I. Regulatory Limits on Claims-Handling

A. Timing for Responses and Determinations
State Statutes Governing Timeliness or Acknowledgement of Claim and for Determination of Acceptance or Denial of Coverage

It is an unfair claim settlement practice for an insurer, when committed with the frequency to indicate a general business practice, to fail to acknowledge and act with reasonable promptness on communications about claims that arise under policies, to fail to adopt and implement reasonable standards for the prompt investigation of claims that arise under policies, to fail to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed, to fail to make a prompt, fair, and equitable good faith attempt to settle claims for which liability has become reasonably clear, to delay an investigation or payment of a claim by requiring a claimant or a claimant's licensed healthcare provider to submit a preliminary claim report and subsequently to submit formal proof of loss forms that contain substantially the same information, to fail to settle a claim promptly whenever liability is reasonably clear under one part of a policy, in order to influence settlements under other parts of the policy, and to fail to provide promptly a reasonably explanation of the basis for denial of a claim or the offer of a compromised settlement. Md. Code Ann., Ins. § 27-304. In alleging a claim under this section, a plaintiff must prove the insurer acted under “arbitrary and capricious reasons.” Berkshire Life Ins. Co. v. Maryland Ins. Admin., 142 Md. App. 628, 671, 791 A.2d 942, 967 (2002).

B. Standards for Determinations and Settlement
State Statutory Guidelines for Insurance Policies

Maryland’s Unfair Claim Settlement Practices Act within the Insurance Article sets forth standards for determining and settling claims. Md. Code Ann., Ins. §§ 27-301 et seq. The statute defines unfair trade practices and provides administrative remedies only. See id. § 27-301(b)(1). The statute does not provide or prohibit a private right or cause of action to, or on behalf of, a claimant or other person in any state. See id. § 27-301(b)(2); see also Zappone v. Liberty Life Ins. Co., 349 Md. 45, 706 A.2d 1060 (1998) (explaining the nature, process, and exclusivity of available administrative remedies). The statute also does not impair the right of a person to seek redress in law or equity for conduct that otherwise is actionable. See Md. Code Ann., Ins. § 27-301(b)(3).
C. Privacy Protections (In addition to Federal Gramm-Leach-Bliley Act)
State Privacy Laws Governing Insurance Information

Maryland insurance regulations require an insurer to provide clear and conspicuous notice to the insured that accurately reflects its privacy policies and practices for non-public financial information. See Md. Code Regs. 31.16.08.05. An insurer must provide this notice at the initial establishment of a customer relationship and annually thereafter. See Md. Code Regs. 31.16.08.05-06. Furthermore, an insurer generally must obtain authorization from the insured before disclosing non-public personal health information pertaining to the insured. See Md. Code Regs. 31.16.08.17.

II. Principles of Contract Interpretation


III. Choice of Law

Maryland follows the rule of lex loci contractus, “which requires that the construction and validity of a contract be determined by the law of the state where the contract was made.” Commercial Union Ins. Co. v. Porter Hayden Co., 97 Md. App. 442, 451, 630 A.2d 261, 266 (1993), vacated on other grounds, 339 Md. 150, 661 A.2d 691 (1995); see also Erie Ins. Exch. v. Heffernan, 399 Md. 598, 618, 925 A.2d 636, 648 (2007); Allstate Ins. Co. v. Hart, 327 Md. 526, 529, 611 A.2d 100, 101 (1992) (stating that “Maryland courts ordinarily should apply the law of the jurisdiction where the contract was made. This is referred to as the principle of lex loci contractus”). Generally, “[t]he locus contractus of an insurance policy is the state in which the policy is delivered and the premiums are paid.” Aetna Cas. & Sur. Co. v. Souras, 78 Md. App. 71, 77, 552 A.2d 908, 911 (1989); see also Cigna Prop. & Cas. Cos. v. Zeitler, 126 Md. App. 444, 460, 730 A.2d 248, 268 (1999).

of the state where the tort or wrong was committed applies. 

Hood, 395 Md. at 613, 911 A.2d at 844. Where the events giving rise to a tort action occur in more than one state, the court must apply “the law of the State where the injury—the last event required to constitute the tort—occurred.” Heffernan, 925 A.2d at 649; see also Hood, 911 A.2d at 845. Similarly, § 377 of the First Restatement of Conflict of Laws states that “[t]he place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.” Restatement (First) of Conflict of Laws § 377 (1934).

The Court of Appeals, however, has recognized a public policy exception to this general lex loci delicti rule. Lab. Corp. of Am., 911 A.2d at 849 (extending the public policy exception to lex loci delicti to tort causes of action). Under this exception, the law of Maryland will be applied if application of the law of the place of the injury violates a “clear, strong, and important Maryland public policy.” Id. at 849-51 (citing Reed v. Campagnolo, 332 Md. 226, 630 A.2d 1145 (1993)).

IV. Duties Imposed by State Law

A. Duty to Defend

1. Standard for Determining Duty to Defend

The obligation of an insurer to defend its insured under a contract provision such as here involved is determined by the allegations in the tort actions. If the plaintiffs in the tort suits allege a claim covered by the policy, the insurer has a duty to defend. Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842 (1975). Even if a tort plaintiff does not allege facts which clearly bring the claim within or without the policy coverage, the insurer still must defend if there is a potentiality that the claim could be covered by the policy. Id.

If there is any doubt as to whether there is a duty to defend, it is resolved in favor of the insured. Springer v. Erie Ins. Exch., 439 Md. 142, 94 A.3d 75 (2014); see also Aetna Cas. & Sur. Co. v. Cochran, 337 Md. 98, 651 A.2d 859 (1995). Nonetheless, in permitting the use of extrinsic evidence to establish a potentiality of coverage, Maryland courts have made clear that an insured cannot assert a frivolous defense to establish an insurer’s duty to defend. Aetna, 337 at 111-12, 651 A.2d at 866. “Only if an insured demonstrates that there is a reasonable potential that the issue triggering coverage will be generated at trial can evidence to support the insured's assertion be used to establish a potentiality of coverage under an insurance policy.” Id.

2. Issues with Reserving Rights

The insurer, in drafting its policy, may include a provision limiting its duty to defend the insured when a conflict of interests arises. However, the insurer will not be deprived of her contractual rights because of the failure of the insurer to limit its obligations. A conflict of interest does not relieve the insurance company of the responsibility for providing for the defense of the insured. Brohawn, 276 Md. at 412, 347 A.2d at 852. The contractual duty which the Insurance company has assumed cannot be removed by the insurer’s simply creating its own conflict of interest. Rather, the insurer must either provide an independent attorney to represent the insured, or pay for the cost of defense incurred by the insured hiring an attorney of his choice.
An insurer may, however, avoid its duty to defend on the ground of delayed notice, provided that the insurer establishes by a preponderance of affirmative evidence that the delay in giving notice has resulted in actual prejudice to the insurer. Maynard v. Westport Ins. Corp., 208 F. Supp. 2d 568, 574 (D. Md. 2002), aff’d, 55 Fed. Appx. 667 (4th Cir. 2003).

B. Duty to Settle

A liability insurer’s bad faith failure to settle a claim within policy limits gives rise only to a tort action. The tort action based upon a liability insurer’s wrongful failure to settle a claim against its insured within policy limits was first recognized by the Court of Appeals of Maryland in Sweeten, Adm'r. v. Nat’l. Mutual, 233 Md. 52, 194 A.2d 817 (1963). The basis for the tort duty, according to the Court of Appeals of Maryland, was “because the insurer has the exclusive control, under the standard policy, of investigation, settlement and defense of any claim or suit against the insured, and there is a potential, if not actual, conflict of interest giving rise to a fiduciary duty.” Id.; see also Mesmer v. Maryland Auto. Ins. Fund, 353 Md. 241, 725 A.2d 1053 (1999).

V. Extra-Contractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

1. First Party
   Elements and Remedies in Claims Against Insurers for Failure to Pay Benefits

   In 2007, the Maryland General Assembly amended the Unfair Claims Settlement Practices Act and created a new cause of action that an insured may bring against an insurer after exhausting administrative procedures before the Maryland Insurance Administration (“MIA”). Md. Code Ann., Ins. §§ 27-301 et seq.; Md. Code Ann., Cts. & Jud. Proc. § 3-1701. Under this amendment, insurers can receive damages in civil actions arising from first-party property and casualty insurance claim disputes. The insured must prove that the insurer acted in bad faith in denying the claim. Id. In addition, the amendment makes an insurer’s failure to settle a claim in good faith a violation of the Unfair Claims Settlement Practices Act and allows for enhanced administrative sanctions. Id. This amendment, however, only applies to first party claims under property and casualty insurance policies. Id.

2. Third Party
   Elements and Remedies in Claims Against Insurers for Failure to Defend or Settle Third Party Actions

   It is well established in Maryland that there is a significant difference between a first-party claim and a third-party claim against the insured. In the third-party claim situation, the standard “liability policy gives the insurer exclusive control over the investigation, litigation, and settlement of claims against the insured”. Johnson v. Fed. Kemper Ins. Co., 74 Md. App. 243, 247, 536 A.2d 1211 (1988). Thus, the insurer owes a fiduciary duty to the third-party insured “to attempt to settle the claim within the limits of the policy since the insured has surrendered the right to do so itself.” Id. at 247, 536 A.2d at 1213. A liability insurer may be sued for “bad faith” if it unjustifiably refuses to settle a claim within the

A liability insurer’s mistaken refusal to provide any defense whatsoever, on the grounds that there is no valid insurance contract or that there is no coverage under an insurance contract, gives rise to a breach of contract action against the insurer; however, it does not give rise to the tort action for an alleged bad faith failure to settle a third-party claim against the insured. Mesmer v. Maryland Auto. Ins. Fund, 353 Md. 241, 725 A.2d 1053 (1999).

B. Fraud

Elements and Remedies in Cause of Action Against Insurers

In order to recover damages for fraud under Maryland law, a plaintiff must prove the following elements:

1. the defendant made a false representation to the plaintiff;
2. the defendant knew that the representation was false or made the representation with reckless indifference as to its truth;
3. the misrepresentation was made for the purpose of defrauding the plaintiff;
4. the plaintiff relied on the misrepresentation and had the right to rely on it; and
5. the plaintiff suffered compensable injury resulting from the misrepresentation.


Moreover, the plaintiff must establish these elements by clear and convincing evidence. See VF Corp. and Blue Bell, Inc. v. Wrexham Aviation Corp., 350 Md. 693, 704, 715 A.2d 188, 193 (1998); Gross v. Sussex, 332 Md. 247, 258, 630 A.2d 1156, 1161 (1993).

In Maryland, there is ordinarily no duty imposed on parties to a transaction to disclose material facts. See Sass v. Andrew, 152 Md. App. 406, 430, 832 A.2d 247, 260 (2003). Thus, concealment of a material fact only constitutes fraud where one party had a duty to disclose. See id. The only exception to this rule is in the case of facts which materially qualify representations made to another party. Id.

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

In Harris v. Jones, 281 Md. 560, 566, 380 A.2d 611, 614 (1977), the Court of Appeals of Maryland recognized the tort of intentional infliction of emotional distress and listed its four elements as follows:
1. the conduct must be reckless;
2. the conduct must be extreme and outrageous;
3. there must be a causal connection between the wrongful conduct and the emotional distress; and
4. the emotional distress must be severe.


Since the Harris decision, Maryland courts have limited recovery for intentional infliction of emotional distress to the most extreme and unusual circumstances. See Hrehorovich v. Harbor Hosp. Ctr., Inc., 93 Md. App. 772, 799, 614 A.2d 1021, 1034 (1992). Kentucky Fried Chicken Nat'l Management Co. v. Weathersby, 326 Md. 663, 607 A.2d 8 (1992), demonstrates just how difficult it is for a plaintiff to satisfy the stringent standards of this tort. In that case, an employee of the defendant brought an action seeking damages for the intentional infliction of emotional distress after she suffered a nervous breakdown in response to her demotion from store manager to assistant manager. The employee suffered from a personality disorder that made her particularly susceptible to stress; but because the employer did not know of her vulnerability, its actions in demoting her did not reach the level of outrageousness the tort requires, and did not support the employees cause of action. See id. at 680, 607 A.2d at 16.

Maryland does not recognize the separate and distinct tort of negligent infliction of emotional distress; in other words, unintended emotional distress negligently inflicted by conduct that is not itself tortuous, is not a recognized tort. Lapides v. Trabbic, 134 Md. App. 51, 758 A.2d 1114 (2000).

D. State Consumer Protection Laws

State Statutes, Rules or Regulations as a Basis for Cause of Action Against Insurer Including Consumer Protection and Trade Practices

The Maryland Consumer Protection Act is found in Title 13 of the Commercial Law Article of the Annotated Code of Maryland. The Consumer Protection Act prohibits certain unfair and deceptive trade practices, as defined in § 13-301 of the Commercial Law Article, in the sale, lease rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the offer for sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the extension of consumer credit; or the collection of consumer debts. See Md. Code Ann., Com. Law § 13-303. Title 13 prohibits a person from engaging in any unfair or deceptive trade practice and authorizes a private cause of action for recovery of damages, and possibly attorney's fees at the discretion of the court. See Brooks v. Lewin Realty III, Inc., 378 Md. 70, 835 A.2d 616 (2003); Richwind Joint Venture v. Brunson, 335 Md. 661, 645 A.2d 1147 (1994).

The Act defines sales to include not only sales, but also offers and attempts to sell. See Md. Code Ann., Com. Law § 13-101(i). It defines consumer goods as goods which are primarily for personal, household, family, or agricultural purposes. See id. § 13-101(d). Any person may bring an
action to recover for injury or loss sustained by him as the result of a practice prohibited by the Act. See id. § 13-408(a). Attorney's fees may also be awarded under the Act if a claimant is successful. See id. § 13-408(b). In determining the damages due to the consumer in a private action, the court must look only to his actual loss or injury caused by the unfair or deceptive trade practices. See Hallowell v. Citaramis, 88 Md. App. 160, 172, 594 A.2d 591, 597 (1991), aff'd, 328 Md. 142, 613 A.2d 964 (1992).

Title 27 of the Insurance Article of the Annotated Code of Maryland addresses unfair trade practices and other prohibited practices. The purpose of this title is to regulate trade practices in the business of insurance in accordance with the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 through 1015, by defining, or providing for the determination of, all trade practices in the business of insurance in Maryland that are unfair methods of competition or unfair or deceptive acts or practices and by prohibiting those trade practices. See Md. Code Ann., Ins. § 27-101. The commission of an act prohibited under subtitle 2 of Title 27 of the Insurance Article is defined as an unfair method of competition and an unfair and deceptive act or practice in the business of insurance. See id. § 27-201.

Title 27 of the Insurance Article of the Annotated Code of Maryland provides administrative remedies only. It does not provide or prohibit a private right or cause of action to, or on behalf of, a claimant or other person in any state, nor does it impair the right of a person to seek redress in law or equity for conduct that otherwise is actionable. See id. § 27-301.

VI. Discovery Issues in Actions Against Insurers

A. Discoverability of Claims Files Generally

Maryland courts have ordered the production of an insurer's claim file in bad faith cases. In APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10 (Md. 1980), Plaintiff APL sought indemnification from its insurer as a result of employee theft. When the insurer refused to indemnify the Plaintiff, claiming policy exclusions, the Plaintiff filed a bad faith lawsuit. Id. at 12. The Plaintiff sought the claim file from the Defendant's senior claim examiner that contained documents regarding the examiner's investigation into the occurrence. The Court held that the documents were not prepared in anticipation of litigation, and that even if they were, that the Plaintiff had met its burden of showing substantial need and undue hardship. To the Court, a substantial probability of litigation did not arise until after the insurer completed its investigation and denied the claim. Id. at 21. Consequently, the Defendant was ordered to produce the claim file. Id.

B. Discoverability of Reserves

Maryland case law has not addressed the discoverability of loss reserves, many courts have held that loss reserves may be discoverable and admissible on any number of issues which commonly are presented in bad faith actions. See, e.g., Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 813 (Ky. 2004) (finding evidence of reserve settling procedures was relevant to bad faith claim because it would help to show whether insurer followed statutory and regulatory requirements and whether system for setting reserves was aimed at achieving unfairly low values); CIGNA Ins. Co. v. Cooper Tire & Rubber, Inc., 180 F. Supp. 2d 933, 936 (N.D. Ohio 2001) (finding reserves discoverable, relevant to issues of mistake and intent); Kirchoff v. American Cas. Co. of Reading, Pennsylvania, 997 F.2d 401 (8th Cir. 1993); Samson v.

In these cases, loss reserves information may lead to admissibility of evidence regarding whether an insurance company adjusted a claim in good faith or made a prompt investigation, assessment or settlement of a claim.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

Maryland law has not addressed the discoverability of existence of reinsurance and communications with reinsurers.

D. Attorney/Client Communications
Issues Relating to Tripartite Relationship/Advice of Counsel Defense

When a claim is made against an insured person under a typical liability policy, a tripartite relationship is established between an insurance company, its insured, and the defense attorney hired to represent their joint interests in resolving the claim. The tripartite relationship between insurer, insured, and defense counsel makes potential conflicts of interest inevitable. Insureds are threatened by conflicts because of the effect on their defense. Conflicts of interest may strip insurers of coverage defenses and expose them to the threat of extra-contractual damages. From defense counsel’s perspective, with potential conflicts of interest come potential malpractice claims. The fundamental malpractice danger posed by conflicts of interest is that the insured (the client) will allege that defense counsel protected the insurer’s interest at the insured's expense, and to the insured's ultimate detriment. See, e.g., Nat’l Union Fire Ins. Co. of Pittsburgh v. Wadsworth Golf Const. Co. of Midwest, 160 Md. App. 257, 863 A.2d 347 (2004); Fidelity & Cas. Co. v. McConnaughy, 179 A.2d 117, 121 (Md. 1962) (stating that an attorney can represent insured and insurer unless a conflict develops).

Ironically, even some defense attorneys mistakenly believe they represent only the insured. As pointed out in a Maryland ethics opinion, however, this assumption conflicts with substantive law and could jeopardize some of the insured's rights, especially in the area of attorney-client privilege, when necessary information must be disclosed to the insurer. See Md. State Bar Ass’n Comm. on Ethics, Ethics Doc. 00-23 (2000), LEXIS, Ethics Library, ETHOP File.

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

Maryland decisions interpreting § 12-207 of the Insurance Article and its statutory predecessors have uniformly held that an insurance policy issued in reliance upon an incomplete or false statement or an omission as to a matter which is material to the risk of being assumed is avoidable and may be rescinded by the insurer. See Jackson v. Hartford Life & Annuity Ins. Co., 201 F. Supp. 2d 506, 511-12 (D. Md. 2002). This right to rescission is available simply by virtue of the material misrepresentation—the insurer is under no duty to investigate the applicant’s medical history or go any further than the four corners of the insurance application. See Chawla v. Transamerica Occidental Life Ins. Co., 440 F.3d 639, 647 (4th Cir. 2006). It

One widely quoted definition of materiality is:

A false representation in an application for insurance is material to the risk if it is such as would reasonably influence the insurer’s decision as to whether or not it should issue the policy requested.


If the undisclosed ailment is not minor, the question of materiality is at issue and is normally one of fact for the jury to decide. Whenever it is manifest, either shown from uncontradicted testimony or from the mere nature of the misrepresentation, that the misrepresentation has been material to the risk, the court should rule so as a matter of law. Myrick v. Prime Ins. Syndicate Inc., 395 F.3d 485, 492 (4th Cir. 2005); Bryant v. Provident Life & Acc. Ins. Co., 22 F. Supp. 2d 495, 498 (D. Md. 1998); Fitzgerald, 465 F. Supp. at 536; Commercial Cas. Ins. Co. v. Schmidt, 166 Md. 562, 569-70, 171 A. 323, 326 (1934).

Maryland courts have frequently found that an applicant or beneficiary may not be relieved of an error or omission in an application by contending that the omission was innocent or was the fault of the agent, and Maryland law places upon an insured a heavy burden to examine an application attached to a policy delivered to him or her to verify its accuracy. See Parker v. Prudential Ins. Co. of Am., 900 F.2d 772, 777-78 (4th Cir. 1990); Fitzgerald, 405 F. Supp. at 534-41; Serdenes v. Aetna Life Ins. Co., 21 Md. App. 453, 459-62, 319 A.2d 350, 862-63 (1974).

In order to sustain a defense to a claim on a policy or rescission on the basis of a material misrepresentation, an insurer is not required to establish any causal connection between the condition misrepresented or omitted from the application and the condition giving rise to the claim on the policy. See Parker v. Prudential Ins. Co. of Am., 900 F.2d 772, 777 (4th Cir. 1990); Hofmann, 400 F. Supp. at 831-33; Fitzgerald v. Franklin Life Ins. Co., 465 F. Supp. 527, 535 (D. Md. 1979); Loving v. Mutual Life Ins. Co., 140 Md. 173, 179-80, 117 A. 323, 326 (1922).

In order to obtain a decree rescinding a policy, an insurer must prove that it has fully and promptly tendered to the insured the return of all premiums paid plus interest to the date of tender. See Hofmann, 400 F. Supp.
B. Failure to Comply with Conditions

Assistance and Cooperation/Late Notice

Pursuant to Md. Code Ann., Ins. § 19-110:

"An insurer may disclaim coverage on a liability insurance policy on the ground that the insured or a person claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of cooperation or notice has resulted in actual prejudice to the insurer."

In Maryland, the cooperation clause of an insurance policy may be either an express condition or a covenant. Snyder v. Chester Cty. Mut. Ins. Co., 264 F. Supp. 2d 332 (D. Md. 2003). However, substantial compliance with the cooperation clause in insurance policy exists when the insured: (1) supplies reasonably requested information to a reasonable extent, and (2) undertakes to submit the balance when it is reasonably possible. Id.

With respect to the notice requirement, in order to avoid its duty to defend or indemnify on the ground of delayed notice, the insurer must establish by a preponderance of affirmative evidence that the delay in giving notice resulted in actual prejudice to the insurer. Pac. Emp’rs Ins. Co. v. Eig, 160 Md. App. 416, 864 A.2d 240, (2004). An insurer may not, therefore, disclaim coverage for either lack of notice or failure to cooperate unless it demonstrates that the deficiency has resulted in actual prejudice to the insurer. Prince George’s Cty. v. Local Gov’t Ins. Trust, 859 A.2d 353, 159 Md. App. 471 (2004), aff’d, 388 Md. 162, 879 A.2d 81 (2005).

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


Moreover, although Md. Code Ann., Ins. § 19-110 permits a liability insurer to disclaim coverage based on an insured’s failure to cooperate or give timely notice only if the insurer was prejudiced, the statute is inapplicable when an insurer defends on the basis that its insured failed to meet the condition precedent in a no-action clause requiring a final judgment against the insured or a settlement with the written consent of the insurer. Phillips Way, Inc. v. Am. Equity Ins. Co., 795 A.2d 216, 143 Md. App. 515 (2002).

D. Statutes of Limitations
Generally, civil actions must be filed within three (3) years from the date the claim accrues. Md. Code Ann., Cts. & Jud. Proc. § 5-101. It is noted, however, that the statute of limitations does not begin to run on an insured’s claim that the insurer breached its duty to defend the insured in a tort suit brought by a third party until the underlying action is completed, because while the underlying tort action is continuing, the insurer can always step in and cure its breach. See Vigilant Ins. Co. v. Luppino, 352 Md. 481, 492, 723 A.2d 14, 19 (1999).

VIII. Trigger and Allocation Issues for Long-Tail Claims

A. Trigger of Coverage

The most frequently offered theories for the trigger of coverage are (1) the exposure theory, (2) the manifestation theory, and (3) the continuous-trigger theory. At least two other less-frequently followed theories exist. One is the “injury-in-fact” (or “damages-in-fact”) approach, which holds that coverage is triggered by a showing of actual injury or damage-producing event; and the other is the “double-trigger” theory, which holds that injury occurs at the time of exposure and the time of manifestation, but not necessarily during the intervening period. Mayor & City Council of Baltimore v. Utica Mut. Ins. Co., 145 Md. App. 256, 802 A.2d 1070 (2002). The Court of Appeals of Maryland has concluded that: “[M]anifestation is not the sole trigger of coverage in environmental pollution cases. Rather, . . . coverage under the policies may be triggered during the policy period at a time earlier than the discovery or manifestation of the damage.” Harford Cty. v. Harford Mut. Ins. Co., 327 Md. 418, 610 A.2d 286 (1992).

B. Allocation Among Insurers

On February 3, 2012, the United States Court of Appeals for the Fourth Circuit, in Pennsylvania Nat. Mut. Cas. Ins. Co. v. Roberts, 668 F.3d 106 (4th Cir. 2012), cert. denied, 133 S. Ct. 191 (2012), reaffirmed the application of pro rata, time-on-the-risk, allocation of liability coverage under Maryland law. The underlying plaintiffs had presented claims of bodily injury to a minor arising from exposure to lead-based paint in a residential property owned by the policyholder. The insurer acknowledged coverage and agreed to provide a defense to the policyholder but maintained that it would be responsible for no more than its pro rata share of any damages awarded – as measured by the length of the period of coverage compared to the length of the period of alleged exposure.

Following a jury trial and entry of an $850,000 judgment in favor of the minor plaintiff, Pennsylvania National brought a declaratory judgment action asserting that it was contractually liable to pay no more than forty percent of the judgment. The minor plaintiff disagreed, contending that the insurer must pay the entire judgment in light of the joint and several liability of its policyholder with other tortfeasors. The district court, relying primarily on Mayor & City Council of Baltimore v. Utica Mut. Ins. Co., 802 A.2d 1070 (Md. Ct. Spec. App. 2002), noted that Maryland courts had settled law concerning allocation of insurance coverage for long-tail claims and held in favor of Pennsylvania National that the pro rata allocation by time on the risk method would control.
On review, the Fourth Circuit largely agreed with the district court, holding that under Maryland law, and its own precedent in In re Wallace & Gale Co., 385 F.3d 820 (4th Cir. 2004), pro rata allocation would apply without regard to the number of insureds or tortfeasors. The Court noted that this conclusion was further consistent with the public policy of encouraging parties to obtain liability insurance to cover risks.

IX. Contribution Actions

A. Claim in Equity vs. Statutory

The right to contribution exists under common law, by statute and rule. A right to contribution exists under common law based on principles of equity, where one person discharges more than his or her just share of a common burden. See Wallace v. Jones, 110 Md. 143, 146-47, 72 A. 769, 770-71 (1909). At common law, however, there was no liability and thus no right of contribution among joint tortfeasors. See Hashmi v. Bennett, 416 Md. 707, 720, 7 A.3d 1059, 1067 (2010).

The Maryland Uniform Contribution Among Tortfeasors Act, codified at Md. Code Ann., Cts. & Jud. Proc. §§ 3-1401 through 3-1409, was developed to promote “some common policy” to legislatively establish contribution among joint tortfeasors. Hashmi, 416 Md. at 721, 7 A.3d at 1067. The Act provides a right to contribution among joint tortfeasors on a pro rata basis even if there has been no joint judgment against them. See Wassel v. Eglowsky, 399 F. Supp. 1330, 1366, aff’d, 542 F.2d 1235 (4th Cir. 1976), overruled in part on other grounds by Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101 (4th Cir. 1989). Each defendant may be liable to the plaintiff for the full amount of damages. See Md. Code Ann., Cts. & Jud. Proc. § 3-1401(c). Moreover, a tortfeasor has an action for contribution against another joint tortfeasor who signs a release and agrees he is a joint tortfeasor or who is so determined by a court. A joint tortfeasor who has paid more than his pro rata share of the judgment may enforce the right of contribution by making a post-trial motion for Judgment of Contribution or Recovery Over pursuant to Md. Rule 2-614 (Circuit Court) or 3-614 (District Court) even if he did not file a cross-claim against his joint tortfeasors. Lerman v. Heemann, 347 Md. 439, 444-48, 701 A.2d 426, 429-31 (1997). The statute of limitations is three years from the date of payment or judgment. Md. Code Ann., Cts. & Jud. Proc. § 5-101; Tadjer v. Montgomery Cty., 61 Md. App. 492, 496-97, 487 A.2d 658, 660 (1985).

B. Elements

To recover for contribution based on equitable principles, the plaintiff joint debtor must show that:

1. The parties are under a common burden or liability;
2. The property of the plaintiff as a co-debtor was taken in satisfaction of the debt;
3. The person paying is under a legal obligation to pay; and
4. The amount paid was the whole amount due or at least more than his or her pro rata share of the common obligation.

To recover for contribution under the Maryland Uniform Contribution Among Joint Tort Feasors Act, the plaintiff joint tortfeasor must show that:

1. There is a common liability to an injured person in tort (in fact, where an original plaintiff has no right of action against a third party, there can be no contribution entitling the defendant to join a third party as a defendant under the Maryland Uniform Contribution Among Joint Tort Feasors Act); and

2. The joint tortfeasor has by payment discharged the common liability of has paid more than his or her pro rata share thereof.


X. Duty to Settle

A. In General

“An insurer does not have an absolute duty to settle a claim within policy limits, although it may not refuse to do so in bad faith.” Allstate Ins. Co. v. Campbell, 334 Md. 381, 396, 639 A.2d 652, 659 (1994). The insurer does, however, have “a continuing duty to negotiate in good faith to settle the claim within policy limits.” Id. In determining whether an insurer has acted in good faith in refusing to settle a claim, Courts have looked to the following factors:

- The severity of the plaintiff's injuries giving rise to the likelihood of a verdict greatly in excess of the policy limits
- Whether there was a lack of proper and adequate investigation of the circumstances surrounding the accident
- Whether there was a lack of skillful evaluation of plaintiff's disability
- Whether the insurer failed to inform the insured of a compromise offer within or near the policy limits
- Whether the insurer pressured the insured to make a contribution towards a compromise settlement within the policy limits, as an inducement to settlement by the insurer
- Whether the insurer took any actions which demonstrate a greater concern for the insurer's monetary interests than the financial risk attendant to the insured's predicament

State Farm Mut. Auto. Ins. Co. v. White, 248 Md. 324, 332, 236 A.2d 269, 273 (1967). An insurer is not liable for bad faith failure to settle a claim where the insurer disclaims coverage for a claim, even if the insurer’s denial of coverage is erroneous. Mesmer v. Maryland Auto Ins. Fund, 353 Md. 241, 263, 725 A.2d 1053, 1064 (1999). In such a situation, the insurer remains liable only for breach of contract. Id.

B. Conflict of Interest

An insurer’s decision to reject a settlement offer within policy limits does not create a conflict that would require the insurer to cease directing

C. Subrogation

An excess insurer has the right to assert an equitable subrogation claim on behalf of its insured against the insured’s primary insurance carrier for bad faith failure to settle a claim. Fireman’s Fund Ins. Co. v. Continental Ins. Co., 308 Md. 315, 519 A.2d 202 (1987).

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