I. **Regulatory Limits on Claims Handling**

A. **Timing for Responses and Determinations**

Time limitations with respect to casualty insurance are set forth in NRS § 690B.012. Generally, an insurer must approve or deny a claim within 30 days after receiving the claim. If the claim is approved, the insurer must pay the claim within 30 days of approval. If the approved claim is not paid within the 30 days, the insured is entitled to interest on that claim at the rate of interest set forth in the insurance contract, or in the absence of a contractual provision, prime rate at the largest bank in Nevada plus two percent. NRS § 99.040. The interest must be calculated from the date the payment is due until the date the claim is ultimately paid.

If the insurer requires additional information or time to determine whether to approve or deny a claim, the policy holder must be notified of its request for additional information or time within 20 days after receiving the claim and at least once every 30 days thereafter, until the claim is approved or denied. The subsequent payment provisions following such a request are set forth in NRS § 690B.012 (3) and (4).

NRS § 691A.010 provides that all contracts of property insurance covering subjects located in Nevada are subject to the applicable provisions of chapter § 687B of the code. Thus, the relevant time limitations involved with approving, denying, and paying a claim, outlined above, are also applicable to claims filed under a contract for property insurance.

B. **Standards for Determinations and Settlements**

The Nevada Unfair Claims Settlement Practices Act ("Act"), found at NRS § 686A.310, establishes unfair trade practices for determinations and settlement of claims. If the insurer commits any practice labeled as unfair by NRS § 686A.310, a cause of action may be brought against the insurer under the Act and the insurer may be liable to the insured for any resulting damages. NRS § 686A.310(2); see Bergerud v. Progressive Cas. Ins., 453 F. Supp. 2d 1241, 1250 (D. Nev. 2006). However, the Nevada Supreme Court has held that the Unfair Claims Settlement Practices Act does not codify the law of bad faith in Nevada. Pioneer Chlor Alkali Co. v. National Union Fire Ins. Co., 863 F. Supp. 1237, 1243-1244 (D. Nev. 1994).

C. **Privacy Protections (In addition to Federal Gramm-Leach-Bliley Act)**
Nevada has not adopted by statute “The Insurance Information and Privacy Protection Model Act.” However, under NRS § 679B.135, the Nevada Insurance Commissioner may adopt the same provisions as provided in the model legislation originally drafted by the National Association of Insurance Commissioners. At this time, the Commissioner has not formally adopted any provisions of The Insurance Information and Privacy Protection Model Act.

Nevertheless, the Commissioner has adopted several regulations meant to protect the privacy of insureds. According to NAC § 679B.842, insurers must provide an “initial privacy notice” to all new customers. Thereafter, the insurer must also provide similar privacy notices every twelve months, so long as the insured maintains a policy with the insurer. The notice must accurately reflect privacy policies and practices of the insurer. A complete list of all information to be included in privacy notices can be found in NAC § 679B.846.

Further, Nevada prohibits the disclosure of non-public personal information in a manner contrary to federal law. NRS § 686A.025.

II. Principles of Contract Interpretation


Nevada courts will not rewrite contract provisions that are otherwise unambiguous. Farmers Ins. Group v. Stonik, 110 Nev. 64, 67 (Nev. 1994). In addition, Nevada courts will not increase an obligation to the insured where such was intentionally and unambiguously limited by the parties. Senteney v. Fire Ins. Exchange, 101 Nev. 654, 707 P.2d 1149 (1985).

III. Choice of Law

Nevada allows contracting parties to insurance contracts broad limits to choose the law that will determine the validity and effect of their contract. Progressive Gulf Ins. Co. v. Paehnrich, 327 P.3d 1061 (Nev. 2014). However, the agreement must not be contrary to the public policy of the forum or other interested state. Id.

IV. Duties Imposed by State Law

A. Duty to Defend

1. Standard for Determining Duty to Defend

An insurance company’s duty to defend and/or indemnify the insured arises from the provisions of the insurance policy. Rockwood Ins. Co. v. Federated Capital Corp., 694 F. Supp. 772 (D. Nev. 1988). The insurer must defend any lawsuit brought against its insured which potentially seeks damages within the coverage of the policy. Id. An insurance policy is judged from the perspective of one not trained in law or in insurance, with the


The duty to defend attaches upon notice of a demand against its insured, and continues through litigation until the final resolution of that claim. Allstate v. Miller, 212 P. 3d 318 (2009).

2. Issues with Reserving Rights

As previously noted, an insurer must generally approve or deny a policy holder’s claim within 30 days after receiving notice of it. NRS § 690B.012. If an insurer denies the policy holder’s claim, but is concerned about satisfying its duty to defend, the insurer may assume the insured’s defense under a reservation of its rights. According to NRS § 104.1308, an insurer who promises to defend its policy holder under an explicit reservation of rights does not thereby prejudice the rights reserved. An insurer defending a policy holder under a reservation of rights should notify the policy holder of its intentions within the 30-day period described above.

Nevada law requires an insurer to provide independent counsel for its insured when a conflict of interest arises between the insurer and the insured. State Farm Mut. Auto. Ins. Co. v. Hansen, 357 P.3d 338, 339 (2015). A reservation of rights does not create a per se conflict of interest. Rather, courts must make a case-by-case determination whether there is an actual conflict of interest. Id. A conflict of interest may arise when an insurer reserves its right to determine coverage, yet provides counsel to defend its insured, because the outcome of the litigation may also decide the outcome of the coverage determination—a determination that may pit the insured’s interest against the insurer’s. Id. at 340. When such a conflict of interest exists, Nevada law requires the insurer to satisfy its contractual duty to provide representation by permitting the insured to select independent counsel and by paying the reasonable costs of such counsel. Id. at 341-42.

B. Duty to Settle

The Nevada Supreme Court has discussed the duty to settle in the context of an automobile uninsured motorist policy. Allstate v. Miller, 212 P. 3d 318 (2009). In that case, the Nevada Supreme Court held that the duty to defend includes the right to control settlement and litigation against the insured. Id. at 324-25. This likewise imposes the duty of good faith and fair dealing in settlement negotiations. Therefore, if an insurer fails to adequately inform an insured of a known reasonable settlement opportunity prior to the filing of a lawsuit, the insurer may breach its duty of good faith and fair dealing. Id. at 325. If the insurer fails to adequately inform an insured of such an opportunity after the filing of a lawsuit, the insurer has breached its duty to defend against lawsuits. Id. at 327.
The Court then went on to state that a failure to adequately inform of settlement opportunities is a “factor” in a bad faith claim. Id. When evaluating whether the failure to settle is bad faith, the following factors are to be considered:

(1) The probability of the insured’s liability;
(2) The adequacy of the insurer’s investigation of the claim;
(3) The extent of damages recoverable in excess of policy coverage;
(4) The rejection of offers in settlement after trial;
(5) The extent of the insured’s exposure as compared to that of the insurer; and
(6) The nondisclosure of relevant factors by the insured or insurer.

If an insurer fails to settle or fails to inform an insured of a reasonable opportunity to settle, it can be considered the proximate cause of all damages arising from a foreseeable settlement or excess judgment. Id. at 327.

Likewise, NRS § 686A.310(1) of the Nevada Unfair Claims Settlement Practices Act makes an insurer’s failure to promptly settle a claim actionable:

(1) Engaging in any of the following activities is considered to be an unfair practice:
   (e) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.

(2) . . . an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.

V. Extracontractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

1. First Party

According to the Nevada Supreme Court, bad faith is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct. Guaranty Nat'l Ins. Co. v. Potter, 912 P.2d 267, 272 (Nev. 1996). An insurer’s duty to its policy holder is “akin” to a fiduciary relationship, but does not rise to that level. Powers v. United States Services Auto. Ass’n., 962 P.2d 596, 602 (Nev. 1998). When investigating claims, insurers must act with the interest of the insured in mind. Misconduct, such as misrepresenting or concealing facts to gain an advantage over the insured, is a breach of the insurer’s fiduciary-like responsibility. Id. at 603.

In addition, there are three elements required to establish an insurance bad faith claim:

(1) The denial or refusal to provide benefits under a policy;
(2) With no reasonable basis to deny or refuse to pay the claim; and
(3) The insurer must know of, or recklessly disregard the fact that there was no reasonable basis for denying or refusing to pay the claim.
In Allstate v. Miller, 212 P. 3d 318 (2009) the Court clarified that bad faith includes more than a failure to pay or a rejection of a settlement offer within policy limits.

2. **Third Party**


3. **Damages**

In a bad faith action, a plaintiff is entitled to recover all damages proximately caused by the insurer’s conduct, as well as punitive damages. Guaranty Nat’l Ins. Co., supra, at 273. Under NRS § 42.005, punitive damages are allowed, “where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied.” Id. The court has defined “oppression” as a conscious disregard for the rights of others “which constitutes an act of subjecting plaintiffs to cruel and unjust hardship.” United Fire Ins. Co. v. McClelland, 780 P.2d 193, 198 (1989) (quoting Ainsworth v. Combined Ins. Co., 763 P.2d 673, 675 (1988)). There is no statutory limitation on the amount of punitive damages that can be awarded in bad faith lawsuits. NRS 42.005(2)(b). However, “[P]roof of bad faith, by itself, does not establish liability for punitive damages.” United Fire Ins. Co. v. McClelland, 105 Nev. 504, 512, 780 P.2d 193, 198 (1989), citing United States Fidelity v. Peterson, 91 Nev. 617, 620, 540 P.2d 1070, 1072 (1975). A plaintiff is never entitled to punitive damages as a matter of right because the allowance or denial rests in the discretion of the trier of fact. Powers v. United Servs. Auto Ass’n, 114 Nev. 690 705 (1998).

The Supreme Court of Nevada has set aside bad faith jury awards that it considered excessive. See Wohlers & Co. v. Bartgis, 969 P.2d 949 (Nev. 1998). The court has ruled that “damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the misconduct of the tortfeasor under the circumstances of a given case.” Id. at 962. Factors to consider when determining whether a punitive damage award is excessive include the financial position of the defendant, culpability and blameworthiness of the insurer, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and property, and he means which are judged necessary to deter future misconduct of this kind. Id.

B. **Fraud**


In accordance with Nevada Law, the plaintiff has the burden of proving each element of a fraud claim by clear and convincing evidence. Lubbe v. Barba, 91 Nev. 596, 540 P.2d 115 (1975). The elements of fraud include: (1) a false representation made by the defendant; (2) defendant’s knowledge or belief that the representation is false (or that the defendant had an insufficient basis for making the representation); (3) defendant intended to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) plaintiff’s justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance. Wohlers v. Bartgis, 91 Nev. 596, 1260-1261, 969 P.2d 949, 957-58 (1998), cert. denied 527 U.S. 1038 (1999) citing Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992).
Justifiable reliance upon an alleged misrepresentation is established when a plaintiff shows that the false misrepresentation played a material and substantial part in leading the plaintiff to adopt his particular course. Blanchard v. Blanchard, 108 Nev. 908, 839 P.2d 1320, 1322 (1992).

Nevada has specifically recognized a cause of action for constructive fraud. Constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others or to violate confidence. Perry v. Jordan, 111 Nev. 943, 946, 900 P.2d 335, 337 (1995). Constructive fraud is characterized by a breach of duty arising out of a fiduciary duty or confidential relationship. Id. at 946-947, citing Long v. Towne, 98 Nev. 11, 13 839 P.2d 528, 529-30 (1992).

The statute of limitation for fraud is three years. NRS 11.190(3)(d). However, the time period begins to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake. Id.

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

In order to recover under the theory of intentional infliction of emotional distress, a plaintiff must establish: (1) defendant’s extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff actually suffered severe or extreme emotional distress, and (3) the defendant’s conduct actually or proximately caused the distress. Olivero v. Lowe, 995 P.2d 1023, 1025 (2000); Bartmettler v. Reno Air, Inc., 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998); Nelson v. City of Las Vegas, 99 Nev. 548, 555 (1983). Extreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community. Kahn v. Morse & Mowbray, 121 Nev. 464, 467, 117 P.3d 227, 230 (2005).

In order to prevail on a negligent infliction of emotional distress cause of action in cases where emotional distress damages are not secondary to physical injuries, either a physical impact must have occurred or proof of serious emotional distress causing physical injury or illness must be presented. Bartmettler, 956 P.2d at 1387.

D. State Consumer Protection Laws, Rules and Regulations

NRS § 686A.310 expressly provides a private right of action for an insured party or claimant against an insurer for breaches of the list of unfair practices in settling claims. NRS 686A.310(2); see Bergerud v. Progressive Cas. Ins., 453 F. Supp. 2d 1241, 1250 (D. Nev. 2006). Specifically, the section states:

(1) Engaging in any of the following activities is considered to be an unfair practice:

   (e) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.

(2) . . . an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.

The Act was not intended to codify the common law tort of bad faith; while the statute and the common law may overlap, the statute reaches different conduct than that which is contemplated by the common law tort. Hart v. Prudential Property & Casualty Insurance Co., 848 F. Supp. 900, 904-905 (D.
Instead, the Act specifically prohibits conduct that is similar to that prohibited by the common law tort of bad faith. However, the statute is specific to the manner in which an insurer should handle an insured’s claim in determining coverage. See Guaranty National Insurance Company, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996).

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

A. **Discoverability of Claims Files Generally**

Nevada Rule of Civil Procedure ("NRCP") 26(b)(3) mandates discovery of materials resulting from an insurance company's investigation unless the insurer's investigation has been performed at the request of an attorney. Ballard v. Eighth Judicial Dist. Court, 106 Nev. 83, 85, 787 P.2d 406 (1990). Discovery materials are not privileged if the investigation would have taken place in the ordinary course of business without the involvement or presence of an attorney. Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Court, 113 Nev. 521, 524, 936 P.2d 844, 846 (1997). The attorney-client privilege applies to insurers only when the statement is taken by the insurer at the express direction of counsel for the insured. Ballard at 407-408.

B. **Discoverability of Reserves**


C. **Discoverability of Existence of Reinsurance and Communications with Reinsurers**

The Nevada Supreme Court has not expressly ruled on this issue; therefore, the existence of reinsurance and communication with reinsurers is governed by the normal discovery rules. Thus, information may be obtained regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. NRCP 26(b)(1).

D. **Attorney/Client Communications**

Nevada recognizes the tripartite relationship; therefore, an insurer holds a privilege with defense counsel as against third parties. Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court of Nev., 123 Nev. 44, 46, 152 P.3d 737, 738 (2007).

VII. **Defenses in Actions Against Insurers**

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

The Nevada Revised Statutes provide as follows with respect to misrepresentations made by insurance applicants:

NRS § 687B.110, Representations in applications, provides:

All statements and descriptions in any application for an insurance policy or annuity contract, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:

1. Fraudulent; or
2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or

3. The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

Under most circumstances involving misrepresentations by an insured to an insurance company, it is "a question of fact for the jury to decide whether the variance between the representation and the existing facts was material." Powers v. United Servs. Auto. Ass'n, 114 Nev. 690, 697, 962 P.2d 596 (1998), citing Gerhauser v. N.B.M. Ins. Co., 7 Nev. 174, 196 (1871). If the deception relates to the claims process rather than to the application process, it is only in the rarest of cases of this kind that the materiality issue can be taken from the jury. Id. at 698. The jury must decide whether the false representation is material, substantially related to or, reasonably relevant to the insurance company's investigation. Id.

However, the Nevada Supreme Court determined that while the introductory language of NRS § 687B.110 offers hope to consumers that insurance contracts will not be made voidable by inaccuracies and omissions in their applications. Randono v. Cuna Mut. Ins. Group, 106 Nev. 371, 793 P.2d 1324 (1990). The exceptions largely consume the rule and appear to deny, in most situations, the protection and relief that the statute may have been attempting to grant. Id.

Courts have refused to apply either common law or statutory rules against misrepresentation where waiver or estoppel is present. If the insurance company knew or could have reasonably discovered the misrepresentation, then Nevada courts will not apply the rule against misrepresentation to void a contract. Violin v. Fireman's Fund Ins. Co., 81 Nev. 456, 406 P.2d 287 (1965). However, absent proof of waiver or estoppel, an insurer is not bound to an insurance contract that was induced by misrepresentation. Id.

B. Failure to Comply with Conditions

When a clause is included in an insurance policy that performance of the conditions is a condition precedent to the right of action against the insurer, full recognition will be given to such provision. State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 227, 244 (1950)(overruled by statute for the specific issues of late notice of the claim); Lucini-Parish Ins. v. Buck, 108 Nev. 617, 620, 836 P.2d 627, 629 (1992); Las Vegas Metro. Police Dep't v. Coregis Ins. Co., 256 P.3d 958, 962 (Nev. 2011). The effect of the failure to perform such conditions precedent is described in varying language. Nevada courts have held that the failure "constitutes good ground for the forfeiture of the indemnity"; that by the failure to comply the assured had "forfeited his right to rely on the policy"; that the assured was bound to give the required notice "if it wanted to save the policy"; that the failure "released defendant;" that the assured, by reason of the failure, was "released from liability"; that the failure was "a bar to recovery"; that by reason of the failure the insurer "ceased to be liable;" (and) that the failure was "fatal to a recovery" on the policy. Id.

Furthermore, an insured's failure to submit to an IME qualifies as a breach of the insurance contract and precludes the policy holder from recovering under the policy, even if he/she subsequently undergoes the IME, as her failure to submit to an IME when initially requested still qualified as a violation of coverage. Schwartz v. State Farm Mut. Auto. Ins. Co., 2009
C. Challenging Stipulated Judgments: Consent and/or No-Action Clause

Ordinarily, the insured must cooperate with the insurer. He may not settle with the claimant without breaching the cooperation clause in the policy. Hansen v. State Far Mut. Auto. Ins. Co., 2012 U.S. Dist. LEXIS 176057 (D. Nev. Dec. 12, 2012). The right and duty to defend affords an insurer the right to control the defense. Id. However, any breach of the insurer's duties deprives the insured of the security that he has purchased because the breach leaves him exposed to personal judgment and damage which may exceed the policy limits. Accordingly, when such a breach occurs, the insured in generally held to be free from his obligations under the cooperation clause, and thus, may settle with the claimant. However, insurers are free to challenge the amount of any such judgment. Allstate v. Miller, 212 P.3d 318.

D. Statutes of Limitation

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. NRS § 11.190. However, an action sounding in tort, including a bad faith breach of an implied covenant of good faith, has a four-year limitations period. Davis v. State Farm Fire & Casualty Co., 545 F. Supp. 370, 372 (D. Nev. 1982). These run from the date of denial or breach.

VIII. Trigger and Allocation Issues for Long-Tail Claims

A. Trigger of Coverage

In first-party progressive property loss cases, Nevada has adopted the "manifestation rule." Jackson v. State Farm Fire & Casualty Co., 108 Nev. 504, 509, 835 P.2d 786, 789 (1992). Manifestation of loss is defined as "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered." Id. citing Prudential-LMI Comm. Ins. Co. v. Superior Court, 51 Cal.3d 674 (1990). The manifestation date will generally be a question of fact; nonetheless, summary judgment may be appropriate where the undisputed evidence establishes that no damage had been discovered before a given date. Id.

The Nevada Supreme Court has not specifically addressed the issue of which trigger of coverage theory, manifestation or continuous exposure, should apply to third-party insurance cases. Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co., 459 F. Supp. 2d 1039, 1045-1046 (D. Nev. 2006). In Gary G. Day Constr. Co., the district court determined it need not speculate as to which theory Nevada Courts would adopt, as it found the policy language at issue to unambiguously set forth the requirements triggering coverage under the policy. Id. at 1046. However, in dicta, the court indicated it was unimpressed with the argument supporting use of the continuous exposure theory in third-party insurance cases.

B. Allocation Among Insurers

There is no bright line rule for determining how a court will apportion a loss among multiple insurers. However, with respect to motor vehicle insurance, the Nevada Supreme Court has determined where one policy explicitly defines its liability, and the other does not, the policy with the more specific language controls. Alamo Rent-A-Car v. State Farm Mut. Auto. Ins. Co., 114 Nev. 154, 158, 953 P.2d 1074, 1074 (1998). In addition, under a "Coordination of Benefits" provision, if an insured's benefits under more than one policy exceed his medical expenses, the insurers' liability is determined on a pro rata
Nevada has not adopted the California “horizontal rule” finding that when faced with this situation, the horizontal exhaustion rule does not apply when the language of the relevant policies provides specific guidance on payment priority. Vigilant Ins. Co. v. Lincoln Gen. Ins. Co., 362 Fed. Appx. 841, 843 (9th Cir. Nev. 2010). Moreover, Nevada public policy is in favor of construing insurance policies narrowly against the insurer and in favor of coverage. When ambiguity in the language of a policy exists, the court considers not merely the language, but also the intent of the parties, the subject matter of the policy, and the circumstances surrounding its issuance. Id.

IX. Contribution Actions

A. Claim in Equity vs. Statutory

Nevada treats contribution actions in equity and statutorily created contribution actions under NRS § 17.245 equally. NRS § 11.190(2)(c) sets a four (4) year statute of limitations to bring a contribution claim once there is a settlement or judgment against the defendant. This is because the court views a settlement or judgment as a quasi-contract, not based on an instrument or writing. However, contractually based contribution claims fall under NRS § 17.285 and therefore the statute of limitation to commence a contribution action is one (1) year from the filing of a judgment. Saylor v. Arcotta, 225 P.3d 1276, 1278 (Nev. 2010).

B. Elements

In Nevada, the elements for a claim in equity and statutory claim are essentially the same. Contribution claims exists when there are two or more tortfeasors who are jointly and severally liable whether or not a judgment has been filed a party may file a contribution claim against joint tortfeasors. NRS § 17.285.

X. Duty to Settle

For Nevada law regarding the duty to settle, please see the duty to settle discussion above in section IV. Duties Imposed by State Law.