I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

Ohio Administrative Code § 3901-1-07 defines unfair practices in the insurance context. It is an unfair practice for an insurance company to fail “to acknowledge pertinent communications with respect to claims arising under insurance policies in writing, or by other means so long as an appropriate notation is made in the claim file of the insurer, within fifteen (15) days of receiving the notice of claim in writing or otherwise.” Ohio Admin. Code § 3901-1-07(C)(2). Insurers must reply to all other pertinent communications and/or inquiries of the Department of Insurance respecting a claim within twenty-one (21) days. Ohio Admin. Code § 3901-7-07(C)(3). Furthermore, insurers must implement reasonable procedures to commence an investigation of any claim filed by either a first party or third party claimant within twenty-one (21) days of receipt of notice of a claim. Ohio Admin. Code § 3901-7-07(C)(4).

Regarding property or casualty policies specifically, Ohio Admin. Code § 3901-1-54(G)(1) provides:

An insurer shall within twenty-one days of the receipt of properly executed proof(s) of loss decide whether to accept or deny such claim(s). If more time is needed to investigate the claim than the twenty-one days allow, the insurer shall notify the claimant within the twenty-one day period, and provide an explanation of the need for more time. If an extension of time is needed, the insurer has a continuing obligation to notify the claimant in writing, at least every forty-five days, of the status of the investigation and the continued time for the investigation.

Moreover, an insurer shall tender payment to a first party claimant no later than ten days after acceptance of a claim if the amount of the claim is determined and is not in dispute, unless the settlement involves a structured settlement, action by a probate court, or other extraordinary circumstances as documented in the claim file. Ohio Admin. Code § 3901-1-54(G)(6).

B. Standards for Determination and Settlements
Ohio statutes provide a procedure under which one can pursue an insurance claim. See Ohio Rev. Code §§ 3901.19-3901.221. However, “Nowhere in the Ohio statutory or regulatory framework proscribing deceptive trade practices in insurance does it provide a civil remedy to a private party aggrieved by an insurer.” Elwert v. Pilot Life Ins. Co., 77 Ohio App.3d 529, 542, 602 N.E.2d 1219 (1st Dist. 1991).

However, Ohio Admin. Code. § 3901-1-54 provides rules insurers must follow regarding property/casualty claims settlement practices. For example, Ohio Admin. Code § 3901-1-54(E) provides a great deal of regulations an insurer must follow with respect to misrepresentations of policy provisions, including concealment of benefits, denial of claims, and written notice. § 3901-1-54(G) provides even more standards for the settlement of claims, including, but not limited to, what information a denial must contain, submitting insureds to polygraph testing, and notice. Subsection (H) also provides regulations regarding standards for prompt, fair, and equitable settlements of automobile insurance claims.

The case law also suggests, as with other types of disputes, the law favors compromise or settlement of an insurance claim provided no fraud or deception is practiced. Accordingly, settlement agreements reached with insurers are enforceable notwithstanding subsequent change of heart by the insured regarding the terms of such an agreement. Feathers v. Tasker, 9th Dist. Summit No. 26318, 2012-Ohio-4917, 2012 Ohio App. LEXIS 4299. Parties are bound by the terms of their settlement agreement as in any other contract where they have manifested intent to enter into the agreement. Id. Regular contract defenses apply to settlement agreements in the insurance contract, including mutual mistake, Morgan v. State Farm Mut. Auto. Ins. Co., 8th Dist. Cuyahoga No. 47841, 1985 Ohio App. LEXIS 8130 (1985), or fraud Stoller v. Fidelity Guar. Ins. Underwriters, Inc., 6th Dist. Wood No. WD-87-64, 1988 Ohio App. LEXIS 3097 (1988).

Once an insured cashes a check received by an insurer as settlement of a claim, the insured can no longer challenge the settlement. Fraley v. Allstate Ins. Co., 5th Dist. Richland No. 03-CA-67, 2004-Ohio-2272, 2004 WL 1047412.

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

While there are no specific statutory provisions dealing specifically with privacy in the insurance context, the Ohio Administrative Code contains provisions that regulate the Department of Insurance with respect to employee access to confidential personal information. Ohio Admin. Code § 3901-1-02. The superintendent of the department must designate an employee of the department to serve as the data privacy point of contact. The data privacy point of contact shall work with the chief privacy officer within the office of information technology to assist the department with both the implementation of privacy protections for the confidential personal information that the department maintains and compliance with section 1347.15 of the Revised Code and the rules adopted pursuant to the authority provided by that chapter. Id. at § 3901-1-02(D)(4).

II. PRINCIPLES OF CONTRACT INTERPRETATION

Insurance policies are written contracts between the insurer and insured. Thus, the meaning of the contract terms must be determined according
to the same rules as are applicable to other written contracts. Chiquita Brands Internat'l., Inc. v. National Union Ins. Co., 2013-Ohio-759, 988 N.E.2d 897 (Ohio St. App. 1st Dist. Hamilton County 2013); Auto-Owners Ins. Co. v. Marillat, 167 Ohio App. 3d 148, 2006-Ohio-2491, 954 N.E.2d 513 (6th Dist. Fulton County 2006). When confronted with an issue of contract interpretation, courts must give effect to the intent of the parties in the agreement. Indeed, the fundamental goal in an insurance policy is to ascertain the intent of the parties from a reading of the contract in its entirety and to settle upon a reasonable interpretation of any disputed terms in a manner calculated to give the agreement its intended effect. Med. Assur. Co., Inc. v. Dillaplain, 186 Ohio App. 3d 635, 2010-Ohio-841m 929 N.E.2d 1084 (2d Dist. Greene County 2010).


Contract terms are to be given their plain and ordinary meaning. Cincinnati Indemn. Co. v. Martin, 85 Ohio St. 3d 604, 1999-Ohio-322, 710 N.E.2d 677 (1999); Gomolka v. State Auto. Mut. Ins. Co., 70 Ohio St.2d 166, 436 N.E.2d 1347, 1348 (1982). A court may only deviate from the plain and ordinary meaning of the policy terms and construe a different meaning if the plain meaning would cause an absurd result. Blohm v. Cincinnati Ins. Co., 39 Ohio St.3d 63, 529 N.E.2d 433 (1988). Thus, only in the rarest of circumstances may a court substitute a different meaning to provisions of a policy that are unambiguous. See Herschell v. Rudolph, 2002-Ohio-1688, 2002 WL 549980 (Ohio Ct. App. 11th Dist. Lake County 2002). However, in the absence of plain meaning, a term must be defined by reference to extrinsic evidence. Aetna Casualty & Surety Co. v. Roland, 47 Ohio App.3d 93, 96, 547 N.E.2d 379 (10th Dist. Franklin County 1988).

When a contract term is defined in the policy, that definition controls what the term means. Watkins v. Brown, 97 Ohio App.3d 160, 646 N.E.2d 485 (2nd Dist. Montgomery County 1994). When a term is not defined in the policy, the court must look to their plain and ordinary meaning, and the fact that an insurance policy does not define a term does not necessarily mean it is ambiguous. Pahlbusv v. Crum-Jones, 176 Ohio App. 3d 326, 2008-Ohio-1953, 891 N.E.2d 1242 (1st Dist. Hamilton County 2008). Nor is it true that a term is ambiguous because the policy could have been more clearly drafted. Milburn v. Allstate Ins. Co. Prop. & Cas., 2009-Ohio-5476, 185 Ohio App.3d 796, 925 N.E.2d 1018 (10th Dist. 2009). Terms or phrases that have a technical meaning in the business to which the contract refers will be interpreted according to such meaning unless a contrary intention is clearly expressed. Govt. Emps. Ins. Co. v. Hughes, 184 Ohio App.3d 397, 2009-Ohio-5023, 921 N.E.2d 269 (10th Dist. Franklin County 2009); Mastellone v. Lightning Rod Mut. Ins. Co., 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130 (8th Dist. Cuyahoga County 2008).
“A court will resort to extrinsic evidence in its effort to give effect to the parties’ intentions only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with special meaning.” Kelly v. Med. Life Ins. Co., 31 Ohio St.3d 130, 509 N.E.2d 411, 413 (1987). Furthermore, where words in the policy have a special meaning within a particular trade or industry which is not reflected on the face of the agreement, courts may resort to extrinsic evidence to establish that meaning. Roland, 47 Ohio App.3d at 95.

Since the insurer generally is the party who drafts the policy language, a policy which is reasonably susceptible to more than one interpretation, i.e. it is ambiguous, is to be construed liberally in favor of the insured and strictly against the insurer. Marusa v. Erie Ins. Co., 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232 (2013); Clark v. Scarpeili, 91 Ohio St.3d 271, 2001-Ohio-39, 744 N.E.2d 719 (2001); Crabtree v. 21st Century Ins. Co., 176 Ohio App. 3d 507, 2008-Ohio-3335, 892 N.E.2d 925 (4th Dist. Ross County 2008); Cincinnati Ins. Co. v. ACE INA Holdings, Inc., 175 Ohio App.3d 266, 2007-Ohio-5576, 886 N.E.2d 876 (1st Dist. 2007). If a policy provision is ambiguous, any reasonable construction which results in coverage for the insured must be adopted by the trial court. Colombiana Cty. Bd. of Commrs. v. Nationwide Ins. Co., 130 Ohio App.3d 8, 719 N.E.2d 561 (7th Dist. 1998). As a limitation, the general rule of liberal construction of insurance policies in favor of the claimant who seeks coverage cannot be used to create an ambiguity where one does not exist. Lager v. Miller-Gonzalez, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666 (2008); Auto-Owners Ins. Co. v. Merillat, 167 Ohio App.3d 148, 2006-Ohio-2491, 854 N.E.2d 513 (6th Dist. Fulton County 2006). Exclusions or exceptions from coverage must be expressly provided or must arise by necessary implication from the policy language. Dublin Bldg. Sys. v. Selective Ins. Co. of South Carolina, 172 Ohio App.3d 196, 2007-Ohio-494, 874 N.E.2d 788 (10th Dist. 2007). Thus, provisions that provide for exclusions or exemptions from coverage must be narrowly construed in favor of the insured.

III. CHOICE OF LAW

The Ohio Supreme Court has adopted Sections 187 and 188 of the Restatement of Conflicts of Law. Ohayon v. Safeco Ins. Co. of Illinois, 91 Ohio St.3d 474, 479, 2001-Ohio-100, 747 N.E.2d 206 (2001). Section 187 of the Restatement generally provides that the law of the state chosen by the parties to a contract will govern their contractual rights and duties. Thus, Ohio courts will honor choice of law provisions in insurance policies. Where choice of law is not designated in the policy, Section 188 governs. Section 188 provides the “most significant relationship” test. The rights and duties of the parties must be determined by the law of the state which has the most significant relationship to the transaction and the parties. This also section also enumerates factors that courts should consider in the absence of such a choice.

In absence of an effective choice of law provision in the insurance policy, the contacts to be taken into account to determine the law applicable include:

a) The place of contracting,
b) The place of negotiation,
c) The place of performance,
d) The location of the subject matter, and
e) The domicile, residence, nationality, place of incorporation, and place of business of the parties.

The above contacts are to be evaluated according to their relative importance with respect to the particular issue.

The focus on the various factors above will often correspond with the Restatement’s view that the rights created by an insurance contract should be determined “by the local law of the state which the parties understood was to be the principle 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.” Ohayon, 91 Ohio St.3d at 479 (emphasis in original).

A separate choice of law analysis applies to the underlying loss. Thus, the state law that applies to an insurance contract may not be the same law that applies to the underlying claim. If the underlying claim is a tort, the law of the state where the tort occurred controls, but if the underlying claim is contractual, the Restatement will determine the choice of law. See Kurent v. Farmers Ins. Of Columbus, Inc. 62 Ohio St.3d 242, 581 N.E.2d 533 (1991).

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend

Under Ohio law, an insurer has a duty to defend its insured, and the duty is broad. Cincinnati Ins. Co. v. BCPS Holdings, Inc., 115 Ohio St.3d 306, 2007-Ohio-4919, 875 N.E.2d 31 (2007)(holding that the insurer’s duty to defend is both broader and distinct from the duty to indemnify). Thus, the issue is often whether the complaint is sufficiently pleaded to trigger the duty. Pursuant to the standard “pleading test” where the pleadings unequivocally bring an action within the coverage afforded by the policy, the duty to defend will attach. Willoughby Hills v. Cincinnati Ins. Co., 9 Ohio St.3d 177, 459 N.E.2d 555 (1984); Sanderson v. Ohio Edison Co., 69 Ohio St.3d 582, 635 N.E.2d 19 (1994). However, where the insurer’s duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is “potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage had been pleaded, the insurer must accept the defense of the claim.” Willoughby Hills, 9 Ohio St.3d at 180, 459 N.E.2d 555 (emphasis added). Thus, the “scope of the allegations” may encompass matters well outside the four corners of the pleadings. Id.

The “duty to defend need not arise solely from the allegations in the complaint but may arise at a point subsequent to the filing of the complaint.” Id. at 177; but see Preferred Risk Ins. Co. v. Gill, 30 Ohio St.3d 108, 113, 507 N.E.2d 1118 (1987)(distinguishing Willoughby Hills holding that “where the conduct which prompted the underlying suit is so indisputably outside coverage, we discern no basis for requiring the insurance company to defend or indemnify its insured simply because the underlying complaint alleges conduct within coverage.”); Ward v. United Foundaries, Inc., 129 Ohio St.3d 292, 295, 2011-Ohio-3176, 951 N.E.2d 770
Thus, while the duty to defend is broad, it is not without limitation. In Preferred Risk, the Ohio Supreme Court held that the allegations in the complaint did not justify the application of the Willoughby Hills rule when the insurer sought a declaratory judgment that it had no duty to defend an insured against a tort claim brought by the parents of a child murdered by the insured. Preferred Risk, 30 Ohio St.3d at 112, 507 N.E.2d 1118; See also Cincinnati Ins. Co. v. Anders, 99 Ohio St.3d 156, 2003-Ohio-3048, 789 N.E.2d 1094 (2003)(holding that if the conduct alleged in a complaint is indisputably outside the scope of coverage, there is no duty to defend); compare Great American Ins. Co. v. Hartford Ins. Co., 85 Ohio App.3d 815, 818, 621 N.E.2d 796 (11th Dist. 1993)(holding that “the insurer’s obligation to defend will continue until the claim is confined to a theory of recovery that the policy does not cover.”); Cincinnati Indemn. Co. v. Martin, 85 Ohio St.3d 604, 1999-Ohio-322, 710 N.E.2d 677 (1999)(holding that an insurer has no duty to defend or indemnify its insured in a wrongful death lawsuit brought by a noninsured based on the death of the insured where the policy excludes liability coverage for claims based on bodily injury to the insured). The Anders court made clear that while Preferred Risk remains good law, the principles set forth in that case should be limited to cases which are substantially similar to Preferred Risk.

When an insurer is found to have breached its duty to defend, the insured may recover all damages “which could reasonably be considered as arising naturally from [the insurer’s] breach of the duty to defend. Roberts v. United States Fid. & Guar. Co., 75 Ohio St.3d 630, 1996-Ohio-101, 665 N.E.2d 664 (1996). However, an insurer may not recover damages that are too “remote, speculative, and not supported by evidence.” Id.

2. Issues with Reserving Rights

Where the insurer is doubtful of its liability and wishes to retain its rights, it may give a “nonwaiver” notice to the insured or attempt to enter a “nonwaiver” agreement with the insured, reserving the rights to later assert the policy breach for noncoverage. A “reservation of rights” consists of a notice given by the insurer that it will defend the suit but reserved all rights it has based on noncoverage under the policy. Estate of Heintzelman v. Air Experts, Inc., 5th Dist. Delaware No. 11CAE50043, 2011-Ohio-5242, 2011 Ohio App. LEXIS 4323 (quoting Motorists Mutual Ins. Co. v. Trainor, 33 Ohio St.2d 41, 45, 294 N.E.2d 874 (1973)). By providing a reservation of rights, an insurer reserves the right to deny coverage at a later date based on the terms of the policy. Id.; Nationwide Ins. Co. v. Alli, 178 Ohio App.3d 17, 2008-Ohio-4318, 896 N.E.2d 742 (7th Dist. 2008); Mastellone v. Lightning Rod Mut. Ins. Co., 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130, fn. 7 (8th Dist. 2008).

A reservation of rights may be issued in response to a notice of occurrence, notice of claim or in response to a notice of the suit. Upon receipt of notice of occurrence, claim or suit, an insurer should issue a reservation of rights in order to preserve any coverage positions available to it at law or under the insurance policy. Trainor, 33 Ohio St.2d at 45, 294 N.E.2d 874. An insurer must give “reasonable notice” to the insured that it disclaims liability; otherwise, the insurer waives the right to avoid liability because of an exception under the policy. Socony-Vacuum Oil Co. v. Continental Cas. Co., 45 Ohio L. Abs. 458, 67 N.E.2d 836 (Ct. App. 8th Dist. 1944).

Ohio courts have not definitively determined what constitutes “reasonable notice.” If the reservation of rights comes so late that it prejudices the insured’s ability to defend the matter, a court may find the insurer has waived the reservation of rights. Britton v. Smythe, 139 Ohio App.3d 337, 345, 743 N.E.2d 960 (8th Dist. 2000) (holding that a two year lapse between the start of the defense and reservation of rights was too long). “Providing a defense for nearly one year without reserving rights may give rise to a claim of estoppel.” Turner Liquidation Co. v. St. Paul Surplus Lines Ins. Co., 93 Ohio App.3d 292, 300, 638 N.E.2d 174 (9th Dist. 1994). In Collins v. Grange Mut. Cas. Co., the Court of Appeals held that a sixteen-month period constituted a waiver of a reservation of rights. 124 Ohio App.3d 574, 579, 706 N.E.2d 856 (12th Dist. 1997). On the other hand, defending the insured for as long as two months was not sufficient to prejudice the insured. Med. Prot. Co. v. Fragatos, 190 Ohio App.3d 114, 2010-Ohio-4487, 940 N.E.2d 1011 (8th Dist. 2010). Similarly, the insured was not prejudiced when the insurer defended for a period of 16 days before issuing a reservation of rights. GuideOne Mut. Ins. Co. v. Reno, 2nd Dist. Greene No. 01-CA-68, 2002 WL 857682 (Apr. 26, 2002). However, some courts have concluded that by providing a defense without a reservation of rights, it is conclusively established that the insured was prejudiced. See Insurance Co. of North America v. Travelers Ins. Co., 118 Ohio App.3d 302, 323, 692 N.E.2d 1028 (8th Dist. 1997).

There are no specific requirements as to what information must be included in a reservation of rights letter and whether the letter is sufficient is to be determined on a case-by-case basis. Efficient Lighting Sales Co. v. Meverman, 8th Dist. Cuyahoga No. 91093, 2009 WL 348826, 2009-Ohio-627 (holding that a reservation of rights letter that reserved the right to raise all defenses and preserve all terms and conditions of the policy was deemed sufficient. However, the letter should “fairly inform” the insured of the insurer’s position with regard to a claim. Newby Int’l Inc. v. Nautilus Ins. Co., 112 Fed. App’x 397, 305-406 (6th Cir. 2004); see Britton, 139 Ohio App.3d at 350, 743 N.E.2d 960 ("When deciding to reserve rights, an insurer has the obligation to do so in good faith, without causing undue prejudice to plaintiff's ability to make an informed decision to obtain independent counsel."); Fairfield Mach. Co. v. Aetna Cas. & Sur. Co., 7th Dist. Columbiana No. 2000 CO 14, 2001-Ohio-3407.

Conflicts of interest and ethical issues may arise when an insurer hires an attorney or law firm to defend a policyholder. Disputes can develop regarding the tripartite relationship between defense counsel, the insurer, and the insured. See Swiss Reinsurance Am. Corp., Inc. v. Roetzel & Andress, 163 Ohio App.3d 336, 2005-Ohio-4799, 837 N.E.2d 1215 (9th Dist. 2005). If the insurer has issued a reservation of rights, a potential conflict exists with respect to the conduct of the insured’s defense—the insurer and insured may have divergent views on how to handle the defense, views that may cause the
judgment in the underlying case to be determinative of the coverage issue in one way or another.

The majority view in Ohio is that an insurer may select counsel to defend the insured under a reservation of rights. The insurer need only pay for the insured’s private counsel when the insurer’s stance with respect to coverage renders it “impossible” for it to “protect both its own interests and those of the insured.” Redhead Brass, Inc. v. Buckeye Union Ins. Co., 135 Ohio App.3d 616, 626, 735 N.E.2d 48 (9th Dist. 1999). This is a difficult hurdle to jump for the insured who seeks to utilize private counsel. The interests must be “mutually exclusive,” or irreconcilable on an issue material to coverage, before the insurer must pay the costs of private counsel for the policyholder. Id. Where the insurer reserves its right to deny coverage, but the facts present “no conflict of interest,” the insurer need not pay for private counsel. Lusk v. Imperial Cas. & Indemn. Co., 78 Ohio App.3d 11, 16, 603 N.E.2d 420 (10th Dist. 1992).

A reservation of rights is not necessary in the absence of a duty to defend. Thus, if a policy excludes coverage for certain types of circumstances or behavior, the reservation of rights is not necessary to maintain defenses to coverage. If an insurer has no duty to defend, it cannot later be estopped from raising coverage defenses, or said to have waived those defenses, if it fails to reserve rights when notified of a claim or suit potentially implicating its coverage. See McGuffin v. Zaremba Contr., 166 Ohio App.3d 142, 147, 2006-Ohio-1734, 849 N.E.2d 315 (8th Dist. 2006).

Finally, if an insurer defends an insured, and it is later determined that there was no duty, the insurer may be able to recoup the money it spent on the defense. See United National Insurance Co. v. SST Fitness Corp., 309 F.3d 914 (6th Cir. 2002) (“We agree that allowing an insurer to recover under an implied contract theory so long as the insurer timely and explicitly reserved its right to recoup the cost and provided adequate notice of the possibility of reimbursement promotes the policy of ensuring defenses are afforded even in questionable cases.”). Thus, if the reservation of rights letter contains a provision that allows the insurer to recoup legal fees, courts will enforce it, assuming there are no deficiencies in the reservation. When faced with a reservation of rights, an insured can choose to 1.) decline the offer, pay for the defenses and seek to recover on the policy, 2.) decline the offer and file a declaratory judgment action, or 3.) accept the offer subject to the reservation of rights. Id. at 921.

V. **EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES**
A. Bad Faith

1. First Party

An insurer has a duty under Ohio law to act in good faith in the processing and payment of the claims of its insured. Zoppo v. Homestead Insurance Company, 71 Ohio St.3d 552, 554, 644 N.E.2d 397, 1994-Ohio-461 (1994); Staff Builders, Inc. v. Armstrong, 37 Ohio St.3d 298, 525 N.E.2d 783 (Ohio 1988). The liability arises from the breach of the positive legal duty imposed by law due to the relationship between the insurer and the insured. Staff Builders, at 302. The duty of good faith operates to ensure that an insurer’s performance or refusal to perform under the contract does not impair the insured’s right to receive benefits that he might reasonably expect to flow from the contract. See Buckeye Union Ins. Co. v. State Farm Mut. Auto. Ins. Co., 1st Dist. Hamilton No. C-960282, 1997 Ohio App. LEXIS 1472 (Apr. 16, 1997).

However, it still remains unclear whether, under Ohio law, a bad faith plaintiff must be able to point to a specific contract provision or duty in order to prevail as a matter of law. The Staff Builders court and the Zoppo court both stated that an insurer has a duty of good faith in the processing and payment of the claim. Staff Builders, 37 Ohio St.3d at 302; Zoppo, 71 Ohio St.3d at 554-55. Thus, it seems that a bad faith claim must, as a matter of law, be premised on the insurer’s failure to “process” or “pay” a covered claim. The process or payment language in both cases suggest that the bad faith claim must be tied to some contractual duty.

Some courts will require an underlying breach of contract claim. See, e.g., Bob Schmitt Homes, Inc. v. The Cincinnati Ins. Co., 8th Dist. Cuyahoga No. 75263, 2000 Ohio App. LEXIS 659 (Feb. 24, 2000), at *13 (holding that the “initial factual prerequisite” for a bad faith claim was an allegation that the insured was denied some contractual coverage to which the insured was entitled); Pasco v. State Auto. Mut. Ins. Co., 10th Dist. Franklin No. 99AP-430 (Dec. 21, 1999) at *15, 17 (there can be no bad faith claim without an insurer having an “obligation to pay or settle a claim” covered by the policy); Toledo-Lucas County Port Auth. v. Axa Marine & Aviation Ins. (UK) Ltd., 220 F.Supp. 2d 868, 873 (N.D. Ohio 2002) (“[A]n insured may not maintain a claim of bad faith in the absence of coverage under the policy.”); Hahn’s Elec. Co. v. Cochran, 10th Dist. Franklin Nos. 01AP-1391, 01AP-1394, 2002-Ohio-5009 (Sep. 24, 2002)(allowing the trial court to stay the bad faith claim pending the outcome of the underlying contract claim); Emerson v. Medical Mut., 1st Dist. Hamilton No. C-030074, 2004-Ohio-3892, 2004 Ohio App. LEXIS 3512 (Jul. 23, 2004), ¶ 35(holding that because the plaintiff was not covered under the policy, he could not maintain a claim for bad faith based on the refusal to pay).
On the other hand, some Ohio courts have held that a breach of the duty of good faith will give rise to a cause of action in tort irrespective of any liability arising from breach of contract. See, e.g., Staff Builders, 37 Ohio St.3d at 302; Bullet Trucking, Inc. v. Glen Falls Ins. Co., 83 Ohio St.3d 327, 333, 616 N.E.2d 1123 (2d Dist. 1992) ("the tort of bad faith is an independent claim which does not necessarily rely on a breach of contract claim for its existence."); Wagner v. Midwestern Indem. Co., 83 Ohio St.3d 287, 1998-Ohio-111, 699 N.E.2d 507 (1998) (holding that jury issue on coverage does not prove absence of bad faith); Essad v. Cincinnati Cas. Co., 7th Dist. Mahoning No. 00 CA 207, 2002-Ohio-1947 (Apr. 16, 2002) (Bad faith claim based on "failure to investigate" without reasonable justification could be asserted without proving coverage); Simpson v. Permanent General Ins. Co., 8th Dist. Cuyahoga No. 81216, 2003-Ohio-1157, 2003 Ohio App. LEXIS 1094 (Mar. 13, 2003) (holding that the duty of good faith is independent from any contractual duties and bad faith can exist in the absence of coverage).


Even though the "reasonable justification" standard has been around since 1949, the Ohio Supreme Court modified it in 1992 when it required plaintiffs to show that a bad faith tort arises when an insurer intentionally refuses to satisfy a claim where there is either (1) no lawful basis for the refusal, and (2) an intentional failure to determine whether there was any lawful basis for such a refusal. Motorists Mutual Insurance Company v. Said, 63 Ohio St.3d 690 (1992). The 1994 Zoppo decision, however, overruled the Said decision and the "reasonable justification" standard returned. Zoppo, 71 Ohio St.3d at 554, 525 N.E.2d 397. Now, proof of actual intent is no longer required. Wagner v. Midwestern Indemnity Company, 83 Ohio St.3d 287, 290, 699 N.E.2d 507 (1998) (acknowledging that the Zoppo decision sets forth a lower standard of proof for a bad faith action).

An insurer lacks a reasonable justification when it acts arbitrarily or capriciously. Hoskins v. Aetna Life Ins. Co., 6 Ohio St.3d 272, 277 (1983). In an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage. Boone v. Vanliner Ins. Co., 91 Ohio St.3d 209 (2001).

3. Third-Party

Ohio law does not recognize third-party bad faith claims brought against an insured’s carrier. See, e.g., Intercity Auto Sales, Inc. v. Evans, 8th Dist. Cuyahoga No. 95778, 2011-Ohio-1378, 2011 Ohio App. LEXIS 1203; Gillette v. Estate of Gillette, 163 Ohio App.3d 426, 2005-Ohio-5247, 837 N.E.2d 1283 (10th Dist. 2005). A third-party tort claimant has no right to assert a bad faith claim against a tortfeasor’s liability insurer. Murrell v. Williamsburg School District, 92 Ohio App.3d 92, 95, 634 N.E.2d 263 (12th Dist. 1993) (“Ohio’s law is clear that an insurer’s duty to act in good faith runs only from the insurer to the insured and a third party has no cause of action for bad faith against the tortfeasor’s insurance company.”); see also Medical Assur. Co. v. Martinez, 2008 U.S. Dist. LEXIS 125607 (S.D. Ohio 2008) (“Ohio law clearly and unequivocally provides that a claim of bad faith cannot be brought against an insurer by a third-party claimant.”); Anthony v. Chicago Title Ins. Co., 2007 U.S. Dist. LEXIS 28028 (S.D. Ohio 2007); Pasipanki v. Morton, 61 Ohio App.3d 184, 185, 572 N.E.2d 234 (9th Dist. 1990) (“An insurance company has a duty to act in good faith in settling claims and a breach of that duty will give rise to a cause of action by the insured. However, this duty runs only from the insurer to the insured, not to third parties.”).

In Whitacre v. Nationwide Ins., Co., 7th Dist. Belmont No. 11 BE 5, 2012-Ohio-4557, 2012 Ohio App. LEXIS 4001, the court held that the bar to a bad faith action by an injured party against a tortfeasor's liability insurer did not apply to a plaintiff nonpolicy holder's suit against tortfeasor's liability insurer directly under verbal contract the plaintiff claimed to have obtained with the insurer to pay the plaintiff’s medical expenses and not for payment of damages pursuant to the tortfeasor's insurance policy.

B. Fraud

In Ohio, fraudulent conduct that is intended to induce a person to enter into a contract is a cause of action. See Stecz et al. v. Travelers Insurance Co., Common Pleas Medina 08CIV2299 August 28, 2009. In order to prove fraudulent inducement, a plaintiff must show that a defendant made a knowing, material misrepresentation, or where there is a duty to disclose, concealment of a material fact, with the intent of inducing the plaintiff’s reliance and that the plaintiff relied upon that misrepresentation or omission to his or her detriment. ABM Farms, Inc. v. Woods, 81 Ohio St.3d 498, 502, 692 N.E.2d 574 (1998). Stated differently, a claim of fraud consists of six elements: a representation of fact, which is material, made falsely—either with knowledge of its falsity or utter disregard and recklessness as to falsity—with the intent to mislead, with justifiable reliance thereupon, and a resulting injury. Tokles & Son, Inc. v. Midwestern Indem. Co., 65 Ohio St.3d 621,632, 605 N.E.2d 936 (1993).

Like the duty of good faith, the tort of fraud in the inducement is separate and distinct from the insurance contract. Stecz at ¶ 21. Thus, any contractual statutes of limitations or limitations enforceable pursuant to a policy are not applicable to fraud claims.

C. Intentional or Negligent Infliction of Emotional Distress

A claim for intentional infliction of emotional distress requires plaintiff to show that (1) defendant intended to cause emotional distress, or knew or should have known that actions taken would result in serious
emotional distress; (2) defendant's conduct was extreme and outrageous; (3) defendant's actions proximately caused plaintiff's psychic injury; and (4) the mental anguish plaintiff suffered was serious. \textit{Pyle v. Pyle}, 11 Ohio App.3d 31, 34, 463 N.E.2d 98 (8th Dist. 1983). Defendant's conduct must be so extreme and outrageous “as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” \textit{Hanly v. Riverside Methodist Hosp.}, 78 Ohio App.3d 73, 82, 603 N.E.2d 1126 (10th Dist. 1991). A defendant can avoid liability for plaintiff’s emotional distress “if defendant does no more than insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.” \textit{Id.}; see \textit{Griffith v. Buckeye Union Ins. Co.}, 10th Dist. Franklin No. 86AP-1063, 1987 Ohio App. LEXIS 8971; \textit{William Hammann, Inc. v. Continental Cas. Co.}, 1st Dist. Hamilton No. C-850803, 1987 Ohio App. LEXIS 9051, *10 (holding that an action for intentional infliction of emotional distress is a purely independent tort and not derivative of a contract claim).

D. \textbf{State Consumer Protection Laws, Rules and Regulations}

The Ohio Consumer Sales Practices Act is Ohio’s most encompassing consumer protection law. The CSPA generally has no application to controversies concerning insurance policies. \textit{Johnson v. Lincoln Nat’l Life Ins. Co.}, 69 Ohio App.3d 249, 590 N.E.2d 761 (2d Dist. 1990); see also \textit{Schaller v. Nat’l Alliance Ins. Co.}, 496 F. Supp. 2d 890 (S.D. Ohio 2007)(granting summary judgment to an insurer on a claim brought by the owners of a motor home who claimed their damaged motor home should have been declared a total loss by the insurer).

However, the insurance company exception to the OCSPA does not provide a blanket exemption for all activities conducted by an insurance company; rather, a court must make a practical inquiry into whether the insurer was actually operating as an insurance company in the transaction at issue. \textit{Thornton v. State Farm Mut. Auto Ins. Co.}, 2006 U.S. Dist. LEXIS 83968 (N.D. Ohio Nov. 17, 2006); see also \textit{Hofstetter v. Fletcher}, 905 F.2d 897 (6th Cir. 1988)(holding that defendant’s acts of selling life insurance by fraudulently advising the investor to set up a home-based business in order to avoid paying tax fall within the statutory definition of “consumer transactions” contained in Ohio Rev. Code § 1345.01(A)).

Furthermore, as stated above, Ohio Rev. Code §§ 3901.19-3901.221 prohibit unfair and deceptive acts regarding insurance and provide the procedure under which one can pursue a claim. Ohio Rev. Code § 3901.22 provides for both an administrative hearing process and penalties for committing an unfair or deceptive act. The Superintendent of the Department of Insurance may revoke an offender’s license to engage in the business of insurance, prohibit the company or agency from employing the person who committed the act, order the person to return any payments received as a result of the violation and pay statutory interest on such payments. Ohio Rev. Code § 3901.22(D). The Superintendent may also request that the Ohio Attorney General prosecute the person who committed the act, and this may be commenced as a class action. \textit{Id.} at § 3901.22(E). The Superintendent may also impose monetary damages. \textit{Id.} at 3901.22(F).
VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

As we know, the attorney-client privilege generally prevents the opposing side from discovering your client’s privileged information. However, this is not necessarily the case when it comes to privileged documents in an insurer’s claims file. Since the mid-1980s, the Supreme Court of Ohio has slowly chipped away at the protections afforded to an insurer’s claims file in three opinions. In Peyko v. Frederick, the Ohio Supreme Court allowed discovery of non-privileged documents in the insurer’s claim file as part of a prejudgment interest proceeding. Peyko v. Frederick, 25 Ohio St.3d 164, 495 N.E.2d 918 (1986).

In determining any discovery dispute involving disclosure of the claims file, the trial court must conduct an in camera inspection of all documentation withheld from production, including the insurer’s claims file materials, before ordering disclosure. See, e.g., Stewart v. Sicilano, 2012-Ohio-6123, 985 N.E.2d 226 (11th Dist. 2012). The in camera review is an important part of the process. In Unklesbay, 167 Ohio App.3d 408, 2006-Ohio-2630, 855 N.E.2d 516, ¶ 16 (2d Dist. 2006) the court of appeals held that the trial court abused its discretion in failing to conduct an in camera review of the claims file “because a bad faith claim does not entitle disclosure of everything in a claims file.” Id.

B. Discoverability of Existence of Reinsurance and Communications with Reinsurers


E. Attorney/Client Communications

It is established Ohio law that an insurer may not rely on the attorney-client privilege or the work-product doctrine in withholding documents and other information from their claims file showing lack of good faith in settling a claim or denying coverage. Moskovitz v. Mt. Sinai Med. Ctr., 69 Ohio St.3d 638, 1994 Ohio 324, 635 N.E.2d 331 (1994); Boone v. Vanliner Ins. Co., 91 Ohio St.3d 209, 2001 Ohio 27, 744 N.E.2d 154 (2001); Squire, Sanders, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, at P 31. In Moskovitz, the Supreme Court extended the Peyko decision and concluded that the attorney-client privilege does not protect the insurer’s claims files from discovery in a prejudgment interest proceeding. Moskovitz, 69 Ohio St.3d at 638. In Boone, the Court expanded Moskovitz to allow a plaintiff in a bad faith claim against an insurer to discover privileged
information in the insurer’s claims files that existed prior to the denial of coverage.

The Ohio legislature attempted to rein in the scope of the Boone, Moskovitz, and Peyko decisions when it enacted Ohio Rev. Code § 2317.02(A). This statute requires judicial review of the attorney-client privilege. It also provides the exclusive means by which privileged communications can be waived. Jackson v. Greger, 110 Ohio St. 3d 488 (2006). The Court in Jackson concluded that O.R.C. § 2317.02(a) applies to both testimony and written discovery.

A testimonial privilege applies not only to prohibit testimony at trial, but also to protect the sought after communications during the discovery process. The purpose of discovery is to acquire information for trial. Because a litigant’s ultimate goal in the discovery process is to elicit pertinent information that might be used as testimony at trial, the discovery of attorney-client communications necessarily jeopardizes the testimonial privilege. Such privileges would be of little import were they not applicable during the discovery process. Id.

The Cuyahoga County Court of Appeals (Eighth District) in DeMarco v. Allstate Insurance Co. (2014–Ohio-933) upheld the trial court’s denial of Allstate’s Motion for Protective Order concerning its claims file. Allstate had argued that its claims file was protected under the attorney-client privilege and the work product doctrine. The Cuyahoga County Court of Appeals disagreed.

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

Under Ohio insurance law, a “representation” is a verbal or written statement by the insured to the insurer, prior to the completion of the contract, as to the existence of some fact or state of facts, made for the purpose of inducing, and tending to induce, the insurer more readily to assume the risk.

Allstate Ins. Co. v. Boggs, 27 Ohio St.2d 216, 271 N.E.2d 855 (1971). A "misrepresentation" is a statement, as a fact, of something which is untrue and which the insured states with the knowledge that it is untrue and with an intent to deceive, or which the insured states positively as true without knowing it to be true, and which has a tendency to mislead, where such fact in either case is material to the risk. A half-truth or failure to speak when necessary to qualify an insurance applicant's misleading prior statements also amounts to a misrepresentation.

A claim or defense based on an alleged material representation by the insured in an insurance application begins with Ohio Rev. Code § 3911.06, which states:

No answer to any interrogatory made by an applicant in his application for a policy shall bar the right to recovery upon any policy issued thereon, or be used in evidence at any trial to recover upon such a policy, unless it is clearly proved that such answer is willfully false, that is was fraudulently made, that it is material, and that it induced the company to issue the policy, that but for such answer the
policy would not have been issued, and that the agent or company had no knowledge of the falsity or fraud of such an answer.


Courts routinely find that nothing more completely vitiates a contract of insurance than false answers to material questions in an insurance application. An insurer can avoid coverage if an insured knowingly gives false answers to material questions on the application. Further, Ohio courts do not recognize a distinction between misrepresentation in the application (or underwriting) and misrepresentation in a claim. Both may be grounds for voiding the policy. If the insured, upon issuance of the policy, notes false answers and conceals such falsity from the insurer, then the insurer can similarly void the policy. Redden v. Constitutional Life Ins. Co., 172 Ohio St. 20, 24, 173 N.E.2d 365 (1961).

As a general rule, the mere fact that a misrepresentation is false does not in and by itself void the policy. In order to relieve the insurer of liability, the untrue representation must relate to a material matter. James v. Safeco Ins. Co. of Illinois, 195 Ohio App.3d 265, 2011-Ohio-4241, 959 N.E.2d 599 (8th Dist. 2011). A fact may be "material" in relation to an insurance contract if the fact, communicated to the insurer, would either induce it to decline insurance altogether or not to accept it unless at a higher premium; any fact is material if knowledge or ignorance of it would naturally influence the insurer in making the contract at all or in estimating the degree and character of the risk or in fixing the rate of the insurance. American Continental Ins. Co. v. Estate of Gerkins, 69 Ohio App.3d 697, 591 N.E.2d 774 (3d Dist. 1990).

"[A] misrepresentation will be considered material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented." Abon, Ltd. V. Transcon. Ins. Co., 5th Dist. Richland No. 2004-CA-0029, 2005-Ohio-3052, 2005 Ohio App. LEXIS 2847. False sworn answers by an insured are material if they might have affected the attitude and action of an insurer. They are equally material if they may be said to have been calculated either to discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate. Id.

Example: A lawyer’s failure to disclose affiliations with business entities in an application for professional malpractice insurance was not a material misrepresentation that voided coverage. Ross v. Ohio Bar Liab. Ins. Co., 124 Ohio App.3d 591, 706 N.E.2d 867 (5th Dist. 1998).

Under Ohio’s statutory framework, a false statement in the application for sickness or accident insurance does not bar recovery unless the insurer clearly proves five elements: 1.) the statement was willfully false, 2.) the statement was fraudulently made, 3.) that it materially affects the acceptance of risk or the hazard assumed by the insurer, 4.) that it induced the insurer to issue the policy, and 5.) but for the false statement the policy would not have been issued. Ohio Rev. Code § 3923.14.

If the misrepresentation or misstatement is a warranty, the policy is void ab initio. The Boggs case established a two-part test for deciding if a
misrepresentation or misstatement qualifies as a warranty. "The first prong requires that the misrepresentation appear on the policy's face or be plainly incorporated into the policy. Under the second prong, the policy must plainly warn that a misstatement or misrepresentation renders the policy void from its inception." Care Risk Retention Group v. Martin, 191 Ohio App.3d 797, 947 N.E.2d 1214 (2d Dist. 2010). Thus, in order for a misstatement to render an insurance policy void ab initio, that fact must appear clearly and unambiguously from the terms of the policy, rendering the misstatement a warranty.

B. Failure to Comply with Conditions

Ohio law recognizes the enforceability of conditions within insurance policies for obtaining coverage, including conditions excluding coverage losses for concealing or misrepresenting material facts or circumstances. See Gibney v. State Farm Fire & Cas. Co., 897 F.Supp.2d 618 (S.D. Ohio 2012). A condition precedent is an act or event, other than a lapse of time, which must exist or occur before a duty of immediate performance of a promise arises. Ohio Natl. Life Assur. Co. v. Satterfield, 194 Ohio App.3d 405, 2011-Ohio-2116, 956 N.E.2d 866 (9th Dist. 2011). On the other hand, a condition subsequent provides that a policy will become void, or the insurer relieved from performance, upon the happening of some act.

Insurance contracts usually contain conditions that, if satisfied, will relieve the insurer of performance. Under common law principles, the happening of a condition or misrepresentation will lead to harsh results for the insured. Thus, Ohio has enacted statutes that relieve the rigorous consequences of the common-law rules on conditions for life insurance policies. Ohio Rev. Code § 3911.06. However, this statute does not apply to automobile liability or collision policies. See Pioneer Mut. Cas. Co. of Ohio v. Qualls, 103 Ohio App. 14, 146 N.E.2d 612 (2d Dist. 1957); Republic Mut. Ins. Co. v. Wilson, 66 Ohio App. 522, 35 N.E.2d 467 (4th Dist. 1940); Burpo v. Resolute Fire Ins. Co., 90 Ohio App. 492, 107 N.E.2d 227 (8th Dist. 1951). Thus, the issue of fulfillment of conditions precedent is highly litigated in the State of Ohio.

A condition requiring the insured to bring an uninsured/underinsured motorist claim within three years of the date of the accident is valid and enforceable. See Chalker v. Steiner, 7th Dist. Mahoning No. 08 MA 137, 2009-Ohio-6533, 2009 Ohio App. LEXIS 5455 (Dec. 8, 2009)(“the limitations provision in this case is unambiguous and enforceable and the exhaustion provision [of the tortfeasor’s policy] is a condition precedent to payment rather than the right to file an action for UM/UIM benefits.”). However, an insurer has a duty of good faith to inform its insured of a policy’s time limitation condition precedent if the insurer becomes aware of a potential claim prior to the clause’s expiration. Wilson v. Ohio Cas. Ins., 185 Ohio App.3d 276, 279, 2009-Ohio-6798, 923 N.E.2d 1187 (1st Dist. 2009)(“An insurer owes an insured a duty of good faith, and if the insurer simply remains silent about a limitations period in the face of a potential claim, it violates that duty.”).

On the other hand, courts will enforce notice provisions requiring insureds to inform the insurer of a potential claim as a condition precedent. See, e.g., Heiney v. The Hartford, 10th Dist. Franklin No. 01AP-1100, 2002-Ohio-3718, 2002 Ohio App. LEXIS 3801 (Jul. 23, 2002). More generally, if an insurance policy specifies general conditions precedent that must be satisfied before an insured is entitled to coverage, an insured’s failure to
comply with those conditions precedent precludes recovery under UM or UIM coverage by operation of law. *Duriak v. Globe American Cas. Co.*, 28 Ohio St.3d 70, 502 N.E.2d 620 (1986), overruled on other grounds *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 1994-Ohio-160, 635 N.E.2d 317 (1994), at syllabus (holding that a provision for uninsured or underinsured motorist coverage which precludes the insured from commencing any action or proceeding against the insurance carrier for payment of uninsured or underinsured motorist benefits, unless the insured has demanded arbitration and/or commenced suit within one year from the date of the accident, is void as against public policy).

An insured breaches the conditions precedent to liability coverage by entering a consent judgment with the plaintiff before providing the insurer notice of the claim and suit. *Novak v. State Farm Ins. Co.*, 9th Dist. Medina No. 09CA0029-M, 2009-Ohio-6952, 2009 Ohio App. LEXIS 5860 (Dec. 31, 2009), at ¶ 13 (“where an insurer does not refuse to defend an insured, the insured is not at liberty, and is in fact barred from, entering into a settlement agreement without the insurer’s consent.”).

Notice and subrogation provisions contained in the general “Conditions” section of a policy create a condition precedent, with which failure to comply precludes recovery of UIM coverage. See *Knox v. Travelers Ins. Co.*, 10th Dist. Franklin No. 02AP-28, 2002-Ohio-6958, 2002 Ohio App. LEXIS 6773 (Dec. 17, 2002). To determine whether a notice provision has been breached, the court first asks whether the insured provided notice within a “reasonable time” in light of the circumstances. *Burlington Ins. Co. v. PMI Am., Inc.*, 862 F.Supp. 2d 719, 735 (S.D. Ohio 2012) (quotation omitted). If the delay was reasonable, then the insured did not breach the notice provision. But, if the delay was unreasonable, then the court presumes prejudice, which the insured must then rebut. *Id."

Finally, Ohio joins the majority of states and holds that when an insurer’s denial of underinsured or uninsured motorist (UIM) coverage is premised on the insured’s breach of a consent-to-settle or other subrogation-related provision in a policy of insurance, the insurer is relieved of the obligation to provide coverage if it is prejudiced by the failure to protect its subrogation rights. An insured’s breach of such a provision is presumed prejudicial to the insurer absent evidence to the contrary. *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 207, 2002-Ohio-7217, 781 N.E.2d 927 (2002).

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

In *Dominish v. Nationwide Ins. Co.*, the Ohio Supreme Court held that an insured’s limitation of action clause was enforceable. The policy provided:

> Suit Against Us. No action can be brought against us unless there has been full compliance with the policy provisions. Any action must be started within one year after the date of loss or damage.

*Dominish v. Nationwide Ins. Co.*, 129 Ohio St.3d 466, 2011-Ohio-4102, 953 N.E.2d 820 (2011). The Supreme Court reversed the Eleventh District and held that Nationwide could enforce its limitation-of-action clause because there was no ambiguity in the clause and Nationwide did not waive its rights by its actions. Moreover, the Supreme Court held that under Ohio law, for an insurance company to waive such a right, it must have either: (1) “recognized liability,” or (2) “held out a reasonable hope of adjustment and by doing so,
induced the insured to delay filing a lawsuit until after the contractual period of limitation had expired.” Id. at ¶ 10.

In terms of consent clauses, an insurer providing underinsured motorist coverage is not required to give its consent to a proposed settlement, the terms of which would destroy its right of subrogation provided within the policy. Bogan v. Progressive Cas. Ins. Co., 36 Ohio St.3d 22, 521 N.E.2d 447 (1988). The Bogan court held that where a provider of underinsured motorist coverage has reasonably refused to give advanced consent, particularly in the context of a settlement, then the insured is bound by the policy’s advance consent requirement. The issue then becomes whether the insurer has unreasonably refused to grant consent for the insured to settle with the tortfeasor’s carrier. Id. An insured can proceed to bring an action against the tortfeasor without obtaining a consent to sue from his own underinsurance carrier, such proceeding not affecting the insurance coverage. However, there may remain a contractual duty of the insured not to settle with the tortfeasor without obtaining the consent of the insurer, where such settlement entails a complete release of the tortfeasor from all liability and, accordingly, destroys the insurer's right of subrogation. Id. at 30.

In cases involving the alleged breach of a consent-to-settle or other subrogation-related clause, the first step is to determine whether the provision actually was breached. Ferrando v. Auto-Owners Mut. Ins. Co., 98 Ohio St.3d 186, 208, 2002-Ohio-7217, 781 N.E.2d 927 (2002). If it was not, the inquiry is at an end, and UIM coverage must be provided. Also, if the insurer failed to respond within a reasonable time to a request for consent to the settlement offer, or unjustifiably withheld consent, the release will not preclude recovery under the UIM policy, and the subrogation clause will be disregarded. Id. If the consent-to-settle or other subrogation provision-related clause was breached, the second step is to determine whether the UIM insurer was prejudiced. If a breach occurred, a presumption of prejudice to the insurer arises, which the insured party bears the burden of presenting evidence to rebut. Id.

Insurers have tried to use a subrogation provision of its policy to deny uninsured motorist coverage when it refused to consent to a settlement with the tortfeasor. This forced the Supreme Court to revisit its decision in Bogan. See Fulmer v. Insura Prop. & Cas. Co., 94 Ohio St.3d 85, 93, 2002-Ohio-64, 760 N.E.2d 392 (2002) (holding that when an insured has given her underinsurance carrier notice of a tentative settlement prior to release, and the insurer has had a reasonable opportunity to protect its subrogation rights by paying its insured the amount of the settlement offer but does not do so, the release will not preclude recovery of underinsurance benefits).

Because the purpose of a consent-to-settlement provision is essentially similar to that of a notice of claim provision, the prejudice standard should apply to both. That is, the insurer must suffer prejudice, such as the loss of subrogation rights, from the breach of a consent-to-settlement clause in order to deny coverage. See Ferrando, 2002-Ohio-7217 at ¶ 86.

D. Statutes of Limitation

In Ohio, the statute of limitations for a written contract is eight (8) years. Ohio Rev. Code § 2305.06. However, insurance policies usually contain a clause limiting the time within which suit must be brought under the policy. Parties may limit the statute of limitations time period on a contract “to a period that is shorter than the general statute of limitations
for a written contract, as long as the shorter period is a reasonable one.” Sarmiento v. Grange Mut. Ins. Co., 106 Ohio St.3d 403, 2005-Ohio-5410, 835 N.E.2d 692, ¶ 11. If the insurance contract does reduce the time provided in the statute of limitations, it must be “in words that are clear and unambiguous to the policyholder.” Id.; Lane v. Grange Mut. Companies, 45 Ohio St.3d 63, 543 N.E.2d 488 (1989). The Ohio Supreme Court held that a two-year limitation period would be a “reasonable and appropriate” period of time in which to require an insured who has suffered a bodily injury to commence an action under the uninsured/underinsured motorist provision of an insurance policy. Miller v. Progressive Ins. Co., 69 Ohio St.3d 619, 624, 635 N.E.2d 317 (1994). It also held in Miller, however, that a one-year period to commence such a lawsuit would be unenforceable as against public policy. Id.

Actions on an insurance contract not in writing, or upon a liability created by statute other than a forfeiture or penalty, must be brought within six years. Ohio Rev. Code § 2305.07. Actions for fraud growing out of a contract for insurance must be brought within four years, and the period of limitation in such regard runs from the time of discovery of the fraud. Ohio Rev. Code § 2305.09.

In general, a claim based on a written contract must be asserted within 8 years. Ohio Rev. Code § 2305.06. But under Ohio Rev. Code § 3937.18(H), a policy for uninsured/underinsured motorist coverage may shorten the limitations period to as little as three years. Wilson v. Ohio Cas. Ins., 185 Ohio App.3d 276, 279, 2009-Ohio-6798, 923 N.E.2d 1187 (1st Dist. 2009). Furthermore, “[i]t is incumbent upon an insurer to establish the enforceability of a limitations clause and it cannot enforce such a clause where the insured had not been provided with notice that the clause was part of the policy. It would be unconscionable to permit an insurance company to enforce a limitation clause contained in the standard form of their policy against an insured who did not specifically bargain for the clause and who never had an opportunity to become aware of the clause until after the limitation period had expired.” Id.

VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

A. Trigger of Coverage

There are various theories as to which policies are triggered to provide coverage for a continuing loss. Several courts apply the “continuous trigger” theory. Under a continuous trigger, all policies from first exposure to the end of the loss provide coverage. See Westfield Ins. Co. v. Milwaukee Ins. Co., 12th Dist. Butler No. CA2004-12-298, 2005-Ohio-4746, 2005 Ohio App. LEXIS 4255 (Sep. 12, 2005). The Ohio Supreme Court has not expressly determined Ohio law on trigger theories in the context of long-tail claims. Gencorp, Inc. v. AIU Ins. Co., 104 F. Supp. 2d 740, 745 (N.D. Ohio 2000). The decision most commonly relied upon by policyholder is a Lucas County (Toledo) trial court opinion applying a continuous trigger to asbestos bodily injury claims. Owens-Corning Corp. v. American Continental Ins. Co., 74 Ohio Misc.2d 183, 213, 660 N.E.2d 770 (Lucas C.P. 1995) (stating that the “continuous injury” rule has been adopted as consistent with and recognized by Ohio law).

Since the Supreme Court has not ruled on the issue, there is no uniform consensus in Ohio on which theory applies. However, other Ohio district courts have used the “continuous trigger” theory. Plum v. W. Am. Ins. Co., 1st Dist. Hamilton No. C-050115, 2006-Ohio-452, 2006 Ohio App. LEXIS 387 (Feb. 3, 2006) (applying continuous trigger theory to defective construction
litigation). Indeed, it is the theory used quite often by courts in other jurisdictions.

Generally, parties tend to avoid the triggering issue. See Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St.3d 512, 515, 2002-Ohio-2842, 769 N.E.2d 835 (2002) (“The parties are in agreement as to which primary insurance policies have been called into play, and there is no dispute that there was continuous pollution across multiple policy periods that give rise to occurrences and claims to which these policies apply.”). Thus, the parties in Goodyear, assumed a continuous trigger. The trigger issue was not discussed, analyzed, or decided.

B. Allocation Among Insurers

Allocation deals with the apportionment of a covered loss across multiple triggered insurance policies. Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St.3d 512, 515, 2002-Ohio-2842, 769 N.E.2d 835 (2002). The issue of allocation arises in situations involving long-term injury or damage, such as environmental cleanup claims where it is difficult to determine which insurer must bear the loss. Id.

Where the policy promises to provide coverage for “all sums” the insured becomes liable to pay during the coverage period, Ohio has adopted the “all sums” pick-and-choose method of allocation. Id.; Pa. Gen. Ins. Co. v. Park-Ohio Indus., 126 Ohio St.3d 98 (2010). Under this theory, the insured can allocate the entire loss to any one primary policy (the targeted policy) unless there is a contrary statute, a clause prohibiting other insurance, or a clause providing apportionment of payments between insurers. See Encore Receivable Management, Inc. v. Ace Property and Cas. Ins. Co., 2013 U.S. Dist. LEXIS 93516 (S.D. Ohio 2013); Goodyear, 95 Ohio St.3d 512, 796 N.E.2d 835. The insured thereof has the ability to allocate the entire loss to any one primary policy. If that policy is exhausted, then coverage flows upward through the umbrella policy. The Ohio Revised Code provides:

Ohio Rev. Code § 3929.26. If an insured chooses a target policy, that insurer may seek contribution from the other policies that have not been triggered but who have not been requested to respond to the loss by the insured. See Pa. Gen., 126 Ohio St.3d 98, paragraph one of the syllabus. Thus, the lynchpin for establishing liability among coinsurers is a showing that the respective coverages apply to the same property, insure against the same risk, and protect the same interest of the same insured. Arkwright Mut. Ins. Co. v. Lexington Ins. Co., 1st Dist. Hamilton No. C-990347, 2000 Ohio App. LEXIS 4468 (Sep. 29, 2000).

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

Ohio law gives rise to two rights of contribution for an insurer: (1) from a joint tortfeasor, pursuant to Ohio Rev. Code § 2307.25; and (2) from a coinsurer or concurrent insurer who provides coverage for the same loss. The
right to contribution from a co-insurer or concurrent insurer is recognized in both statute and equity. Ohio Rev. Code § 3929.26 states that: "[w]hen there are two or more insurance policies upon the same property, each policy shall contribute to the payment of the whole or of the partial loss in proportion to the amount of insurance mentioned in each policy. In no case shall the insurer be required to pay more than the amount mentioned in its policy.”

Ohio Rev. Code § 2307.34 provides for a cause of action for contribution in favor of a primary insurer against a secondary insurer. A cause of action for contribution in favor of a primary insurer against a secondary insurer exists if all of the following apply:

The primary insurer issues a policy of motor vehicle liability insurance to a motor carrier to pay any final judgment recovered against the motor carrier for the death of any person or an injury to or loss to person or property of any person resulting from the negligent operation, maintenance, or use of motor vehicles displaying the identification placards of the motor carrier, as required by the interstate commerce commission or the public utilities commission;

The motor carrier enters into a lease agreement with the owner of a motor vehicle not owned by the motor carrier, that provides that an operator not employed by the motor carrier will, during the duration of the lease, operate the motor vehicle in service to the motor carrier and will display on the motor vehicle the required identification placards;

Due to the negligent operation by the operator of the leased motor vehicle an accident involving the leased motor vehicle occurs while the operator is engaged in a nontrucking activity, resulting in the death of any person or in an injury to or loss to person or property of any person, and the operator is not an employee of the motor carrier;

The primary insurer pays a final judgment to compensate a party for the death of any person as the result of the accident or for an injury or loss to person or property of the party as the result of the accident;

At the time of the accident, a secondary insurer had issued to the owner of the motor vehicle a policy of motor vehicle liability insurance to pay any final judgment recovered against the owner for the death of any person or an injury to or loss to person or property of any person resulting from the negligent operation, maintenance, or use of the motor vehicle while it is being operated during a nontrucking activity.

Ohio Rev. Code § 2307.34(B)(1)-(5).

In terms of long-tail coverage disputes among co-insurers, the all-sums insurance coverage approach allows an insured to seek full coverage for its claims from any single policy, up to that policy's coverage limits, out of the group of policies that has been triggered. The insured selects one insurer, the "targeted insurer," from which it is able to obtain a defense to the action and full coverage for any eventual judgment. The targeted insurer is then able to file a later action against any other insurers, the "nontargeted insurers," to obtain contribution. Pa. Gen. Ins. Co. v. Park-Ohio Indus., 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800.
B. Elements

As stated above, the lynchpin for establishing liability among coinsurers is a showing that the respective coverages apply to the same property, insure against the same risk, and protect the same interest of the same insured. Arkwright Mut. Ins. Co. v. Lexington Ins. Co., 1st Dist. Hamilton No. C-990347, 2000 Ohio App. LEXIS 4468 (Sep. 29, 2000). If two policies insure the same risk, concurrent coverage will exist even where each policy purports to provide only excess coverage. Id.

X. DUTY TO SETTLE


There is a distinction between an insurer's duty to defend and duty to settle within policy limits, which is appropriate because the duty to defend is usually absolute while the duty to settle is generally more discretionary. Romstadt v. Allstate Ins. Co., 59 F.3d 608 (6th Cir. 1995); City of Willoughby Hills v. Cincinnati Ins. Co., 9 Ohio St.3d 177, 459 N.E.2d 555 (1984) ("where the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage had been pleaded, the insurer must accept the defense of the claim."); compare Netzley v. Nationwide Mut. Ins. Co., 34 Ohio App.2d 65, 296 N.E.2d 550 (2d Dist. 1971)(there is a duty to settle where "there is reason to believe that the claim against the insured is a meritorious one, and where the reasonable expectation of successfully defending the action is negligible."); see also Fireman's Fund Ins. Co. v. Mitchell-Peterson, Inc., 63 Ohio App.3d 319, 578 N.E.2d 851 (12th Dist. 1989)("Evidence of facts indicating that an insurer refuses to settle within policy limits is not, in itself, conclusive of the insurer's bad faith").