

## Mississippi

### REGULATORY LIMITS ON CLAIMS HANDLING

#### Timing for Responses and Determinations

With respect to accident, health and Medicare supplement insurance policies, Miss. Code Ann. § 83-9-5 establishes applicable time limits for submission and payment of claims. Examples: 30 days to provide written notice of claim to insurer (Miss. Code Ann. § 83-9-5(1)(e)); 25 days to pay benefits after receipt of written proof of loss in form of clean claim form submitted electronically or 35 days if submitted in paper format (Miss. Code Ann. § 83-9-5(1)(h)).

#### Standards for Determination and Settlements

The resolutions of claims involving minors and other incompetents is controlled by statute. Effective January 1, 2020, the Mississippi Guardianship and Conservatorship overhauled the prior statutory framework, providing needed clarity. Miss. Code Ann. § 93-20-101, et seq.

Again, Mississippi has no general unfair claims practices statute; therefore, the standards for determination and settlements, to the extent not specified by policy terms, are matters susceptible of ex post facto "regulation" by the courts. "Unreasonable" delay in payment has been held actionable by the Mississippi Supreme Court. See, e.g., *Caldwell v. ALFA Ins. Co.*, 686 So. 2d 1092 (Miss. 1996).

### PRINCIPLES OF CONTRACT INTERPRETATION

The interpretation of insurance policy language is a question of law. Generally, under Mississippi law, when the words of an insurance policy are plain and unambiguous, the court will afford them their plain, ordinary meaning, and will apply them as written. Ambiguous and unclear insurance policy language must be resolved in favor of the insured. Further, provisions that limit or exclude coverage are to be construed liberally in favor of the insured and most strongly against the insurer. *Lewis v. Allstate Ins. Co.*, 730 So. 2d 65, 68 (Miss. 1998); *Paul Revere Life Ins. Co. v. Prince*, 375 So. 2d 417, 418 (Miss. 1979).

### CONTRACT INTERPRETATION

#### Common Issues

1. **Faulty Workmanship as an "Occurrence"** [What is the state of the common law in your state on this subject?]

Following the decision of the Mississippi Supreme Court in *Architex*

*Ass'n, Inc. v. Scottsdale Ins. Co.*, 27 So. 3d 1148 (Miss. 2010), faulty workmanship can qualify as an "occurrence," and Mississippi courts generally find that insurers have a duty to defend claims of defective workmanship as arguably within coverage.

### 2. Does Your State Have an Anti-Indemnity Statute? [And if so, does it have any notable peculiarities?]

Yes. Agreements in public or private contracts for "construction, alteration, repair or maintenance of buildings, structures, highway bridges, viaducts, water, sewer or gas distribution systems, or other work dealing with construction" to indemnify or hold harmless another person from that person's own negligence are void as against public policy. Miss. Code Ann. § 31-5-41.

## CHOICE OF LAW

Choice of law analysis involves a multi-step process. First, it must be determined whether the conflicting laws are substantive or procedural. Regardless of the substantive law to be applied, Mississippi courts will apply their own procedural law. *Ford v. State Farm Ins. Co.*, 625 So. 2d 792, 793 (Miss. 1993). However, few laws are classified as procedural in Mississippi. In addition to the Mississippi Rules of Civil Procedure and Mississippi Rules of Evidence, Mississippi courts have only found the definition of "procedural" to include statutes of limitations, awards of attorney's fees and awards of pre-judgment interest. *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 960 (Miss. 1999). The Mississippi Supreme Court has held that contract construction is substantive. *Zurich Am. Ins. Co. v. Goodwin*, 920 So. 2d 427, 433 (Miss. 2006); *Boardman v. United Servs. Auto. Ass'n*, 470 So. 2d 1024, 1039 (Miss. 1985).

In determining which state's substantive law to apply, Mississippi relies on the "center of gravity" doctrine set forth in the Restatement (Second) of Conflict of Laws. The Mississippi Supreme Court has described the center of gravity doctrine as follows:

This doctrine is a rule whereby the court trying the action applies the law of the place which has the most significant relationship to the event and parties or which, because of the relationship or contact with the event and parties, has the greatest concern with the specific issues with respect to the liabilities and rights of the parties to the litigation.

*Mitchell v. Craft*, 211 So. 2d 509, 514-15 (Miss. 1968). Under Mississippi law, the court applies the factors set forth in the Restatement (Second) of Conflicts of Law in determining which state's law to apply, including the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract and the domicile, residence, nationality, place of incorporation and place of business of the parties. *Baites v. State Farm Mutual Auto Ins. Co.*, 733 So. 2d 320, 322-23 (Miss. Ct. App. 1998)

## DUTIES IMPOSED BY STATE LAW

### Duty to Defend

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

The duty to defend is broader than the duty to indemnify. *W.R. Berkley Corp. v. Rea's Country*

*Lane Constr.*, 140 So. 3d 437, 442 (Miss. Ct. App. 2013). An insurer is obligated to defend an insured not only when the suit is within the coverage afforded by the policy, but also when allegations of the suit state claims or facts that are potentially within the policy's coverage. All doubts as to the existence of a defense obligation are resolved in favor of the insured. *U.S. Fidelity & Guar. Co. v. B&B Oil Well Service, Inc.*, 910 F. Supp. 1172 (S.D. Miss. 1995). While the general rule is that the duty to defend hinges on the allegations of the complaint, there is an exception which imposes a duty to defend when the insurer has knowledge, or could obtain knowledge through reasonable investigation, of the existence of facts which trigger coverage. *American States Ins. Co. v. Natchez Steam Laundry*, 131 F. 3d 551 (5th Cir. 1998).

## 2. Issues with Reserving Rights

When an insurer agrees to provide a defense under a reservation of rights, "special obligations" are placed on the insurer and defense counsel hired by the insurer. Insurance defense counsel may only represent the insured on those claims which are clearly covered by the policy, and if the insurer reserves its rights as to any portions of the complaint, then the insured has a right to hire an attorney of his/her own choosing to defend those claims at the insurer's expense. If all claims are being defended under a reservation of rights, the insurer must permit the insured to retain his/her own attorney, whose fees the insurer must pay. *Moeller v. American Guar. and Liability Ins. Co.*, 707 So. 2d 1062 (Miss. 1996).

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

### 1. Criminal Sanctions

Mississippi's privacy regulations do not contain any criminal sanctions or penalties.

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

Compensatory damages must be proved by a preponderance of the evidence and are intended to make the plaintiff whole. *Richardson v. Canton Farm Equipment, Inc.*, 608 So.2d 1240 (Miss. 1992). Punitive damages awards are governed by Miss. Code Ann. § 11-1-65, which provides the criteria for punitive awards and sets caps tied to the defendant's net worth. In the insurance context, punitive damages are generally synonymous with bad faith, because as discussed below, one of the two bad faith prongs requires proof that the insurer committed a willful wrong or acted with reckless disregard for the insured's rights.

### 3. Insurance Regulations to Watch

Although not statutory, Mississippi's requirement of independent Moeller counsel where the insurer has reserved rights is a unique procedure that requires careful attention, as discussed below.

### 4. State Arbitration and Mediation Procedures

General guidelines governing the inclusion of binding arbitration provisions in insurance policies may be found at <https://www.mid.ms.gov/legal/pdf/arbitration-guidelines.pdf>.

Insurers are barred from including mandatory arbitration provisions in uninsured motorists policies.

Miss. Code Ann. § 83-11-109. Mississippi has no insurance statutes or rules governing mediation.

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

The Mississippi Insurance Department is the administrative entity vested with rule-making authority. The Commissioner is charged with execution of all laws relative to insurance companies, corporations, associations and fraternal orders, their agents and adjusters.

## EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

#### 3. First Party

To recover punitive damages on a cause of action for "bad faith" under Mississippi law, a plaintiff must prove the following elements by a preponderance of the evidence: (1) that the insurer lacked an arguable or legitimate basis for denying the claim; and (2) that the insurer committed a willful or malicious wrong, or acted with gross and reckless disregard for the insured's rights. *State Farm Mut. Auto. Ins. Co. v. Grimes*, 722 So. 2d 637, 641 (Miss. 1998); *Standard Life Ins. Co. v. Veal*, 354 So. 2d 239, 248 (Miss. 1977).

#### 4. Third-Party

Generally, the implied covenant of good faith and fair dealing runs only between the insurer and the insured, so a third party cannot sue for its breach based upon a refusal to settle claims. However, under certain circumstances, an insured may assign its bad faith rights to the third party, usually in exchange for a covenant not to execute on an excess judgment. *Kaplan v. Harco National Ins. Co.*, 716 So. 2d 673 (Miss. 1998).

## Fraud

To establish a cause of action for fraud or intentional misrepresentation under Mississippi law, a plaintiff must prove by clear and convincing evidence the following elements: (1) a representation; (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 on its truth; (8) the hearer's right to rely thereon; and (9) his/her consequent and proximate injury. *Levens v. Campbell*, 733 So. 2d 753, 761-62 (Miss. 1999); *Allen v. Mac Tools, Inc.*, 671 So. 2d 636, 642 (Miss. 1996); *Boling v. A-1 Detective Patrol Service, Inc.*, 659 So. 2d 586, 590 (Miss. 1995).

## Intentional or Negligent Infliction of Emotional Distress

To establish a cause of action for intentional infliction of emotional distress and/or outrage under Mississippi law, a plaintiff must prove that the defendant's conduct was malicious, intentional, willful, wanton, grossly careless, indifferent or reckless. *Adam v. U.S. Homecrafters, Inc.*, 744 So. 2d 736 (Miss. 1999).

## State Consumer Protection Laws, Rules and Regulations

Mississippi has no "unfair claims practices" statute. However, within Mississippi's insurance code, Miss. Code Ann. § 83-5-1, et seq., may be found its "unfair trade practices" prohibitions, § 83-5-33; the specific enumerated acts prohibited are found or alluded to at §§ 83-5-35 and 83-5-45, which statutes deal with unfair methods of competition or deceptive acts or practices both defined and "undefined"; the later prohibition may be constitutionally suspect.

Mississippi also has a general unfair trade practice act statute, Miss. Code Ann. § 75-24-5. It provides in pertinent part that "unfair methods of competition affecting commerce and unfair or deceptive trade practices in or affecting commerce are prohibited."

## DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

### Discoverability of Claims Files Generally

While there are no cited cases in Mississippi on this issue, claims files or parts thereof are often considered relevant and discoverable in suits against insurers. The claims files of other insureds may be discoverable if relevant to show other instances of misconduct. However, defense counsel will generally object to producing other claims files and put the burden on plaintiff to prove the need for the information.

### Discoverability of Reserves

Again, there are no cited cases in Mississippi on this issue, but reserve information may be considered relevant and discoverable in a bad faith suit to prove an insurer's awareness of facts triggering a duty to defend and/or that the insurer unreasonably exposed its insured to the risk of an excess judgment. However, defense counsel should generally object to such discovery and put the burden on plaintiff to prove the need for the information.

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

The existence of reinsurance is probably discoverable under a liberal reading of Miss. R. Civ. P. 26. The discovery of communications with reinsurers may be discoverable if shown to be relevant to the specific case at issue. However, defense counsel should object to the discovery of such information until plaintiff has shown a real need for it.

### Attorney/Client Communications

Where an insurer retains counsel to represent an insured, the insurer and insured are joint clients for purposes of the attorney-client privilege. Neither party may use the privilege as a shield in litigation between insurer and insured. Reliance on the advice of counsel defense results in a waiver of the attorney client and work product privileges only where it can be said that the defendant has voluntarily injected the issue into the case. *Buford v. Holladay*, 133 F.R.D. 487, 494-95 (S.D. Miss. 1990); *Ward v. Succession of Freeman*, 854 F. 2d 780, 788 (5th Cir. 1988). However, in *Travelers Property Casualty Company of America v. 100 Renaissance, LLC*, 308 So. 3d 847 (Miss. 2020), the Mississippi Supreme Court held that the attorney-client privilege did not apply where in-house counsel was the only individual with personal knowledge of the reason the claim was denied.

## DEFENSES IN ACTIONS AGAINST INSURERS

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

An insurance policy may be rescinded for a misstatement or concealment of a material fact in the application if the insurer establishes (1) that a false statement was made in the representation, and (2) that the false statement was material. *Wesley v. Union Nat. Life*, 919 F. Supp. 232, 234 (S.D. Miss. 1995); see also, Miss Code Ann. § 83-9-11. "A misrepresentation is regarded as material if it affects either (1) the acceptance of the risk or (2) the hazard assumed by the company." *Golden Rule Ins. Co. v. Hopkins*, 788 F. Supp. 295, 301 (S.D. Miss. 1991); *Mattox*, 693 F. Supp. at 214.

Moreover, "there is no requirement under Mississippi law that the actual cause of [loss] be related to risks concealed by an insurance applicant in order for the concealed facts to be material." *Wesley*, 919 F. Supp. at 234.

It is not entirely clear whether the materiality requirement is an objective or subjective standard. *Cf. Sanford v. Federated Guaranty Ins. Co.*, 522 So. 2d 214 (Miss. 1988) (applying subjective standard); *Imperium Ins. Co. v. Shelton & Assoc.*, 761 Fed. Appx. 412, 421 (5th Cir. 2019) (applying objective standard).

Finally, it has been held that an insurance agent's knowledge of the condition misrepresented by the insured is imputed to the insurer and, therefore, waives the right to rescind the policy. *Southern United Life Ins. Co. v. Caves*, 481 So. 2d 764, 767 (Miss. 1985).

### Failure to Comply with Conditions

When the insured breaches a condition precedent to recovery, the insurer need not demonstrate prejudice. *United States Fid. & Guar. Co. v. Wiggington*, 964 F.2d 487, 491 (5th Cir. 1991). Thus, where a policy makes notice of claim a condition precedent to recovery, the insurer may assert a defense of untimely notice without showing prejudice. *Bolivar County Bd. of Supervisors v. Forum Ins. Co.*, 779 F. 2d 1081, 1085 (5th Cir. 1986). Other defenses may also be available to insurers for failure to comply with conditions of the policy such as the cooperation clause and settlement clause.

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

Mississippi has no cases or statutes addressing this issue.

### Preexisting Illness or Disease Clauses

Miss. Code Ann. § 83-9-49 governs preexisting condition clauses in health and accident policies. This statute provides:

- Any group hospital, health or medical expense insurance policy, hospital or medical service contract,

health and accident insurance policy or any other insurance contract of this type which is delivered or issued for delivery in this state on or after January 1, 1994, shall not deny, exclude or limit benefits for a covered individual for losses due to a preexisting condition incurred more than twelve (12) months following the effective date of the individual's coverage. Any group policy, contract or plan subject to this section shall not contain a definition of a preexisting condition more restrictive than the following:

- A condition that would have caused an ordinary prudent person to seek medical advice, diagnosis, care or treatment during the six (6) months immediately preceding the effective date of coverage;
  - A condition for which medical advice, diagnosis, care or treatment was recommended or received during the six (6) months immediately preceding the effective date of coverage.
- Any individual hospital, health or medical expense insurance policy, hospital or medical service contract, health and accident insurance policy or any other insurance contract of this type which is delivered or issued for delivery in this state on or after January 1, 1994, shall not deny, exclude or limit benefits for a covered individual for losses due to a preexisting condition incurred more than twelve (12) months following the effective date of the individual's coverage. Any individual policy, contract or plan subject to this section shall not contain a definition of a preexisting condition more restrictive than the following:
    - A condition that would have caused an ordinary prudent person to seek medical advice, diagnosis, care or treatment during the twelve (12) months immediately preceding the effective date of coverage;
    - A condition for which medical advice, diagnosis, care or treatment was recommended or received during the twelve (12) months immediately preceding the effective date of coverage;
    - A pregnancy existing on the effective date of coverage.
  - This section shall not apply to hospital daily indemnity plans, specified disease only policies, or other limited, supplemental benefit insurance policies.

Mississippi courts have held that "the ailment or disease will ordinarily be deemed to exist when a distinct symptom, ailment or condition manifests itself from which a doctor can, with reasonable accuracy, diagnose the disease." *Thompson v. Commercial Ins. Co.*, 344 So. 2d 135, 137 (Miss. 1977) (quoting *Blue Cross and Blue Shield of Mississippi, Inc. v. Mosley*, 317 So. 2d 58, 61 (Miss. 1975)). The question as to whether or not the illness or disease is preexisting is normally a jury question. *Thompson*, 344 So. 2d at 137.

## Statutes of Limitations and Repose

Unless otherwise specified, a three-year statute of limitations applies to causes of action based upon contract or tort theories. See Miss. Code Ann. § 15-1-49. The three-year period does not begin to run until the alleged breach of contract occurs or the tort is discovered or should be discovered. *Id.*

## TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

### Trigger of Coverage

While there are few Mississippi cases addressing trigger theories, in *Essex Ins. Co. v. Massey Land & Timber, LLC*, 2006 U.S. Dist. LEXIS 36748, 2006 WL 1454767 (S.D. Miss. 2006), a declaratory judgment action involving



defective construction, the court predicted that the Mississippi Supreme Court would apply a "continuous trigger" theory, which "includes all times from exposure through progression to manifestation."

### Allocation Among Insurers

When competing insurance policies each contain conflicting "other insurance" clauses or "excess coverage" clauses, the clauses shall not be applied and the benefits under the policies shall instead be prorated according to the coverage limits of each policy. *Allstate Ins. Co. v. Chicago Ins. Co.*, 676 So. 2d 271 (Miss. 1996); *Titan Indem. Co. v. American Justice Ins. Reciprocal*, 758 So. 2d 1037 (Miss. App. 2000).

## CONTRIBUTION ACTIONS

### Claim in Equity vs. Statutory

Equitable contribution typically arises when more than one insurer provides coverage to the same insured and one insurer has paid more than its share of the loss. *Guidant Mut. Ins. Co. v. Indem. Ins. Co. of N. Am.*, 13 So. 3d 1270, 1280 (Miss. 2009); *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 255 So. 2d 667, 669 (Miss. 1971). Statutory contribution is available in those limited situations where a defendant is held to be jointly and severally liable with another defendant with whom he or she is found to have been acting in concert. Miss. Code Ann. § 85-5-7(4).

### Elements

To prevail on a claim of equitable contribution, an insurer must prove that it made payments when "it was legally liable to settle" and that the amount paid was "reasonable." "Legally liable to settle" has been interpreted to mean that an insurer must prove that it had a legal duty to settle, or at least a legal duty to consider the insured's best interest and to make an honest evaluation of a settlement offer within the policy limits. *Indem. Ins. Co. of N. Am. v. Guidant Mut. Ins. Co.*, 99 So. 3d 142, 151 (Miss. 2012). "The existence or nonexistence of a legal duty - such as the duty to settle - is a question of law to be decided by the court." *Id.* at 153; *Lyle v. Mladinich*, 584 So. 2d 397, 400 (Miss. 1991).

Miss. Code Ann. § 85-5-7 allows for the imposition of joint and several liability "on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it." Miss. Code Ann. § 85-5-7(4). However, this statute further provides that when a person is held jointly and severally liable, he or she "shall have a right of contribution from his fellow defendants acting in concert." *Id.*

## DUTY TO SETTLE

Insurers have a fiduciary duty to their insureds to "consider fairly the interests of the insured as well as [their] own" when faced with a settlement demand within the insured's policy limits. *Hartford Acc. & Indem. Co. v. Foster*, 528 So. 2d 255 (Miss. 1988). An insurer must place the interests of its insured above its own financial interests and can be exposed to tort liability (including bad faith) for refusing to settle within policy limits in the event of an adverse



judgment against the insured in excess of policy limits. Id.

## LH&D BENEFICIARY ISSUES

### Change of Beneficiary

Under Mississippi law, a change of beneficiary must generally be made in writing and in proper form. However, where this has not been done, "the courts will brush aside technicalities to give effect to the intention of the insured." *Mitchell v. United States*, 165 F. 2d 758, 761 (5th Cir. 1948). Regarding requested changes to a designated beneficiary, Mississippi follows the majority rule of courts that accept the "substantial compliance rule". *Bell v. Parker*, 563 So. 2d 594, 598 (Miss. 1990). "Under this rule, where an insured evidences an intent to change beneficiaries, and does all (s)he can do to comply with the requirements of the policy, substantial compliance will be found and the change of beneficiaries will be upheld." Id.

### Effect of Divorce on Beneficiary Designation

Divorce does not generally serve to revoke a designation of the former spouse as a beneficiary under a policy of insurance under Mississippi law. Generally, if a party wishes to change a beneficiary from a former spouse, then formal steps need to be taken to have the named beneficiary changed. However, "termination of marriage" clauses which are clear and unambiguous have been upheld. *Allgood v. Metropolitan Life Ins. Co.*, 543 F. Supp. 2d 591, 594 (S.D. Miss. 2008). Further, divorce decrees often require a spouse to maintain insurance with the former spouse named as the beneficiary.

## INTERPLEADER ACTIONS

### Availability of Fee Recovery

Rule 22 of the Mississippi Rules of Civil Procedure provides that "[p]ersons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability." However, attorney's fees are not recoverable by the plaintiff or stakeholder in interpleader actions.

### Differences in State vs. Federal

The Mississippi interpleader rule is patterned after and similar to the Federal interpleader rule. See Fed. R. Civ. P. 22.