, 217 (Ky. 1979). However, in bad faith cases, the claims file becomes discoverable, except for any communications between the insurer and the insured or its counsel. See generally Commonwealth v. Meleor, 638 S.W.2d 290, 290 (Ky. Ct. App. 1982)(applying Asbury to hold that statements made by the insured to the insurer were not discoverable in a criminal prosecution for manslaughter).

B. Discoverability of Reserves

The case of Terrell v. Western Casualty & Surety Co., 427 S.W.2d 825, 827 (Ky. 1968) involved, in pertinent part, a discovery issue in a claim
against an insurance company of “bad faith in refusing to negotiate a fair settlement of the suit.” Terrell states:

Finally it is within the proper scope of discovery to inquire into and demand the production of all documents and material pertaining to any negotiations or offers of settlement. These matters could not be considered as having been produced in preparation for trial or in anticipation of any litigation that is now or may hereafter be pending. They concern another suit or suits which have been terminated.

Id. at 828. Thus, it would appear that Kentucky courts recognize that in “bad-faith-failure-to-settle” actions, which followed after the litigation against the insured is concluded, matters pertaining to the negotiation of the case were a legitimate subject of discovery. It can be assumed that reserves would be discoverable based upon Terrell, supra.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

Kentucky has not yet specifically addressed the discoverability of reinsurance in its case law. However, based upon Terrell, supra, it can be assumed that the same would be discoverable. Additionally, the Kentucky Court of Appeals in Schmidt v. Am. Physicians Assur. Corp., 2003 Ky. App. Unpub. LEXIS 17 *5-6, 2003 WL 22927760 (Ky. Ct. App. Dec. 12, 2003), held that reinsurance policies are inadmissible as evidence in a bad faith case because the insurance coverage available to the defendant has no bearing on the defendant’s liability.

D. Attorney/Client Communications

Kentucky has held that the attorney-client privilege applies to communications made by the insured to the insurance company concerning the basis of a claim that may be made against the insured. Asbury, 589 S.W.2d at 217. It has also been indicated by the Court of Appeals that an attorney opinion letter regarding an insurer’s coverage liability was not discoverable; however the Kentucky Supreme Court had avoided this issue. See Guar. Nat’l Ins. Co. v. George, 953 S.W.2d 946, 947-49 (Ky. 1997). Broad discovery of settlement negotiations is permitted in a bad faith case, but this discovery is limited by the attorney-client privilege. Riggs v. Schroering, 822 S.W.2d 414, 415 (Ky. 1991).

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

A policy of casualty insurance may be voided if the insured has made material misrepresentations or omissions concerning the property to the insurer or if the insurer would not have issued the policy if it had known the true state of the facts. See, e.g., KRS 304.14-110. The insurer must have relied on the misrepresentation before the policy will be voided. See Aetna Ins. Co. v. Solomon, 511 S.W.2d 205, 209 (Ky. 1974).

B. Failure to Comply with Conditions

Several conditions in the policy may provide a defense to the insurer. For example, an insurer may assert that the insured failed to promptly give
notice of the claim as required by the policy. The purpose of such a provision is to allow the insurer to make an intelligent estimate of its rights and liabilities, to investigate the loss, and to prevent fraud. Commercial Travelers Mut. Accident Ass’n v. Witte, 406 S.W.2d 145, 148 (Ky. 1966). Yet, if an insurer intends to use delay in giving notice as a defense, it must prove that the delay caused “probable prejudice.” Jones v. Bituminous Coal & Cas. Corp., 821 S.W.2d 798, 803 (Ky. 1991). A failure to comply with a provision forbidding the change of use of property may void the policy. Kentucky Farm Bureau Mut. Ins. Co. v. McMullin, 280 S.W.2d 882, 883 (Ky. 1955). But only slight deviations in the expected use will not render the policy ineffective. See Rash v. North British & Mercantile Ins. Co., 246 S.W.2d 990, 991 (Ky. 1951).

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

Consent clauses “which merely deny conclusiveness of the judgment against the uninsured . . . as to the issues of liability and damages, where written consent to the suit was not obtained,” have been held valid by Kentucky courts although not “strictly” enforced. Newark Ins. Co. v. Ezell, 520 S.W.2d 318, 319-320 (Ky. 1975); see also Jones v. Bituminous Casualty Corp., 821 S.W.2d 798, 803 (Ky. 1991). It is unclear whether clauses denying any coverage if the insured brings an action against the uninsured without the written consent of the company are permitted.

D. Statutes of Limitations

Typically, the statute of limitations will depend on the type of action brought by the plaintiff. In Kentucky, the statute of limitations for actions based on written contracts is fifteen years after the action accrues. See Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331, 332-33 (Ky. 1995); KRS 413.090(2). The statute of limitations for actions founded in tort is one year. KRS 413.140(1). Parties to an insurance contract may limit the time period in which to bring actions against the insurer as long as the provision is reasonable and not otherwise prohibited by statute. See Brown v. State Auto, 189 F.Supp.2d 665, 668-69 (W.D.Ky. 2001); Gordon, 914 S.W.2d at 332-33.

Motor vehicle accidents involving personal injury are subject to the special statute of limitations found in Kentucky’s Motor Vehicle Reparations Act. Specifically, KRS 304.39-230 provides a two (2) year limitations period for a claimant injured in an automobile, but if basic or added reparation benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor’s benefits, by either the same or another claimant, may be commenced not later than two (2) years after the last payment of benefits. This is clarified by House Bill 191, passed in 2017 and signed into law by Governor Bevin. It modifies KRS 304.39-230 to specify that the statute begins to run on the date of issuance of the final original basic or added reparations benefit, and that subsequent replacement checks are not considered to extend the statute. This overturns the Kentucky Supreme Court Opinion found in Beaumont v. Zeru, 460 S.W.3d 904, 908 (Ky. 2015) (“The date of the last payment is the date the last check is sent, whether that check is the initial check or a replacement check.”).

VIII. Trigger and Allocation Issues for Long-Tail Claims

A. Trigger of Coverage
Policies generally fall in one of two categories: occurrence policies or claims-made policies. This will control whether coverage is triggered under the policy. An occurrence policy will provide coverage if the event insured against occurs within the policy period, regardless of when the claim is made. A claims-made policy only provides coverage if a claim is made for coverage during the policy period. Kentucky has held that an occurrence policy may cover a claim that evolves slowly over time, even if one event cannot be identified as the occurrence giving rise to the claim. The *Travelers v. Humming Bird Coal Co.*, 371 S.W.2d 35, 38 (Ky. 1963).

B. Allocation Among Insurers

Kentucky has not yet specifically addressed allocation issues among insurers in its case law.

IX. Duty to Settle

Kentucky law recognizes an implied covenant of good faith to protect the insured against an unreasonable risk of having a judgment rendered against it greatly in excess of the limits of the policy. *Eskridge v. Educator and Executive Insurers, Inc.*, 677 S.W.2d 887, 889 (Ky. 1984). An insurer who exercises bad faith in refusing to settle a claim against an insured within the policy limits may become liable to the insured for amounts in excess of the policy limits. *Terrell v. W. Cas. & Sur. Co.*, 427 S.W.2d 825, 827 (Ky. 1968). There are several factors to consider in determining whether an insurer has exercised bad faith in failing to settle a claim:

1. The probability that the plaintiff will recover;
2. The probability that the recovery will exceed the policy limits;
3. Any negotiations for settlement;
4. Whether the plaintiff offered to settle for less than the policy limits; and
5. Whether the insured made a demand for settlement on the insurer.

*Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 499-500 (Ky. 1975). A good faith belief that coverage does not exist is no defense in a failure to settle claim. *Eskridge*, 677 S.W.2d at 889-90. If the contract to defend is breached, the party aggrieved by the breach is entitled to recover all damages naturally flowing from the breach. *Id.*