

PROPERTY & CASUALTY
MONTANA

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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 through -1006. 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. Mont. Code Ann. § 33-18-232. 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. Insurers must acknowledge and act promptly upon communications with respect to claims. Mont. Code Ann. § 33-18-201(2). Insurers must pay interest on claims over \$5 that were paid late under the statute.

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). It was held in an automobile claim that this means that liability the accident must be reasonably clear and it is reasonably clear that the medical expenses are causally related to the accident. Etter v. Safeco Ins.Co. of Illinois, (2002) 192 F.Supp 2nd 1071. Insurers are prohibited from refusing to pay claims without conducting a reasonable investigation. The UTPA provides that 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.

To determine if liability is reasonably clear, you must decide whether 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., 239 P.3d 904, 915 (Mont. 2010). In doing so, you should take into account that, under Montana law, if the defendant was 50% or more negligent, then the

plaintiff would be entitled to recover damages from the defendant, even if the plaintiff was partially negligent. Id.

C. Privacy Protection (In addition to Federal Gramm-Leach-Bliley Act)

The Insurance Information and Privacy Protection Act (Mont. Code Ann. §33-19-201 through -409 (2003) establishes standards for the collection use, and disclosure of information gathered in connection with insurance transactions by insurance institutions. This act was passed in 1981 and is based on the model Act drafted by the National Association of Insurance Commissioners. The Act was amended in 2001 to provide privacy protection consistent with federal law.

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., 1998 MT 251, P 13, 291 Mont. 189, 967 P.2d 393. 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., 2007 MT 57, P 27, 336 Mont. 197, 154 P.3d 52.

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., 2003 MT 102, P 26, 315 Mont. 281, 68 P.3d 703. 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 (Mont. 2010).

III. CHOICE OF LAW

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 to determine the applicable state law, but 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., 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 in 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).

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 court is bound to interpret the terms of an insurance contract 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 (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, ¶¶ 21-24,

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 (Mont. 1995). "Where a complaint alleges facts which 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. (1974), 165 Mont. 239, 245-46, 527 P.2d 549, 552. 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. 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 (Mont. 2009).

2. Issues with Reserving Rights

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.

The Supreme Court has said that the way for 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, 321 Mont. 99 (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.2d 469 (Mont. 2005).

3. Problems with insurer controlling the defense

Montana severely limits the right of an insurance company to control the defense. In the case of In Re Rules of Professional Responsibility and Insured Billing Rules and Procedures, 299 Mont. 321 (2004), the Montana Supreme Court stated that an insured is the client of defense counsel appointed by the insurer, and not the insurer, and that the insurer may not do anything which may interfere with defense counsel's independent judgment. Thus, Billing guidelines that require prior approval of actions or otherwise restrict the scope of defense counsel's representation are considered a violation of the Rules of Professional Responsibility and thereby impermissible.

B. 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. § 33-18-203(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. 286 Mont. 325, 951 P.2d 987 (1997); Dubray v. Farmers Ins. Exchange, 2001 MT 251, 307 Mont. 134, 36 P.3d 897 ¶ 14-15. On the other hand, the court has acknowledged that 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. Id. Additionally, the Montana Supreme Court has held that a general release of the insurer or insured is not required by UTPA as a condition to settlement. Shilhanek v. D-2 Trucking, Inc., 2003 MT 122, 315 Mont. 519, 528, 70 P.3d 721, 727.

V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A. Bad Faith

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. (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).

2. 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).

3. Damages

In addition to recovering compensatory damages proximately caused by the insurer's conduct and punitive damages, an insured can also recover attorney's fees "when the insurer forces the insured to assume the burden of legal action to obtain the full benefit of the insurance contract. Mt. W. Farm Bureau Mut. Ins. Co. v. Brewer, 69 P.3d 652 (Mont. 2003). Generally, compensatory damages are a prerequisite to recovery of punitive damages for bad faith insurance practices. Estate of Gleason v. Cent. United Life Ins. Co., 350 P.3d 349 (Mont. 2015).

However, when an insurer is found to have violated the UTPA, breach of contract damages can constitute compensatory damages for purposes of determining eligibility for punitive damage relief. Rather, we hold that HN26 where an insurer has been found to have violated the UTPA due to delay or refusal to pay benefits in breach of the insurance contract, damages resulting from that violation may be considered compensatory damages under the UTPA for purposes of pursuing punitive damages. Id.

B. Fraud

Montana permits an action for actual or constructive fraud. The Montana Supreme Court has described the following elements for a claim of actual fraud: (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 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 (Mont. 2000)

Constructive fraud is defined by statute as follows:

28-2-406. What constitutes constructive fraud.
Constructive fraud consists of:
(1) any breach of duty which, without an

actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under him by misleading another to his prejudice or to the prejudice of anyone claiming under him; or
(2) any such act or omission as the law especially declares to be fraudulent, without respect to actual fraud.

While actual fraud requires knowledge and intent on the part of the defendant, constructive fraud only requires knowledge. Durbin, 916 P.2d at 762, Moschelle v. Hulse, 622 P.2d 155, 158 (Mont. 1980). Constructive fraud allows the court to hold a defendant liable and prevent him from being unjustly enriched where a false statement is made unknowingly or relevant facts are withheld from the other party. Durbin, 916 P.2d at 762.

C. Intentional or Negligent Infliction of Emotional Distress

An independent cause of action for negligent or intentional infliction of emotional distress arises under circumstances where "(1) serious or severe consequence of (3) the defendant's negligent or intentional act or omission." Wages v. First Nat. Ins. Co. of Am. 2003 MT 308. ¶ 11, 318 Mont. 232, 11, 79 P.3d 1095, 11 (quoting Sacco, 896 P.2d at 426, 428). Montana has abolished the by-stander requirement. Sacco v. High Country Indep. Press, Inc. (1995), 271 Mont. 209, 239, 896 P.2d 411, 429.

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. Moreover, the court *may* consider whether the plaintiff was a bystander to the accident. It may not, however, rely exclusively on the fact that a plaintiff was not a bystander to conclude that such a plaintiff is an unforeseeable plaintiff." Wages, 25.

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 (2003). Both state and private actions can be brought under the Act. See Mont. Code Ann. §§ 30-14-111 and -133 (2003). One may recover actual damages and treble damages and the prevailing party may also recover attorney's fees. Mont. Code Ann. § 30-14-133. Insured's 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).

E. State Class Actions

To certify a class action, the Plaintiff must prove the existence of all of the following six elements.

1. The class must be so numerous that joinder of all members

- Is impractical;
2. There must be questions of fact or law common to the class;
 3. The claims or defenses of the representative class parties must be typical of the claims or defenses of the proposed class;
 4. The representative parties must fairly and adequately protect the interests of the proposed class;
 5. The questions of law or fact common to the members of the class must predominate over questions of the individual members; and
 6. The class action must be superior to other methods of adjudicating the controversy.

McDonald v. Washington, 862 P.2d 1150 (Mont. 1993); Mont. R. Civ. P. 23(a)-(b)(3). In determining whether these elements are met, the court must perform a rigorous analysis based on sufficient information to for a reasonable judgment as to each element. Burton v. Mt. W. Farm Bureau Mut. Ins. Co., 214 F.R.D. 598, 608 (D. Mont. 2003) (citations omitted). The court must accept as true the substantive allegations of the class claim, and cannot examine the merits of the claim. Burton, 214 F.R.D. at 608 (citations omitted). Prudence and caution must be used in authorizing a class action. Murer v. Mont. State COmpt. Mut. Ins. Fund (1993), 257 Mont. 434, 849 P.2d 1036, 1038 (citing to the Advisory Committee's notes on Rule 23). A predominance of common questions over individual ones, however, is not required. Ferguson v. Safeco Ins. Co.of America, 342 Mont. 380, 180 P.2d 1164 (2008).

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

Generally, a claims file is discoverable; however, such discovery is subject to normal protections afforded by the work product doctrine and attorney-client privileges. Palmer by Diacon v. Farmers' Ins. Exch. 861 P.2d 895, 906 (Mont. 1993).

B. Discoverability of Reserves

No case law.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

No case law.

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. (1981), 193 Mont. 452, 461, 632 P.2d 694, 699. 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. (1993), 261 Mont. 91, 107, 861 P.2d 895, 905.

"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.

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. 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. DEFENSE IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting

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. §33-15-411 (2003).

B. Failure to Comply with Conditions

In Steadele v. Colony Ins. Co., 2011 MT 208, the Montana reaffirmed its previous holdings that a notice requirement in an insurance policy is a condition precedent and failure to comply will bar a recovery under the policy.

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

Montana follows the no prejudice rule, meaning that an insurer must show it will be prejudiced by the entry of judgment. Augustine v. Simonson (1997), 283 Mont. 259, 265, 940 P.2d 116, 119; Sorenson v. Farmers Ins. Exch. (1996), 279 Mont. 291, 295, 927 P.2d 1002, 1004 (holding that there was no prejudice to the insurer where the tortfeasor was judgment proof and, consequently, the insured's actions would not compromise the insurer's ability to subrogate).

D. Statutes of Limitation

Written contract:	8 years	Mont. Code Ann. § 27-2-202 (1) (2003)
Oral contract:	5 years	Mont. Code Ann. § 27-2-202 (2)(2003)
Unfair Claims Practices Action by Insured against Insurer:	1 year	Mont. Code Ann. § 33-18-242 (2003)
Common law bad faith:	3 years	Mont. Code Ann. § 27-2-202 (3)(2003)

Brewington v. Employers Fire Ins. Co. 1999 Mt 312, 24, 297 Mont. 243, 24, 992 P.2d at 236, 24

Fraud:	2 years	Mont. Code Ann. § 27-2-203 (2003)
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VIII. TRIGGER AND ALLOCATION FOR LONG-TAIL CLAIMS

A. Trigger of Coverage

No case law.

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 Volkswage, Inc. v. McClafferty (1984), 213 Mont. 99, 109, 689 P.2d 1237, 1242.

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

In Montana, the right of contribution is established by statute, while the 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 has been allowed have the right to obtain contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of. Id. "[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." Id. 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 its intent to do so. Mont. Code Ann. § 27-1-703(4), (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. 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., 68 P.3d 654 (Mont. 2003).