

MONTANA

I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

Montana's claim handling practices are governed by the Montana Unfair Trade Practices Act (UTPA). Mont. Code Ann. § 33-18-101, et seq. Insurers must acknowledge and act promptly upon communications with respect to claims and promptly investigate claims. Mont. Code Ann. § 33-18-201 (2) and (3). Coverage must be affirmed or denied within a reasonable time after proof of loss statements have been completed. Mont. Code Ann. § 33-18-201 (5).

The UTPA requires insurers to pay or deny a claim within 30 days after receipt of a proof of loss unless the insurer makes a reasonable request for additional information in order to evaluate the claim. If the insurer requests additional documentation, then it must pay or deny the claim within 60 days of receiving the proof of loss or advise the insured of its reasons for not issuing payment. Mont. Code Ann. §33-18-232(1). Insurers must pay interest on claims over \$5 that were paid late under the statute; however, private actions are not permitted against an insurer solely for failure to strictly adhere to time limits. Mont. Code Ann. §§ 33-18-232 (2) and (3).

B. Standards for Determination and Settlements

The UTPA requires insurers, in good faith, to effectuate prompt, fair and equitable settlements of claims where liability is "reasonably clear." Mont. Code Ann. § 33-18-201(6). An insurer may not withhold payment where liability is reasonably clear under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage. Mont. Code Ann. § 33-18-201(13). An insurer must pay an injured third party's medical and other out-of-pocket expenses, including lost wages, in advance of a settlement to the extent liability is reasonably clear and it is also reasonably clear that the expenses are causally related to the accident. *Etter v. Safeco Ins. Co. of Illinois*, 192 F. Supp. 2d 1071, 1073 (D. Mont. 2002).

Liability is deemed reasonably clear, if a reasonable person, with knowledge of the relevant facts and law, would have concluded for good reason that one party is liable to another. *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187 ¶ 39, 239 P.3d 904, 915, 357 Mont. 293 (Mont. 2010). Essentially, the reasonably clear standard is comparable to the "clear and convincing evidence" standard. *Teeter v. Mid-Cent. Ins. Co.*, 2017 MT 292, ¶ 15, 389 Mont. 407,

411, 406 P.3d 464, 468. Under Montana law, if the defendant was 50% or more negligent, then the plaintiff is entitled to recover damages from the defendant, even if the plaintiff was partially negligent and this must be considered in determining an insurer's obligations in paying and settling claims. *Id.* See also Commissioner of Securities and Insurance Advisory Memorandum, *Asserting Comparative Negligence Without Adequate Factual Investigation*, December 13, 2019, <https://csimt.gov/laws-rules/advisory-memos/>.

The UTPA prohibits insurers from refusing to pay claims without conducting a reasonable investigation based on all available information Mont. Code Ann. § 33-18-201(4). An insurer may not compel an insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered if suit is filed. Mont. Code Ann. § 33-18-201 (7).

II. PRINCIPLES OF CONTRACT INTERPRETATION

In Montana, the interpretation of an insurance contract is a question of law. When a court reviews an insurance policy, it is bound to interpret its terms according to their usual, common sense meaning as viewed from the perspective of a reasonable consumer of insurance products. *Counterpoint, Inc. v. Essex Ins. Co.*, 967 P.2d 393, 395 (Mont. 1998). Exclusions from coverage are to be narrowly and strictly construed because they are contrary to the fundamental protective purpose of an insurance policy. *Swank Enters., Inc. v. All Purpose Servs., Ltd.*, 154 P.3d 52, 57 (Mont. 2007).

When an insurance policy is ambiguous, it is to be interpreted most strongly in favor of the insured, and any doubts as to coverage are to be resolved in favor of extending coverage for the insured. *Mitchell v. State Farm Ins. Co.*, 68 P.3d 703, 709 (Mont. 2003). An ambiguity exists where the insurance contract, taken as a whole, is reasonably subject to two different interpretations. *Park Place Apts., L.L.C. v. Farmers Union Mut. Ins. Co.*, 247 P.3d 236, 239 (Mont. 2010). Montana follows the "reasonable expectations doctrine," which provides that the "objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Fisher ex. rel. McCartney v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 208, 371 Mont. 147, 305 P.3d 861, 867 (Mont. 2013). The reasonable expectations doctrine is inapplicable when the terms of a policy are clear and explicit, and also inapplicable when the terms of the policy are ambiguous. *Id.*

III. CHOICE OF LAW

The Montana Supreme Court claims that, when faced with a choice-of-law conflict in contract disputes, they follow the "most significant relationship" approach contained in the *Restatement (Second) of Conflict of Laws* § 188 to determine the applicable state law. However, in fact, the Court has refused on a number of occasions to follow those rules where application of the law of the state chosen in the policy would be contrary to Montana public policy—

especially when an insurer has attempted to make a subrogation claim. *Youngblood v. American States Ins.*, 866 P.2d 203 (Mont. 1993); *Keystone v. Triad Systems, Inc.*, 971 P.2d 1240 (Mont. 1998); *Swanson v. Hartford Ins. Co.*, 46 P.3d 584 (Mont. 2002). The Court acknowledged the inconsistency in *Moodro v. Nationwide Mut. Fire Ins. Co.*, 191 P.3d 389 (Mont. 2008) and attempted to clarify its position by stating that it will not apply the law of the state chosen by the parties if three factors are met: (1) if, but for the choice-of-law provision, Montana law would apply under § 188 of the *Restatement*; (2) if Montana has a materially greater interest in the particular issue than the state chosen by the parties; and (3) if applying the state law chosen by the parties would contravene a fundamental policy of Montana.

The plaintiff must timely be put on notice that defendant intends to assert a choice of law defense, but where the issue should be inferred from the choice of law provision in the contract, it is not considered an affirmative defense for purposes of pleading. *Masters Grp. Int'l, Inc. v. Comerica Bank*, 352 P.3d 1101, 1111-12 (Mont. 2015).

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend

An insurer's duty to defend is determined by the language of the insurance policy, the terms of which are interpreted according to their usual common-sense meaning as viewed from the perspective of a reasonable consumer of insurance products. *Tidyman's Management Services Inc. v. Davis*, 330 P.3d 1139, 1149 (Mont. 2014); *Stutzman v. Safeco Ins. Co.*, 945 P.2d 32, 34 (Mont. 1997). Coverage is based upon the acts giving rise to the claim, not necessarily the language of the policy. *Brabeck v. Employers' Mut. Cas. Co.*, 16 P.3d 355, 357 (Mont. 2000). The duty to defend is independent from and broader than the duty to indemnify created by the same insurance contract. *Tidyman's*, 330 P.3d at 1149. An insurer's duty to defend is not excused by a co-insurer's defense of the insured. *J & C Moodie Props., Ltd. Liab. Co. v. Deck*, 2016 MT 301, 385 Mont. 382, 384 P.3d 466.

To determine whether an insured's obligation is "triggered," the court must liberally construe the allegations in the complaint, resolving all doubts about the meaning of the allegations in favor of finding the duty to defend was "triggered." *Grindheim v. Safeco Ins. Co.* 908 F. Supp. 794, 805 (D. Mont. 1995). "Where a complaint alleges facts that represent a risk outside the coverage of the policy but also avers facts which, if proved, represent a risk covered, the insurer is under a duty to defend." *Atcheson v. Safeco Insurance Co.*, 527 P.2d 549, 552 (Mont. 1974). Unless there exists an unequivocal demonstration that the claim against an insured does not fall within the insurance policy's coverage, an insurer has a duty to defend. *Tidyman's*, 330 P.3d at 1149. Further, if an insurer has knowledge of facts that could give rise to coverage but which are not apparent from the allegations of the complaint, the duty to defend is

triggered. *Revelation Industries, Inc. v. St. Paul Fire & Marine Ins. Co.*, 206 P.3d 919, 926 (Mont. 2009).

2. Issues with Reserving Rights

The Supreme Court has said that the way for an insurer to protect itself is to defend its insured under a reservation of rights and then seek a determination of rights through a declaratory action. *Farmers Mut. Ins. Co. v. Staples*, 90 P.3d 381, 386 (Mont. 2004). The reservation of rights must be specific and unambiguous with respect to the insurer's intention to reserve a particular defense and must inform the insured of all known policy defenses likely to be asserted. *Travelers Casualty & Surety Co. v. Ribl Immunochem Research, Inc.*, 108 P.3d 469, 480 (Mont. 2005).

An insurer has an obligation to inform the insured of all policy defenses it intends to rely upon. *Portal Pipe Line Co. v. Stonewall Ins. Co.*, 845 P.2d 746, 750 (Mont. 1993) (citing Mont Code Ann § 33-18-201(14)).

If an insurer, without a reservation of rights, assumes exclusive control of the defense, it cannot thereafter withdraw and deny liability under the policy on grounds of lack of coverage. Prejudice to the insured is exclusively presumed by the loss of the insured's right to control and manage the case. *Id.*

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

1. Criminal Sanctions

Montana's Insurance Information and Privacy Protection Act establishes standards for the collection, use, and disclosure of information gathered by insurance institutions in connection with insurance transactions and provides for privacy protections of medical and other records. Mont. Code Ann. §§ 33-19-101 through 33-19-410. Violations of HIPAA can result in both civil and criminal penalties. Montana law does not provide for criminal sanctions for either information handling or claims handling practices. However, claimants have a private right of action for violations of the Montana Insurance Information and Privacy Protection Act, as well as for violations of the Montana Unfair Trade Practices Act, and the Insurance Commissioner may bring an administrative action and impose civil penalties for violations. Mont. Code Ann. §§ 33-19-407 and 33-19-405 (MIIPPA), and §§ 33-18, 242, and 33-18-1003-1006 (MUTPA).

2. The Standards for Compensatory and Punitive Damages

Compensatory damages must be proven by reasonable certainty. MPJI 25.90 (citing Mont. Code Ann. § 27-1-203). Montana law does not set a definite standard by which to calculate compensation for mental and physical pain and suffering. However, jurors are

admonished to award an amount which is appropriate and reasonable. MPJI 25.01 (citing *Tynes v. Bankers Life Co.*, 730 P.2d 1115 (Mont. 1987); *Johnson v. Murray*, 656 P.2d 170 (Mont. 1982)).

All elements of a claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt. *Seltzer v. Morton*, 154 P.3d 561, 602 (Mont. 2007) (citing Mont. Code Ann. § 27-1-221(5)).

3. Insurance Regulations to Watch

Insurers should be aware of Montana's Unfair Trade Practices Act, which, among other things, provides an insurer has a duty to attempt in good faith to effectuate prompt, fair, and equitable settlements when liability is reasonably clear. Mont. Code Ann. § 33-18-203(6). Insurers are prohibited from failing to settle claims under one portion of the policy in order to influence settlements under other portions of the policy. Mont. Code Ann. § 33-18-203(13). Insurers are obligated to pay, in advance of settlement, reasonable and necessary expenses incurred by a claimant as a result of the accident when liability for those expenses is "reasonably clear." *Ridley v. Guaranty Nat. Ins. Co.*, 951 P.2d 987 (Mont. 1997); *Dubray v. Farmers Ins. Exchange*, 36 P.3d 897 (Mont. 2001). This obligation to pay "does not mean that an insurer is liable for all expenses submitted by an injured plaintiff unless liability for that expense is also reasonably clear." *Ridley v. Guaranty Nat. Ins. Co.*, 951 P.2d 987. When liability is reasonably clear, undisputed expenses must be paid up to the limits of coverage without the benefit of a settlement agreement. *Shilhanek v. D-2 Trucking*, 2003 MT 122, ¶ 22, 315 Mont. 519, 526, 70 P.3d 721, 725.

The UTPA provides insurers and adjusters may not:

- (1) misrepresent pertinent facts or insurance policy provisions relating to coverages at issue;
- (2) fail to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- (3) fail to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- (4) refuse to pay claims without conducting a reasonable investigation based upon all available information;
- (5) fail to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
- (6) neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;

(7) compel insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds;

(8) attempt to settle a claim for less than the amount to which a reasonable person would have believed the person was entitled by reference to written or printed advertising material accompanying or made part of an application;

(9) attempt to settle claims on the basis of an application that was altered without notice to or knowledge or consent of the insured;

(10) make claims payments to insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments are being made;

(11) make known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(12) delay the investigation or payment of claims by requiring an insured, claimant, or physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(13) fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

(14) fail 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.

Mont. Code Ann. § 33-18-201.

Advisory memos issued by the Commissioner of Securities and Insurance may be found at <https://csimt.gov/laws-rules/advisory-memos/>.

4. State Arbitration and Mediation Procedures

Montana has adopted the Uniform Arbitration Act. Mont. Code Ann. § 27-5-111, et. seq. However, Montana courts strictly construe arbitration agreements for compliance with state constitutional standards generally applicable to contracts. The Montana constitutional rights to full legal redress and jury trial are fundamental rights entitled to “the highest level of constitutional scrutiny and protection.” *Lenz v. FSC Securities Corp.*, 414 P.3d 1262, 1272 (Mont. 2018). A waiver of a fundamental Montana constitutional right is valid only if made knowingly, voluntarily, and intelligently under the totality of circumstances. *Park v. Montana 6th Jud.*

District Ct., 961 P.2d 1267 (Mont. 1998) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)). Further, Montana has adopted the “reasonable expectations doctrine,” which is a special, public policy-based rule requiring liberal construction of insurance policies in favor of coverage when the policy language is such that an ordinary, objectively reasonable person would fail to understand that the policy technically does not provide the coverage at issue, or where circumstances attributable to the insurer would cause an ordinary, objectively reasonable person to believe that the coverage exists. *Id.*

There are no laws that require mediation at the trial court level; although, the practice of most state district courts is to include a mediation requirement in their pre-trial scheduling orders. The Montana Supreme Court rules provide for mandatory appellate mediation in most cases including those involving a money judgment. See Rule 7, Mont. R. App. P.

5. State Administrative Entity Rule-Making Authority

The Insurance Commissioner has specific rule-making authority to adopt rules under the Montana Administrative Procedures Act necessary to implement the Unfair Trade Practices Act, which governs claims handling and insurer-claimant relations. Mont. Code Ann. § 33-18-235. The Montana Administrative Procedure Act requires public notice and comment prior to adoption of rules.

V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

1. First Party

Mont. Code Ann. § 33-18-242(3) actually prohibits an insured from suing their insurer for common law “bad faith” over the handling of an insurance claim; however, an insured who has suffered damage as a result of the handling of an insured claim is permitted under the statute to bring an action against an insurer for a number of improper practices including: breach of contract; fraud; misrepresentation of pertinent facts or policy provisions; refusal to pay claims without conducting a reasonable investigation based upon all reasonable information; failure to affirm or deny coverage within a reasonable time after proof of loss statements have been provided; failure to attempt in good faith to effectuate prompt, fair, and equitable settlements when liability is reasonably clear if an insurer attempts to settle claims on the basis of an application which was altered without notice to or consent of the insured; and failure to promptly settle claims if liability has become reasonably clear under one portion of an insurance policy in order to influence settlements under other portions of the policy. Mont. Code Ann. § 33-18-242 (read in conjunction with Mont. Code Ann. § 33-18-201(1), (4), (5), (6), (9), (13) (known as the Montana Unfair Trade Practices Act or “UPTA”).

It is not necessary for an insured to prove that the violations were of such frequency as to indicate a general business practice. Mont. Code Ann. § 33-18-242(2). An unfair trade practices claim, however, is considered a cause of action which is independent from the underlying claim. As a result, a defense verdict in an underlying negligence claim against the insured does not in itself preclude an action against the insurer for violation of the UTPA. *Graf v. Continental Western Ins. Co.*, 89 P.3d 22, 25 (Mont. 2004).

An insurer may not be held liable for unfair trade practices if the insurer had a reasonable basis in law or fact for contesting the amount of the claim, whichever is at issue. Mont. Code Ann. § 33-18-242(5).

A claim of misrepresentation under the UTPA is determined by an objective analysis of the substance of the representation at issue, without regard to whether it resulted from an intentional effort to mislead, carelessness, incompetence or anything else. *Lorang v. Fortis Insurance*, 192 P.3d 186, 212 (Mont. 2008).

2. Third-Party

A third party has the same causes of action under the UTPA as stated above, absent the breach of contract claim. Moreover, a third party is not limited to the exclusivity of the above remedies and, in addition to the above causes of action, can bring common law bad faith actions against an insurer over the handling of a claim. *Brewington v. Employers Fire Ins. Co.*, 992 P.2d 237, 240 (Mont. 1999). A party may allege and recover damages in a common law cause of action upon proof of a common law claim, but a party is not entitled to obtain private enforcement of a regulatory UTPA statute that is not specifically intended by the legislature to be enforceable by private parties. *Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 371 P.3d 446, 455 (Mont. 2016) (holding plaintiff had no UTPA claim for violation of Mont. Code Ann. §§ 33-18-208 or 33-18-212).

Third party bad faith actions against an insurer may not be brought until liability of the insured has been established in the underlying action. *Safeco Ins. Co. of Ill. v. Mont. Eighth Jud. Dist. Ct. Cascade County*, 2 P.3d 834, 838 (Mont. 2000).

An insurer is obligated to pay, in advance of a settlement and without release, all reasonable and quantifiable expenses, such as medical bills and lost wages, that are incurred as a result of the accident. *Dubray v. Farmers Ins. Exchange*, 36 P.3d 897, 900 (Mont. 2001). Failure to pay these expenses or predicating a payment on the claimant signing a release are grounds for bad faith. *Shilhanek v. D-2 Trucking, Inc.*, 70 P.3d 721, 725 (Mont. 2003). Further, nothing in the UTPA requires a general release of the insured or insurer as a condition of settlement. *Id.*, at 727.

B. Fraud and Negligent Misrepresentation

Montana law allows claims for actual or constructive fraud and for negligent misrepresentation. The elements for a claim of actual fraud are: (1) a representation of past or present fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance upon its truth; (8) the right of the hearer to rely upon it; and (9) the hearer's consequent and proximate injury or damage. *May v. ERA Landmark Real Est. of Bozeman*, 15 P.3d 1179, 1182 (Mont. 2000)

While actual fraud requires knowledge and intent on the part of the defendant, constructive fraud only requires knowledge. *Durbin v. Ross*, 916 P.2d 758, 762 (Mont. 1996); *Moschelle v. Hulse*, 622 P.2d 155, 158 (Mont. 1980). Constructive fraud depends on a legal duty to refrain from making misleading statements of fact or affirmatively correct false information, which may flow from fiduciary duties or special circumstances. Mont. Code Ann. § 28-2-406. The elements of constructive fraud are: a representation, the falsity of that representation; the materiality of that representation; the speaker's knowledge of that representation's falsity or ignorance of its truth; the hearer's ignorance of that representation's falsity; the hearer's reliance upon the truth of that representation; the hearer's right to rely upon that representation; and the hearer's consequent and proximate injury or damage caused by reliance on that representation. *Dewey v. Stringer*, 2014 MT 136, ¶ 9, 375 Mont. 176, 180, 325 P.3d 1236, 1240; *White v. Longley*, 2010 MT 254, ¶ 28, 358 Mont. 268, 244 P.3d 753.

The elements of the tort of negligent misrepresentation are:

- a) the defendant made a representation as to a past or existing material fact;
- b) the representation must have been untrue;
- c) regardless of its actual belief, the defendant must have made the representation without any reasonable ground for believing it to be true;
- d) the representation must have been made with the intent to induce the plaintiff to rely on it;
- e) the plaintiff must have been unaware of the falsity of the representation; it must have acted in reliance upon the truth of the representation and it must have been justified in relying upon the representation;
- f) the plaintiff, as a result of its reliance, must sustain damage.

Harpole v. Powell Cnty. Title Co., 2013 MT 257, ¶¶ 28-29, 371 Mont. 543, 550, 309 P.3d 34, 38-39; *Osterman v. Sears*, 2003 MT 327, ¶ 32, 318 Mont. 342, 80 P.3d 435.

C. Intentional or Negligent Infliction of Emotional Distress

An independent cause of action for negligent or intentional infliction of emotional distress may arise under circumstances where (1) serious or severe emotional distress of the plaintiff was (2) the reasonably foreseeable consequence of (3) the defendants' negligent or intentional act or omission. *Wages v. First Nat. Ins. Co. of Am.*, 79 P.3d 1095, 1098 (Mont. 2003). Montana has abolished the by-stander requirement. *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 429 (Mont. 1995).

Whether foreseeability exists is a function of such factors as "the closeness of the relationship between the plaintiff and victim, the age of the victim, and the severity of the injury of the victim, and any other factors bearing on the question." *Wages*, 79 P.3d at 1100. Although courts *may* consider whether the plaintiff was a bystander to the accident, it may not rely exclusively on the fact that a plaintiff was not a bystander to conclude that such a plaintiff is an unforeseeable plaintiff. *Id.*

D. State Consumer Protection Laws, Rules and Regulations

Montana's Unfair Trade Practices and Consumer Protection Act makes it unlawful to engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Mont. Code Ann § 30-14-103. Both state and private actions can be brought under the Act. See Mont. Code Ann. §§ 30-14-111 and -133. One may recover actual damages and treble damages and the prevailing party may also recover attorney's fees. Mont. Code Ann. § 30-14-133. However, insureds are not allowed to bring an action under this act against an insurer for the handling of a claim. See generally Mont. Code Ann. § 33-18-242(3).

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

The work-product doctrine applies from the time a claim file is opened because normally, claims files are commenced in anticipation of litigation and geared toward the eventuality of litigation. *Palmer by Diacon v. Farmers Ins. Exchange*, 861 P.2d 895, 909-10 (Mont. 1993) (quoting *Kuiper v. Dist. Court of Eighth Jud. Dist. of State of Mont.*, 632 P.2d 694, 701 (Mont. 1981)). However, in bad faith cases, the claims file does not enjoy protection from disclosure. *Diacon*. at 910. Ordinary work-product prepared in anticipation of litigation is discoverable "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.* (quoting Mont. R. Civ. P. 26(b)(3)). Opinion work product is discoverable when the mental impression is directly at issue in the case and the need for the material is compelling, meaning public policy and the administration of justice outweigh protecting the mental impressions of the opposing party's attorneys. *Id.* at 911 (quoting *Kuiper*, 632 P.2d at 701-02).

B. Discoverability of Reserves

There is no Montana case law specifically on the discoverability of reserves.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

There is no Montana case law specifically on the discoverability of reinsurance.

D. Attorney/Client Communications

Absent a voluntary waiver or an exception, the privilege applies to all communications from the client to the attorney and to all advice given to the client by the attorney in the course of the professional relationship. *Kuiper v. Dist. Ct of the Eighth Jud. Dist.*, 632 P.2d 694, 699 (Mont. 1981). Disclosure by defense counsel of detailed descriptions of professional services to third-party auditors without first obtaining the contemporaneous fully informed consent of insureds violates client confidentiality under the Rules of Professional Conduct. *In re the Rules of Professional Conduct*, 2000 MT 110, ¶ 78, 299 Mont. 321, 347, 2 P.3d 806, 822.

The courts recognize a limited exception in first party bad faith cases where a third-party claimant obtains a judgment in excess of policy limits and the insured later sues the insurer for the failure to settle within the policy limits. *Palmer by Diacon v. Farmers' Ins. Exch.*, 861 P.2d 895, 905 (Mont. 1993).

"The attorney-client privilege applies with equal force in 'bad faith' insurance litigation as in all other civil litigation," however the privilege does not apply when the insurer's attorney represents the interests of both the insured and the insurer. *Barnard Pipeline, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 13-07-BU-DLC, 2014 U.S. Dist. LEXIS 53778, at *7 (D. Mont. Apr. 17, 2014). "To the extent that an attorney acts as a claims adjuster, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney-client privilege does not apply." *Id.* Furthermore, to the extent that the insurer or its representative communicates non-confidential information to the attorney, i.e., basic facts that the insurer discovers pursuant to its statutory duty to investigate a claim, such information cannot be protected from discovery by a claim of attorney-client privilege. *Id.*

An insurer in a bad faith case waives the attorney-client privilege by relying on advice of counsel as a defense to a bad faith charge. *Id.* To waive the privilege, the party "must affirmatively raise the issue involving privileged communications." *Id.* (citing *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288, 295 (D. Mont. 1998)).

Certain information is protected under the work product doctrine if it is prepared in anticipation of litigation. *Id.* In the insurance context, materials prepared as part of the ordinary course of business in investigating a claim are not covered by the work product doctrine. *Id.*

However, “where a sufficient degree of adversity arises between the insurer and the insured,” the nature of the insurer’s investigation and other claim handling activity may “develop into an activity undertaken in anticipation of litigation.” *Id.*

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

Misrepresentations, omissions, concealment of facts, and incorrect statements made by an insured can prevent recovery if they were fraudulent, material to the acceptance of the risk or hazard assumed by the insurer, if the insurer in good faith would either not have issued the policy or issued it at a different rate or limit; or, if the true facts had been known, the insurer would not have issued coverage for the particular type of hazard that caused the loss. Mont. Code Ann. §33-15-403. If a misrepresentation is made, it must have been material to justify avoidance of coverage. *Williams v. Union Fid. Life Ins. Co.*, 123 P.3d 213, 220 (Mont. 2005).

Though misrepresentation may prevent coverage, an insurer, health service corporation, or health maintenance organization may not place an elimination rider on or rescind coverage provided by a disability policy, certificate, or subscriber contract after a policy, certificate, or contract has been issued unless the insured has made *a material misrepresentation or fraudulent misstatement* on the application or has failed to pay the premium when due. *Id.* (citing Mont. Code Ann. § 33-18-215).

B. Failure to Comply with Conditions

A notice of claim requirement in an insurance policy is a condition precedent to coverage and failure to comply may bar recovery under the policy. Factors include how far the claim has progressed and whether the insured’s failure to provide required notice and the resulting prejudice to the insurer was explained in the initial reservation of rights. *Newman v. Scottsdale Ins. Co.*, 2013 MT 125, ¶ 67, 370 Mont. 133, 151, 301 P.3d 348, 360

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

The Montana Supreme Court has held that when an insurer wrongfully refuses to defend its insured, “the insured is justified in taking steps to limit his or her personal liability,” including entering into a stipulated judgment with a covenant not to execute and an assignment of rights. *Abbey/Land, LLC v. Glacier Construction Partners, LLC*, 433 P.3d 1230, 1240 (Mont. 2019). The insurer becomes liable to the insured for the resulting defense costs, judgments, or settlements. *Id.* A stipulated judgment is presumptively enforceable as the measure of damages. *Id.* However, the Montana Supreme Court has recognized the opportunity for mischief in settlement negotiations where the insurer has declined involvement—which may be checked by judicial review of whether the settlement amount stipulated to is reasonable. *Id.* Thus, the

insurer will be bound by its insured's settlement and any resulting judgment so long as the settlement is reasonable and not the product of collusion. *Id.*

D. Preexisting Illness or Disease Clauses

Mont. Code Ann. § 33-22-246 provides as follows:

(1) Except as provided in subsection (2), a health insurance issuer offering individual health insurance coverage may not exclude coverage for a preexisting condition unless:

(a) Medical advice, diagnosis, care, or treatment was recommended to or received by the participant or beneficiary within the 3 years preceding the effective date of coverage; and

(b) Coverage for the condition is excluded for not more than 12 months.

(2) A health insurance issuer offering health insurance coverage may not impose a pre-existing condition exclusion on a federally defined eligible individual because of a preexisting condition.

Montana also has a guaranteed renewability of individual health insurance coverage statute. It provides health insurance coverage to an individual shall be renewable or continue the coverage in force at the option of the individual. Mont. Code Ann. § 33-22-247. Nonrenewable or discontinuance of health insurance is allowable only if the individual failed to pay premiums or committed fraud. Mont. Code Ann. § 33-22-247.

Montana follows the general rule of insurance contract interpretation when applying these clauses. "If the terms of an insurance policy are ambiguous, obscure or open to different constructions, the constructions most favorable to the insured or other Beneficiary must prevail, particularly if an ambiguous provision in the policy attempts to exclude the liability of an insurer." *Head v. Central Reserve Life of North America Ins. Co.*, 845 P.2d 735, 745 (Mont. 1993).

E. Statutes of Limitations and Repose

Written contract:	8 years	Mont. Code Ann. § 27-2-202(1)
Oral contract:	5 years	Mont. Code Ann. § 27-2-202(2)
Unfair Claims Practices Action by Insured against Insurer:	1 year	Mont. Code Ann. § 33-18-242

Common law bad faith:	3 years	Mont. Code Ann. § 27-2-202(3); <i>Brewington v. Employers Fire Ins. Co.</i> , 992 P.2d 237, 250 (Mont. 1999)
Fraud:	2 years	Mont. Code Ann. § 27-2-203

VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

A. Trigger of Coverage

If an insurer determines that the benefit trigger of a long-term care insurance policy has not been met, it must provide a clear written notice to the insured and the insured's authorized representative of the reasons for such determination, of internal appeal rights, and of the right to request an independent review after the internal review process is exhausted. Admin. R. Mont. 6.6.3130. Standards for certifying or approving entities that review long-term care insurance benefit trigger decisions are set forth in Admin. R. Mont. 6.6.3131.

B. Allocation Among Insurers

Where two policies that provide coverage are each declared excess, each insurer "is liable for a pro-rata share of the loss. The pro-rata share of each insurer is to be calculated on the basis of the ratio that the insurer's applicable policy bears to the total of all insurer's applicable limits." *Bill Atkin Volkswagen, Inc. v. McClafferty*, 689 P.2d 1237, 1242 (1984).

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

In Montana, the right of contribution is established by statute, while a non-contractual right to indemnity exists in equity. *State Farm Fire and Cas. Co. v. Bush Hog, LLC*, 219 P.3d 1249 (Mont. 2009); *Metro Aviation, Inc. v. United States*, 305 P.3d 832, 834-35 (Mont. 2013). Parties against whom recovery may be allowed have the right to seek contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of. *Id.*; Mont. Code Ann. § 27-1-703.

B. Elements

"[I]f the negligence of a party to an action is an issue, each party against whom recovery may be allowed . . . has the right of contribution from any other person whose negligence may have contributed . . . to the injury complained of." Mont. Code Ann. § 27-1-703. However, a defendant has no right to contribution from settled parties. *Id.*

A defendant may try to apportion liability to a settled party at trial but is required to notify the settled party and all other parties if it intends to do so. Mont. Code Ann. § 27-1-703(4) and (6). In practical terms, the statute requires a jury verdict form to list the plaintiffs if they were allegedly negligent, all defendants, all parties with whom the plaintiff has settled, and all parties released from liability. *Id.* The jury then determines the percentage of fault of each person or entity listed on the verdict form. *Id.* However, the trier of fact may not consider the negligence of parties who are immune from liability, parties who are not subject to the state's jurisdiction, and parties who could have been but were not named as third-party defendants when determining the percentage of fault. Mont. Code Ann. § 27-1-703(6)(c)(i)-(iii). The Montana Supreme Court has made clear that presentation of evidence regarding the alleged negligence of an unnamed defendant is prohibited and the jury may not consider the negligence of an unnamed party. *Truman v. Montana Eleventh Judicial Dist.*, 68 P.3d 654 (Mont. 2003).

X. DUTY TO SETTLE

An insurer has a duty to attempt in good faith to effectuate prompt, fair, and equitable settlements when liability is reasonably clear. Mont. Code Ann. § 33-18-201(6). Insurers are prohibited from failing to settle claims under one portion of the policy in order to influence settlements under other portions of the policy. Mont. Code Ann. § 33-18-201(13). Insurers are obligated to pay, in advance of settlement, reasonable and necessary expenses incurred by a claimant as a result of the accident when liability for those expenses is "reasonably clear." *Ridley v. Guaranty Nat. Ins. Co.*, 951 P.2d 987, 993 (Mont. 1997); *Dubray v. Farmers Ins. Exchange*, 36 P.3d 897, 900 (Mont. 2001).

XI. LH&D BENEFICIARY ISSUES

A. Change of Beneficiary

A contract of insurance is not subject to the Statute of Frauds. See Mont. Code Ann. § 28-2-903. As a result, there are no formal requisites for a change of beneficiary except as specified by the policy. The law provides, however, that "unless the insured makes an irrevocable designation of beneficiary, the right to change a beneficiary is reserved to insured." Mont. Code Ann. § 33-22-215.

B. Effect of Divorce on Beneficiary Designation

Montana law provides that a divorce decree, a prenuptial agreement, or a settlement agreement revokes any revocable beneficiary appointment. Mont. Code Ann. § 72-2-814(2)(a).

XII. INTERPLEADER ACTIONS

A. Availability of Fee Recovery

In Montana state court, a stakeholder, disinterested in the result, who interpleads money or property so that a court may decide the true owner is entitled to costs and reasonable attorney fees for the interpleader action. *Mutual of Omaha Insurance Company v. Walsh*, 395 F. Supp. 1219 (D. Mont. 1975). Such fees and costs may be charged against the stake to be distributed. *Rocky Mountain Elevator Co. v. Bammel*, 81 P.2d 673 (Mont. 1938). The Montana Supreme Court has declined to adopt an equitable rule generally providing for attorneys' fees in interpleader matters. *Nat'l Cas. Co. v. Am. Bankers Ins. Co.*, 19 P.3d 223, 227-28 (Mont. 2001). Where the party's claim for insurance proceeds was neither frivolous nor malicious, denial of interpleader fees is appropriate. *Id.*

B. Differences in State vs. Federal

Montana's interpleader rule as set forth in Mont. R. Civ. P. 22(a) is identical to Fed. R. Civ. P. 22. Montana's interpleader rule is an equitable remedial device that exists in order to avoid the unfairness that may result to some claimants who have competing claims to the interpleader res, but who lose the "race to judgment." *Associated Dermatology and Skin Cancer Clinic of Helena, P.C. Profit Sharing Plan and Tr. for Benefit of Stephen D. Behlmer, M.D. v. Fitte*, 388 P.3d 632, 636-38 (Mont. 2016).

Under 28 U.S.C. § 1335, an insurance company is permitted to file in the U.S. District Court a "civil action of interpleader" where it has issued an insurance policy or other instrument of value or amount of \$500 or more, but only if the following apply: (1) there are two or more claimants of diverse citizenship, as defined by subsection (a) and (d) of 28 U.S.C. § 1332, who are claiming or may claim to be entitled to money or benefits arising under a policy and (2) the Plaintiff had deposited such money or paid the value of the instrument into the registry of the court or given sufficient bond to secure a future judgment rendered by the court with respect to the amounts owed.

There is no interpleader statute in Montana comparable to 28 U.S.C. § 1335. Interpleader can be pursued under Mont. R. Civ. P. 22, which allows persons with claims that may expose a party to double or multiple liability to be joined as defendants through an interpleader, even though the claims of the several claimants may lack a common origin or are adverse and independent rather than identical. A plaintiff may initiate an interpleader by naming the interested parties as defendants. Defendants may seek interpleader through a cross-claim or counterclaim except that a defendant in a contract or property action may substitute as the defendant a person who is not a party and who demands the same debt or property at issue in the action. An interpleader by a defendant must be done before an answer is filed, with due notice to the person not a party and to the plaintiff, and with an affidavit stating that the non-party has made a demand for the same debt or property and is not colluding with the defendant. Once this occurs, the court has the discretion to order a defendant substituted under Rule 22 to either deposit into the court the amount of the debt at issue or deliver the property at issue or its value to such person as the court may direct. A defendant's deposit of debt or delivery of property under this rule discharges the defendant's liability to either the

plaintiff or the substitute defendant. With respect to smaller amounts, Mont. Code Ann. §§ 25-31-119 and 25-35-508 provide that an interpleader action can be maintained to determine the rights of rival claimants to a fund held by a disinterested party.