I. Regulatory Limits on Claims Handling

A. Timing for Responses and Determinations

In Missouri, an insurer must acknowledge notice of a claim within ten (10) working days, unless payment is made within that time period. See 20 CSR 100-1.030. Further, claim forms, including a proof of loss, shall be promptly provided to the insured. In most circumstances, "promptly" means within ten (10) working days. See id. Investigation of a claim shall be completed within thirty (30) days after notification unless this time period becomes unreasonable. See 20 CSR 100-1.050. If the investigation continues for more than forty-five (45) days after the insurer receives the proof of loss, the insurer must send a letter to the insured advising that additional time is needed to complete the investigation and the reasons for such additional time must be listed. See id. For every 45 days thereafter, an additional letter must be sent setting forth the reasons for the delay. See id. The insurer also must respond within ten (10) days to any communications from the insured that require a response. See 20 CSR 100-1.030 (2015).

The insurer then has fifteen (15) working days after it receives
the proof of loss to inform the insured of whether the claim is being accepted, denied, or further action is being taken. See 20 CSR 100-1.050. A denial of a claim must be made in writing and shall include every specific policy provision upon which the insurer relies. See id.

Missouri has enacted the Unfair Claims Settlement Practices Act ("Act"). See Mo. Rev. Stat. §§ 375.1000-1018 (2016). The Act sets forth broad standards for the investigation and disposition of claims. See id. Further, the Act sets forth a series of "improper claims practices" and the procedures for allowing the Director of Insurance to investigate and discipline insurers for the commission of any improper acts. See id.


In addition, violations of the Act are not wholly irrelevant to the insured's or third party's private action against the insurer. The Act is an expression of Missouri public policy concerning such claims. See Brawner v. Brawner, 327 S.W.2d 808, 812 (Mo. 1959) (stating that "statutes are the very highest evidence of public policy and binding on the courts") (overruled on unrelated grounds); see also 30 Mo. Prac., Ins. Law & Prac., § 1:6.

The state regulations cited above were adopted to aid in the interpretation of the Act. The Act is also relevant in determining whether the insurer’s conduct constitutes a waiver; was vexatious under Missouri's vexatious-refusal-to-pay statutes; or constitutes “bad faith” in refusing to settle the claim of a third party. See Mo. Rev. Stat. §§ 375.296 and 375.420 (2016); see also 30 Mo. Prac., Ins. Law & Prac., §§ 5:20-30, 7:39-7:44, and 8:1-8:3.

B. Standards for Determinations and Settlements

Under the Unfair Claims Settlement Practices Act, codified as Mo. Rev. Stat. §§ 375.1000 to 375.1018 (2016), an insurer engages in an improper claims practice if it commits any of the acts enumerated in Section 375.1007 with such frequency as to indicate a general business practice to engage in such conduct. See Mo. Rev. Stat. § 375.1007 (2016). Such acts include, but are not limited to, attempting to settle claims in bad faith, denying claims without reasonable investigation, failing to adopt and implement reasonable standards for investigation and settlement, and causing unreasonable delays. See id. Insurers must attempt in good faith to effectuate the prompt, fair, and equitable settlement of claims when the insurer’s liability has become “reasonably clear.” See Mo. Rev. Stat. § 375.1007(4)(2016).

As noted above, under the Act, there is no private cause of action for the commission of unfair claims practices. Rather, insureds must bring a breach of contract claim against the insurer if (1) coverage is wrongfully denied; or (2) to seek recovery above what the insurer is willing to pay. These breach of contract claims are often accompanied by a vexatious-refusal-to-pay claim. See Mo. Rev. Stat. §§ 375.296 and 375.420 (2016).
C. Privacy Protections (In Addition to Federal Gramm-Leach-Bliley Act)

Since the early twentieth century, Missouri has recognized a cause of action for an "invasion of privacy." Sullivan v. Pulitzer Broadcasting Co., 709 S.W.2d 475, 477 (Mo. 1986) (en banc) (citing Munden v. Harris, 134 S.W. 1076 (Mo. App. 1911)).

In supplementing the Federal Gramm-Leach-Bliley Act, Missouri enacted Mo. Rev. Stat. § 362.422 (2016), which governs the disclosure of nonpublic personal information to nonaffiliated third parties. Among other things, Section 362.422 authorizes a state agency with primary regulatory authority to adopt rules and regulations in furtherance of the Federal Act. See id.

Based on the authority granted by Section 362.422, the Missouri Department of Insurance has adopted 20 CSR 100-6.100 and 100-6.110 to address the privacy of financial information. See Mo. Rev. Stat. § 362.422 (2016). These regulations require the insurer to give notice to the insured of its privacy policies detailing the types of nonpublic information the insurer collects, the types of such information the insurer discloses, to whom such information is disclosed, and setting forth the policies and procedures in place to protect the security of nonpublic personal information. See 20 CSR 100-6.100. The insurer must also give the insured the opportunity to "opt out" of a disclosure of nonpublic personal information to a "nonaffiliated third party." See id.

These regulations also require insurance companies to implement a comprehensive written information security program to include administrative, physical, and technological safeguards for the protection of customer information. See 20 CSR 100-6.110. This program must ensure the security and confidentiality of customer information as well as protect against anticipatory threats to such information and unauthorized access by others to the protected information. See id.

Issues of privacy within the insurer/insured relationship often arise in cases where the insurer denies the claim of the insured for intentional acts of the insured, such as arson. Therefore, the Missouri Supreme Court Missouri in Overcast v. Billings Mut. Ins. Co., held that Missouri's vexatious-refusal-to-pay statute, Mo. Rev. Stat. § 375.420 (2016), does not preempt all tort actions brought by an insured such that an insured could also sue for defamation following denial of an insurance claim based on an arson defense. See Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 69-70 (Mo. 2000) (en banc).

The elements of defamation in Missouri are: (1) publication; (2) of a defamatory statement; (3) that identifies the plaintiff; 4) that is false; 5) that is published with the requisite degree of fault; and (6) damages the plaintiff’s reputation. Id. at 70.

Thus, in Overcast, where a denial letter was sent by the insurer in the mail, this was held to be an unsuccessful attempt to avoid publication of a letter containing a defamatory statement where the insurer was aware that the allegation of arson by the insured would need to be published and would be published. Id. at 70.
The Missouri Supreme Court in *Overcast* also made clear that there is no statutory immunity in Missouri for statements made while denying claims. *Id.* at 71. Thus, under *Overcast*, where the insureds do not specifically request the reasons why their claim was being denied, they do not consent to defamation. *Id.* at 71-72.

II. **Principles of Contract Interpretation**

The primary rule of judicial construction of an insurance policy is for the court to enforce the insurance contract according to the parties' intent as expressed in the language of the freely entered contract, unless doing so would violate applicable federal or state law. *Todd v. Missouri United School Ins. Council*, 223 S.W.3d 156 (Mo. 2007) (en banc); *Bowen ex rel. Bowen v. General Sec. Indemn. Co. of Arizona*, 174 S.W.3d 1 (Mo. App. E.D. 2005). When analyzing an insurance policy, the court considers the entire policy, not just isolated provisions or clauses. *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 47 (Mo. 2009) (en banc). The court will try to give each provision of the policy a reasonable meaning and avoid interpreting the policy in a way that renders one or more provisions "useless" or "redundant." *Lero v. State Farm Fire and Cas. Co.*, 359 S.W.3d 74, 83 (Mo. App. W.D. 2011).

The terms of an endorsement and the terms of the printed policy should be reconciled if reasonably possible, but if there is an irreconcilable conflict, the terms of the endorsement will be given effect. *MFA Mut. Ins. Co. v. Dunlap*, 525 S.W.2d 766 (Mo. App. 1975); *White v. Illinois Founders Ins. Co.*, 52 S.W.3d 597, 598 (Mo. App. E.D. 2011). In addition, the construction the parties have placed upon the contract of insurance by their own actions is significant. *Stone v. Farm Bureau Town & Country Ins. Co. of Missouri*, 203 S.W.3d 736, 745 (Mo. App. S.D. 2006).

Since policies are generally intended to protect the insured from a covered risk, where it is reasonably possible, they will be interpreted to provide coverage rather than to defeat it. *Burns v. Smith*, 303 S.W.3d 505, 512 (Mo. 2010) (en banc). Where one clause appears to provide coverage but another clause indicates that such coverage is not provided, then the policy is ambiguous, and "the ambiguity will be resolved in favor of coverage for the insured." *Rice*, 301 S.W.3d at 48; see *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 689 (Mo. 2009) (en banc) ("Missouri law is well-settled that where one provision of a policy appears to grant coverage and another to take it away, an ambiguity exists that will be resolved in favor of coverage."). However, the mere fact that a policy contains a limitation on coverage or an exclusion does not render the policy ambiguous. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 221 (Mo. 2014) (en banc).

Whether a policy is ambiguous or not is determined from an examination of the specific facts of the case and the relevant policy provisions. *Dahmer v. Hutchison*, 315 S.W.3d 375 (Mo. App. S.D. 2010). If the policy is ambiguous, evidence of subsidiary agreements, the relationship of the parties, the subject matter of the policy, the facts and circumstances surrounding the execution of the policy, and the practical construction the parties have placed on the contract by their actions is admissible. *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359, 362 (Mo. 1991) (en banc).
III. Choice of Law

When more than one state has a connection with or a relationship to the insurance contract in question, the resolution of an issue of substance under that contract requires a determination, be it express or implied, of what law governs the disposition of that issue. Markway v. State Farm Mut. Auto. Ins. Co., Inc., 799 S.W.2d 146 (Mo. App. W.D. 1990). Generally, the court at the forum determines, according to its own conflict-of-laws rules, whether a given law is substantive or procedural, but in making this determination, the court will give consideration to interpretation of foreign law by courts of that state. Noe v. U.S. Fidelity & Guaranty Co., 406 S.W.2d 666, 668 (Mo. 1966). In insurance policy cases, the "substantive" law the court must apply includes the execution, interpretation, and validity of the contract; the existence of an insurable interest; and damages for vexatious delay in performance by the insurer. Kellogg v. National Protective Ins. Co., 155 S.W.2d 512 (Mo. App. 1941); Grider v. Twin City Fire Ins. Co., 426 S.W.2d 698 (Mo. App. 1968); and Handly v. Lyons, 475 S.W.2d 451 (Mo. App. 1971).

Missouri has adopted Sections 188 and 193 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) for choice-of-law issues in casualty insurance contracts. Viacom, Inc. v. Transit Cas. Co., 138 S.W.3d 723, 724-25 (Mo. 2004) (citing Crown Center Redevelopment Corp. v. Occidental Fire & Cas. Co. of North Carolina, 716 S.W.2d 348, 358 (Mo. App. W.D. 1986)). Section 188 applies to policies that do not contain a choice-of-law provision; specifically, this section provides that the law of the state with the most significant relationship to the transaction and the parties governs. Viacom, Inc., 138 S.W.3d at 725 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1)).

The RESTATEMENT also sets forth what contacts are to be taken into account: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." Id. (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 188(2)).

Section 193 of the RESTATEMENT (SECOND) states that the "validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship . . . to the transaction and the parties, in which event the local law of the other state will be applied." Crown Center, 716 S.W.2d at 358 (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 193); see also Viacom, Inc., 138 S.W.3d at 725. Comment (b) to Section 193 provides that the location of the insured risk is given greater weight than any other single contact in determining which state's law controls, although less weight when the policy covers a group of risks scattered throughout two or more states. Viacom, Inc., 138 S.W.3d at 725.
IV. Duties Imposed by State Law

A. Duty to Defend

1. Standard for Determining Duty to Defend

The duty to defend is usually determined by comparing the language of the insurance policy with the allegations in the petition. See McCormack Baron Mgmt. Serv., Inc. v. Am. Guar. & Liab. Ins. Co., 989 S.W.2d 168 (Mo. 1999) (en banc). The duty to defend is broader than the duty to indemnify. Id. If the petition against the insured alleges facts that state a claim potentially within the policy's coverage, the insurer must provide a defense to the insured. See Lampert v. State Farm Fire & Cas. Co., 85 S.W.3d 90, 93 (Mo. App. E.D. 2002).

Under Missouri law, an insurer has a duty to defend its insured against allegations that implicate coverage regardless of whether those claims are groundless or valid. Custom Hardware Engineering & Consulting, Inc. v. Assurance Co. of America, 295 S.W.3d 557, 561 (Mo. App. E.D. 2009). The insurer has a duty to defend even if the petition alleges alternative facts stating covered as well as non-covered excluded claims. See Union Pac. R. Co. v. Am. Family Mut. Ins. Co., 987 S.W.2d 340, 345-46 (Mo. App. E.D. 1998). So long as one count in a petition against the insured is plainly covered, and the other counts are not, the insurer must defend the insured against all claims. Scottsdale Ins. Co. v. Ratcliff, 927 S.W.2d 531, 534 (Mo. App. E.D. 1996).

The duty to defend is not determined solely by comparing the language of the petition with the insurance policy. The insurer cannot ignore actual facts of which it knows or could know from a reasonable investigation in determining whether there is a duty to defend. See State ex rel. Inter-State Oil Co. v. Bland, 190 S.W.2d 227, 229 (Mo. 1945) (en banc); see also Allen v. Bryers, 2016 WL 7378560, *8 (Mo. Dec. 20, 2016) (en banc); Allen v. Continental Western Ins. Co., 436 S.W.3d 548, 552-53 (Mo. 2014) (en banc); and Trainwreck West Inc. v. Burlington Ins. Co., 235 S.W.3d 33, 42 (Mo. App. E.D. 2007). Facts known to the insurer or ascertainable through a reasonable investigation can also create a duty to defend. See Truck Ins. Exch. v. Prairie Framing, L.L.C., 162 S.W.3d 64, 83 (Mo. App. W.D. 2005). An insurer must prove that there is no possibility of coverage to be absolved of its duty to defend. See id. at 79. Thus, so long as the petition states a potential or possible claim that would be covered, the insurer must defend its insured. See id. at 83. Under Missouri law, any ambiguity over the insurer's defense obligation is resolved in the insured's favor. Millers Mut. Ins. Ass'n of Ill. v. Shell Oil Co., 959 S.W.2d 864, 867 (Mo. App. E.D. 1997).

Finally, a breach by an insurer of its defense obligation may expose the insurer to substantial liability, including extra-contractual liability. If an insurer unjustifiably refuses to defend a claim brought against its insured, the insurer will be “liable to the insured for all resultant damages from that breach of contract,” up to the insurer’s policy limit. Williams v. Employers Mut. Cas. Co., 845 F.3d 891, 902 (8th Cir. 2017); Schmitz v. Great Am. Assur. Co., 337 S.W.3d 700, 710 (Mo. 2011) (en banc); and Allen v. Bryers, 2016 WL 7378560, at *14 (Mo. Dec. 20, 2016) (en banc). In the event the insurer’s breach of its defense obligation is determined to have been in bad faith, the insurer may be required to indemnify the entire judgment entered against its insured, regardless

2. Issues with Reserving Rights

The insurer has the right to offer to defend its insured under a reservation of rights. However, an insurer cannot force an insured to accept a reservation of rights defense. See Allen v. Bryers, 2016 WL 7378560, at *9 (Mo. Dec. 20, 2016) (en banc); Versaw v. Versaw, 202 S.W.3d 638, 651 (Mo. App. S.D. 2006).

Moreover, the insurer’s decision to defend its insured under a reservation of rights is treated as the equivalent of a refusal to defend. Butters v. City of Independence, 513 S.W.2d 418, 425 (Mo. 1974). The insurer’s decision to file a declaratory judgment action is deemed a refusal to defend as well. Allen v. Bryers, 2016 WL 7378560, at *9 (Mo. Dec. 20, 2016) (en banc). Therefore, the insured has an absolute right to refuse a reservation of rights defense. Id.

If the insured refuses to accept a defense under a reservation of rights, the insurer has three options: (1) defend the insured without a reservation of rights; (2) deny the claim and withdraw from defending the insured, i.e., lose control of the litigation; or (3) file a declaratory judgment action to determine the scope of the policy’s coverage. See Allen, 2016 WL 7378560, at *9; Ballmer v Ballmer, 923 S.W.2d 365, 369 (Mo. App. W.D. 1996). See also Schmitz v. Great American Assur. Co., 337 S.W.3d 700, 710 Mo. 2011) (en banc) (“[The insurer] cannot have its cake and eat it too by both refusing coverage and at the same time continuing to control the terms of settlement in defense of an action it had refused to defend.”).

The insurer may seek a stay of the underlying action during the pendency of its declaratory judgment action, and the trial court has the discretion to stay the underlying action until the declaratory judgment action is decided. See State ex rel. Mid-Century Ins. Co., Inc. v. McKelvey, 666 S.W.2d 457, 459 (Mo. App. W.D. 1984). However, such stays are rarely granted.

If the trial court refuses to stay the underlying action and the insurer seeks to defend under a reservation of rights over the insured’s objection, the insurer forfeits its right to select defense counsel and control the defense. See Allen, 2016 WL 7378560, at *9; Butters v. City of Independence, 513 S.W.2d 418, 425 (Mo. 1974); Versaw, 202 S.W.3d at 651. Moreover, when an insurer breaches its defense obligation by refusing to provide its insured with an unconditional defense, the insured is relieved of the duty to comply with policy conditions, including the duty to cooperate. See Allen, 2016 WL 7378560, at *12; Truck Ins. Exch. v. Prairie Framing, L.L.C., 162 S.W.3d 64, 89 (Mo. App. W.D. 2005).

Once an insurer unjustifiably refuses to defend its insured, the insured may enter into an agreement with the plaintiff to the insured’s liability to the insurer’s policy limits under Mo. Rev. Stat. 537.065 (2016). See Allen, 2016 WL 7378560, at *9. These agreements are typically followed by judgments to which the insured did not offer any defenses and which the insurer has no right to relitigate liability or damages. See Section VII. C. below.
Missouri imposes upon insurers a duty to issue a “proper reservation of rights letter” that is timely and clear and that fully informs the insured of the insurer’s coverage position. Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co., 449 S.W.3d 16, 22-23 (Mo. App. W.D. 2014); Kinnaman-Carson v. Westport Ins. Corp., 283 S.W.3d 761 (Mo. 2009) (en banc); and Butters v. City of Independence, 513 S.W.2d 418, 424-25 (Mo. 1974). Restated, the reservation of rights letter must be specific and unambiguous, fully explain the insurer’s coverage position, and avoid any confusion. Advantage Bldgs., 449 S.W.3d at 23.

Further, unless the insurer reserves its rights, the insurer will be estopped to deny coverage once it assumes unconditional control over the insured’s defense. Kinnaman-Carson v. Westport Ins. Corp., 283 S.W.3d 761 (Mo. 2009) (en banc). Under Missouri law, the insurer’s defense of an action against its insured with knowledge of non-coverage under its policy without a proper and effective reservation of rights in place will bar the insurer from later denying liability due to non-coverage. Advantage Bldgs., 449 S.W.3d at 24.

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

A. Bad Faith

1. First Party

The Missouri Supreme Court’s decision in Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 67 (Mo. 2000) (en banc), is the leading case on a first-party extra-contractual claims. The tort of bad faith does not apply to first-party claims. See id. When the insurer wrongfully refuses to pay a first-party claim, the insurer has breached the contract and liability is limited to damages for breach of contract. See id.

If the jury determines that the refusal to pay was vexatious, the insured may recover additional penalties under Missouri’s vexatious-refusal-to-pay statutes, Mo. Rev. Stat. §§ 375.296 and 375.420 (2016). Section 375.296 allows recovery after the insurer has refused to pay and 30 days have passed. Section 375.420 does not have that time requirement.

2. Third Party

Missouri courts have long recognized the right of the insured to recover against the insurer under the tort of bad faith when the insurer refuses to pay a third-party settlement demand. See Overcast, 11 S.W.3d at 67. A bad faith refusal to settle action will lie when a liability insurer:

1) reserves the exclusive right to contest or settle any claim;
2) prohibits the insured from voluntarily assuming any liability or settling any claims without consent; and
3) is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy.

Scottsdale Ins. Co. v. Addison Ins. Co., 448 S.W.3d 818, 827 (Mo. 2014) (en banc). A demand by the insured to settle a claim is not an essential element of a bad faith claim under Missouri law. Scottsdale Ins. Co., 448 S.W.3d at 828. Nor is an excess judgment. Id. at 827.
Also, as noted above, an insurer may be exposed to extra-contractual liability in bad faith if the insurer wrongfully refuses to provide its insured a defense. Allen v. Bryers, 2016 WL 7378560, at *14 (Mo. Dec. 20, 2016) (en banc). In the event the insurer’s breach of its defense obligation is determined to have been in bad faith, the insurer may be required to indemnify the entire judgment entered against its insured, regardless of its policy limits. Allen, 2106 WL 7378560, at *14.

Whether the insurer's refusal to pay the loss was willful is determined by the facts as presented at the time the insured demanded payment under the policy limits. See JAM Inc. v. Nautilus Ins. Co., 128 S.W.3d 879, 897-98 (Mo. App. W.D. 2004). This right to sue for bad faith may also be assigned to a third-party claimant. See Scottsdale Ins. Co., 448 S.W.3d at 830; Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 554, 564-65 (Mo. App. S.D. 1990).

3. Damages

In a case involving a first-party loss, the insured may recover the following damages under Missouri’s vexatious-refusal-to-pay statutes: (1) the amount of the covered loss; (2) 20% of the first $1,500 of the loss; (3) 10% of the amount of the loss in excess of $1,500; and, (4) reasonable attorney's fees. See Mo. Rev. Stat. §§ 375.296 and 375.420 (2016).

In a case involving a third-party loss, the insurer is liable for the entire amount of the judgment. See Ganaway, 795 S.W.2d at 563-64. Missouri follows the “judgment” rule. Therefore, the insurer is liable for the entire judgment regardless of whether the insured has no legal liability to satisfy the entire judgment, whether by agreement with the claimant judgment creditor or because of bankruptcy. Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64, 93 (Mo. App. W.D. 2005).

It may also be possible to recover punitive damages if the insurer's refusal to settle was willful or wanton. See Zumwalt, 228 S.W.2d at 756. In Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co., 449 S.W.3d 16, 29 (Mo. App. W.D. 2014), the Missouri Court of Appeals upheld the submission of a punitive damage claim in a bad faith action based on a jury instruction that directed the jury to award punitive damages if the jurors found that the insurer had acted with evil motive or reckless indifference to the insured’s rights.

B. Fraud

In Missouri, the elements for common-law fraud are:

1) a false and material representation;

2) the defendant's knowledge of the representation's falsity or ignorance of truth;

3) the defendant's intent that the representation be acted upon by the plaintiff in a manner reasonably contemplated;

4) the plaintiff’s ignorance of the falsity of the representation;
5) the plaintiff’s rightful reliance on the truth of the statement and his right to rely thereon; and

6) proximate injury.


C. Intentional or Negligent Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress include a showing by the plaintiff that:

1) the defendant's conduct was extreme and outrageous;

2) the defendant acted in an intentional or reckless manner; and

3) such conduct resulted in severe emotional distress that is medically diagnosable and medically significant.

See Gibson v. Brewer, 952 S.W.2d 239, 249 (Mo. 1997) (en banc); Nazeri v. Missouri Valley Coll., 860 S.W.2d 303 (Mo. 1993) (en banc); and Hendrix v. Wainwright Indus., 755 S.W.2d 411 (Mo. App. E.D. 1988).

The elements of a cause of action for negligent infliction of emotional distress include a showing by the plaintiff that:

1) the defendant should have realized its conduct involved an unreasonable risk of causing distress; and

2) the emotional distress or mental injury must be medically diagnosable and sufficiently severe to be medically significant.


D. State Consumer Protection Laws

VI. Discovery Issues in Actions against Insurers

A. Discoverability of Claims Files Generally

The Missouri Supreme Court, in noting that the insurer/insured relationship is most closely analogous to an attorney/client relationship, has held that the insured's claim file belongs to the insured and the insured is entitled to discover the contents of the file. See Grewell v. State Farm Mut. Auto. Ins. Co., 102 S.W.3d 33, 37 (Mo. 2003) (en banc). If the insurer refuses to produce its claim file in response to the insured's request, the insurer may be exposed to liability in an action for breach of fiduciary duty and punitive damages. Grewell v. State Farm Mut. Auto. Ins. Co., 162 S.W.3d 503 (Mo. App. W.D. 2005).

Additionally, because the insurer/insured relationship is analogous to an attorney/client relationship, where and insurance policy contains a duty to defend, communications between the insured and insurer are privileged. See id.; see also State ex rel. Tillman v. Copeland, 271 S.W.3d 42, 45 (Mo. App. S.D. 2008).

B. Discoverability of Reserves

A federal court in Missouri has held that documents regarding insurance reserves may be protected by the work-product doctrine if they relate to specific claims. Spirco Environmental, Inc. v. American Intern. Specialty Lines Ins. Co., 2006 WL 2521618, at *2 (E.D. Mo. August 30, 2006). The court in that case found that the documents sought were accurately described in the privilege log, related to the actions of the defendant regarding reserves with respect to the specific claim, and the plaintiff did not show a need for the information that was as important as the "insurer's need to accurately assess its potential loss on its policies." Id. at *1. The documents regarding reserves were therefore protected by the work product doctrine. See id. at *2.

The United States Court of Appeals for the Eighth Circuit has also ruled on this issue. In Simon v. G.D. Searle, the Eighth Circuit ruled that risk management documents, such as those involving reserves, which relate to specific claims are protected as work-product materials. See Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987) (construing Minnesota law). However, the documents might not be so protected, if they relate to the company's reserve policies generally, as they did in that case. The court in Simon based its ruling on the fact that the risk management documents had not been prepared "for the purposes of litigation," noting that the reserve information serves many business planning functions but does not appear to enhance the defense of any particular lawsuit. Id. at 401.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

Missouri courts have only addressed this issue indirectly. Missouri law generally states that the reinsured insurer is the beneficiary of a reinsurance contract, not the original insured. Allendale Mut. Ins. v. Grist, 731 F.Supp. 928, 930 (Mo. App. W.D. 1989). In expanding upon this general rule, the court noted that there is no privy of contract between the original insured and the reinsurer such that the reinsurer cannot be liable to the original insured, unless the reinsurance policy creates such
a contractual duty to the original insured. See id.; see also First Nat'l Bank v. Higgins, 357 S.W.2d 139, 143 (Mo. 1962) (en banc); J.C. Penney Life Ins. Co. v. Transit Cas. Co. in Receivership, 299 S.W.3d 668, 674 (Mo. App. W.D. 2009).

D. Attorney/Client Communications

In dealing with issues between an excess insurer and the primary insurer for a bad-faith-duty-to-settle claim, a federal district court sitting in Missouri, in citing a case from another jurisdiction, noted that no attorney/client privilege attaches to communications between an attorney and an insurer where the attorney represents both the insured and the insurer. Cent. Nat'l Ins. of Omaha v. Med. Protective Co., 107 F.R.D. 393, 394 (Mo. App. E.D. 1985).

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

A misrepresentation in an insurance application can be material in one of two ways:

1) where the misrepresentation would affect a reasonable insurer's determination of whether the insured posed an acceptable risk for the insurer for the correct premium to assess; and

2) where the misrepresentation would have been relied upon by the insurer acting in accordance with industry custom and standards.

Adams v. Columbia Mut. Ins. Co., 978 S.W.2d 10, 11 (Mo. App. W.D. 1998). If the insurance policy contains language that states that the insurer may rely on all statements therein, there is no need for the insurer to prove that it actually relied on the misrepresentations made by the insured. New York Life Ins. Co. v. Feinberg, 229 S.W.2d 531, 539 (Mo. 1950) (this was a suit in equity to cancel life insurance policies based on material misrepresentations in its application).

Concerning misrepresentations in the application for insurance, "an applicant who is able to read is legally bound to know the contents of the application she signed," so that the incorrect answers cannot be treated as mistakes. Schnatzmeyer v. Nat'l Life Ins. Co., 791 S.W.2d 815, 820-21 (Mo. App. E.D. 1990). "This is not affected by the fact that she relied upon or trusted the agent to prepare the application for the policy." Id.; see also Miller v. Plains Ins. Co., 409 S.W.2d 770, 772-73 (Mo. App. 1966). But, the insurer may be bound by false answers in a policy application if "the agent knows the truth . . . should know the truth from the circumstances . . . [or] fills out the application without questioning the applicant." Priesmeyer v. Shelter Mut. Ins. Co., 995 S.W.2d 41, 48 (Mo. App. W.D. 1999).

To void a policy based on a misrepresentation in the application, the insurer generally must demonstrate that the representation was both false and fraudulently made. See Shirkey v. Guarantee Trust Life & Ins. Co., 141 S.W.3d
However, an insurer may void the policy by showing that the representation was false and material, without proof of fraud, if one of four conditions is met:

1) the representation is warranted in the application to be true;  
2) the policy is expressly conditioned upon the truth of the representation; 
3) the policy provides that falsity in the application will void the policy; or 
4) the application is incorporated into and attached to the policy.


"[T]he failure to answer questions under oath constitutes failure to comply with a condition precedent to suit. 'False swearing . . . [however,] voids the policy and forfeits the whole sum due if the policy so provides."


B. Failure to Comply with Conditions

Under Missouri law, conditions in insurance policies barring coverage if the insured fails to give timely notification of a claim are valid and enforceable. However, coverage will not be denied for breach of such a condition unless the insurer can demonstrate that it has been prejudiced by the violation of such condition. See Johnston v. Sweany, 68 S.W.3d 398, 401-02 (Mo. 2002) (en banc). Moreover, when an insurer breaches its defense obligation by refusing to provide its insured with an unconditional defense, the insured is relieved of the duty to comply with policy conditions, including the duty to cooperate. See Allen v. Bryers, 2016 WL 7378560, *12 (Mo. Dec. 20, 2016) (en banc); Truck Ins. Exch. v. Prairie Framing, L.L.C., 162 S.W.3d 64, 89 (Mo. App. W.D. 2005).

It is important to note that Missouri distinguishes between "occurrence" and "claims made" policies and only imposes the judicially-created prejudice rule in the case of "occurrence" policies. See Southeast Bakery Feeds, Inc. v. Ranger Ins. Co., 974 S.W.2d 635, 639 (Mo. App. E.D. 1998); see also Grissom v. First Nat’l Ins. Agency, 371 S.W.3d 869 (Mo. App. S.D. 2012).

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

Mo. Rev. Stat. § 537.065 provides the mechanism for insureds to foreclose any liability on their part by entering into a statutory contract with the underlying plaintiff. See Mo. Rev. Stat. § 537.065 (2016). Under such an agreement, a plaintiff and the insured/defendant agree that the plaintiff will only seek collection of any judgment obtained from available insurance proceeds. Though not required by the statute, the result of such an agreement is that the insured in essence agrees to a consent judgment in that defense evidence is not usually entered and the judgment is often for the limits of the policy.
Upon the entering of such an agreement, the underlying plaintiff must then take his chances by seeking recovery of the judgment from the insurer. The insurer may assert any coverage defenses it possesses against the underlying plaintiff. However, as to the judgment, the insurer has no right to relitigate the insured’s liability or the claimant’s damages. Schmitz v. Great American Assur. Co., 337 S.W.3d 700, 708-10 (Mo. 2011) (en banc). Restated, the underlying judgment is conclusive in a subsequent action to satisfy the judgment under the judgment debtor’s insurance policy. Allen v. Bryers, 2016 WL 7378560, at *9-10 (Mo. Dec. 20, 2016) (en banc). Thus, “[w]here the insurer had the opportunity to defend the insured but wrongfully refused to do so, [t]he insurer is precluded from relitigating any facts that actually were determined in the underlying case and were necessary to the judgment.” Id. at *10 (quoting Assurance Co. of America v. Secura Ins. Co., 384 S.W.3d 224, 233 (Mo. App. E.D. 2012)).

D. Statutes of Limitations

There is a split of authority concerning the applicable statute of limitations. Most courts have held that the insured has ten (10) years under Mo. Rev. Stat. § 516.110 (2016) (setting time limit for bringing suits on contracts) to file suit on the policy. See e.g., Johnson v. State Mutual Life Assurance Co. of America, 942 F.2d 1260 (8th Cir. 1991). It has been held, on at least one occasion, that the five (5) year statute of limitations under Mo. Rev. Stat. § 516.120 applied to the insured’s claim; however, in that instance the insured’s claim was based on the insurer’s negligent payment of policy proceeds to the wrong beneficiary. See Curnes v. Equitable Life Assurance Soc’y of U.S., 6 S.W.3d 175 (Mo. App. S.D. 1999); see also Mo. Rev. Stat. § 516.120 (2016).

VIII. Trigger and Allocation Issues for Long Tail Claims

A. Trigger of Coverage

As noted above, Missouri makes a distinction between “occurrence” and “claims made” policies. Under an “occurrence” policy, the policy covers negligent acts or omissions that occur within the policy period, "regardless of when the negligent acts or omissions are discovered or the claim is made." Southeast Bakery Feeds, Inc. v. Ranger Ins. Co., 974 S.W.2d 635, 639 (Mo. App. E.D. 1998). In contrast, the trigger of coverage in a claims made policy is the transmittal of the notice of claim to the insurer such that there could be coverage for a loss that occurred before the effective date of the claims-made policy. See id.

In cases involving long-tail claims, such as progressive occupational disease resulting from exposure to asbestos-containing materials or environmental contamination, the time-of-occurrence determination under Missouri law is not settled. The extant authorities suggest that Missouri would apply either the injury-in-fact trigger or the exposure trigger.

The Eighth Circuit, in Nationwide Ins. Co. v. Central Missouri Elec. Coop., Inc., noting that coverage under Missouri law is triggered by the occurrence of damages, and not by the time of the insured’s negligent acts, discussed the various “trigger” theories employed by different jurisdictions to determine when damage occurs for coverage purposes. The Eighth Circuit explained:

There are multiple approaches to addressing this issue. For example, “[i]f coverage is triggered at the time that personal injury or property damage becomes known to the victim or property owner, the approach is identified as the “manifestation theory.” If coverage is triggered when real personal injury or actual property damage first occurs, the approach is called the “injury in fact theory.” If coverage is triggered when the first exposure to injury-causing conditions occurs, then the court is said to have chosen the “exposure theory.” Finally, if coverage is triggered in a manner such that insurance policies in effect during different time periods all impose a duty to indemnify, then the approach is labeled a “continuous” or “multiple” trigger theory.


In Nationwide, the Eighth Circuit observed that it is not entirely clear which of these approaches is appropriate under Missouri law. 278 F.3d at 747. Previously, the Eighth Circuit had forecasted that Missouri would apply an “exposure” theory. See, e.g., Continental Ins. Co. v. Northeastern Pharm. & Chem. Co., Inc., 842 F.2d 977, 984 (8th Cir. 1988) (en banc). However, after the Eighth Circuit’s decision in Continental Ins. Co., the Missouri Court of Appeals decided Shaver v. Insurance Co. of North America, 817 S.W.2d 654 (Mo. App. S.D. 1991). In Shaver, the court held that coverage was triggered “when the complaining party was actually damaged,” i.e., an injury-in-fact analysis. 817 S.W.2d at 657.

The Shaver decision comports with an early decision by the Missouri Supreme Court addressing trigger of coverage in a progressive occupational injury case. In Tomnitz v. Employers Liability Assur. Corp., 121 S.W.2d 745 (Mo. 1938), the court held that an “injury-in-fact” is necessary to establish a covered “occurrence.” See also D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co., 316 S.W.3d 899, 906 (Mo. 2010) (en banc) (“Viewed in the light most favorable to the verdict, there is evidence to support Sherry’s [construction defect] claim that the cause of the damage commenced during the policy period and, therefore, constituted an insurable “occurrence.”).


Ultimately, regardless of trigger theory, it may make little difference if a Missouri court were to apply the exposure trigger versus the “injury-in-fact” trigger. In many cases involving progressive occupational injuries and environmental contamination, an actual injury occurs upon the claimant’s exposure to injurious condition. Therefore, the two theories largely overlap in application.

B. **Allocation Among Insurers**

Missouri has established standards governing the apportionment of the same risk among multiple insurers of that risk. There is also a distinction made between primary and excess insurers. Despite the presence of “other insurance” clauses in primary insurance policies, all primary insurance proceeds must be exhausted before an excess insurer has any duty to pay its insurance proceeds. This is because Missouri courts have made clear that “a primary insurer cannot use an ‘other insurance clause’ to require an umbrella carrier to share in its liability.” *Smith v. Wassau Underwriters Ins. Co.*, 977 S.W.2d 291, 294 (Mo. App. W.D. 1998) (quoting *LeMars Mut. Ins. Co v. Farm and City Ins. Co.*, 494 S.W.2d 216, 219 (Iowa 1992)).

In addition, “other insurance” clauses between concurrent excess insurers are “mutually repugnant” in Missouri such that each concurrent excess insurer must share in paying its portion of the loss. *Cargill, Inc. v. Commercial Union Ins. Co.*, 889 F.2d 174, 178 (8th Cir. 1989). The proportion of the loss each excess insurer is required to pay is based on the proportion its policy limits bears to the aggregate policy limits of the other concurrent insurers. *Id.* at 178-80. For example, if an excess insurer’s policy limits are 75% of the total amount of available excess insurance proceeds, that insurer is responsible for 75% of the excess liability remaining after all primary policy proceeds have been exhausted. See *Id.*

Missouri follows a different allocation rule between insurers when an indemnity contract is involved. When an enforceable indemnity agreement is in place, the indemnitee’s primary insurance carrier is not required to exhaust its policy limits before all available insurance coverage, including excess coverage, under the indemnitor’s policies is extinguished in payment of the claim. *Federal Ins. Co. v. Gulf Ins. Co.*, 162 S.W.3d 160, 164-66 (Mo. App. E.D. 2005). Restated, Missouri gives “controlling effect” to the indemnitor’s indemnity obligation over the “other insurance” clauses in the insurance policies available to the indemnitor and indemnitee. *Id.* at 165. Otherwise, a contrary rule, would render the indemnity contract between the insureds and their agreed-to risk allocation scheme ineffectual. *Id.* See also *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583, 587 (8th Cir. 2002).

In long-tail claims, involving progressive injuries, Missouri case law is limited. The leading case is *Continental Cas. Co. v. Med. Protective Co.*, 859 S.W.2d 789, 792 (Mo. App. E.D. 1993), in which the Missouri Court of Appeals, applying an exposure analysis, allocated a claim amongst the insured’s several consecutive insurers on a pro rata basis based on each insurer’s time on the
risk. In contrast, the Missouri Supreme Court, addressing policies governed by Pennsylvania law, and Missouri Court of Appeals, addressing unique policy language, applied an “all sums” approach. See, e.g., Viacom, Inc. v. Transit Cas. Co., 138 S.W.3d 723, 726 (Mo. 2004) (en banc); Doe Run Resources Corp. v. Certain Underwriters at Lloyd's London, 400 S.W.3d 463, 474-75 (Mo. App. E.D. 2013).

IX. Contribution Actions

A. Claim in Equity vs. Statutory

There is no statutory claim for contribution by one insurer against another under Missouri law. Statutory contribution in Missouri only exist between joint tortfeasors. Mo. Rev. Stat. § 537.067 (2016).

The typical claim by one insurer against another is in equity, usually a claim for equitable contribution. Heartland Payment Systems, L.L.C. v. Utica Mut. Ins. Co., 185 S.W.3d 225, 232 (Mo. App. E.D. 2006). Moreover, a claim for equitable subrogation exists in favor of an excess insurer that has paid a claim that should have been paid by a primary insurer. Scottsdale Ins. Co. v. Addison Ins. Co., 448 S.W.3d 818, 830-31 (Mo. 2014) (en banc).

B. Elements

The right to equitable contribution applies when several insurers are obligated to indemnify the same loss and one insurer has paid more than its share of the loss. Heartland Payment Systems, L.L.C. v. Utica Mut. Ins. Co., 185 S.W.3d 225, 232 (Mo. App. E.D. 2006). To maintain a claim for equitable contribution, the two insurers must cover the same insured, the same interest, and the same risk. Id.

X. Duty To Settle

The “bad faith” cause of action is based upon the insurer's action in taking control of the settlement negotiations and litigation under a liability insurance policy, which creates a fiduciary relationship between the insurer and the insured. See Freeman v. Leader Nat'l. Ins. Co., 58 S.W.3d 590, 598 (Mo. App. E.D. 2001). It is the existence of this fiduciary relationship, in addition to the good faith and fair dealing covenant under the insurance policy, that exposes the insurer to tort liability for failing to exercise good faith in evaluating and negotiating third-party claims against its insured. Id.

The elements of a bad faith claim are stated above in Section V.A.2.

An insurer’s bad faith is a state of mind, which is demonstrated by the insurer’s acts and circumstances. See Johnson v. Allstate Ins. Co., 262 S.W.3d 655, 662 (Mo. App. W.D. 2008).

Circumstances that Missouri courts have considered as evidence of an insurer’s bad faith in refusing to settle a claim within policy limits include, but are not limited to, the following:

- The insurer sought to require the insured to contribute to a settlement after the insurer refused to pay its coverage limit. McCombs v. Fidelity & Cas. Co. of N.Y., 89 S.W.2d 114 (Mo. App. 1935).
• The insurer was acting subservient to the direction of a reinsurer. Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750 (Mo. 1950).


• The insurer did not consider its trial counsel’s recommendations. McCombs v. Fidelity & Cas. Co. of N.Y., 89 S.W.2d 114 (Mo. App. 1935).

• The insurer acted on its stated policy never to pay its full liability limit on a claim. Id.


• The insurer failed to respond to a policy limit demand, with a short time limit, although the insurer was on notice that the plaintiff’s claim was a serious one that exposed the insured to liability well in excess of his policy limits. Johnson v. Allstate Ins. Co., 262 S.W.3d 655 (Mo. App. W.D. 2008).

• The insurer sought to escape payment of its entire policy limit by engaging in conduct that sought to limit its payment to two-thirds of the policy limit. Rinehart v. Shelter Gen’l Ins. Co., 261 S.W.3d 583 (Mo. App. W.D. 2008).

• The insurer did not consider the insured’s interest because it was irrelevant to its coverage decision, made its “no coverage” decision before any investigation, and which the insurer confirmed after an inadequate investigation limited to coverage only. Shobe v. Kelly, 279 S.W.3d 203 (Mo. App. W.D. 2009).

Moreover, a meritorious coverage defense and a successful declaratory judgment action may not provide a defense to a bad-faith-failure-to-settle claim. In Advantage Buildings & Exteriors, Inc. v. Mid-Continent Cas. Co., 449 S.W.3d 16 (Mo. App. W.D. 2014), the Missouri Court of Appeals upheld a bad faith award against an insurer, although the insurer had successfully litigated its coverage defenses in a separate declaratory judgment action and had received a declaration of no coverage. The court, in subjecting the insurer to liability in bad faith, held the insurer had failed to reserve its rights to deny coverage because its two reservation-of-rights letter did not timely, fully, or unambiguously explain the insurer's coverage position or how the cited policy provisions affected the insured’s position.

Finally, Missouri courts have held that once the insurer has, in good faith, exhausted its policy limits on behalf of the insured, its duty to defend is terminated as to additional insureds who may remain in the case and who may incur liability. See Millers Mut. Ins. Ass 'n. of Ill. v. Shell Oil Co., 959 S.W.2d 864, 872 (Mo. App. E.D. 1997); National Beef Packing Co., LLC v. Zurich American Ins. Co., 336 S.W.3d 181, 185-88 (Mo. App.
W.D. 2011).