I. Regulatory Limits on Claims Handling

A. Timing for Responses and Determinations

All relevant time limits are found in the Unfair Property, Liability and Title Claims Settlement Practices Rule, Utah Admin. R590-190 (2014). Key provisions include:

- 15 days to acknowledge receipt of claim and to provide “all necessary claim forms, instructions, and reasonable assistance so that first party claimants can comply with the policy conditions and the insurer’s reasonable requirements” (R590-190-6)(1) and (3);
- 15 days to provide a substantive response to a claimant’s request (R590-190-6)(2)
- 30 days after receipt of properly executed proof of loss to complete investigation and advise claimant of the acceptance / denial of the claim. If more time is needed, claimant must be notified of reasons within 30 days of proof of loss. Additional notices must be sent each 45 days that the investigation remains incomplete. (R590-190-10)(2) and (3).

B. Standards for Determinations and Settlements

Utah’s Unfair Property, Liability and Title Claims Settlement Practices Rule, Utah Admin. Rule 590-190, sets forth claims handling standards for P & C claims, including separate standards for automobile insurance. No private right of action exists for violation of the regulations, or of their enabling statute. However, they may be relevant in bad faith claims. Machan v. UNUM Life Ins. Co. of America, 2005 UT 37, 116 P.3d 342.

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

As of July 1, 2001, all licensees in Utah were required to be in compliance with the Privacy of Consumer Financial and Health Information Rule, Utah Admin. Rule 590-206 (2016). The rule specifies notice requirements, limits the disclosure of personal health and financial information, and provides methods for individuals to prevent such disclosure.

II. Principles of Contract Interpretation
Under Utah law, insurance contracts are construed according to general contract principles. Utah Farm Bureau Ins. Co. v. Crook, 1999 UT 47, ¶ 5, 980 P.2d 685. (“Insurance policies are generally interpreted according to rules of contract interpretation.”) When interpreting a contract, a court must give language its usual and ordinary meaning. Lopez v. United Auto. Ins. Co., 2012 UT 10, ¶ 17, 274 P.3d 897, 902 (“[w]e construe insurance contracts by considering their meaning to a person of ordinary intelligence and understanding, ... in accordance with the usual and natural meaning of the words, and in the light of existing circumstances, including the purpose of the policy.’ ”) quoting Doctors' Co. v. Drezga, 2009 UT 60, ¶ 12, 218 P.3d 598, 603).

Because “an insurance policy is a classic example of an adhesion contract,” Utah courts have held that “‘insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance.’” United States Fidelity & Guar. Co. v. Sandt, 854 P.2d 519, 521–22 (Utah 1993) (quoting Richards v. Standard Acc. Ins. Co., 58 Utah 622, 200 P. 1017, 1020 (1921)). “It follows that ambiguous or uncertain language in an insurance contract that is fairly susceptible to different interpretations should be construed in favor of coverage” and “provisions that limit or exclude coverage should be strictly construed against the insurer.” Id. at 522–23. In strictly construing exclusions, Utah courts give them effect only when they use “language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided.” Crook, 1999 UT 47, ¶ 5, 980 P.2d 685 (citations and internal quotation marks omitted). As a corollary, anything that “is not clearly excluded from the operation of [an insurance] contract is included in the operation thereof.” LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 859 (Utah 1988).

Any ambiguities in the insuring agreement, or its exclusions, are resolved in favor of the insured. Doctors' Co. v. Drezga, 2009 UT 60 at ¶ 12, 218 P.3d at 603 (defining ambiguity as a provision that is “‘capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.” (quoting WebBank v. Am. Gen. Annuity Serv. Corp., 2002 UT 88, ¶ 20, 54 P.3d 1139 (internal quotation marks omitted))). “This rule of strict construction is justified by ‘the need to afford the insured the protection he or she endeavored to secure by paying premiums.” Id. (quoting Auto Lease Co. v. Cent. Mut. Ins. Co., 7 Utah 2d 336, 325 P.2d 264, 266 (1958)). Where contract language proves to be ambiguous, courts generally “consider extrinsic evidence in an effort to resolve the ambiguity.” Fire Ins. Exchange v. Oltmanns, 2012 UT App. 230, ¶ 7, 285 P.3d at 805 (citing Wilburn v. Interstate Electric, 748 P.2d 582, 584-85 (Utah Ct.App.1988)).

III. Choice of Law

Utah federal district courts and Utah state courts have looked to the Restatement (Second) of Conflicts of Law for guidance and have adopted the “most significant relationship” test when determining which law governs the rights of parties under an insurance contract where the contract itself is silent. See, Overthrust Constructor's Inc. v. Home Ins. Co., 676 F. Supp. 1086, 1088 (D. Utah 1987) (finding that in cases involving an interpretation of contractual rights, duties, and obligations, the state in which the insurance contract was negotiated, issued, and performed, was the state whose law governed.); Forsman v. Forsman, 779 P.2d 218, 219 (Utah 1999). In particular, Utah courts have applied Section 188 of the Restatement (Second)
that, in pertinent part, provides that “[t]he rights and duties of parties with respect to an issue of contract are determined by the local law of the state, which, with respect to that issue, has the most significant relationship to the transaction of the parties . . . .” Restatement (Second) of Conflicts of Law, § 188(1); Overthurst Constructor’s Inc., 676 F. Supp. at 1088.

In evaluating which state has the “most significant relationship,” Utah courts consider: (a) the place of contracting; (b) the place of negotiating the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) domicile, residence, nationality, place of incorporation and place of business of the parties. Id. § 188; Overthurst Constructor’s Inc., 676 F. Supp. at 1088; American Nat. Fire v. Farmers Ins. Co., 927 P.2d 186, 190 (Utah 1996).

IV. Duties Imposed by State Law

A. Duty to Defend

1. Standard for Determining Duty to Defend

A policy containing motor vehicle liability coverage imposes on the insurer the duty to defend, in good faith, any person insured under the policy against any claim or suit seeking damages which would be payable under the policy. Utah Code Ann. § 31A-22-303(5). This is the only statute which addresses the duty to defend, the remaining law in Utah is common law established by the courts.

Utah courts provides that the duty to defend is broader than the duty to indemnify because it is antecedent to and independent of the duty to indemnify. Sharon Steel v. Aetna Cas. & Sur., 931 P.2d 127, 133 (Utah 1997). If the insurer owes a duty to defend any allegations in the complaint, it must defend all allegations, at least until the suit is limited to non-covered claims. Benjamin v. Amica Mut. Ins. Co., 2006 UT 37, 140 P.3d 1210; Ohio Cas. Ins. Co. v. Cloud Nine, LLC, 464 F.Supp.2d 1161 (D. Utah 2006); Great American Ins. Co. v. Woodside Homes Corp., 448 F.Supp.2d 1275 (D. Utah 2006).

The duty to defend is measured by the nature and risks covered by the policy, and arises whenever the insurer ascertains facts which give rise to potential liability under the policy. Fire Ins. Exch. v. Estate of Therkelsen, 2001 UT 48, ¶ 21-23, 27 P.3d 555. An insurer's duty to defend is generally determined by comparing the language of the insurance policy with the allegations of the complaint. Benjamin v. Amica Mut. Ins. Co., 2006 UT 37, 140 P.3d 1210. A declaratory judgment action brought while no suit is pending (i.e., when there is no complaint to compare) is not ripe. Allstate Indemnity Co. v. Thatcher, 2007 UT App 183, 164 P.3d 445. (Note: This sparse opinion appears to be addressing future coverage. The insurer defended a lawsuit pending resolution of its declaratory judgment action, and hence, when the underlying plaintiff dismissed its action without prejudice, the only issue would presumably be one of future coverage of the as-yet-refiled complaint.)

The insurer must defend unless it makes a good faith determination, based on all the facts known to it, or which by reasonable efforts could be discovered by it, that there is no potential liability under the policy. Insurance contracts typically provide that the insurer has a duty to defend
even if the allegations in a suit are groundless, false, or fraudulent. The question is whether the allegations in the underlying complaint, if proved, could result in liability under the policy. Fire Ins. Exch. v. Estate of Therkelsen, 2001 UT 48, 21-23, 27 P.3d 555. However, a local federal judge has held that facts known to the insured but not alleged in the complaint should not be considered where the policy required the insurer to "defend any suit seeking those damages to which this insurance applies." Mid-America Pipeline Co., LLC v. Mountain States Mut. Cas. Co., 2006 WL 1278748 (D. Utah 2006); see also Hartford Cas. Ins. Co. v. Softwaremedia.com, 2012 WL 965089 (D. Utah 2012).

Where factual questions render coverage uncertain, the liability insurer must defend until those uncertainties can be resolved against coverage. Benjamin v. Amica Mut. Ins. Co., 2006 UT 37, 140 P.3d 1210, 1215 (complaint alleged intentional sexual assault or negligent infliction of emotional distress in the alternative; insurer had duty to defend until the factual dispute was resolved; "Where an insurance policy obligates an insurer to defend claims of unintentional injury, the insurer is obligated to do so until those claims are either dismissed or otherwise resolved in a manner inconsistent with coverage . . . [w]hen in doubt defend"). In the Summer of 2014 the Utah Supreme Court reaffirmed the foregoing tenet by stating: "If the underlying complaint alleges any facts or claims that might fall within the ambit of the policy," the insurer must offer a defense." Summerhaze Co., L.C. v. FDIC, 2014 UT 28, ¶ 36, 332 P.3d 908 (emphasis within) (quoting Cyprus Amax Minerals Co. v. Lexington Ins. Co., 74 P.3d 294, 301 (Colo. 2003)).

Moreover, the Summerhaze case contains dicta articulating a two-option rule for an insurer in responding to an insured’s tender of defense, either file a declaratory judgment proceeding or defend under a reservation of right. The court stated:

Once presented with a tender of defense, an insurer that believes it is not liable for coverage has two options. The insurer may either "protect its interests through a declaratory judgment proceeding" asking the court to determine coverage under an insurance policy, or it may "defend the suit under a reservation of its right to seek repayment later." However, an insurer "may not refuse the tendered defense of an action unless a comparison of the policy with the underlying complaint shows on its face that there is no potential for coverage." An insurer "that refuses a tender of defense by its insured takes the risk not only that it may eventually be forced to pay the insured's legal expenses but also that it may end up having to pay for a loss that it did not insure against."

Id. at ¶ 38 (footnotes omitted). The issue before the court in Summerhaze was whether the district court properly dismissed a creditors’ suit against an insolvent bank which was filed prior to the bank going into receivership for lack of subject matter jurisdiction because the creditor failed to timely comply with the administrative creditor claim requirements once the receivership was filed. The creditor’s suit had been tendered to the bank’s liability insurer prior to receivership and the insurer had filed a declaratory judgment suit to contest coverage. The issue of the duty to defend was only addressed in relation of whether the bank, rather than the insurer, was the real party in interest in the district court suit. The
court found that the insured bank and the FDIC were the real parties in interest and retain the ability to resolve the claims and therefore those claims fell within the parameters of the receivership.

A local federal judge has held that, in assessing the duty to defend, it is the insurer’s burden to establish that the claim falls outside of the policy's coverage; in essence, that “the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove that it cannot.” Harris v. Zurich Holding Co. of America, Inc., 2006 WL 120258 (D. Utah 2006) (the insurer must prove that there is no factual or legal basis on which it might eventually be held liable to indemnify the insured in the underlying action).

Although it is a general rule that an insurer's duty to defend is broader than the duty to indemnify, the duty is not without boundaries. The duty to defend is measured by the nature and kinds of risks covered by the policy and arises whenever the insurer ascertains facts which give rise to the potential of liability under the policy. Green v. State Farm Fire & Cas. Co., 2005 UT App 564, 127 P.3d 1279.

The question of whether an insurer must consider extrinsic evidence in determining whether it owes a duty to defend has been addressed by the Utah Supreme Court and the answer turns on the contractual terms of the policy between the insurer and insured. Fire Ins. Exch. v. Estate of Therkelsen, 2001 UT 48, ¶ 25, 27 P.3d 555. “If the parties make the duty to defend dependent on the allegations against the insured, extrinsic evidence is irrelevant to a determination of whether a duty to defend exists. However, if, for example, the parties made the duty to defend dependent on whether there is actually a ‘covered claim or suit,’ extrinsic evidence would be relevant to a determination of whether a duty to defend exists.” Id.; see also Equine Assisted Growth and Learning Ass’n v. Carolina Cas. Ins. Co., 2011 UT 49, 266 P.3d 733 (extrinsic evidence was relevant in determination of whether insured owed a duty to defend when application of insured vs. insured exclusion was dependent on the actual facts underlying the complaint and not simply the allegations made in the complaint). See Hamlet Homes Corp. v. Mid-Continent Cas. Co., 2013 U.S. Dist. LEXIS 3616, 10 (D. Utah Jan. 9, 2013) (court ruled that extrinsic evidence was relevant in the determination of duty to defend, but when insurer seeks discovery as to the extrinsic evidence, the insurer owes a duty to defend the insured while conducting that discovery).

An insurer does not have to provide counsel to an insured in a declaratory judgment action if the issue is coverage. An insurer is required to provide counsel to an absentee insured in a declaratory judgment action if the insured’s liability for an underlying accident is at issue. Burke v. Lewis, 2005 UT 44, 122 P.3d 533.

An exclusion that would override something expressly covered is ambiguous and unenforceable. Harris v. Zurich Holding Co. of America, Inc., 2006 WL 120258 (D. Utah 2006) (fatally inconsistent for policy to specifically cover malicious prosecution, an intentional tort, yet attempt to exclude all intentional acts).

Exhaustion of policy limits: The duty to defend must be considered on the basis of specific policy language. Sharon Steel, 931 P.2d at 141. An insurer has no duty to defend beyond payment of policy limits under a policy that clearly and unambiguously states that the insurer “will not defend any
suit, or make additional payments after we have paid the limit of liability for the coverage.” Simmons v. Farmers Ins. Group, 877 P.2d 1255, 1258 (Utah App. 1994). However, a federal district judge has held that an insurer may not tender its policy limits and withdraw from defense under a policy provision stating that “company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company’s liability has been exhausted by payment of judgments or settlements.” Utah Power & Light v. Federal Ins. Co., 711 F.Supp. 1544, (D. Utah 1989) (J. Sam) (distinguishing language allowing “tender for settlement” or limiting duty to defend to exhaustion of policy limits).

2. Issues with Reserving Rights And Seeking Reimbursement

An insurer may reserve its rights to invoke coverage defenses, and it is common practice. Retained counsel are assumed to represent both the insurer and the insured unless a conflict arises, in which event counsel’s duty of loyalty is exclusively toward the insured. Additionally, it is fairly rare in Utah for a reservation of rights to be invoked after its initial issuance. As a result of these factors, insurers who are defending under a reservation of rights generally are not required to provide independent counsel.

The Utah Supreme Court addressed the question of whether an insurer can seek reimbursement against its insured. The Court in U.S. Fidelity v. U.S. Sports Specialty, 2012 UT 3, 270 P.3d 464, declined to adopt the proposed approach in § 35 of the Restatement (Third) of Restitution and Unjust Enrichment. Id. at ¶ 10. The U.S. Fidelity Court noted that restitution and unjust enrichment are extra-contractual remedies. Id. at ¶ 12. The Court further noted that Utah’s insurance code requires all terms of an insurance policy be set forth in writing. Id. at ¶ 18; see also, Utah Code Ann. § 31A-21-106(1)(a). Consequently, under the U.S. Fidelity case, an insurer may claim a right to reimbursement for a claim filed in Utah only if the express terms of the insurance contract create an enforceable right to reimbursement. Id.

Notwithstanding the ruling in U.S. Fidelity, the Utah Supreme Court in the 2014 Summerhaze case may have opened a door for an exception to the no reimbursement rule when the insurer seeks repayment of defense fees when it accepts defense under a reservation of rights. The Court made a statement about an insurer seeking repayment of defense fees when it generally discussed an insurer’s options for responding to a tender of defense: “Once presented with a tender of defense, an insurer that believes it is not liable for coverage has two options. The insurer may either "protect its interests through a declaratory judgment proceeding" asking the court to determine coverage under an insurance policy, or it may "defend the suit under a reservation of its right to seek repayment later." Summerhaze, 2014 UT 28, ¶ 38 (quoting Hartford Accident & Indem. Co. v. Gulf Ins. Co., 776 F.2d 1380, 1382 (7th Cir. 1985)). However, as stated above, the portion of the Summerhaze opinion addressing tenders of defense is dicta.

B. Duty to Settle

A liability insurer owes its insured a duty to settle a third-party’s claim within policy limits when there is a “substantial likelihood” of an excess judgment against the insured and potential for punitive damages liability for the insured. Rupp v. Transcontinental Ins. Co., 627 F.Supp.2d 1304, 1324 (D. Utah 2008); see also Campbell v. State Farm Mutual Automobile

An insurer who refuses to participate in settlement discussions on the wrongful belief that it does not owe defense and indemnification coverage is estopped from challenging a settlement reached by its insured. Benjamin v. Amica Mut. Ins. Co., 2006 UT 37, 140 P.3d 1210; Gibbs M. Smith Inc. v. USF&G, 949 P.2d 337 (Utah 1997).

For settlement purposes, it should also be noted that step-down provisions (household exclusions) that purport to reduce liability coverage to the statutory minimums for injury to a named insured are invalid in Utah. Liberty Mut. Ins. Co. v. Shores, 2006 UT App 393, 147 P.3d 456.

V. Extracontractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

1. First-Party Bad Faith

Each insurance contract contains an implied contractual duty of good faith and fair dealing under Utah law. At a minimum, the duty includes diligent investigation, a fair evaluation, a prompt and reasonable decision on the claim, treating the insureds as lay persons and not as experts in insurance law, and refraining from actions that will injure the insured’s ability to obtain the benefits of the contract. Gibbs M. Smith v. U.S. Fid. & Guar. Co., 949 P.2d 337, 344 (Utah 1997) (quoting Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985); Jenkins v. Percival, 962 P.2d 796 (Utah 1998). See also Lieber v. ITT Hartford Ins. Ctr., Inc., 2000 UT 90, ¶ 19, 15 P.3d 1030. The Utah Supreme Court has recognized the duty in both first-party and third-party contract contexts. Beck, 701 P.2d at 799.

Because Utah law imposes duties beyond payment itself (e.g., diligent investigation, etc.), the absence of coverage does not preclude a bad faith claim. Christiansen v. Farmers Ins. Exchange, 2005 UT 21, 116 P.3d 259.

An insurer can be insulated from bad faith liability if the underlying claim was “fairly debatable,” which is a question of law, and a matter to which the district court is afforded significant discretion. Billings v. Union Bankers, 918 P.2d 461, 464 (Utah 1996). However, recently the Utah Supreme Court, in Jones v. Farmers Ins. Exchange, 2012 UT 52, 286 P.3d 301, provided clarification regarding the fairly debatable defense stating:

We take this opportunity to clarify that a bad faith claim need not be resolved on summary judgment whenever an insurance company argues that the claim was fairly debatable. Summary judgment is only appropriate if, viewing 'the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.' An analysis of whether an insurance claim is fairly debatable is closely related to the analysis of whether an insured fulfilled its duty under Beck to evaluate the claim fairly. When making the determination of whether a claim is fairly debatable, a judge should remain mindful of an insurer's implied duties to diligently investigate claims, evaluate claims
fairly, and act reasonably and promptly in settling or denying claims. Only when "there [is] a legitimate factual issue as to the validity of [the insured's] claim," such that reasonable minds could not differ as to whether the insurer's conduct measured up to the required standard of care, should the court grant judgment as to a matter of law.

Id. at ¶ 12; but see Prince v. Bear River, 2002 UT 68, 56 P.3d 524 (summary judgment on the fairly debatable defense was affirmed where insurer retained medical expert who provided an report which created a legitimate factual question regarding the continued validity of the insured’s claim for medical benefits). These are known as the Beck duties.

Notwithstanding the ruling in Jones, Utah courts will grant summary judgment on a claim of bad faith when the issue is a determination of the duty to defend under the eight corners rule and the insurer correctly determined that no coverage was owed to the insured. See Headwaters Res., Inc. v. Ill. Union Ins. Co., 770 F.3d 885, 889 (10th Cir. 2014). The Tenth Circuit applied the Beck duties to the determination of an insurer’s duty to defend and stated:

Headwaters also argues that ACE violated its duty of good faith. Under Utah law, the "obligation of good faith performance contemplates, at the very least, that the insurer will [30] diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim." Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985). Where an insurance contract indicates that the scope of coverage is defined by the allegations in the underlying complaint, then the insurer's only obligation is to compare the complaint to the policy to determine whether the occurrence is covered. Equine Assisted Growth, 266 P.3d at 736. So, to meet its obligation of good faith, ACE in this case only needed to compare the allegations in the complaints to the policies and timely communicate to the insured its coverage decision. Ace fulfilled its obligation. ACE fulfilled its obligation.

Id. See also 8665 North Cove, LLC v. Am. Family Mut. Ins. Co., 2014 U.S. Dist. LEXIS 86579, *11, 2014 WL 2777467 (D. Utah June 19, 2014) (granting summary judgment on bad faith claim finding that insured’s two-year delay in giving notice of liability claim filed against it provided basis to deny coverage and basis that there can be no breach of the implied covenant of good faith and fair dealing). In that case, American Family rightly denied coverage under the Policy based on North Cove's delay in making the claim. Therefore, there can be no breach of the implied covenant of good faith and fair dealing, and the court grants American Family summary judgment on this claim.

In a first-party situation, the insurer, although bound by the duty of good faith, is not in a fiduciary relationship with its insured. Accordingly, a breach of the duty of good faith in a first party situation gives rise only to contract damages although the court is liberal in the types of damages awarded, which can include attorneys’ fees, emotional distress, and loss of credit standing. Consequential damages are available for violation of either the express or implied covenants in an insurance
policy. Machan v. UNUM Life Ins. Co. of America, 2005 UT 37, 116 P.3d 342. Punitive damages are not available unless the acts constitute an independent tort, such as fraud or intentional infliction of emotional distress. Beck, 701 P.2d at 800-01.

2. Third-Party Bad Faith

In a third-party situation, the insurer controls the disposition of the claims against the insured. In essence, the contract between the insurer and its insured creates a fiduciary relationship, obligating the insurer to ensure that the insured’s interests are protected. Campbell, 840 P.2d at 138.

Plaintiffs and other third parties do not have standing to sue an insurer for breach of the implied covenant of good faith and fair dealing. Savage v. Educators Ins. Co., 908 P.2d 862, 866 (Utah 1995). However, plaintiffs who recover excess judgments are usually able to find a way to pursue claims against the liability carrier. Tort claims generally cannot be assigned in Utah, but it is not uncommon for third parties to sign a covenant not to execute against the insured in exchange for the insured’s pursuit of bad faith claims against the insurer.

An action for third-party bad faith lies in tort. Consequently, the plaintiff may recover all damages proximately caused by the insurer’s conduct, including punitive damages. Campbell, 840 P.2d at 141. The plaintiff may also recover attorney fees and litigation expenses. Campbell v. State Farm, 2001 UT 89, 119, 126, 65 P.3d 1134, 1168-69, rev’d on other grounds.

B. Fraud

Generally, a cause of action for fraud requires:

1) A false representation of fact made by the defendant;

2) knowledge or belief of the defendant that the representation was false (“scienter”);

3) an intention to induce the defendant to act or refrain from acting in reliance;

4) Justifiable reliance by plaintiff upon the representation in taking action or in refraining from it;

5) Damages suffered by plaintiff as a result.


Insurance fraud: A person, including a corporation, commits insurance fraud if with intent to deceive or defraud, the person gives the insurer misleading information concerning a material fact in the issuance or renewal of an insurance policy. Such information is also fraudulent if used to
obtain benefits under an insurance policy. Utah Code Ann. § 76-6-521(1). Penalties range from a Class B misdemeanor to a 1st degree felony depending on the value of the claim. Id. § 76-6-521(2).

Insurers are allowed to request information from government agencies regarding fraud and are required to release information to an agency investigating fraud. Released information may be classified as protected under the Governmental Records Access and Management Act and is not subject to discovery unless, after reasonable notice, a court determines that the public interest and any ongoing criminal investigations will not be compromised. An insurer who properly releases such information is immune from suit for doing so unless the insurer itself is guilty of fraud. Utah Code Ann. §§ 31A-31-104 and 105.

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

Intentional infliction of emotional distress claims (IIED) are unpopular with courts in Utah, and are often thrown out on summary judgment.

To sustain a clause of action for IIED, a plaintiff “much show that (i) the conduct complained of was outrageous and intolerable in that it offended against the generally accepted standards of decency and morality; (ii) the defendant intended to cause, or acted in reckless disregard of the likelihood of causing, emotional distress; (iii) the plaintiff suffered severe emotional distress; and (iv) the defendant’s conduct proximately caused severe emotional distress.” Retherford v. AT&T Comm. of the Mountain States, Inc., 844 P.2d 949, 970-71 (Utah 1992); Anderson Development Co. v. Tobias, 2005 UT 36, 116 P.3d 323.

Conduct that occurs outside the presence of a plaintiff may not contribute to a claim of intentional infliction of emotional distress except under particularly compelling circumstances. Hatch v. Davis, 2006 UT 44, 147 P.3d 383.

Conduct is not deemed “outrageous” if it is nothing more than “unreasonable, unkind, or unfair,” even if it is “tortuous, injurious, malicious, or illegal.” Franco v. The Church of Jesus Christ of Latter-day Saints, 21 P.3d 198, 207 (Utah 2001). If an insurer’s reason for denying benefits under the policy is fairly debatable, then as a matter of law, the denial does not rise to the level of outrageous conduct that could give rise to liability for IIED. See, Prince v. Bear River, 2002 UT 68 ¶ 39, 56 P.3d 524; Saleh v. Farmers Ins. Exchange, 2006 UT 20, ¶ 24, 133 P.3d 428; Westport v. Ray Quinney & Nebeker, 2009 WL 24740005 (D. Utah 2009).

“[T]he element of emotional distress is specific to the plaintiff in each case,” and “is to be gauged subjectively.” The question is when “[plaintiff] experienced severe emotional distress, not when an ordinarily sensitive person would have experienced such suffering.” Retherford, 844 P.2d at 975-76. Plaintiffs “must only show that they subjectively experienced severe emotional distress regarding the situation they found themselves in, not that an ‘ordinary reasonable person’ would have experienced it that way.” Campbell v. State Farm, 2001 UT 89, 110, 65 P.3d 1134, 1165.

Negligent infliction of emotion distress (NIED) claims require a showing of 1) negligence; 2) that the actor “should have realized that his
conducted involved an unreasonable risk of causing the stress,"; 3) and that the distress “might result in illness or bodily harm.” Straub v. Fisher and Paykel Health Care, 990 P.2d 384, 387 (Utah 1999). The crux of an NIED claim is unintentional injury. Benjamin v. Amica Mut. Ins. Co., 2006 UT 37, 140 P.3d 1210. To survive a summary judgment dismissal of an NIED the plaintiff must provide evidence that the distress he or she claimed to have suffered manifested itself through severe mental or physical symptoms. Carlton v. Brown, 2014 UT 6, ¶¶ 57-58.

Improper use of the legal process cannot sustain a claim for IIED or NIED. Anderson Development Co. v. Tobias, 2005 UT 36, 116 P.3d 323.

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

Utah’s consumer protection laws have not been applied to insurance contracts or disputes.

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

A. **Discoverability of Claims Files Generally**

Utah has no appellate opinion that addresses the scope of the discovery of claims files within the context of claims for insurance coverage or claims of bad faith. In the context of claims against insureds, Utah courts take a case-by-case approach to determining whether documents in insurance claims files are discoverable or protected by the work product doctrine prepared in anticipation of litigation with trial courts considering the nature of the requested documents, reason for preparation of documents, relationship between preparer of document and party seeking protection from discovery and relationship between litigating parties. Attorney involvement is not required in order to fall under the work product doctrine and being prepared in anticipation of litigation. See Askew v. Hardman, 918 P.2d 469 (Utah 1996); see also Green v. Louder, 2001 UT 62, 29 P.3d 426 (Utah 2001) (trial court did not abuse its discretion in denying motion to compel peace of mind letter which insurer sent to insured stating that insurer would unconditionally promise to pay any judgment rendered against insured, as such letter was protected by work product doctrine even though attorney did not prepare letter).

B. **Discoverability of Reserves**

Utah has no appellate opinion that addresses whether reserves are discoverable.

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

Utah has no appellate opinion addressing the discoverability of reinsurance or communications with reinsurers.

D. **Discoverability Attorney/Client Communications**

Utah has no appellate opinion addressing the discovery of attorney client communications in the context of claims for insurance coverage or claims of bad faith. However, when considering whether there was a waiver of the attorney-client privilege in the context of a medical malpractice case, the Utah Supreme Court recognized the general rule that “[a] party may []
waive the privilege by placing the attorney-client communications at the heart of a case, as where a party raises the defense of good faith reliance on advice of counsel.” Doe v. Maret, 1999 UT 74 ¶ 9, 984 P.2d 980 (Utah 1999) (overruled in part on other grounds by Munson v. Chamberlain, 2007 UT 91, 173 P.3d 848 (Utah 2007)).

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

An insurer may cancel an insurance policy for a material misrepresentation. Utah Code Ann. § 31A-21-303(2). However, a misrepresentation does not affect an insurer’s obligations unless (1) the statement is relied on by the insurer and was either material or made with intent to deceive, or (2) the misrepresentation contributes to the loss. Id. § 31A-21-105(2).

An innocent misstatement is not a “misrepresentation.” Derbidge v. Mut. Protective Ins. Co., 963 P.2d 788 (Utah Ct. App. 1998) (misstatement due to memory disorder); see also ClearOne Communications, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, 494 F.3d 1238 (10th Cir. 2007). In the ClearOne Communications case, the 10th Circuit Court of Appeals held that misstatements in financial statements provided as part of corporation’s application for D&O insurance could be imputed to corporation, for purposes of rescission of policy, if corporate officer certifying accuracy of application knew or should have known about misstatements. See ClearOne, 494 F.3d at 1248-49.

A misrepresentation is material if it diminishes an insurer’s opportunity to evaluate or estimate risk. The test for whether a fact is material to the risks assumed under an insurance policy is whether reasonable insurers would regard the fact as one which substantially increases the chance that the risk insured against will happen and therefore would reject the application. Id. at 1250 citing Burnham v. Bankers Life & Cas. Co., 470 P.2d 261, 263 (Utah 1970). See also PHL Variable Ins. Co. v. Sheldon Hathaway Family Ins. Trust, 2013 U.S. Dist. LEXIS 169823, 12, 2013 WL 6230351 (D. Utah 2013) (grant of summary judgment in favor of life insurer where Trust knew or should have known about the clear misrepresentations contained in Mr. Hathaway’s insurance application).

A material misrepresentation makes a policy voidable, not void. Continental Ins. Co. v. Kingston, 2005 UT App 233, 114 P.3d 1158 (For that reason, the defense can be waived. See infra.)

The insurer is estopped from claiming misrepresentation if it has notice of the falsity or if it has made an independent but insufficient inquiry into the facts. Hardy v. Prudential Life Ins., 763 P.2d 761, 770 (Utah 1988); see also ClearOne, 494 F.3d at 1250-51. Furthermore, if the insurer, after issuance of the policy, acquires knowledge of sufficient facts to constitute a defense to all claims under the policy, the defense is only available if the insurer notifies the insured of its intent to defend against a claim within 60 days of acquiring knowledge. Utah Code Ann. § 31A-21-105(5). An insurer’s burden of proof to show fraud or misrepresentation is by a preponderance of the evidence. Horrell v. Utah Farm Bureau Ins. Co., 909 P.2d 1279, 1281-82 (Utah Ct. App. 1996).
An insurance company may waive its right to rescind a policy for material misrepresentation if it has knowledge of facts that would give it the right to rescind the policy and does not act promptly to assert or reserve the right to rescind the policy or otherwise treats the policy as valid, such as by earning and collecting premiums. Continental Ins. Co. v. Kingston, 2005 UT App 233, 114 P.3d 1158 (Utah Ct. App. 2005) (homeowner’s policy; insurer waived right to rescind policy based upon misrepresentation of home’s age; insurer’s investigator informed insurer a week after fire that home was over 100 years old, insurer did not check application at that time, reservation-of-rights letter was not sent until eight months after fire, and insurer informed insured that loss was covered, authorized demolition of home’s interior, and obtained commitments from contractors for restoration work).

None of these rules displace the common law right of contract rescission. Utah Code Ann. § 31A-21-303(11).

B. Failure to Comply with Conditions

Assistance and Cooperation

By statute, a notice of proof of loss is considered timely if the insured shows that “it was not reasonably possible to give the notice or file the proof of loss within the prescribed time and that notice was given or proof of loss filed as soon as reasonably possible.” Utah Code Ann. § 31A-21-312(1). Moreover, “failure to give notice or file proof of loss . . . does not bar recovery under the policy if the insurer fails to show it was prejudiced by the failure.” Utah Code Ann. § 31A-21-312(2).

In Utah, an insurer seeking to avoid coverage of a claim for reason of failing to abide by the condition of cooperating in the defense of a claim must establish two things: (1) that it used “reasonable diligence” to secure the insured’s cooperation; and (2) that the noncooperation “substantially prejudiced” its ability to defend against the claim in question. The Doctors’ Company v. Drezga, 2009 UT 60, ¶ 21, 218 P.3d 598 (Utah 2009). The Utah Supreme Court also held that an insurer was contractually barred from retroactively avoiding coverage for the malpractice claim because the policy’s provision regarding cooperation was ambiguous as to the prospective or retroactive effect of non-cooperation. Id. at ¶ 29 (policy language was that failure to cooperation “will result in loss of coverage.”).

Late Notice

Under Utah law, “failure to give any notice or file any proof of loss required by the policy within the time specified in the policy does not invalidate a claim made by the insured, if the insured shows that it was not reasonably possible to give the notice or file the proof of loss within the prescribed time and that notice was given or proof of loss filed as soon as reasonably possible.” Utah Code Ann. § 31A-21-312(1)(b). Utah generally follows the notice-prejudice rule, i.e., coverage cannot be denied unless the failure to give notice was prejudicial. See Utah Transit Authority v. Liberty Mut. Ins. Co., 2006 WL 2992715 (D. Utah 2006); see also 8865 North Cove, LLC v. Am. Family Mut. Ins. Co. 2014 U.S. Dist. LEXIS 86579, *8, 2014 WL 2777467 (D. Utah 2014) (granting summary judgment in favor of insurer finding that two-year delay in insured providing notice of claim and in making repairs to the property prejudiced the insurer such that it owed no coverage). However, that rule does not apply to claims-made policies as such

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

Utah has no appellate opinion that addresses an insurer’s ability to challenge a stipulated judgment between the insured and third party claimant. However, Utah courts have addressed a similar question of the insurer’s ability to challenge a settlement between the insured and third party claimant where the insurer denied coverage, and finds that where the insurer improperly denied coverage it is estopped from “second-guessing [the insured’s] decision to settle.” *Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, 140 P.3d 1210, 1216 (Utah 2006). In *Gibbs M. Smith, Inc. v. USF&G*, 949 P.2d 337 (Utah 1997), the Utah Supreme Court stated that no consent “provisions prohibiting out-of-court settlements between an insured and a claimant without the consent of the insurer are not enforced when the insurer repudiates coverage or denies liability.” *see also Summerhaze Co., L.C. v. FDIC*, 2014 UT 28, ¶ 38, 332 P.3d 908 (An insurer “that refuses a tender of defense by its insured takes the risk not only that it may eventually be forced to pay the insured’s legal expenses but also that it may end up having to pay for a loss that it did not insure against.”). A federal court has extended the scope of such rule finding that an insureds bad faith claim against insurer for refusing to settle underlying claim within policy limits was not barred by the insurance policy’s no action/legal action limitation and no consent provisions. *Rupp v. Transcontinental Ins. Co.*, 627 F.Supp.2d 1304, (D. Utah 2008).

**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 the policy itself are subject to a three year limitations period. Utah Code Ann. § 31A-21-313(1). Actions based upon tort (e.g., third-party bad faith, IIED) are subject to a four-year “catchall” limitations period. Utah Code Ann. § 78B-2-307.

The limitations period begins to run from “inception of the loss.” Utah Code Ann. § 31A-21-313(1). *See Tucker v. State Farm Mutual Auto. Ins. Co.*, 2002 UT 54, ¶15, 53 P.3d 947, 952; *Canadian Indem. Co. v. K&T, Inc.*, 745 F.Supp. 661, 664 (D. Utah 1990). The statute is tolled during the period in which the parties “conduct an appraisal or arbitration procedure prescribed by the insurance policy, by law, or as agreed to by the parties.” *Utah Code Ann. § 31A-21-313(5)*. If negotiations have been ongoing, an insurer must notify the insured of an impending statute of limitations or contract limit 60 days before it expires. Utah Admin. Rule 590-190-10(4).