I. **Regulatory Limits on Claims Handling**

**A. Timing for Responses and Determinations**

The time limits for responding to claims are found in the Uniform Trade Practices Act, MCLA § 500.2001, et seq. Examples: 30 days to specify in writing the materials that constitute a satisfactory proof of loss after receipt of claim unless claim is settled within the 30 days, MCLA § 500.2006; 60 days to pay after receipt of proof of loss; 30 days to pay personal protection benefits under the Michigan Auto No-Fault Act after an insurer receives reasonable proof of the fact and of the amount of the loss sustained, MCLA § 500.3142.

**B. Standards for Determinations and Settlements**


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

All insurers domiciled in the State of Michigan and all other entities and persons regulated by the Division of Insurance that provide products to individuals for personal, family or household purposes are subject to the Title V privacy requirements of the federal Gramm-Leach-Bliley Financial Services Modernization Act.

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1 Failure to timely pay benefits may subject an insurer to paying 12% penalty interest, irrespective of whether coverage is reasonably in dispute. MCLA § 500.2006(4); *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 562-563; 741 NW2d 549 (2007).
Services Modernization Act, effective November 13, 2000. Title V declares that it is the policy of Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers’ nonpublic personal information. Until Michigan law or regulations are adopted, the Commissioner of Insurance will deem compliance with the standards contained in the Federal Trade Commission regulations 16 CFR § 313 (2008) to be compliance with Title V. MI Bulletin 2000-8.

Michigan has adopted the Freedom of Information Act, MCLA § 15.231, et seq, which governs public access to government records.

II. Principles of Contract Interpretation


“[T]he language of the parties’ contract is the best way to determine what the parties intended.” Klapp at 476. “[T]he terms of an insurance contract are interpreted according to the definitions set for the therein or, if none are provided, are given a meaning in accordance with their common usage.” Cavalier Mfg Co v Employers Ins, 211 Mich App 330, 334; 535 NW 2d 583 (1995) citing Allstate Ins Co v Freeman, 432 Mich 656, 664-665; 443 NW2d 734 (1989). See also Henderson v State Farm and Casualty Co, 460 Mich 348, 356; 596 NW2d 190 (1999) (A policy is not ambiguous just because it does not define a relevant term).


III. Choice of Law

Michigan courts have endorsed the balancing approach for contract choice of law questions set forth in §§ 187 and 188 of the Restatement (Second) Conflicts of Law. Chrysler Corp v Skyline Industrial Services, Inc,
IV. Duties Imposed by State Law

A. Duty to Defend

1. Standard for Determining Duty to Defend

The duty to defend is broader than the duty to indemnify. Auto-Owners Ins Co v City of Clare, 446 Mich 1; 521 NW2d 480, 487 (1994). The duty to defend is determined by the allegations in the underlying complaint against the insured and the duty to defend arises with "allegations that even arguably come within policy coverage." Am Bumper and Mfg Co v Hartford Fire Ins Co, 452 Mich 440; 550 NW2d 475, 450-51 (1996). However, the "duty to defend cannot be limited by the precise language of the complaint. The insurer has the duty to look behind the third party’s allegations to analyze whether coverage is possible." Citizens Ins Co v Pro-Seal Serv Group, 477 Mich 75; 730 NW2d 682, 689 (2007). Thus, an insurer’s duty to defend must include the duty to investigate and analyze whether the third party's claim is covered. Koski v Allstate Ins Co, 456 Mich 439; 572 NW2d 636, 639 (1998). The duty to defend continues until the carrier confines the claim to one that is not covered by the policy. Id. The duty to defend also exists even if there are theories of recovery against the insured in the complaint, which do not fall within coverage of the policy, so long as some allegations arguably fall within coverage. Am Bumper, 550 NW2d at 48, (quoting Dochod v Cent Mut Ins Co, 81 Mich App 63; 264 NW2d 122 (1978)).

2. Issues with Reserving Rights

An insurer may unilaterally reserve its rights to decline coverage at a later date. The insurer satisfies its defense obligation in situations where a potential conflict exists by appointing independent counsel to represent the insured. Cent Mich Bd of Tr v Employer’s Reinsurance Corp, 117 F Supp 2d 627 (ED Mich 2000). The insurer must exercise good faith in selecting truly independent counsel. Id. Because the tripartite relationship is rife with potential for conflict, the defense attorney’s loyalty must lie with the insured. Id. Moreover, an insurer’s reservation of rights still allows the insurer “some prerogative with respect to the defense beyond just paying expenses.” Fed Ins Co v X-Rite, Inc, 748 F Supp 1223 (WD Mich 1990).

Where an insurer has undertaken the defense of an insured while having knowledge of facts which would allow avoidance of liability the insurer will be deemed to be estopped from avoiding coverage if it fails to provide reasonable notice to its insured of the possible disclaimer. See Fire Ins
Exchange v Fox, 167 Mich App 710 (1988) (finding as a matter of law that four months is not unreasonable).

B. Duty to Settle

Michigan law recognizes the cause of action for bad faith refusal to settle within policy limits and provides that an insurer is liable to the insured for a judgment in excess of the policy limits when an insurer “having exclusive control of settlement, fraudulently or in bad faith refuses to compromise a claim for an amount within the policy limits.” Frankenmuth Mut Ins Co v Keeley, 433 Mich 525, 534; 447 NW2d 691 (1989) (quoting City of Wakefield v Globe Indem Co, 246 Mich 645, 648; 225 NW 643 (1929)); See also J & J Farmer Leasing, Inc. v. Citizens Ins. Co. of America, 472 Mich 353, 356 fn 3; 696 NW2d 681 (2005).


The Supreme Court of Michigan has held that “the insurer does not act in bad faith if it refuses settlement in the honest belief that it has a fair chance of victory, or of keeping the verdict within the policy limit, or, upon reasonable grounds, that the compromise amount is excessive, or if it has legal defenses, as yet undetermined by a court of last resort, which fairly seem applicable…” City of Wakefield, 246 Mich at 652-653. A “mistake of judgment is not bad faith.” Id. at 653.

V. Extracontractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

1. First Party

Michigan courts have repeatedly refused to recognize an independent cause of action for breach of the implied covenant of good faith and fair dealing arising out of commercial contracts, including insurance policies. See, e.g., Dahlman v Oakland Univ, 172 Mich App 502, 507; 432 NW2d 304 (1988) ("We decline to recognize such a cause of action, because such a radical departure from the common law and Michigan precedent should come only from the Supreme Court."); Ulrich v Fed Land Bank, 192 Mich App 194, 197; 480 NW2d 910 (1992) ("Michigan does not recognize an independent tort action for an alleged breach of a contract’s implied covenant of good faith and fair dealing."); Aetna Cas & Sur Co v Dow Chem Co, 883 F Supp 1101, 1111 (ED Mich 1995) (Michigan law does not recognize an implied contractual duty of good faith. Michigan law does not recognize an independent tort based upon a bad faith breach of contract). See also, Kewin v Mass Mut Life Ins Co, 409 Mich 401; 295 NW2d 50 (1980); Roberts v. Auto-Owners Ins. Co., 422 Mich 594, 604; 374 NW2d
2. **Third Party**

Michigan courts previously held that any duty of good faith and fair dealing arises from the contract, thus, third-parties were barred from suing an insurer for bad faith because Michigan law treated bad faith as a claim for fraud. *In Re Baker*, 709 F2d 1063 (6th Cir Mich 1983); *Jones v Hicks*, 358 Mich 474; 100 NW2d 243 (1960). However, since that time the Michigan Supreme Court decided that bad faith should not be used interchangeably with the word “fraud,” “because bad faith is a state of mind and there can be bad faith without actual dishonesty or fraud.” *Benkert v Med Protective Ins Co*, 842 F2d 144 (6th Cir 1988) (citing *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127; 393 NW2d 161 (1986). Therefore, where an insured’s claim for bad faith failure to settle within policy limits is not based on a claim for fraud, the claim is assignable. Id.

3. **Damages**

When an insurer fails in bad faith to settle within policy limits, resulting in a judgment in excess of the policy limits, the insured’s ability to recover for the excess amount is limited to the amount collectible from the insured. *Frankenmuth Ins Co v Keeley*, 436 Mich 372; 461 NW2d 666 (1990). Exemplary damages are not allowed because insurance policies, like other commercial contracts, do not involve matters of mental concern and solitude, and, therefore, an award of exemplary or mental distress damages are not available. *Benkert v Med Protective Ins Co*, 842 F2d 144 (6th Cir Mich 1988). Attorney fees and costs may not be awarded unless expressly authorized by statute, court rule, or a recognized exception. *Burnside v State Farm Fire Ins Co*, 208 Mich App 422; 528 NW2d 749 (1995). One such exception can be found in the Michigan Auto No-Fault Act; MCLA § 500.3148.

**B. Fraud**

To sustain a cause of action for fraud, plaintiff must establish that (1) the defendant made a material representation, (2) the representation was false, (3) when the defendant made the representation, it knew it was false, or the defendant made the representation recklessly, without any knowledge of its truth, and as a positive assertion, (4) the defendant made the representation with the intent that it be acted upon by the plaintiff, (5) the plaintiff acted in reliance on the representation, and (6) the plaintiff suffered injury due to his reliance on the representation. *Hord v Envtl Research Inst*, 463 Mich 399; 617 NW2d 543 (2000).

**C. Intentional or Negligent Inflection of Emotional Distress (IIED or NIED)**
It is generally held that damages for mental distress cannot be recovered in an action for breach of a contract. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401; 295 NW 2d 50, 53 (1980). In *Kewin*, the Michigan Supreme Court stated that while it recognizes that breach of an insurance contract results in annoyance and vexation, recovery for the annoyance and vexation is generally not allowed “absent evidence that [those consequences] were within the contemplation of the parties at the time the contract was made.” *Id.* at 54. Michigan courts have held that failure to pay a contractual obligation does not constitute outrageous conduct, even if it is done in bad faith or willfully. *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004).

There is no Michigan case law that has allowed a plaintiff to recover for NIED arising out of a claim against an insurance company. Claims for NIED are typically limited to cases where plaintiff witnesses injury to an immediate family member that was caused by negligence. *Hesse v Ashland Oil*, 466 Mich 21; 642 NW2d 330 (2002).

D. **State Consumer Protection Laws, Rules and Regulations**

Michigan Consumer Protection Act (“MCPA”), MCLA § 445.903, provides remedies for unfair, unconscionable, or deceptive methods, acts, or practices in conduct of trade or commerce. The Intent of the MCPA is to protect consumers in their purchases of goods which are primarily used for personal, family, or household purposes. The MCPA does not provide protection if an item is purchased primarily for business or commercial purposes. *Zine v Chrysler Corp*, 236 Mich App 261; 600 NW2d 384 (1999). Amendments to the MCPA in 2000 eliminated the ability to bring a MCPA claim against an insurance company. *McLiechey v Bristol West Ins Co*, 474 F3d 897 (2006) (holding that the MCPA does not apply to insurance companies).

VI.

A. **Discoverability of Claims Files Generally**

Insurer claim files are routinely held discoverable in first party coverage litigation because these files are not generally made in anticipation of litigation. Files generated in relation to third party claims are made in anticipation of litigation and are generally not discoverable. *Taylor v Temple & Cutler*, 192 FRD 552, 558 (ED Mich 1999). Courts recognize that such claim files may contain documents subject to the attorney/client privilege and/or the work product doctrine, and such documents are to be protected from discovery. *Koster v June’s Trucking, Inc*, 244 Mich App 162; 625 NW2d 82 (2001).

While there are no published decisions in Michigan regarding the production of claim files of other insureds, some trial courts have flatly
rejected the right to such discovery. See, e.g., Commercial Union v Cannelton, No 2:92 CV 111 (WD Mich SD 1996) (Magistrate Rowland rejected the policyholder’s request for such information as "not necessarily probative of the mutual intent of the parties in this case" and unduly burdensome to produce).

B. Discoverability of Reserves

There are no published decisions in Michigan regarding the discoverability of reserves. However, in Aetna Cas & Sur Co v Dow Chem Co, unpublished opinion of the United States District Court, Eastern District of Michigan, decided July 14, 1995 (Case No. 93-CV-73601-DT), the Court stated that information regarding reserves need not be produced by the insurer because it is "insufficiently probative of the proper interpretation or application of the individual policies in issue..." See also, Commercial Union v Cannelton, Case No. 2:92 CV 111 (WD Mich SD 1996) (Magistrate Rowland held that "because insurance carriers set reserves at least in part because they are required by law, it does not appear that the reserve amount or the date the reserve was set would have any significance in this case"); Dow Corning Corp v Hartford Accident & Indem Co, Case No 93-325-789-CK (Wayne Cty Cir Court) ("Dow also seeks information with respect to ...reserves. The overwhelming majority of case law cited recognizes that these items are not discoverable") and Hendricks v Frankenmuth Mut Ins Co, Case No. 08095843 (Oakland Cty Cir Court) (reserve information held not relevant and therefore not discoverable in first party no-fault case).

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

Again, there are no published decisions in Michigan regarding the discoverability of reinsurance information and communications with reinsurers. Magistrate Rowland addressed this issue in Cannelton, supra, in the context of a "late notice" analysis. Judge Rowland held that "[i]n the absence of an ambiguity, if it is [the policyholder’s] responsibility to provide notice of an occurrence or claim, extrinsic evidence [reinsurance] may not be admissible." (See Op. at 11). See also Strkyer Corp v Nat’l Union Fire Ins Co No. 4:01-CV-157 (WD Mich), oral argument transcript at pg. 38, (Judge Quist stating that he does not believe that reinsurance information is helpful to the insured and that reinsurance is a “business decision” not an “insurance decision”). See also, Aetna Cas & Sur Co v Dow Chem Co, No. 93-CV-73601-DT (ED Mich), Order at 2, and Dow Corning Corp v Hartford Accident & Indem Co, No 93-325-789-CK (Wayne Cty Cir Court).

D. Attorney/Client Communications

No attorney/client relationship exists between the insurance company and the attorney it appoints to represent the insured. The attorney’s sole
loyalty and duty is owed to the client, and not the insurer. Koster v June’s Trucking, Inc, 244 Mich App 162; 625 NW2d 82 (2001); Kirschner v Process Design Assoc, 459 Mich 587; 592 NW2d 707 (1999).

Michigan courts have not addressed whether advice of counsel can act as a defense to a bad faith action.

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

An insurance company may rescind coverage and declare a policy void if an insured misrepresents a material fact in the application for insurance. Oade v Jackson Nat Life Ins Co, 465 Mich 244; 632 NW2d 126 (2001). The insurer may rescind coverage even for an innocent misrepresentation, as long as the insurer relied on the misrepresentation. Lake States Ins Co v Wilson, 231 Mich App 327, 331; 586 NW2d 113 (1998); Titan Ins Co v Hyten, 491 Mich 547, 571-572; 817 NW 2d 562, 576 (2012). No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to either a refusal by the insurer to make the contract or to the charging of a higher premium. Montgomery v Fidelity & Guar Life Ins Co, 269 Mich App 126, 129; 713 NW2d 801 (2005) (“A misrepresentation on an insurance application is material if, given the correct information, the insurer would have rejected the risk or charged an increased premium.”)

B. Failure to Comply with Conditions

The Michigan Supreme Court has supported the use of notice provisions in insurance contracts requiring policyholders to provide reasonable notice as a means of protecting a carriers’ right to investigate, evaluate and defend claims. Wendell v Swanberg, 384 Mich 468; 185 NW2d 348 (1971); Wehner v Foster, 331 Mich 113, 117; 49 NW2d 87 (1951); Weller v Cummins, 330 Mich 286, 292-93; 47 NW2d 612 (1951); Kenney v Dashner, 319 Mich 491; 30 NW2d 46 (1947); Wood v Duckworth, 156 Mich App 160; 401 NW2d 258 (1987). The purpose of notice provisions in insurance policies is to allow carriers to make timely investigations of accidents in order evaluate claims and to defend against fraudulent, invalid or excessive claims. Tenneco Inc v Amerisure Mut Ins Co, 281 Mich App 429; 761 NW2d 846, 858 (2008); Wendell, supra, at 477; CPC Int’l, Inc v Aerojet-Gen’l Corp, 825 F Supp 795, 813 (WD Mich 1993). Conditions requiring notice to the insurer "as soon as practicable" are interpreted to mean within a reasonable time, dependent on the facts and circumstances of the case. Motor State Ins Co v Benton, 35 Mich App 287, 297; 192 NW2d 385, 387 (1971); CPC Int’l, Inc., supra at 815; Upjohn v Aetna Cas & Sur Co, 768 F Supp 1186, 1202 (WD Mich 1990). It is well established that an insurer which seeks to cut off responsibility on the grounds that the insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual

Breaches of the cooperation clause also preclude coverage where the insurer can establish resultant prejudice. Fed Ins Co v X-Rite, Inc, 748 FSupp 1223 (WD Mich 1990). The insurer has the burden to show that it actively sought cooperation, and that due to insureds lack of cooperation, evidence needed to defend insured was not available. Anderson v Kemper Ins Co, 128 Mich App 249, 253-254; 340 N2d 87 (1983).

Failure to comply with the "voluntary payment" condition also may result in loss of coverage for a claim. Coil Anodizers, Inc v Wolverine Ins Co, 120 Mich App 118; 327 NW2d 416 (1983); Tenneco Inc, 281 Mich App at 472. An insurer does not need to establish prejudice to preclude coverage for breach of a policy’s “voluntary payment” condition. Tenneco Inc, 281 Mich App at 470.

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

While most liability policies seek to bar collusive settlements by barring action against it until there has been a judgment or a settlement approved by the carrier, Michigan law recognizes the right of a subrogee of the insured’s rights to take a consent judgment and to bring a direct action against the insurer for breach of the insurance contract. Ounan v Hastings Mut Ins Co, 1996 WL 33347940,*1; Davis v Great Am Ins Co, 136 Mich App 764; 357 NW2d 761 (1984); Cloud v Vance, 97 Mich App 446; 296 NW2d 68 (1980).

D. Statutes of Limitations

Where the insurance policy does not specify a deadline for when a suit must be brought under the policy, the action is controlled by the statute of limitations, MCLA § 600.5807(8). Parties to an insurance contract may stipulate to shorten, Tom Thomas Organization, Inc v Reliance Insurance Co, 396 Mich 588, 242 NW2d 396 (1976), or lengthen the time when a cause of action accrues. Traverse City State Bank v Ranger Ins Co, 72 Mich App 150; 243 NW2d 333 (1977). The statute of limitations in an insurance coverage action depends upon whether the plaintiff asserts a cause of action based upon contract or tort theories. Actions based upon breach of contract are subject to a six year limitations period MCLA § 600.5807(8); Smith v Allstate Ins Co, 102 Mich App 473; 302 NW2d 208 (1981). With respect to an insurer’s promise to defend its insured from suits, a breach of contract occurs when the insurer refuses to defend an action brought against its insured. Schimmer v Wolverine Ins Co, 54 Mich App 291, 297; 220 NW2d 772 (1974). With respect to a promise to indemnify, the period of limitations runs from “when the indemnitee sustained the loss,” Ins Co of North Am v Southeastern Electric Co, Inc, 405 Mich 554, 557; 275 NW2d 255 (1979), or “when the promisor fails
to perform under the contract.” Cordova Chem Co v Dep’t of Natural Resources, 212 Mich App 144, 153; 536 NW2d 860 (1995).

Actions based upon tort (i.e., bad faith breach of implied covenant of good faith, to the extent recognized) are subject to a three year limitations period; MCLA § 600.5805(8).

The statute of limitations under the Michigan Auto No-Fault Act is generally one year for first-party no-fault benefits; MCLA § 500.3145.

VIII. Trigger and Allocation Issues for Long-Tail Claims

A. Trigger of Coverage

In Gelman Sciences, Inc v Am Motorists Ins Co, 456 Mich 305, 329; 572 NW2d 617, 628 (1998), overruled in part by Wilkie v Auto-Owners Ins Co, 469 Mich 41; 664 NW2d 776 (2003), the Michigan Supreme Court held that the standard CGL policy language, providing coverage for property damage occurring during the policy period, unambiguously dictated application of the injury-in-fact trigger of coverage.

B. Allocation Among Insurers

The Michigan Courts have discussed five different methods for allocating liability among successive insurance policies where property damage or injury occurred over several years. All five methods were discussed in Arco Indus Corp v Am Motorists Ins Co, 232 Mich App 146, 165; 594 NW2d 61 (1999) aff’d by equal division, (Order dated June 22, 2000). In Arco the Michigan Court of Appeals determined that the “time-on-the-risk” method of allocation should be utilized in cases involving continuous property damage and successive insurance policies.

More recently, in an unpublished decision, the Saginaw County Circuit Court determined in a lead paint chip ingestion case that the insured was obligated to participate in a pro rata share of both defense and indemnification costs for periods of no insurance or lost policies. Indiana Ins Co v Maul Inv, No 02-043886-CZ-1 (Borchard, J.). In Century Indem Co v Aero-Motive Co, 318 F Supp 2d 530 (WD Mich 2003) the Court in an environmental contamination coverage case, determined that defense costs are subject to a pro rata allocation among insurers based on the time-on-the-risk method.