I. Regulatory Limits on Claims-Handling

A. Timing for Responses and Determinations

Mississippi has no Unfair Claims Practices Act or similar statute imposing time limits in which to respond to claims. However, the "Model Unfair Claims Act" has been cited in dissenting opinions by the Mississippi Supreme Court. See, e.g., Preferred Risk Mut. Ins. Co. v. Johnson, 730 So. 2d 574 (Miss. 1998). Insurers must investigate claims and advise insureds of the acceptance or denial of claims promptly and adequately. Universal Life Ins. Co. v. Veasley, 610 So. 2d 290, 297 (Miss. 1992).

B. Standards for Determinations and Settlements

The resolutions of claims involving minors and other incompetents is controlled by statute; no such resolution is valid without specific court approval. Miss. Code Ann. § 93-13-1, et seq. (1972). Depending upon the gross size of the compromise, formal guardianship will be required; the threshold value is $25,000.00. Miss. Code Ann. § 93-13-211. Again, Mississippi has no general unfair claims practices statute; therefore, the standards for determination and settlements, to the extent not specified by policy terms, are matters susceptible of ex post facto "regulation" by the courts. "Unreasonable" delay in payment has been held actionable by the Mississippi Supreme Court. See, e.g., Caldwell v. ALFA Ins. Co., 686 So. 2d 1092 (Miss. 1996).

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

Mississippi has no statutory nor constitutional provision directly addressing privacy rights in the context of property and casualty insurance. There are no standards on privacy viz. insurance.

II. Principals of Contract Interpretation

The interpretation of insurance policy language is a question of law. Generally, under Mississippi law, when the words of an insurance policy are plain and unambiguous, the court will afford them their plain, ordinary meaning, and will apply them as written. Ambiguous and unclear insurance policy language must be resolved in favor of the insured. Further, provisions that limit or exclude coverage are to be construed liberally in favor of the insured and most strongly against the insurer.
III. Choice of Law

Choice of law analysis involves a multi-step process. First, it must be determined whether the conflicting laws are substantive or procedural. Regardless of the substantive law to be applied, Mississippi courts will apply their own procedural law. Ford v. State Farm Ins. Co., 625 So. 2d 792, 793 (Miss. 1993). However, few laws are classified as procedural in Mississippi. In addition to the Mississippi Rules of Civil Procedure and Mississippi Rules of Evidence, Mississippi courts have only found the definition of "procedural" to include statutes of limitations, awards of attorney's fees and awards of pre-judgment interest. Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp., 743 So. 2d 954, 960 (Miss. 1999). The Mississippi Supreme Court has held that contract construction is substantive. Zurich Am. Ins. Co. v. Goodwin, 920 So. 2d 427, 433 (Miss. 2006); Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1039 (Miss. 1985).

In determining which state's substantive law to apply, Mississippi relies on the "center of gravity" doctrine set forth in the Restatement (Second) of Conflict of Laws. The Mississippi Supreme Court has described the center of gravity doctrine as follows:

This doctrine is a rule whereby the court trying the action applies the law of the place which has the most significant relationship to the event and parties or which, because of the relationship or contact with the event and parties, has the greatest concern with the specific issues with respect to the liabilities and rights of the parties to the litigation.

Mitchell v. Craft, 211 So. 2d 509, 514-15 (Miss. 1968). Under Mississippi law, the court applies the factors set forth in the Restatement (Second) of Conflicts of Law in determining which state's law to apply, including the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract and the domicile, residence, nationality, place of incorporation and place of business of the parties. Baites v. State Farm Mutual Auto Ins. Co., 733 So. 2d 320, 322-23 (Miss. Ct. App. 1998).

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. W.R. Berkley Corp. v. Rea's Country Lane Constr., 140 So. 3d 437, 442 (Miss. Ct. App. 2013). An insurer is obligated to defend an insured not only when the suit is within the coverage afforded by the policy, but also when allegations of the suit state claims or facts that are potentially within the policy's coverage. All doubts as to the existence of a defense obligation are resolved in favor of the insured. U.S. Fidelity & Guar. Co. v. B&B Oil Well Service, Inc., 910 F. Supp. 1172 (S.D. Miss. 1995). While the general rule is that the duty to defend hinges on the allegations of the complaint, there
is an exception which imposes a duty to defend when the insurer has knowledge, or could obtain knowledge through reasonable investigation, of the existence of facts which trigger coverage. American States Ins. Co. v. Natchez Steam Laundry, 131 F. 3d 551 (5th Cir. 1998).

2. **Issues with Reserving Rights**

When an insurer agrees to provide a defense under a reservation of rights, "special obligations" are placed on the insurer and defense counsel hired by the insurer. Insurance defense counsel may only represent the insured on those claims which are clearly covered by the policy, and if the insurer reserves its rights as to any portions of the complaint, then the insured has a right to hire an attorney of his/her own choosing to defend those claims at the insurer's expense. If all claims are being defended under a reservation of rights, the insurer must permit the insured to retain his/her own attorney, whose fees the insurer must pay. Moeller v. American Guar. and Liability Ins. Co., 707 So. 2d 1062 (Miss. 1996).

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

A. **Bad Faith**

1. **First Party**

To recover punitive damages on a cause of action for "bad faith" under Mississippi law, a plaintiff must prove the following elements by a preponderance of the evidence: (1) that the insurer lacked an arguable or legitimate basis for denying the claim; and (2) that the insurer committed a willful or malicious wrong, or acted with gross and reckless disregard for the insured's rights. State Farm Mut. Auto. Ins. Co. v. Grimes, 722 So. 2d 637, 641 (Miss. 1998); Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 248 (Miss. 1977).

2. **Third Party**

Generally, the implied covenant of good faith and fair dealing runs only between the insurer and the insured, so a third party cannot sue for its breach based upon a refusal to settle claims. However, under certain circumstances, an insured may assign its bad faith rights to the third party, usually in exchange for a covenant not to execute on an excess judgment. Kaplan v. Harco National Ins. Co., 716 So. 2d 673 (Miss. 1998).

B. **Fraud**

To establish a cause of action for fraud or intentional misrepresentation under Mississippi law, a plaintiff must prove by clear and convincing evidence the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) his/her consequent and proximate injury. Levens v. Campbell, 733 So. 2d 753, 761-62 (Miss. 1999); Allen v. Mac Tools, Inc., 671 So. 2d 636, 642 (Miss. 1996); Boling v. A-1 Detective Patrol Service, Inc., 659 So. 2d 586, 590 (Miss. 1995).
C. **Intentional or Negligent Infliction of Emotional Distress**

To establish a cause of action for intentional infliction of emotional distress and/or outrage under Mississippi law, a plaintiff must prove that the defendant's conduct was malicious, intentional, willful, wanton, grossly careless, indifferent or reckless. If such conduct is present, then no physical injury is required in order to recover under this cause of action. Smith v. Malouf, 722 So. 2d 490, 497-98 (Miss. 1998); Morrison v. Means, 680 So. 2d 803, 806 (Miss. 1996); Leaf River Forest Products, Inc. v. Ferguson, 662 So. 2d 648, 659 (Miss. 1995). However, if the defendant's conduct is not malicious, intentional, outrageous, etc., then "there must be some sort of demonstrative harm, and said harm must have been reasonably foreseeable to the defendant." Morrison, 680 So. 2d at 806; Strickland v. Rossini, 589 So. 2d 1268, 1275 (Miss. 1991).

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

Mississippi has no Unfair Claims Practices Act Statute. However, Mississippi does have an Insurance Unfair Trade Practices Act in Miss. Code. Ann. § 83-5-33. It provides: No person shall engage in the state in any trade practice which is defined in § 83-5-29 to § 83-5-51 as, or determined pursuant to said sections to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

Mississippi also has a general unfair trade practice act statute, Miss. Code Ann. § 75-24-5. It provides in pertinent part that "unfair methods of competition affecting commerce and unfair or deceptive trade practices in or affecting commerce are prohibited."

VI. **Discovery Issues in Actions Against Insurers**

A. **Discoverability of Claims Files Generally**

While there are no cited cases in Mississippi on this issue, claims files or parts thereof are often considered relevant and discoverable in suits against insurers. The claims files of other insureds may be discoverable if relevant to show other instances of misconduct. However, defense counsel will generally object to producing other claims files and put the burden on plaintiff to prove the need for the information.

B. **Discoverability of Reserves**

Again, there are no cited cases in Mississippi on this issue, but reserve information may be considered relevant and discoverable in a bad faith suit to prove an insurer's awareness of facts triggering a duty to defend and/or that the insurer unreasonably exposed its insured to the risk of an excess judgment. However, defense counsel should generally object to such discovery and put the burden on plaintiff to prove the need for the information.
C. **Discoverability of Existence of Reinsurance and Communications with Reinsurers**

The existence of reinsurance is probably discoverable under a liberal reading of Miss. R. Civ. P. 26. The discovery of communications with reinsurers may be discoverable if shown to be relevant to the specific case at issue. However, defense counsel should object to the discovery of such information until plaintiff has shown a real need for it.

D. **Attorney/Client Communications**

Where an insurer retains counsel to represent an insured, the insurer and insured are joint clients for purposes of the attorney-client privilege. Neither party may use the privilege as a shield in litigation between insurer and insured. Reliance on the advice of counsel defense results in a waiver of the attorney client and work product privileges only where it can be said that the defendant has voluntarily injected the issue into the case. *Buford v. Holladay*, 133 F.R.D. 487, 494-95 (S.D. Miss. 1990); *Ward v. Succession of Freeman*, 854 F. 2d 780, 788 (5th Cir. 1988).

VII. **Defenses in Actions Against Insurers**

A. **Misrepresentations/Omissions: During Underwriting or During Claim**

An insurance policy may be rescinded for a misstatement or concealment of a material fact in the application if the insurer establishes (1) that a false statement was made in the representation, and (2) that the false statement was material. *Wesley v. Union Nat. Life*, 919 F. Supp. 232, 234 (S.D. Miss. 1995); see also, Miss Code Ann. § 83-9-11. "A misrepresentation is regarded as material if it affects either (1) the acceptance of the risk or (2) the hazard assumed by the company." *Golden Rule Ins. Co. v. Hopkins*, 788 F. Supp. 295, 301 (S.D. Miss. 1991); *Mattox*, 693 F. Supp. at 214.

Moreover, "there is no requirement under Mississippi law that the actual cause of [loss] be related to risks concealed by an insurance applicant in order for the concealed facts to be material." *Wesley*, 919 F. Supp. at 234.

It is important to note that the "material to the risk" test is viewed from the standpoint of a "reasonably careful and intelligent underwriter," not from that of a third party such as a doctor. *Equitable Mortgage Corp. v. Mortgage Guar. Ins. Corp.*, 791 F. Supp. 620, 625 (S.D. Miss. 1990).

Finally, it should also be noted that under Mississippi law an insurance agent's knowledge of the condition misrepresented by the insured is imputed to the insurer and, therefore, waives the right to rescind the policy. *Southern United Life Ins. Co. v. Caves*, 481 So. 2d 764, 767 (Miss. 1985).

B. **Failure to Comply with Conditions**

When the insured breaches a condition precedent to recovery, the insurer need not demonstrate prejudice. *United States Fid. & Guar. Co. v. Wigginton*, 964 F.2d 487, 491 (5th Cir. 1991). Thus, where a policy makes notice of claim a condition precedent to recovery, the insurer may assert a
defense of untimely notice without showing prejudice. Boliver County Bd. of Supervisors v. Forum Ins. Co., 779 F. 2d 1081, 1085 (5th Cir. 1986). Other defenses may also be available to insurers for failure to comply with conditions of the policy such as the cooperation clause and settlement clause.

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

Mississippi has no cases or statutes addressing this issue.

D. **Statutes of Limitations**

Unless otherwise specified, a three-year statute of limitations applies to causes of action based upon contract or tort theories. See Miss. Code Ann. § 15-1-49. The three-year period does not begin to run until the alleged breach of contract occurs or the tort is discovered or should be discovered. Id.

**VIII. Trigger and Allocation Issues for Long-Tail Claims**

A. **Trigger of Coverage**

While there are few Mississippi cases addressing trigger theories, in Essex Ins. Co. v. Massey Land & Timber, LLC, 2006 U.S. Dist. LEXIS 36748 (S.D. Miss. 2006), a declaratory judgment action involving defective construction, the court predicted that the Mississippi Supreme Court would apply a "continuous trigger" theory, which "includes all times from exposure through progression to manifestation."

B. **Allocation Among Insurers**

When competing insurance policies each contain conflicting "other insurance" clauses or "excess coverage" clauses, the clauses shall not be applied and the benefits under the policies shall instead be prorated according to the coverage limits of each policy. Allstate Ins. Co. v. Chicago Ins. Co., 676 So. 2d 271 (Miss. 1996); Titan Indem. Co. v. American Justice Ins. Reciprocal, 758 So. 2d 1037 (Miss. App. 2000).

**IX. Contribution Actions**

A. **Claim in Equity vs. Statutory**

Equitable contribution typically arises when more than one insurer provides coverage to the same insured and one insurer has paid more than its share of the loss. Guidant Mut. Ins. Co. v. Indem. Ins. Co. of N. Am., 13 So. 3d 1270, 1280 (Miss. 2009); State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 255 So. 2d 667, 669 (Miss. 1971). Statutory contribution is available in those limited situations where a defendant is held to be jointly and severally liable with another defendant with whom he or she is found to have been acting in concert. Miss. Code Ann. § 85-5-7(4).

B. **Elements**

To prevail on a claim of equitable contribution, an insurer must prove that it made payments when "it was legally liable to settle" and that the
amount paid was “reasonable.” “Legally liable to settle” has been interpreted to mean that an insurer must prove that it had a legal duty to settle, or at least a legal duty to consider the insured’s best interest and to make an honest evaluation of a settlement offer within the policy limits. Indem. Ins. Co. of N. Am. v. Guidant Mut. Ins. Co., 99 So. 3d 142, 151 (Miss. 2012). “The existence or nonexistence of a legal duty - such as the duty to settle - is a question of law to be decided by the court.” Id. at 153; Lyle v. Mladinich, 584 So. 2d 397, 400 (Miss. 1991).

Miss. Code Ann. § 85-5-7 allows for the imposition of joint and several liability “on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it.” Miss. Code Ann. § 85-5-7(4). However, this statute further provides that when a person is held jointly and severally liable, he or she “shall have a right of contribution from his fellow defendants acting in concert.” Id.

X. **Duty to Settle**

Insurers have a fiduciary duty to their insureds to "consider fairly the interests of the insured as well as [their] own" when faced with a settlement demand within the insured's policy limits. Hartford Acc. & Indem. Co. v. Foster, 528 So. 2d 255 (Miss. 1988). An insurer must place the interests of its insured above its own financial interests and can be exposed to tort liability (including bad faith) for refusing to settle within policy limits in the event of an adverse judgment against the insured in excess of policy limits. Id.