

## IDAHO

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### I. REGULATORY LIMITS ON CLAIMS HANDLING

#### A. Timing for Responses and Determinations

There are no definitive times for an insurer to respond or to make a determination with respect to a submitted claim in Idaho. Idaho Code § 41-1329, Idaho's Unfair Claims Settlement Practices Act, provides that an insurer shall be deemed to be committing an unfair method of competition or an unfair or deceptive act or practice in the business of insurance if it, among other acts, fails to "acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;" fails to "adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;" refuses "to pay claims without conducting a reasonable investigation based upon all available information;" fails "to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;" does not attempt "in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;" and/or attempts "to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application." I.C. § 41-1329(2), (3), (4), (5), (6), and (8).

Idaho Code § 41-1839(1) provides that an insurer will be liable for attorneys' fees in the event of litigation if it fails to pay the amount "justly due" under an insurance policy within thirty days of the insured submitting a proof of loss statement. *See also Engineered Structures, Inc. v. Travelers Prop. Cas. Co. of Am.*, 328 F. Supp. 3d 1092, 1113 (D. Idaho 2018) (denying attorneys' fees to plaintiff when plaintiff failed to request, or argue entitlement to, attorneys' fees in plaintiff's motion for summary judgment).

#### B. Standards for Determination and Settlements

There is no specific direction regarding the standards for determinations and settlements by insurers other than the general language of Idaho Unfair Claims Settlement Practices Act, as quoted above. Idaho Code § 41-1329(14) provides that an insurer will be deemed to be committing an unfair method of competition or an unfair or deceptive act or practice in the business of insurance if it, among other acts, fails "to promptly provide a reasonable explanation

of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.”

If a settlement involves a minor, the settlement must be approved by court order by the filing of a verified petition before such settlement is deemed to be valid or of any effect. I.C. § 15-5-409a.

## II. PRINCIPLES OF CONTRACT INTERPRETATION

When interpreting insurance policies, Idaho courts apply general rules of contract law subject to certain special canons of construction. *Clark v. Prudential Prop. & Cas. Ins. Co.*, 138 Idaho 538, 540, 66 P.3d 242, 244 (2003); *see also Evanston Ins. Co. v. Bosski, Inc.*, 2017 WL 1158245, at \*6 (D. Idaho Mar. 28, 2017). In particular, because insurance contracts are adhesion contracts, typically not subject to negotiation between the parties, any ambiguity that exists in the contract “must be construed against the insurer.” *Arreguin v. Farmers Ins. Co. of Idaho*, 145 Idaho 459, 461, 180 P.3d 498, 500 (2008); *see also United States for use & benefit of Contractor's Equip. Supply Co. v. TK Constr., US, LLC*, 2017 WL 2805491, at \*3 (D. Idaho June 28, 2017).

Whether an insurance policy is ambiguous is a question of law. *McFarland v. Liberty Ins. Corp.*, 164 Idaho 611, 434 P.3d 215, 219 (2019). When determining whether a policy is ambiguous, Idaho courts ask whether the policy is reasonably subject to differing interpretation.” *Id.* at 220. A provision that seeks to exclude the insurer’s coverage must be strictly construed in favor of the insured. *Moss v. Mid-America Fire & Marine Ins. Co.*, 103 Idaho 298, 300, 647 P.2d 754, 756 (1982). The burden is on the insurer to use clear and precise language if it wishes to restrict the scope of its coverage. *Id.* “[W]hen interpreting their insurance policies, we do not expect policyholders to know how most courts around the country have construed certain words or to have the knowledge of those who have spent their careers working in or with the insurance industry. Unless contrary intent is shown, common, non-technical words are given the meaning applied by laymen in daily usage—as opposed to the meaning derived from legal usage—in order to effectuate the intent of the parties.” *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 320-21, 233 P.3d 1221, 1242-43 (2010); *see also Gearhart v. Mut. of Enumclaw Ins. Co.*, 160 Idaho 664, 378 P.3d 454 (2016) (rejecting anti-stacking language that was confusing).

An insurer cannot seek to apply policy limitations and exclusions in a way to defeat the precise purpose for which the insurance is purchased. *See Martinez v. Idaho Counties Reciprocal Mgmt. Program*, 134 Idaho 247, 999 P.2d 902, 907 (2000) (“Upon review of these requirements and exclusions, it appears that if any actual coverage does exist it is extremely minimal and affords no realistic protection to any group or class of injured persons. The declarations page of the policy contains language and words of coverage, then by definition and exclusion takes away the coverage. The fact that there might be some small circumstance where coverage could arguably exist does not change the reality that, when the policy is considered in its entirety, the City was receiving only an illusion of coverage for its premiums. This Court will not allow policy limitations and exclusions to defeat the precise purpose for which the insurance is purchased.”).

### III. CHOICE OF LAW

Idaho follows the RESTATEMENT (SECOND) OF CONFLICT OF LAWS' rules governing choice of law provisions. *Ward v. Puregro*, 128 Idaho 366, 368-69, 913 P.2d 582, 584-85 (1996). The Restatement provides that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1). Typically, choice-of-law provisions are given their full effect and the court will apply the laws of another state. *Carroll v. MBNA Am. Bank*, 148 Idaho 261, 265, 220 P.3d 1080, 1084 (2009). However, the procedural law of the Idaho court will still apply. *Id.* at 267, 220 P.3d at 1086.

Even if an issue could not be resolved by an explicit provision in the contract, the chosen law will apply unless: (1) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or (2) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of a particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2).

An Idaho court will then determine whether the chosen state's law recognizes the choice-of-law clause. *Cerami-Kote, Inc. v. Energywave Corp.*, 116 Idaho 56, 58 n.1, 773 P.2d 1143, 1145 n.1 (1989). Further, the chosen law will apply as long as there is no contrary Idaho public policy. The key consideration in making a public policy determination is whether some policy of the forum state is contravened by applying the rules of the selected state. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, cmt. e.

### IV. DUTIES IMPOSED BY STATE LAW

#### A. Duty to Defend

##### 1. Standard for Determining Duty to Defend

The duty to defend arises upon the filing of a complaint containing allegations that, in whole or in part and read broadly, reveal a potential for liability that would be covered by the insured's policy. *AMCO Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 101 P.3d 226 (2004).

Where there is doubt as to whether a theory of recovery within the policy coverage has been pleaded in the underlying complaint, or which is potentially included in the underlying complaint, the insurer must defend regardless of potential defenses arising under

the policy or potential defenses arising under the substantive law under which the claim is brought against the insured. It is a misconception of the duty to defend, however, if the insurer refuses to defend and seeks a determination of the duty while the underlying case progresses against the insured, and then if found obligated under its duty, the insurer merely steps in and defends and pays defense fees that have accumulated. The proper procedure for the insurer to take is to evaluate the claims and determine whether an arguable potential exists for a claim covered by the policy; if so, then the insurer must immediately step in and defend the suit.

*Id.*; see also *Scout, LLC v. Truck Ins. Exch.*, 164 Idaho 593, 434 P.3d 197, 203 (2019). “[T]he duty to defend clearly exists so long as there is a genuine dispute over facts bearing on coverage under the policy or over the application of the policy’s language to the facts.” *Deluna v. State Farm Fire & Cas. Co.*, 149 Idaho 81, 84, 233 P.3d 12, 15 (2008).

An insurer that denies its duty to defend does so at its own peril; however, the insurer is not required to file a declaratory judgment action. *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 48 P.3d 1256 (2002). “If the insurer breaches its duty to defend and the insured settles a claim covered by the policy, the insurer has a duty to indemnify its insured for the amount of that settlement so long as potential liability for the insured existed which resulted in a reasonable settlement in view of the size of possible recovery and the probability of the claimant’s success against the insured.” *Esterovich v. City of Kellogg*, 139 Idaho 439, 441–42, 80 P.3d 1040, 1042–43 (2003); see also *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 888 P.2d 383 (1995).

The duty to defend and the duty to indemnify are separate duties; the duty to defend is much broader. *Scout, LLC*, 164 Idaho 593, 434 P.3d at 202; *Huntsman Advanced Materials LLC v. OneBeacon Am. Ins. Co.*, 2012 WL 480011, at \*3 (D. Idaho Feb. 13, 2012). If an insurer breaches a duty to defend, then the insurer will be “liable for the reasonable costs and attorney fees incurred by the insured in the defense and settlement of a claim that revealed ‘potential’ liability.” *Deluna*, 149 Idaho at 86, 233 P.3d at 17. However, the insurer will still be able to contest whether it ultimately had liability under the terms of the policy. *Id.* It may attempt to show that liability is not covered by the policy in a subsequent action on the policy *Id.* at 85, 233 P.3d at 16.

## 2. Issues with Reserving Rights

Coverage defenses may be preserved by a reservation of rights agreement. *Mutual of Enumclaw v. Harvey*, 115 Idaho 1009, 772 P.2d 216 (1989). However, a reservation of rights does not dissipate an insurer’s obligation to pay the costs of litigation. *Id.* (insurer who entered into a reservation of rights agreement required to pay the costs of litigation taxed against insured).

## B. State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

### 1. Criminal Sanctions

Idaho does not have criminal statutes specific to an insured's or an insurer's respective rights to privacy. The various crimes for invasion of privacy are generally extensions of the basic trespass of privacy, codified as I.C. § 18-7006. These variations include a crime for voyeurism (I.C. § 18-6609), computer hacking (I.C. § 18-2202), and other similar invasions of privacy. However, it may be more likely in the insurance context that an invasion of privacy is committed through wrongfully intercepting and disclosing wire, electronic, or oral communications. See I.C. § 18-6701 *et seq.*

### 2. The Standards for Compensatory and Punitive Damages

The Department of Health and Welfare's records are confidential pursuant to IDAPA 16.06.01.004. However, the Department will comply with Idaho's Public Records Act, Idaho Code §§ 74-101 - 74-126, when requests for the examination and copying of defined public records are made. Unless otherwise exempted, all public records in the custody of the Department are subject to disclosure. Likewise, Idaho Code § 41-1334 empowers the Director of Insurance to adopt rules necessary to carry out the provisions the Gramm-Leach-Bliley Act related to privacy and protection of non-public personal information. The rules adopted by the Director of Insurance are required to be consistent with Title V of the Gramm-Leach-Bliley Act. However, Idaho Code § 41-1334 does not create a private cause of action.

Idaho also recognizes the tort of invasion of privacy. See, e.g., *Jensen v. State*, 139 Idaho 57, 72 P.3d 897 (2003); see also *LaRosa v. River Quarry Apartments, LLC*, 2019 WL 1027986 (D. Idaho 2019) To recover for invasion of privacy, the plaintiff must show: "(1) an intentional intrusion by the defendant; (2) into a matter, which the plaintiff has a right to keep private; (3) by the use of a method, which is objectionable to the reasonable person." *Jensen*, 139 Idaho at 62, 72 P.3d at 902 (2003). However, "punitive damages are reserved for the most unusual and compelling circumstances." *O'Neil v. Vasseur*, 118 Idaho 257, 264, 796 P.2d 134, 141 (Ct. App. 1990).

Idaho law does not permit a litigant to initially make a claim for punitive damages. Instead, upon pre-trial motion and hearing, a litigant may be granted leave to amend the pleadings to include a prayer for punitive damages. I.C. § 6-1604. That statute requires the plaintiff to establish "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." *Pierce v. McMullen*, 156 Idaho 465, 468, 328 P.2d 445 (2014).

Ultimately, an award of punitive damages requires a bad act and a bad state of mind. *Todd v. Sullivan Const. LLC*, 146 Idaho 118, 123, 191 P.3d 196, 201 (2008). The defendant must (1) act in a manner that was an extreme deviation from reasonable standards of conduct with an understanding of – or disregard for – the likely consequences, and must (2) act with an extremely harmful state of mind, described variously as with malice, oppression, fraud, or outrageousness. *See Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 501, 95 P.3d 977, 983 (2004); *see also O'Neil*, 118 Idaho at 265, 796 P.2d at 142.

### 3. Insurance Regulations to Watch

Idaho provides annual summaries of its legislative changes that may affect insurance. The summaries are available online at <https://doi.idaho.gov/publicinformation/laws/legislation>. New regulations for 2018 include Idaho Code § 41-1852, which prohibits an insurer from discriminating against and based on a person's status as a living organ donor. Additionally, recent legislation adds to and amends existing law to provide for interstate health insurance sales and to authorize out-of-state insurers to sell health insurance in Idaho under certain conditions and to authorize the department of insurance to enter into compacts with other states. *See* I.C. §§ 41-306, 41-306A, 41-516.

### 4. State Arbitration and Mediation Procedures

Idaho, like many other states, has a codified the Uniform Arbitration Act. *See* I.C. § 7-901 *et seq.* In general, arbitration clauses in insurance policies are enforceable. *See Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 45, 72 P.3d 877, 885 (2003). Idaho Code § 7-902 provides that “[o]n application of a party showing an agreement [to arbitrate], and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised.” I.C. § 7-902.

Idaho's civil rules also provide for mediation as a mechanism for alternative dispute resolution. *See* Idaho R. Civ. P. 37.1. All civil cases are eligible for a referral to mediation. *Id.* A court may order the parties to mediate based on a party's motion or during a Rule 16 pretrial conference or shortly thereafter. *Id.* Once a case has been referred to mediation, the parties have 28 days to select a mediator; otherwise, the court will select one. *Id.* The first mediation session must take place within 42 days of the selection of the mediator. *Id.* The mediator's report is due within 7 days after the last mediation session. *Id.* Additionally, the civil rules require the mediator be compensated at their regular fees and expenses. *Id.* Notably, mediators may be bound by the confidentiality rules agreed to by the parties. *Id.*

### 5. State Administrative Entity Rule-Making Authority

The Idaho Department of Insurance is the state agency created to regulate the business of insurance in Idaho. *See* I.C. § 41-201 (creating the Department of Insurance). The Department

is administered by a director appointed by the governor. I.C. § 41-202. The powers and limitations of the Department are provided by Idaho Code § 41-201 *et seq.* While the Department has the general authority to execute the various duties imposed by the Idaho Code (I.C. § 41-210), the code specifically provides that the Department may make reasonable administrative rules necessary to carry out its function of regulating the insurance industry. *See* I.C. § 41-211. These administrative rules are codified in Idaho Administrative Procedure Act (IDAPA) under Title 18.01.

## V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

### A. Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

#### 1. First Party

The tort of bad faith should not be confused with a tortious breach of contract. Rather, it is a “separate intentional wrong, which results from a breach of a duty imposed as a consequence of the relationship established by contract.” *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 97, 730 P.2d 1014, 1017 (1986). A plaintiff establishes a claim for the tort of bad faith where it shows “(1) the insurer intentionally and unreasonably denied or withheld payment, (2) the claim was not fairly debatable, (3) the denial or failure to pay was not the result of a good faith mistake, and (4) the resulting harm is not fully compensable by contract damages.” *Seiniger Law Office, P.A. v. North Pacific Ins.*, 145 Idaho 241, 246 n. 1, 179 P.3d 606, 611 (2008); *see also Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 176, 45 P.3d 829, 832 (2002); *ABK, Ltd. Liab. Co. v. Mid-Century Ins. Co.*, 166 Idaho 92, 103, 454 P.3d 1175, 1186 (2019). The insured/plaintiff has the burden of showing each of the elements. *See id.*

#### 2. Third-Party

Idaho has recognized a third-party bad faith action in tort where an insurer has unreasonably, intentionally, or negligently denied or delayed settlement of a claim. *Robinson*, 137 Idaho at 178, 45 P.3d at 834; *Reynolds v. American Hardware Mut. Ins. Co.*, 115 Idaho 362, 365, 766 P.2d 1243, 1246 (1988); *McKinley v. Guaranty National Ins. Co.*, 144 Idaho 247, 251, 159 P.3d 884, 888 (2007). In determining whether a liability insurer has acted in bad faith in failing to settle or in delaying settlement of a claim against the insured, the trier of fact must consider the following factors, with an emphasis on the first two: (1) the insurer’s failure to communicate with the insured, including particularly informing the insured of any compromise offer; (2) the amount of financial risk to which each party will be exposed in the event an offer is refused; (3) the strength of the injured claimant’s case on the issues of liability and damages; (4) insurer’s thorough investigation of the claim; (5) the failure of the insurer to follow the legal advice of its own attorney; (6) any representations by the insured which misled the insurer in its settlement negotiation; and, (7) any other factors which may weigh toward establishing or negating the bad faith of the insurer. *McKinley*, 144 Idaho at 251, 159 P.3d at 888; *Truck Insurance Exchange v. Bishara*, 128 Idaho 550, 555, 916 P.2d 1275, 1280 (1996).



“In order to avoid liability for bad faith failure to settle when the insured’s potential liability is in excess of the policy limits, the insurer, at a minimum, should make a diligent effort to ascertain the facts, communicate the results of such investigation to the insured and must inform him of any settlement offers that may affect him, so that the insured may take proper steps to protect his own interests.” *McKinley*, 144 Idaho at 252, 159 P.3d at 889.

“In a third party action where the insurer unreasonably denies a settlement or payment, the insured would be able to recover contract damages up to the policy limits and then tort damages for any excess.” *McKinley*, 144 Idaho at 253, 159 P.3d at 890. “For a cause of action based on delay and not denial, however, the insurer has already paid the policy limits and, therefore, contract damages are unavailable.” *McKinley*, 144 Idaho at 253, 159 P.3d at 890.

## B. Fraud

A claim for fraud requires that the plaintiff prove “(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity; (5) the speaker’s intent that the representation be acted upon by the hearer; (6) the hearer’s ignorance of the falsity; (7) the hearer’s reliance that the statement was true; (8) the hearer’s right to rely on the truthfulness; and, (9) the hearer’s proximate injury.” *Thomas v. Medical Center Physicians, PA*, 138 Idaho 200, 207, 61 P.3d 557, 564 (2002). The party alleging fraud has the burden of proving each element by clear and convincing evidence. *Lindberg v. Roseth*, 137 Idaho 222, 225, 46 P.3d 518, 521 (2002); *see also Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 847, 419 P.3d 1139, 1145 (2018).

Misrepresentations about the insurance being purchased can result in either “out-of-pocket” damages (the difference between the real value of the property purchased and the price paid or contracted for), or “benefit of the bargain” damages (the difference between the real value of the property purchased and the value which it would have had had the representations been true). *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 216-18, 923 P.2d 456, 461-63 (1996). The court should apply the measure of damages that would best compensate the victim for every wrong which is the natural and proximate result of the fraud. *Id.* Often, this involves a discussion as to whether the plaintiff is seeking a reformation of the policy in addition to monetary damages. *See id.*

In addition, “an alleged fraudulent representation must concern past or existing material facts.” *Choice Feed, Inc. v. Montierth*, \_\_\_ Idaho \_\_\_, 481 P.3d 78, 95 (Idaho 2021). “One exception to the general rule is ‘where a false prediction or opinion is given with the intent to mislead.’” *Choice Feed, Inc.*, 481 P.3d at 95 (quoting *Country Cove Dev., Inc. v. May*, 143 Idaho 595, 601, 150 P.3d 288, 294 (2006)). “Essentially, this exception applies where a speaker makes a promise to induce action on the part of the promisee without any intent to keep the promise.” *Choice Feed, Inc.*, 481 P.3d at 95.



[C]onstructive fraud usually arises from a breach of duty where a relation of trust and confidence exists; such relationship may be said to exist whenever trust or confidence is reposed by one person in the integrity and fidelity of another. Examples of relationships from which the law will impose fiduciary obligations on the parties include when the parties are: members of the same family, partners, attorney and client, executor and beneficiary of an estate, principal and agent, *insurer and insured*, or close friends. ... The gist of a **constructive fraud** finding is to avoid the need to prove intent (i.e., knowledge of falsity or intent to induce reliance) [under the **elements** required to prove actual fraud], since it is inferred directly from the relationship and the breach. In sum, if a plaintiff establishes that there has been a breach of duty arising from a relationship of trust and confidence, the plaintiff is not required to prove (1) the speaker's knowledge of the falsity regarding the statement or representation of fact, or (2) the speaker's intent that the hearer rely on the statement or representation of fact, to sustain a claim of **constructive fraud**. However, the party is still required to prove the remaining seven **elements** of actual fraud."

*Doe v. BSA*, 159 Idaho 103, 109, 356 P.3d 1049, 1055 (2015) (emphasis added); *see also Doe v. Boy Scouts of Am.*, 329 F. Supp. 3d 1168, 1180 (D. Idaho 2018).

### C. Intentional or Negligent Infliction of Emotional Distress

In order to prove a claim for intentional infliction of emotional distress, the claimant must prove "(1) the conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress was severe." *Nation v. State Dept. of Corrections*, 144 Idaho 177, 192, 158 P.3d 953, 968 (2007); *Edmonson v. Shearer Lumber Products*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003); *Roper v. State Farm Mut. Auto. Ins. Co.*, 131 Idaho 459, 463, 958 P.2d 1145, 1149 (1998).

In order to be actionable, the emotional distress suffered by the claimant must be severe. *Jeremiah v. Yanke Machine Shop*, 131 Idaho 242, 248, 953 P.2d 992, 998 (1998). In explaining the requisite level of proof of severity necessary to support the claim, Idaho courts have favorably quoted from the RESTATEMENT (SECOND) OF TORTS § 46. *Evans v. Twin Falls County*, 118 Idaho 210, 220, 796 P.2d 87, 97 (1990).

Idaho courts require competent evidence that the plaintiff incurred physical damage, was hampered in the performance of his or her daily functions, or suffered a severely disabling emotional response to the defendant's conduct. *See Davis v. Gage*, 106 Idaho 735, 741, 682

P.2d 1282, 1288 (1984) (testimony of the plaintiffs that they were upset, embarrassed, angered, bothered and depressed insufficient to support a claim for intentional infliction of emotional distress); *see also Timothy v. Oneida Cty.*, 2015 WL 2036825, at \*13 (D. Idaho Apr. 30, 2015); *see also Eldridge v. West*, 166 Idaho 303, 310, 458 P.3d 172, 179 (2020) (“to recover damages for emotional distress, Idaho law clearly requires that emotional distress be accompanied by physical injury or physical manifestations of injury”) (quotes removed). Severe emotional distress may be shown either by physical manifestation of the distress or subjective testimony. *Davis*, 106 Idaho at 741, 682 P.2d at 1288.

To qualify as “extreme and outrageous,” the defendant’s conduct must be more than merely objectionable or unreasonable. “Even if a defendant’s conduct is unjustifiable, it does not necessarily rise to the level of ‘atrocious’ and ‘beyond all possible bounds of decency’ that would cause an average person of the community to believe it was ‘outrageous.’” *Alderson v. Bonner*, 142 Idaho 733, 740, 132 P.3d 1261, 1268 (2006); *see also Summers v. City of McCall*, 84 F. Supp. 3d 1126, 1159 (D. Idaho 2015). Whether a defendant’s conduct is so extreme and outrageous as to permit recovery for intentional infliction of emotional distress is a matter of law for the court to decide. *Nation*, 144 Idaho at 192, 158 P.3d at 968; *but see Edmonson*, 139 Idaho at 180, 75 P.3d at 741 (court decides whether conduct is “so extreme and outrageous as to permit recovery” but where “reasonable men may differ, it is for the jury, subject to the control of the court” to determine whether “the conduct has been sufficiently extreme and outrageous to result in liability”) (quoting Restatement (Second) of Torts, § 46 comment h (1965)).

The requirements for negligent infliction of emotional distress are different than that required for a claim of intentional infliction of emotional distress. “Negligent infliction of emotional distress requires a showing of (1) a legally recognized duty; (2) a breach of that duty; (3) a causal connection between the defendant’s conduct and the breach; and, (4) actual loss or damage. *Bollinger v. Fall River Rural Elec. Co-op., Inc.*, 152 Idaho 632, 642, 272 P.3d 1263, 1273 (2012); *see also Newell v. Farm Bureau Mut. Ins. Co. of Idaho*, 2018 WL 1796531, at \*2 (D. Idaho Apr. 16, 2018). Additionally, the plaintiff must demonstrate physical manifestation of the alleged emotional injury.” *Wright v. Ada Cnty.*, 160 Idaho 491, 501, 376 P.3d 58, 68 (2016); *see also Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 219, 923 P.2d 456, 554 (1996) (stating, “[f]or a claim of negligent infliction of emotional distress to arise, there must be physical injury to the plaintiff.”); *Czaplicki v. Gooding Joint School Dist.* 231, 116 Idaho 326, 333, 775 P.2d 640, 647 (1989) (noting that “[i]t is beyond dispute that in Idaho no cause of action for negligent infliction of emotional distress will arise where there is no physical injury to the plaintiff.”).

“The ‘physical injury’ requirement is designed to provide some guarantee of the genuineness of the claim in the face of the danger that claims of mental harm will be falsified or imagined.” *Czaplicki*, 116 Idaho at 332, 775 P.2d at 647. Thus, “[w]here the defendant’s negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, and in the absence of some other independent basis for tort liability, the great majority of courts still hold that in the ordinary case there can be no recovery.” *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 836, 801 P.2d 37, 43 (1990) (quoting Prosser

and Keeton, *The Law of Torts* § 54, p. 361 (1984)); *see also Black County Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 177, 804 P.2d 900, 906 (1991) (allegation of humiliation and severe emotional distress insufficient allegations to support claim for negligent infliction of emotional distress); *Summers v. Western Idaho Potato Processing Co.*, 94 Idaho 1, 479 P.2d 292 (1970) (where plaintiff had her clothes ripped off in front of her co-workers, allegations of pain, suffering, mental anguish and nervous shock insufficient to state a claim of a physical manifestation for a claim of negligent infliction of emotional distress); *Herrera v. Conner*, 111 Idaho 1012, 1023, 729 P.2d 1075, 1085 (Ct. App. 1986) (allegations of mental pain and anguish, even “great mental pain and anguish” insufficient to state a claim for negligent infliction of emotional distress); *see also Newell*, 2018 WL 1796531, at \*2 (“Additionally, the plaintiff must demonstrate a physical manifestation of the alleged emotional injury”). The Idaho Supreme Court also held, in the instance of a young child that cannot verbalize physical manifestations of emotional distress, exposure to negligently inflicted violent contact coupled with emotional distress may allow recovery. *Carrillo v. Boise Tire Co.*, 152 Idaho 741, 750, 274 P.3d 1256, 1265 (2012).

However, Idaho courts have recognized that allegations of loss of sleep, headaches, and stomach pains are sufficient to prove an accompanying physical injury sufficient to assert a claim for negligent infliction of emotional distress. *Brown*, 118 Idaho at 837, 801 P.2d at 44. Likewise, in the case of *Czaplicki*, it was held that allegations of physical symptoms such as severe headaches, occasional suicidal thoughts, sleep disorders, reduced libido, fatigue, stomach pains and loss of appetite sufficient to withstand summary judgment on negligent infliction of emotional distress claim. *Czaplicki*, 116 Idaho at 333, 775 P.2d at 647. Further, for the non-verbal minor in *Carillo*, the Court held regressed development, becoming withdrawn, and nightmares supported recovery for negligent infliction of emotional distress. *Carrillo*, 152 Idaho at 750, 274 P.3d at 1265.

To the extent that alleged physical manifestations of emotional distress constitute medical conditions, expert testimony is required to establish causation. *Cook v. Skyline Corp.*, 135 Idaho 26, 34-35, 13 P.3d 857, 865-66 (2000).

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

Idaho’s Consumer Protection Act (“ICPA”) prohibits “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” I.C. § 48-603. While the ICPA enumerates and declares unlawful “certain unfair and deceptive acts or practices in the conduct of any trade or commerce,” I.C. § 48-603, it specifically excludes from its provisions any “unfair or deceptive acts or practices in the business of insurance” as defined in Idaho Code § 41-1301-1327. I.C. §48-605(3). *See also, e.g., Irwin Rogers Ins. Agency, Inc. v. Murphy*, 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992) (holding that § 48-603 prevented insured from maintaining consumer protection action against insurer even though allegations related to a promissory note entered into between insurer and insured and not conduct related to the insurance policy).

## VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

### A. Discoverability of Claims Files Generally

Idaho courts have not definitively addressed the discoverability of claims files generally. In *Cedillo*, the Idaho Supreme Court was presented with an appeal by an insured who claimed the trial court erred by denying the discovery of the entire claims file following an in camera review; however, the court refused to decide the issue because the insured failed to argue prejudice. See *Cedillo v. Farmers Ins. Co.*, 163 Idaho 131, 136, 408 P.3d 886, 891 (2017). The dissent, however, took the position that the insured was prejudiced and that she would have overcome the attorney-client and work product privileges that often preclude the discovery of the insurer's claims file. *Id.* at 140-142, 408 P.3d at 895-897 (C.J. Burdick, dissenting).

### B. Discoverability of Reserves

Idaho courts have not addressed this issue.

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

Idaho courts have not addressed the discoverability of the existence of reinsurance generally. However, in *General Fire & Cas. Co. v. Guy Carpenter & Co., Inc.*, 2007 WL 683793 (D. Idaho 2007), the United District Court for the District of Idaho ordered that the defendant insurer answer certain interrogatories and produce certain documents relating to reinsurance contracts where plaintiffs sought such information to “explore the relationships between the [plaintiff's reinsurers] and the [defendants] and/or its affiliates... in order to determine the existence of undisclosed incentives or other conflicts of interest which induced the defendant to steer the plaintiff's reinsurance business to such reinsurers in breach of the defendant's fiduciary duties to the plaintiff.” *Id.*

### D. Attorney/Client Communications

The attorney client privilege is contained within Idaho Rule of Evidence 502. Idaho courts have not addressed the application of the attorney client privilege in the context of communications between an insurer and its attorney other than an inference given in the case of *Vaught v. Dairyland Ins. Co.*, 131 Idaho 357, 956 P.2d 674 (1998) where it was found that the attorney client privilege had not been waived.

Worth noting, the Idaho State Bar issued Formal Ethics Opinion #136 which addressed an insurer's use of third party auditors to review billings. Idaho State Bar, *Formal Ethics Opinion #136* (Oct. 1, 1999) [https://isb.idaho.gov/wp-content/uploads/bc\\_fo\\_136.pdf](https://isb.idaho.gov/wp-content/uploads/bc_fo_136.pdf). The Bar noted, unlike other jurisdictions, Idaho courts have not addressed whether an insurer is the client of the

attorney. *Id.* at 3. Instead, the panel held “that the insured unquestionably is a client, owed undeniable duties under the *Idaho Rules of Professional Conduct*” including the duty of confidentiality. *Id.* (italics in original).

## VII. DEFENSES IN ACTIONS AGAINST INSURERS

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

Idaho Code § 41-1811 has codified the common law defense of fraud and misrepresentation in the insurance contract context and has limited its application. Idaho Code § 41-1811 describes the only circumstances in which a contract for insurance is voidable.

Idaho Code § 41-1811 provides:

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

(a) Fraudulent; or

(b) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or

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

A “[m]aterial misrepresentation permits the defrauded party to elect from three possible remedies: damages, rescission, or enforcement of the bargain against the fraudulent party according to the fraudulent party’s representation of the bargain.” *Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 181, 45 P.3d 829, 837 (2002). Idaho Code § 41-1811 does not abrogate the common law requirement that the party seeking rescission must tender back any consideration received under the contract. *Id.* An insurer is required to make a tender of premiums back to the insured within a reasonable time after it discovers the potential of a misrepresentation defense. *Id.* at 181, 45 P.3d at 837. Since the insurance company frames application questions, the insurance company must keep them free from misleading

interpretations and a consequence of its failure to do so is that all ambiguities in the insurance application will be construed against the insurer. *Wardle v. International Health & Life Ins. Co.*, 97 Idaho 668, 671, 551 P.2d 623, 626 (1976); *see also Keiser v. Am. Nat'l Ins. Co.*, No. 216CV00239EJLCWD, 2017 WL 2903343, at \*6 (D. Idaho Feb. 27, 2017), report and recommendation adopted, No. 216CV00239EJLCWD, 2017 WL 3000025 (D. Idaho Mar. 30, 2017) (discussing interpretation of insurance agreements). An ambiguous question in an insurance application is to be interpreted as an ordinary person standing in the position of the insured reasonably would have interpreted it. *Wardle*, 97 Idaho at 673, 551 P.2d at 628. An insurance applicant must act in good faith to truthfully answer direct questions on an insurance application that call for information within the applicant's knowledge. *Id.* at 672, 551 P.2d at 623.

#### **B. Failure to Comply with Conditions**

Idaho courts, while requiring strict compliance with conditions in insurance contracts, will not exact performance beyond their terms. *Therault v. California Ins. Co. of San Francisco*, 27 Idaho 476, 149 P. 719 (1915); *see also Bantz v. Bongard*, 124 Idaho 780, 786, 864 P.2d 618, 624 (1993) ("This Court has long held that only substantial compliance with a contractual notice provision is required.").

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

Idaho courts have ruled that consent-to-settle clauses are enforceable and are not void as against public policy and will even be enforced against a third party beneficiary of the policy. *See Bantz v. Bongard*, 124 Idaho 780, 785, 864 P.2d 618, 623 (1993). Violating a consent provision does not mean that the insurance coverage has been forfeited. *Id.* The insurer must prove that that it was materially prejudiced by the unauthorized settlement agreements entered into before the consent clause will be enforced. *Id.*

#### **D. Preexisting Illness or Disease Clauses**

Pursuant to Idaho Code § 41-5208(3)(a), a health insurance benefit plan shall not deny, exclude or limit benefits for a covered individual for covered expenses incurred more than twelve months following the effective date of the individual's coverage due to a preexisting condition. This permitted exclusion does not apply to persons who satisfy the portability requirements of Idaho Code § 41-5208(3)(b).

A health benefit plan shall not define a preexisting condition more restrictively than: (1) a condition that would have caused an ordinarily prudent person to seek medical advice, diagnosis, care or treatment during the six months immediately preceding the effective date of coverage; (2) a condition for which medical advice, diagnosis, care or treatment was recommended or received during the six months immediately preceding the effective date of coverage; or (3) a pregnancy preexisting on the effective date of coverage. I.C. § 41-5208(3)(a)(i)-(ii).

I.C. § 41-5208, last amended in 2005, has not been examined by Idaho courts or academics in light of the 2010 enactment of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (“ACA”). The ACA, inter alia, prohibits insurers from denying coverage to individuals due to preexisting conditions. *E.g.*, 45 C.F.R. § 147.108. Any analysis of coverage issues relating to pre-existing should take into account federal law.

#### **E. Statutes of Limitations and Repose**

Under Idaho law, a claim for breach of written contract must be commenced within five years. I.C. § 5-216. While there is no express holding by the Idaho Supreme Court on the issue, a claim for bad faith tort likely falls under the catch-all provision of the statute of limitations and as such must be commenced within four years of its accrual. *Id.* at § 5-224.

### **VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS**

#### **A. Trigger of Coverage**

In Idaho, the manifestation theory is often used as a trigger for insurance coverage. *Gravatt v. Regence Blueshield of Idaho*, 136 Idaho 899, 902, 42 P.3d 692, 695 (2002); *Shields v. Gardner*, 92 Idaho 423, 433, 444 P.2d 38, 48 (1968) (“liability . . . does not occur until or at the place of the manifestation of the defect, to the damage or injury of the user”).

#### **B. Allocation Among Insurers**

In *Aetna Cas. & Sur. Co. v. Mutual of Enumclaw Ins. Co.*, 121 Idaho 603, 826 P.2d 1315 (1992), the Idaho Supreme Court addressed the issue of a situation involving multiple insurers. Discussing issues related to contribution, the Supreme Court reaffirmed that “[t]he proper procedure for the insurer to take is to evaluate the claims and determine whether an arguable potential exists for a claim covered by the policy; if so, then the insurer must immediately step in and defend the suit.” When two or more insurers have a duty to defend, they must all share the costs of the defense equally, regardless of the actual limits in their respective policies. *General Sec. Indem. Co. of Arizona v. Great Northern Ins. Co.*, 2007 WL 845857 (D. Idaho 2007) (citing *Viani v. Aetna Ins. Co.*, 95 Idaho 22, 37 (1972) and *Aetna Cas. & Sur. Co. v. Mut. of Enumclaw Co.*, 121 Idaho 603, 605 (1992)). However, as discussed below, the duty to share costs of defense *equally* is not absolute.

### **IX. CONTRIBUTION ACTIONS**

When one insurer breaches the duty to defend and the other insurer pays all costs of defense, the defending insurer has a contribution claim against the other insurer for half of the costs and attorneys’ fees associated with the defense. *See Viani v. Aetna Ins. Co.*, 95 Idaho 22, 37, 501 P.2d 706, 721 (1972); *Aetna Cas. & Sur. Co. v. Mut. of Enumclaw Co.*, 121 Idaho 603, 605,



826 P.2d 1315, 1317 (1992). Where both defend, then there is no right of contribution even if their defense costs are unequal. *See Aetna Cas. & Sur. Co.*, 121 Idaho at 607, 826 P.2d at 1319 (“Both insurance companies, having fulfilled their duty to defend, although adopting different strategy and tactics, shall pay for their own defense costs”).

#### A. Claim in Equity vs. Statutory

A contribution plaintiff is entitled to contribution from a tortfeasor whose liability was extinguished by a settlement, either in main action or separate action. *See* I.C. §§ 6-803, 6-805, 6-806; *Horner v. Sani-Top, Inc.*, 143 Idaho 230, 235, 141 P.3d 1099, 1104 (2006). Contribution, however, may only be obtained among defendants who would have been liable to the original third party. *Hydraulic & Air Equip. Co. v. Mobil Oil Corp.*, 117 Idaho 130, 132, 785 P.2d 947, 949 (1989). Furthermore, “[a] release by the injured person of one (1) joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person’s damages recoverable against all the other tortfeasors. This [statute] shall apply only if the issue of proportionate fault is litigated between joint tortfeasors in the same action.” I.C. § 6-806.

#### B. Elements

In addition to the foregoing, Idaho courts have recognized that a cause of action for contribution is distinct from the underlying cause of action at issue, and, as such, a contribution cause of action accrues when an underlying claim, judgment, or settlement is paid or discharged. *Schiess v. Bates*, 107 Idaho 794, 796, 693 P.2d 440, 442 (1984).

#### X. DUTY TO SETTLE

Unlike the duty to defend, the duty to act in good faith exists at all times. “[E]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. . . . Such a duty is beyond that which the policy imposes by itself--the duty to defend, settle, and pay-- but is a duty imposed by law on an insurer to act fairly and in good faith in discharging its contractual responsibilities.” *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 96, 730 P.2d 1014, 1016 (1986). An insurer is under a duty to exercise good faith in considering offers of compromise an injured party’s claim against the insured for an amount within insured’s policy limits. *McKinley v. Guaranty National Ins. Co.*, 144 Idaho 247, 251, 159 P.3d 884, 888 (2007). Accordingly, Idaho courts recognize a tort cause of action against an insurer who unreasonably denies or delays the settlement of an insurance claim. *Reynolds v. American Hardware Mut. Ins. Co.*, 115 Idaho 362, 364, 766 P.2d 1243, 1245 (1988); *see also Harmon v. State Farm Mut. Auto. Ins. Co.*, 162 Idaho 94, 102, 394 P.3d 796, 804 (2017).

## XI. LH&D BENEFICIARY ISSUES

### A. Change of Beneficiary

The test in Idaho for determining whether there has been substantial compliance with the requirements to change the beneficiary of a death benefit plan or life insurance policy is whether there is evidence that the insured had determined to change beneficiary and that the insured had done everything to the best of his ability to effect such change. *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust*, 147 Idaho 117, 130, 206 P.3d 481, 494 (2009). Generally, the method of changing beneficiaries may be prescribed by the insurance policy, charter, or bylaws of the insurance company. *Noyes v. Noyes*, 106 Idaho 352, 356, 679 P.3d 152, 156 (Ct. App. 1984).

### B. Effect of Divorce on Beneficiary Designation

In Idaho, generally, when a husband names his wife as the beneficiary of his policy on his own life and thereafter they are divorced, but no change is made in the beneficiary, the mere fact of divorce does not affect the right of the named beneficiary to the proceeds of the policy. *Beneficial Life Ins. Co. v. Stoddard*, 95 Idaho 628, 629, 516 P.2d 187, 188 (1973). However, a beneficiary's interest in a life insurance policy "may be terminated by a property settlement agreement which may reasonably be construed as a relinquishment of the spouse's rights to the insurance." *Id.*; see also *Prudential Ins. Co. v. Cooper*, 666 F. Supp. 190, 191 (D. Idaho 1987).

## XII. INTERPLEADER ACTIONS

### A. Availability of Fee Recovery

Idaho Code § 5-321 provides that "[a] person possessing the property who" appropriately files an interpleader action may "request for allowance of his costs and reasonable attorney fees incurred in such action." In ordering the discharge of such party, the court may, in its discretion, award such party his costs and reasonable attorney fees from the amount in dispute which has been deposited with the court. *E.g., Egbert v. Idaho State Ins. Fund*, 125 Idaho 678, 682, 873 P.2d 1332, 1336 (1994). At the time of final judgment in the action, the court may make such further provision for assumption of such costs and attorney fees by one (1) or more of the adverse claimants. At the same time, the court may, in its discretion, award to the person determined to be entitled to the property his costs and reasonable attorneys' fees against an unsuccessful claimant if the claim asserted by said claimant was frivolous or without substantial merit. I.C. § 5-321.

Under federal law, it is within the discretion of the district court to award attorney fees and costs to a disinterested stakeholder in an interpleader action. *Abex Corp. v. Ski's Enters., Inc.*,

748 F.2d 513, 516 (9th Cir. 1984). Courts routinely grant such awards absent a showing of bad faith. *Schirmer Stevedoring Co. Ltd. v. Seaboard Stevedoring Corp.*, 306 F.2d 188, 194-95 (9th Cir. 1962). The stakeholder will typically be compensated out of the interpleader fund deposited in the court. *Massachusetts Mut. Life Ins. Co. v. Morris*, 61 F.2d 104, 105 (9th Cir. 1932). The amount of fees to be awarded in an interpleader action is committed to the sound discretion of the Court. *Trustees of Directors Guild of America-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 426 (9th Cir. 2000). Expenses typically include preparing the complaint, obtaining service of process, and preparing an order discharging the stakeholder from liability and dismissing it from the action. *Id.*

Some courts have awarded attorneys' fees to a plaintiff prevailing on an interpleader action. *See, e.g., Minnesota Life Ins. Co. v. Hoffman*, 2009 WL 10677903, at \*2 (D. Idaho Apr. 22, 2009) (granting insurer's motion for attorneys' fees in the amount of \$3,673.50); *Securian Life Ins. Co. v. Reddeck*, 2018 WL 4184332, at \*2-3 (W.D. Wash. Aug. 31, 2018) (ordering that plaintiff could deduct its fees and costs in the amount of \$8,780.79 from the original deposit amount prior to depositing the sum with the Clerk); *Metro. Life Ins. Co. v. Cline*, 2006 WL 8437874, at \*1-2 (E.D. Wash. May 2, 2006) (directing Clerk of the Court to disburse funds from this interpleader action in the amount of \$1,867.51).

Other courts, however, have declined to award attorneys' fees to insurance companies, because bringing an interpleader action is seen as simply the cost of doing business. *E.g., Metro. Life Ins. Co.*, 966 F. Supp.2d at 104 (collecting cases and denying attorneys' fees); *Transamerica Premier Life Ins. Co. v. Roldan*, 2015 WL 4878074, at \*2 (W.D. Wash. Aug. 14, 2015) (“[T]he Court will not transfer the ordinary costs of doing business to the claimants under a disputed policy simply because the insurer brought an interpleader action.”).

## **B. Differences in State vs. Federal**

There does not appear to be any differences between Idaho Rule of Civil Procedure 22 and Federal Rule of Civil Procedure 22.