

Statutes of Limitation

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Tort	Contract	Declaratory Judgment	Discovery Rule
3 Years; § 27-2-204, MCA	8 Years; §27-2-202, MCA	8 years from date of first claim for declaratory judgment actions based on insurance policies or other contracts; <i>Estate of Gleason v. Cent. United Life Ins. Co.</i> , 350 P.3d 349 (Mont. 2015); § 27-2-202, MCA; § 27-2-102, MCA	Yes, but only where the facts were concealed or the defendant took steps to prevent discovery or in cases of malpractice. §27-2-102(3), MCA

Duty to Defend

What is the standard for an insurer’s duty to defend? The allegations in the pleadings generally determine whether coverage exists under the insurance policy and the duty arises when the complaint alleges facts, which if proven, would result in coverage. *Tidyman’s Management Services Inc. v. Davis*, 2014 MT 205, ¶ 22, 376 Mont. 80, 330 P.3d 1139; *Stutzman v. Safeco Ins. Co.*, 945 P.2d 32, 34 (Mont. 1997); *Graber v. State Farm & Casualty Co.*, 797 P.2d 214, 217 (Mont. 1990); *Burns v. Universal Underwriters Ins. Co.*, 765 P.2d 712, 713 (Mont. 1988). 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*, ¶ 23. 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 also triggered. *Revelation Industries, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2009 MT 123, 350 Mont. 184, 206 P.3d 919.

May the insurer defend only certain claims? **No.** If coverage is triggered under any portion of the complaint, the insurer must defend against all claims. *State Farm Fire & Cas. Co. v. Schwan*, 2013 MT 216, ¶¶ 16-17, 371 Mont. 192, 308 P.3d 48.

Is the insured entitled to selection of defense counsel? **No.**

Time Limit Policy Limit Demands

State			
Montana	The Montana Supreme Court has held that an insurer does not act in bad faith in rejecting a policy limits settlement if it had a reasonable basis in law or fact to contest the claim or the amount of the claim. Six factors are considered to determine if a refusal to settle within limits constitutes		

	<p>common law bad faith: (1) whether, by reason of the severity of the plaintiff's injuries, any verdict is likely to be greatly in excess of the policy limits; (2) whether the facts in the case indicate that a defendant's verdict on the issue of liability is doubtful; (3) whether the [insurance] company has given due regard to the recommendations of its trial counsel; (4) whether the insured has been informed of all settlement demands and offers; (5) whether the insured has demanded that the insurer settle within the policy limits; (6) whether the company has given due consideration to any offer of contribution made by the insured.</p> <p><i>Redding v. Prosight Specialty Mgmt. Co.</i>, 90 F. Supp. 3d 1109, 1139 (D. Mont. 2015)</p>		
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Offers to Compromise/Offers of Judgment

State	Yes/No	Statute	Standard
Montana	Yes	Rule 68, Mont. R. Civ. P.	A waiver of attorney fees in a Rule 68 offer of judgment must be clear and unambiguous, but the offer itself need not include the words "attorney fees" to effect a waiver. <i>Mont. Fair Hous., Inc. v. Barnes</i> , 2002 MT 353, ¶ 18, 313 Mont. 409, 414, 61 P.3d 170, 173. Ambiguities are construed against the offeror. <i>Id.</i>

Automobile Minimum Financial Responsibility Requirements

State	Personal	Commercial
Montana	\$25,000/\$50,000 bodily injury; \$20,000 property. § 61-6-103(1)(b)	Same.

Allocation of Fault

Joint and Several Liability

Montana imposes joint and several liability only on parties who are determined to be more than 50% negligent, but requires the defendant to join any party to whom liability is attributed and the statute establishes a detailed procedure for the joinder process. Mont. Code Ann. § 27-1-703. The statute places the burden of establishing the negligence of third parties, and of proving the injury is divisible on the defendant. *Truman v. Montana Eleventh Judicial Dist.*, 315 Mont. 165, ¶ 33, 68 P.3d 654 (2003). If the injury is indivisible, the defendant is liable for all the damages. *Id.* at ¶ 32.

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. Mont. Code Ann. § 27-1-703(4), (6). 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.*, 315 Mont. 165, ¶¶ 22, 31, 68 P.3d 654 (2003).

Once the jury renders a verdict, a defendant has a right of contribution from other defendants, but has no right to contribution from settled parties. *Durden v. Hyrdro Flame Corp.*, 295 Mont. 318, ¶¶ 24, 26, 52, 983 P.2d 943 (2004). Moreover, the right of contribution is proportionate only to the percentage of fault attributable to the contributing party. *Id.* at ¶ 52.

Allocation of Fault

Comparative Fault

Montana is a comparative negligence state. Under Montana law, a plaintiff's contributory negligence is a defense to negligence, but it does not completely bar the plaintiff's recovery. *Peterson v. Eichhorn*, 344 Mont. 540, ¶ 31, 189 P.3d 615 (2008) (citing Mont. Code Ann. § 27-1-702). The law requires awards to be diminished in proportion to the percentage of negligence attributable to the person recovering so long as the plaintiff's negligence does not exceed 50 percent. *Id.*, *Payne v. Knutson*, 323 Mont. 165, ¶ 18, 99 P.3d 200 (2004) (holding it was not error to bar recovery and instruct the jury not to attribute fault to defendants where jury concluded plaintiff was 51 percent or more negligent).

Allocation of Fault

When contributory negligence is alleged, Montana allows presentation of a multiple-cause jury instruction. *Neal v. Nelson*, 347 Mont. 431, ¶ 32, 198 P.3d 819 (2008). 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. Mont. Code Ann. § 27-1-703(4), (6). 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.*, 315 Mont. 165, ¶¶ 22, 31, 68 P.3d 654 (2003).

Risk Transfer

In Montana a party may be indemnified for its own negligence but the terms of the indemnification agreement must "clear and unequivocal" to be enforceable." *United Nat'l Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 2009 MT 269, ¶ 24, 352 Mont. 105, 113, 214 P.3d 1260, 1267 (citing *Sweet v. Colborn Sch. Supply*, 196 Mont. 367, 369-70, 639 P.2d 521, 523 (1982)).

Bad Faith

First Party

Mont. Code Ann. § 33-18-242(3) prohibits an insured from suing their insurer for common law “bad faith” over the handling of an insurance claim. (2003). An insured who has suffered damage as a result of the handling of an insured claim, however, 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; and a 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; 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).

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. Cont. W. Insur. Co.*, 89 P.3d 65 (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. *Bartlett v. Allstate Ins. Co.*, 929 P.2d 227 (Mont. 1996). A claim of misrepresentation under the Fair Trade Practices Act 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 (Mont. 2008).

Third Party

A third party has the same causes of action 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 (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 (Mont. 2016) (holding plaintiff had UTPA claim for violation of §§ 33-18-208 or 33-18-212, MCA).

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 (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 ¶ 14-15 (Mont. 2001). Failure to pay these expenses, or predicating a payment on the claimant signing a release are grounds for bad faith. *Shilhanek*, 70 P.3d at 725. Further, nothing in the UTPA requires a general release of the insured or insurer as a condition of settlement. *Shilhanek*, 70 P.3d at 727.

It is not bad faith for an insurer to send an adjuster to represent the insured in a mediation instead of an attorney. *Farmers Ins. Exchange v. Johnson*, 224 P.3d. 613 (Mont. 2009).

Late Notice and Prejudice

State	Prejudice Required	Standard	Comments
Montana	Yes	Montana has adopted the notice-prejudice rule which allows an insurer to deny coverage based on a failure to comply with a policy notice provision only if the insurer can demonstrate that it was prejudiced by the late notice. <i>Estate of Gleason v. Cent. United Life Ins. Co.</i> , 2015 MT 140, ¶¶ 36-39, 379 Mont. 219, 229, 350 P.3d 349, 356	

Choice of Law

Montana Supreme Court has held 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 to determine the applicable state law, but 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.*, 262 Mont. 391 (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 their 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 (Mont. 2015).

Insurability of Punitive Damages

Punitive damages may be insured against in Montana. *Fitzgerald v. W. Fire Ins. Co.*, 209 Mont. 213, 217, 679 P.2d 790, 792 (1984)