I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

All relevant time limits are found in Title 284 of the Washington Administrative Code Office of Insurance Commissioner. Examples:

WAC 284-30-360(1) states that every insurer upon receiving notification of the claim, within 10 working days (or 15 working days with respect to claims arising out of the group insurance contracts) must acknowledge the receipt of such notice unless payment is made within such period of time.; WAC 284-30-380(1) requires the insurer to advise the first party claimant of the acceptance or denial of the claim within 15 working days after receipt by the insurer of properly executed proofs of loss. WAC 284-30-370 requires every insurer to complete the investigation of a claim within 30 days after notification of the claim, unless the investigation cannot reasonably be completed within such time.

B. Standards for Determinations and Settlements


C. Privacy Protections

Washington is one of a few states to enact the Uniform Health Care Information Act. This is codified at RCW 70.020. RCW 70.020 regulates disclosure of health information. Strict limits are placed on dissemination of health care information. In some instances Washington State law offers more strict protection than is found in the federal HIPAA Act. Where Washington law offers more stringent protection than HIPAA, Washington law is not preempted by the HIPAA federal statute.

The privacy of consumers’ financial and health information is regulated by WAC 284-04 et seq. Insurers are required to provide their insured a “clear and conspicuous notice” that accurately reflects its privacy policies and practices. WAC 284-04-200. This privacy notice must be provided initially at the beginning of the relationship between the insured and insurer, and at least once every year. WAC 284-04-205(1)(a). Further, WAC 284-04-210 sets forth the relevant information that must be included in the notice.

WAC 284-04-300 further limits the disclosure of nonpublic personal financial information to nonaffiliated third parties unless certain
conditions are met. Insurers are also required to develop and implement written policies, standards and procedures for the management of health information. WAC 284-04-500. Insurers are prohibited from disclosing nonpublic personal health information about its insured unless authorization from the insured is first obtained. WAC 284-04-505.

II. PRINCIPLES OF CONTRACT INTERPRETATION


When a clause in an insurance policy is ambiguous, the parties may present extrinsic evidence of their intent in order to resolve the ambiguity. Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 137, 26 P.3d 910 (2001). This extrinsic evidence, however, is admitted only to aid in the interpretation of the words employed, not to show intention independent of the instrument. Lynott v. Nat'l Union Fire Ins. Co., 123 Wn.2d 678, 683-84, 871 P.2d 146 (1994) (citing Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)). Because the key is what the parties negotiated for, parol evidence is admissible only if it "'goes no further than to show the situation of the parties and the circumstances under which the instrument was executed . . . ."' Berg, 115 Wn.2d at 669 (quoting J.W. Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)), quoted in Lynott, 123 Wn.2d at 684. Usually the terms of insurance policies are not negotiated. Lynott, 123 Wn.2d at 684. Where there were actual negotiations, however, extrinsic evidence is admissible to show the parties' mutual intentions as manifested in the terms. Id.; Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co., 124 Wn.2d 618, 629, 881 P.2d 201 (1994).

III. CHOICE OF LAW


Under Washington law, when parties dispute choice of law, there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before the court will engage in a conflict-of-laws analysis. Tilden-Coil Constructors, Inc. at 1012-13; Erwin v. Cotter Health Ctrs., 161 Wn.2d 676, 167 P.3d 1112, 1120 (2007). An actual conflict exists when the result of the issues are different under the law of the two

If an actual conflict exists but the parties did not select the law to govern the issue, the court will determine the controlling law under the "most significant relationship" test. Tilden-Coil Constructors, Inc., at 1013; Erwin, at 1120-21.

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend


An insurer is not relieved of its duty to defend unless the claim alleged in the complaint is “clearly not covered by the policy.” Truck, supra, citing Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 561, 951 P.2d 1124 (1998). If a complaint is ambiguous, the court will construe it liberally in favor of triggering the insurer’s duty to defend. In sum, the duty to defend is triggered if the insurance policy conceivably covers the allegations in the complaint, whereas the duty to indemnify exists only if the policy actually covers the insured’s liability. Woo, 161 Wn.2d at 53.

There are two exceptions to the rule that the duty to defend must be determined only from the complaint, and both the exceptions favor the insured. Truck, 147 Wn.2d at 761. First, if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend. Id. Washington’s pleading rules, which require only a short and plain statement of the claim, impose a significant burden on the insurer to determine if there are any facts in the complaint that could conceivably give rise to a duty to defend. R.A. Hanson Co. v. Aetna Ins. Co., 26 Wn. App. 290, 294, 612 P.2d 456 (1980). Second, if the allegations in the complaint “conflict with facts known to or readily ascertainable by the insurer,” or if “the allegations . . . are ambiguous or inadequate,” facts outside the complaint may be considered. Truck, 147 Wn.2d at 761, citing Atlantic Mutual Ins. Co. v. Roffe, Inc., 73 Wn. App. 858, 862, 872 P.2d 359 (1994). The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend - it may do so only to trigger the duty. Woo, 161 Wn.2d at 54.
2. Defending Under a Reservation of Rights

The Washington Supreme Court has declared that an insurer has an “enhanced obligation” to its insured when defending under a reservation of rights. Safeco Ins. v. Butler, 118 Wn.2d 383, 388, 823 P.2d 499 (1992); Tank v. State Farm, 105 Wn.2d 381, 387, 715 P.2d 1133 (1986). Where an insurer fails to meet this obligation, it will be estopped from denying coverage. Butler, 118 Wn.2d at 392.

The insurer’s enhanced obligation to its insured when defending under a reservation of rights may be met by fulfilling four criteria. First, the company must thoroughly investigate the cause of the insured’s accident and the nature and severity of the plaintiff’s injuries. Butler, 118 Wn.2d at 388; Tank, 105 Wn.2d at 388. Second, it must retain competent defense counsel for the insured, and both retained counsel and the insurer must understand that only the insured is the client. Id. Third, the company must fully inform the insured not only of the reservation of rights defense itself, but of all developments relevant to policy coverage and the progress of the lawsuit. Id. Finally, the insurer must refrain from engaging in any action which would demonstrate a greater concern for the insurer’s monetary interest than for the insured’s financial risk. Id.

Additionally, if the insurer is unsure of its obligation to defend in a given instance, it may defend under reservation of rights while seeking a declaratory judgment that it has no duty to defend. Truck, 147 Wn.2d at 761, citing Grange Ins. Co. v. Brosseau, 113 Wn.2d 91, 93-94, 776 P.2d 123 (1989). A reservation of rights is a means by which an insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel. Id. “When that course of action is taken, the insured receives the defense promised and if coverage is found not to exist, the insurer will not be obligated to pay.” Id., citing Kirk, 134 Wn.2d at 563. However, the insurer must avoid seeking adjudication of factual matters disputed in the underlying litigation because advocating a position adverse to its insured’s interests would constitute bad faith on its part. Mutual of Enumclaw v. Dan Paulson Constr., 161 Wn.2d 903, 915-916, 169 P.3d 1 (2007).

V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A. Bad Faith

Both insurer and insured are obligated to exercise good faith regarding all insurance contracts and transactions. This duty to act in good faith has been created judicially, Burnham v. Commercial Casualty Ins. Co., 10 Wn.2d 624, 118 P.2d 644 (1941), legislatively, RCW 48.01.030, and administratively, WAC 284-30 et seq. The Insurance Commissioner, pursuant to legislative authority under RCW 48.30.010, promulgated regulations defining specific acts and practices that constitute a breach of an insurer’s duty of good faith. These requirements, imposed by WAC 284-30-300 et seq., are minimum standards. The insurer’s duty of good faith implies more than honesty and lawfulness of purpose: “... an ... insurer must deal fairly with an insured, giving equal consideration in all matters to the insured’s interests.” Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 386, 715 P.2d 1133 (1986).

overruled in part on other grounds (citing Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 796, 16 P.3d 574 (2001)). The insured bears this heavy burden of proof. Smith, 78 P.3d 1274; Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 38 P.3d 322 (2002). To succeed on a bad faith claim, the insured must show the insurer’s breach of the insurance contract was unreasonable, frivolous, or unfounded. Smith, 78 P.3d 1274 (2003) (trial court properly granted summary judgment where insurer’s failure to disclose policy limits to third party claimant was not “unreasonable, frivolous or untenable”); Overton, 145 Wn.2d at 433, 38 P.3d 322 (2002)). If the insurer’s denial of coverage is based on a reasonable interpretation of the insurance policy, there is no action for bad faith.  

Because an action for bad faith is based in tort law, harm is an essential element. Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992). Third party claimants have no cause of action against an insurance company for breach of duty of good faith. Tank, 105 Wn.2d at 393, 715 P.2d 1133. However, an insured’s bad faith cause of action against an insurer can be assigned to the third-party claimant after judgment or settlement of the main case. Safeco, 118 Wn.2d 383, 397, 823 P.2d 499 (1992).

1. **First Party**

The Washington Insurance Fair Conduct Act ("IFCA") went into effect in December 2007 and allows a first party claimant who is unreasonably denied a claim for coverage or for payment of benefits to sue for actual damages, costs, and attorneys’ fees. RCW 48.30.015(1).

Under IFCA after a trial court finds that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated one of several enumerated sections of WAC 284-30, the trial court may increase the total award of damages to an amount that is up to three times the actual damages. RCW 48.30.015(2).

An insurer also has a duty to exercise reasonable care with respect to the interests of its insured. See Murray v. Mossman, 56 Wn.2d 909, 912-13, 355 P.2d 985 (1960) (recognizing a distinction between a claim for negligence and a claim for bad faith). In order to prove a negligence claim against an insurer, an insured must establish the insurer was at fault as defined in RCW 4.22.015. Harm is also an element for an action for an insurer’s negligent handling of its defense of an insurance claim. Burnham, 10 Wn.2d at 627.

In proving negligence, an insured may show noncompliance with WAC § 284-30-300. However, a violation of those standards does not constitute negligence per se. See RCW 5.40.050.

2. **Third Party**

The duty to defend is triggered if the insurance policy conceivable covers the allegations in the complaint, whereas the duty to indemnify exists only if the policy actually covers the insured’s liability. Woo v. Fireman’s Fund Ins. Co., 161 Wn.2d 43, 53, 164 P.3d 454 (2007). An insurer who breaches its duty to defend in bad faith is estopped from denying coverage even where an otherwise good policy defense exists. Safeco Ins. v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992); MOE v. Dan Paulson Const., 161 Wn.2d 903, 169 P.3d 1 (2007). The amount of a covenant judgment will be the presumptive measure of harm in the subsequent bad faith lawsuit, even if the judgment

B. Fraud

In Washington, the nine elements of fraud are: (1) representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker’s knowledge of its falsity, (5) the speaker’s intent that it shall be acted upon by the plaintiff; (6) plaintiff’s ignorance of its falsity; (7) plaintiff’s reliance on the truth of the representation; (8) plaintiff’s right to rely upon it; and (9) consequent damages suffered by plaintiff. Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). The burden is upon the claimant to prove the existence of all the essential and necessary elements of fraud. Beckendorf v. Beckendorf, 76 Wn.2d 457, 462, 457 P.2d 603 (1969).

C. Intentional and Negligent Infliction of Emotional Distress

Washington recognizes the tort of outrage, also known as intentional infliction of emotional distress, as a cause of action. Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn.2d 233, 250, 35 P.3d 1158 (2001) (applying elements of outrage to claim for intentional infliction of emotional distress). The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. Kloepfel v. Bokor, 149 Wn.2d 192, 195, 66 P.3d 630 (citing Reid v. Pierce County, 136 Wn.2d 195, 202, 961 P.2d 333 (1998)). These elements were adopted from the Restatement (Second) of Torts § 46 (1965) by the Washington Supreme Court in Grimsby v. Samson, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975).

As to the first element, extreme and outrageous conduct is conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Grimsby, 85 Wn.2d at 59, 530 P.2d 291 (1975). As to the second element, conduct is reckless when one knows of and disregards a substantial risk that a wrongful act may occur and that disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation. RCW 9A.08.010(1)(c). As to the third element, emotional distress includes “all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.” Kloepfel, 149 Wn.2d at 203, 66 P.3d 630 (citing Restatement (Second) of Torts, supra cmt. J at 77). Severe emotional distress is such that “no reasonable man could be expected to endure it.” Id. Objective symptomology (physical injury or bodily harm) is not required to establish intentional infliction of emotional distress. Grimsby, 85 Wn.2d at 59, 530 P.2d 291 (1975) (a “showing of bodily harm is not necessary” to prove outrage).

Washington also recognizes a cause of action for negligent infliction of emotional distress. A plaintiff claiming negligent infliction of emotional distress must demonstrate objective symptoms evidencing and resulting from the emotional injury. Hunsley v. Giard, 87 Wn.2d 424, 436, 553 P.2d 1096 (1976). To satisfy this “objective symptomology” requirement, a plaintiff’s emotional distress must be susceptible to medical diagnosis and proved through medical evidence. Hegel v. McMahon, 136 Wn.2d 122, 135, 960 P.2d 424 (1998). This requires objective evidence regarding both the
severity of the distress and the causal link between the observation and the subsequent emotional reaction. Id.

D. State Consumer Protection Act

The Washington Consumer Protection Act (RCW 19.86.0 10 et seq.) prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. The Consumer Protection Act provides a private cause of action for persons injured by violations of its terms. RCW 19.86.090. Damages may be trebled in an amount not to exceed $25,000, and the plaintiff may recover reasonable attorney fees and costs incurred in prosecuting the Consumer Protection Act claim. RCW 19.86.090. Note - although treble damages under the CPA are capped at $25,000, treble damages under an IFCA claim are capped at three times actual damages. RCW 48.30.015 and Section II.B. supra. A private action under the Consumer Protection Act may be brought within four years after a cause of action accrues. RCW 19.86.120.

Violations of the insurance regulations are subject to the Consumer Protection Act. Industrial Indem. Co. of Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 922, 792 P.2d 520 (1990); RCW 19.85.170. In order to prove a claim under this Act, an insured must prove (1) an unfair or deceptive act or practice (2) in trade or commerce (3) that impacts the public interest (4) causing injury to the party in his business or property, and (5) which injury is causally linked to the unfair or deceptive act. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).


Third party claimants do not have a cause of action for per se violations of the Consumer Protection Act. Tank v. State Farm, 105 Wn.2d at 393-94, 715 P.2d 133 (1986). The Court has not yet decided whether a third-party claimant has a potential cause of action against an insurer for non per se violations of the Consumer Protection Act. Id.

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

In actions against insurers, claims files are generally discoverable if the file documents were prepared in the regular course of business. Barry v. USAA, 98 Wn. App. 199, 207-08, 989 P.2d 1172 (1999). An insurer may attempt to protect some documents from disclosure as work product if those documents
were prepared in anticipation of litigation. Documents prepared in anticipation of litigation are discoverable only upon a showing that the party seeking discovery has a substantial need for the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by any other means. Id. See also Heidebrink v. Moriwaki, 104 Wn.2d 392, 706 P.2d 212 (1985); and Cedell v. Farmers Ins., 176 Wn.2d 686, 295 P.3d 239 (2013).

For a discussion of discoverability of the claim file in a bad faith action, see subpart D below.

B. Discoverability of Reserves

While there is no Washington authority specific to the question of whether reserve information is discoverable, the general rules of discovery would apply. Please see the discussion for subpart C below.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

There is no Washington authority that directly discusses whether a plaintiff in a suit against an insurer may discover whether that insurer has reinsurance. The general rules of discovery, however, apply. Generally, "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Wash. Civ. Rule 26(b)(1). Additionally, a party may obtain discovery and production of:

(i) the existence and contents of any insurance agreement under which any person carrying an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage . . . .


Application of this rule, however, is untested with respect to reinsurance.

D. Attorney/Client Communications

As with any other client, communications between an attorney his or her insurance company client are privileged. However, an insurer should note that some of the documents it prepares in anticipation of litigation may not be protected by the work product doctrine often associated with the attorney-client privilege. The attorney-client privilege is codified in Rev. Code of Wash. 5.60.060.

In a lawsuit by a first-party insured alleging bad faith claims handling, the claim file will be presumptively discoverable. The insurer may overcome the presumption of discoverability by showing that its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim but, rather, in providing the insurer with counsel as to its own potential liability. An example would be whether or not coverage exists under the law. Cedell v. Farmers Ins. Co., 176 Wn.2d 686, 295 P.3d 239 (2013). An insurer who makes such a showing is entitled to an in-camera
review of the claims file by the trial court and to redact communications from counsel that reflect the mental impressions of the attorney to the insurance company unless those impressions are directly at issue in its quasi-fiduciary responsibilities to the insured. If a trial judge finds an attorney-client privilege applies, then the court will address any claims the insured may have to pierce the attorney-client privilege.

Privileged communications may also be discoverable, if they qualify for the bad-faith or fraud exception. Escalante v. Sentry Ins., 49 Wn. App. 375, 394, 743 P.2d 832 (1987), overruled, in part, on other grounds. An insured seeking to invoke this exception need not prove actual fraud.

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentation/Omissions: During Underwriting or During Claim

If found to be material, an insured’s misrepresentation during the claims process will void the entire policy. Mutual of Enumclaw Co. v. Cox, 110 Wn.2d 643, 757 P.2d 499 (1988). This is true even if the insurer bore no risk of additional loss as a result of the misrepresentation. Id. The rational is that “the insured should be penalized for the willfulness of his conduct regardless of the fact that the insurer would not have been required to pay any greater amount had the falsity not been demonstrated.” Id., citing 16 A.L.R.3d 781 (1967).

Similarly, if an insured makes material false representations in an application for insurance, the insurance company need not honor that policy. See Hein v. Family Life Insurance Co., 60 Wn.2d 91, 95-96, 376 P.2d 152 (1962). Rescission is available under Washington law as a remedy for an insured’s material misrepresentation in the formation of an insurance contract. In order to effect rescission, the insurer must prove a material misrepresentation by clear, cogent and convincing evidence. Queen City Farms v. Central National Ins. Co., 126 Wn.2d 50, 97, 882 P.2d 703 (1994). A misrepresentation is material if it would have affected the insurer’s decision to issue the contract. Id. at 97. Further, in order for the policy to be avoided the misrepresentation must have been with the intent to deceive. Rev. Code of Wash. 48.18.090(1) provides that “no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or avoid the contract or prevent it attaching, unless the misrepresentation or warranty is made with the intent to deceive.” Additionally, an application will only be admissible in evidence “in any action relative to such policy or contract, unless a true copy of the application was attached to or otherwise made a part of the policy when issued and delivered.” Rev. Code of Wash. 48.18.080.

B. Failure to Comply with Conditions

Washington courts recognize that there are conditions set forth in insurance policies, such as cooperation, notice and no-settlement clauses, which contain a condition the insured must fulfill in order to create the insurer’s obligation to pay under the policy. Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co., 124 Wn.2d 789, 803-804, 881 P.2d 1020, 1029 (1994). “Such conditions designate the manner in which claims covered by the policy are to be handled once a claim has been made or events giving rise to a claim have occurred. They are clearly placed in policies to prevent the insurer from being prejudiced by the insured’s actions.” Id.
However, Washington courts only allow an insurer to be released from its obligations under the policy if there is a showing of actual prejudice caused by the insured’s failure to comply with the condition. *Id.* (“To release an insurer from its obligations without a showing of actual prejudice would be to authorize a possible windfall for the insurers.”) See also Oregon Auto. Ins. Co. v. Salzberg, 85 Wn.2d 372, 377, 535 P.2d 816 (1975). An insurer may not deprive an insured of the benefit of purchased coverage absent a showing that the insurer was actually prejudiced by the insured’s noncompliance with conditions precedent. Public Utility Dist. No. 1 of Klickitat Co., 124 Wn.2d 789 citing cf. Time Oil Co. v. Cigna Property & Cas. Ins. Co., 743 F. Supp. 1400, 1416 (W.D. Wash.1990).


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

If an insured enters into a stipulated judgment with a covenant not to execute, an insurer may challenge that judgment if it is not reasonable. The burden of proof to establish the reasonableness of the settlement is initially placed on the insured. *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 510-511, 803 P.2d 1339 (1991), rev. denied, 117 Wn.2d 1019 (1991). The basis for placing the burden of proof on the insured is because “an insured may settle for an inflated amount to escape exposure and thus call into question the reasonableness of the settlement. . . . [Washington courts] share this concern about consent judgments coupled with a covenant not to execute.” *Id.* An insured may establish reasonableness in a reasonableness hearing in the underlying tort case. *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 739-740, 49 P.3d 887, 892 (2002) (the amount of a plaintiff’s judgment against an insured if the insured settles the case and the plaintiff agrees to a covenant not to execute on the judgment is the presumptive measure of an insured’s harm caused by a liability insurer’s tortious bad faith if the covenant judgment is reasonable). Once the court determines that the covenant judgment is reasonable, the burden is shifted back to the insurer to show the settlement was the product of fraud or collusion. If the insured fails to meet this burden, the insurer will be liable for the full settlement amount. *Id.*

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. Actions based upon breach of written contract are subject to a six year limitation period. Rev. Code of Wash. 4.16.040. Actions based upon tort theories are generally subject to a three year limitation period. Rev. Code of Wash. 4.16.080. The contract limitations period begins to run against an insured on the date the insurer breaches the contract of insurance. *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 997 P.2d 353 (2000). The triggering event for the accrual of an insured’s breach of contract action against its insurer does not differ based upon whether the policy involved is “first party” or “third party” insurance. *Id.*
A. Trigger of Coverage

For claims in which damage occurred over several policy periods, Washington courts apply the continuing damage theory. Groul Constr. Co., Inc. v. Ins. Co. of N. Am., 11 Wn. App. 632, 637-38, 524 P.2d 427 (1974). In Groul, the damage began at the time of construction when undiscovered dry rot caused progressively worsening damage to the building. The contractor responsible for the damage in Groul had three different liability insurers during the time that the damage was occurring. The court held that all three insurers had a duty to cover the loss because damage to the building occurred during all three policy periods even though the negligent act that was the beginning cause of the damage (negligent backfilling) took place within the initial insurer’s coverage period. Id.

B. Allocation Among Insurers

When an insured is responsible for damages that occur over several policy periods, his insurers have the burden of proving the amount of damage that occurred within the time limit of each of their policies. Groul Constr. Co., Inc. v. Ins. Co. of N. Am., 11 Wn. App. 632, 637, 524 P.2d 427 (1974). If the insurers are not able to meet their burden of apportionment, they will be held, subject to their policy limits, jointly and severally responsible for the entire amount of the insured’s tort exposure. Id. In effect, when apportionment is not possible, the damage will be considered to be a single injury even though it occurred on an incremental basis over a long period of time. Id. at 637-38; See also, Am. National Fire Ins. Co. v. B&L Trucking, 134 Wn.2d 413, 951 P.2d 250 (1998). However, an insurer will not be required to cover a loss merely because it provided coverage during the general time frame of a loss. An insured still has the burden of proving the fact that some qualitative damage occurred during the specific policy period. Villella v. Public Employees Mut. Ins. Co., 106 Wn.2d 806, 812, 725 P.2d 957 (1986); Washington Insurance Law, Thomas V. Harris, § 23 (2002).

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

Washington’s Tort Reform Act provides a right of contribution between or among persons who are jointly and severally liable upon the same indivisible claim in certain situations. RCW 4.22.040.

Washington recognizes equitable contribution between insurers allowing one insurer to recover from another when both are independently obligated to indemnify or defend the same loss. Mutual of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 191 P.3d 866 (2008). An insured that is sued for contribution by another insurer cannot be held liable for a sum greater than it would have had to pay its insured. Polygon NW Co. v. American National Fire Ins. Co., 143 Wn. App. 753, 189 P.3d 777 (2008).

B. Elements

The inquiry is whether the non-participating co-insurer had a legal obligation to provide a defense or indemnification for the claim or action prior to the date of settlement. Contribution may not lie between insurers
where the insured utilizes the “selective tender” rule. Under that rule, when the insured has not tendered a claim to an insurer, that insurer is excused from its duty to contribute towards a settlement. However, under the “late tender” rule, an insurer is not generally relieved of its duties if the insured fails to promptly notify the insurer of the claim unless there is actual and substantial prejudice to the insurer.

Courts also have equitable authority to enter an order precluding subsequent claims for contribution and indemnity by non-settling parties so long as the non-settling parties receive notice and have their rights protected. Canal Indemnity Co. v. Global Development, 2015 U.S. Dist. LEXIS 8774; Puget Sound Energy v. Certain Underwriters at Lloyd’s, 134 Wn. App. 228, 250, 138 P.3d 1068 (2006).

X. DUTY TO SETTLE

An insurer has a duty to make a good faith effort to settle a claim, including an obligation to conduct good faith settlement negotiations sufficient to ascertain the most favorable terms available. Truck Ins. Exchange v. Century Indemnity, 76 Wn.App. 527, 887 P.2d 455 (1995).

Washington courts have considered an insurer’s duty to settle both in terms of its duty of good faith and its duty to exercise ordinary care. E.g., Hamilton v. State Farm Ins. Co., 83 Wn.2d 787, 791, 523 P.2d 193 (1974); Murray v. Mossman, 56 Wn.2d 909, 911, 912, 355 P.2d 985 (1960); Burnham v. Commercial Cas. Ins. Co., 10 Wn.2d 624, 627, 117 P.2d 644 (1941); Tyler v. Grange Ins. Ass’n, 3 Wn. App. 167, 175-76, 473 P.2d 193 (Div. 11970). An insurer is liable when it fails to settle a claim within the policy limits if that failure is attributable to either bad faith or negligence. Hamilton, 83 Wn.2d 787, 523 P.2d 193. “[I]f investigation of the circumstances and facts . . . disclose liability on the part of the insured, it is the affirmative duty of the insurer to make a good faith attempt to effect settlement.” Id. at 791, 523 P.2d 193. When an insurer refuses to settle a claim, the insured may negotiate a settlement on its own and then seek reimbursement from the insurer. Evans v. Continental Cas. Co., 40 Wn.2d 614, 245 P.2d 470 (1952). The insurer is liable only for the amount of the settlement that is reasonable and paid in good faith. Evans, 40 Wn.2d at 628, 245 P.2d 470.

Because each case is different, Washington courts have focused on the attitude or state of mind that should guide an insurer in evaluating settlement proposals, rather than on specific rules. An insurer must proceed with “a state of mind indicating honesty and lawfulness of purpose and give “equal consideration” to the insured’s interests.” Tank v. State Farm Ins. Co., 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986); Tyler, 3 Wn. App. at 176, 473 P.2d 193. In the context of the duty to settle, the “no limit” test is in harmony with this duty. Hamilton, 83 Wn.2d at 794, 523 P.2d 193; Tyler, 3 Wn. App. at 178, 473 P.2d 193 (1970). The “no limit” test requires the attorney representing the insurer to treat the settlement as if the insured had no insurance or as if the insurance policy had no limits. Hamilton, 83 Wn.2d at 790, 523 P.2d 193. This test “affords the best means of determining whether the interest of the insurer and the insured have been given equal consideration.” Id. An insurer who deviates from the “no limit” standard, regardless of whether it is the result of negligence or bad faith, will be held liable to its insured for a breach of its duty to settle. Id.
A. **Damages**

When an insurer is liable for a breach of duty to settle, an insured is limited to contractual remedies. When an insurer breaches its contractual duties by not settling the claim, its insured must be “put in as good a position” as he would have been had the contract not been breached. *Greer v. Northwestern Nat’l Ins. Co.*, 109 Wn.2d 191, 202, 743 P.2d 1244 (1987). In the absence of bad faith or negligence, an insurer is only responsible for a judgment or settlement up to its policy limit. *Id.* at 202-03, n. 6. However, when a refusal to settle is the result of an insurer’s bad faith or negligence, an insured is entitled to recover tort damages. *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 764-65, 58 P.3d 276 (2002).

B. **Duty to Pay / Indemnify**