TENNESSEE PROPERTY & CASUALTY COMPENDIUM

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I. Regulatory Limits on Claims Handling

A. Timing for Responses and Determinations

Under Tenn. Code Ann. § 56-8-105, insurance companies must, inter alia: 1) Acknowledge and act reasonably and promptly upon communications with respect to claims arising under insurance policies and 2) either affirm or deny coverage within a reasonable amount of time after proof of loss statements have been filed. See Tenn. Code Ann § 56-9-105.

B. Standards for Determinations and Settlements

There are a number of acts that are prohibited by Tenn. Code Ann. § 56-8-105 relating to the standards for determinations and settlements. Included are the following:

1. Knowingly misrepresenting relevant facts or insurance policy provisions relating to coverages at issue;

2. Offering substantially less than the amounts ultimately recovered in actions brought by such insureds, provided that equal consideration is given to the relationship between the amounts claimed and the amounts ultimately recovered through litigation;

3. Attempting to settle a claim for less than the amount that a reasonable person would have believed such person was entitled by reference to written or printed advertising material accompanying or made part of an application;

4. Attempting to settle claims on the basis of an application that was altered without notice to, or knowledge or consent

of, the insured;

5. Making 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;

6. Delaying the investigation or payment of claims by requiring an insured, claimant, or the 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; provided, that nothing herein is intended to prevent or discourage an insurer from requiring a sworn proof of loss when in its judgment such is necessary in order to establish either the liability or amount to which a claimant is entitled;

7. Failing to promptly settle claims, where 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

8. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.

See Tenn. Code Ann. § 56-8-105.

The Commissioner of Insurance has sole enforcement authority for such violations, which means that a private right of action does not exist under this section. See Lindsey v. Allstate Ins. Co., 34 F. Supp. 2d 636 (W.D. Tenn. 1999). However, these regulations do not wholly foreclose the application of the Tennessee Consumer Protection Act pursuant to Tenn. Cod. Ann. § 56-8-113. § 56-8-113 limits the application of the Tennessee Consumer Protection Act against insurance companies only to those remedies available at common law, declaratory, injunctive, or equitable relief and rights to relief or sanctions allowed under Title 50 (Workers Compensation), Title 56 (Insurance). Riad v. Erie Ins. Exchange, see also 436 S.W.3d 256, 269 (Tenn. Ct. App. 2013); citing T.C.A. § 56-8-113.

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

Under Tenn. Code Ann. § 56-11-108, all information, documents and any copies of such either obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation is to be given confidential treatment. The information is not subject to subpoena and cannot be made public by the Commissioner of Insurance, the National Association of Insurance Commissioners, or any other person, except to insurance departments of other states, without the insurer's or health maintenance organization's prior written consent, unless the Commissioner, after providing notice and opportunity to be heard to the insurer or health maintenance organization and its affiliates that would be affected, determines that the interest of the policyholders, enrollees, providers, shareholders, or the public will be served by the publication, in which event, the Commissioner may publish all or a part of the material in the manner the commissioner deems appropriate. See Tenn. Code Ann. § 56-11-108(a).

D. Advance Payments Not Admission of Liability

By statute in Tennessee, any payments to or on behalf of any claimant in advance of trial shall not be construed as an admission of liability in any action brought to recover for personal injury or property damage. Tenn. Code Ann. § 56-7-131.

II. Principles of Contract Interpretation

A. General Rule

The interpretation of a contract is a question law, Guiliano v. Cleo, Inc., 995 S.W.2d 88, 95 (Tenn. 1999), and the cardinal rule of contractual interpretation is that the entire agreement is considered to ascertain and give effect to the intent of the parties. Maggart v. Almany Realtors, Inc., 259 S.W.3d 700, 703-04 (Tenn. 2008). The Court will initially determine the intent of the parties by examining the "plain and ordinary meaning of the written words that are contained within the four corners of the contract. Dick Broadcasting Co., Inc. of Tenn. v. Oak Ridge FM, Inc., 395 S.W.3d 653, 639 (Tenn. 2013). This factual inquiry is objective. Stonebridge Life Ins. Co. v. Horne, No. W2012—00515—COA—R3—CV, 2012 WL 5870386 (Tenn. Ct. App. Nov. 21, 2012). Where the language is clear and unambiguous then the literal meaning of the words controls and the interpretation will be one that gives reasonable meaning to all of the provisions without neutralizing their effect. Maggart, 259 S.W.3d at 704.

B. Ambiguous Language

Only after an ambiguity in the meaning of a contract or a provision therein is found does contract interpretation becomes a question of fact. Dick Broad., 395 S.W.3d at 659. An ambiguity exists where the contract or a provision therein is susceptible to more than one reasonable interpretation and its meaning is uncertain such that it may fairly be understood in more than one way. Maggart, 259 S.W.3d at 704. A contract or a provision therein is not ambiguous merely because

the parties differ as to their interpretations. Id. Moreover, the court will not use a strained construction of the contract to find an ambiguity where none exists. Id. Where an ambiguity is found a court may consider extrinsic evidence to ascertain the intent of the parties including "the circumstances or conditions surrounding the execution of the contract, the situation of the parties, the subject matter of the contract, and the object or purpose of the contract." Stonebridge, 2012 WL 5870386, at *8. However, when an ambiguity is found, a court may construe its meaning against the drafter of the contract. Kiser v. Wolfe , 353 S.W.3d 741, 748 (Tenn. 2011).

III. Choice of Law

A. Lex loc rule

Tennessee follows the lex loci contractus rule for claims based on a contract. Vantage Tech., LLC v. Cross, 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999). This rule presumes that the law of the jurisdiction where the contract was executed, absent a contrary intent, will govern. Id. This rule is based on the intent of the parties i.e. that the contract was executed with the intent to perform in the state of its execution. Gov't Emps. Ins. Co. v. Bloodworth, No. M2003-02986-COA-R10-CV, 2007 WL 1966022, at *26 (Tenn. Ct. App. Jun. 29, 2007). Tennessee will, therefore, apply the substantive law of the state in which the policy was executed where there is no enforceable choice of law clause in the contract to the contrary. Id. at *27. The purpose of this choice of law rule is that the location and jurisdiction of the risk the insurance contract covers will contribute to the terms and conditions of the policy. Id.

B. Exceptions

1. Parties to a contract can choose to be governed by the law of a state other than the state where the policy is executed or made. Solomon v. FloWarr Mgmt., Inc., 777 S.W.2d 701, 705 n.4 (Tenn. Ct. App. 1989).

2. Where the parties execute or make a contract in one state but it is agreed that the place of performance is to be in another state the law of the place of performance will govern. Id.

IV. Duties Imposed by State Law

A. Duty to Defend & Duty to Settle

1. Standard for Determining Duty to Defend

In Tennessee, like in many states, the duty to defend is more expansive than the general duty to indemnify. In fact, in the context of insurance law, the duty to defend is not affected by the facts of a case ascertained before, during, or after the suit. Tennessee employs what is known as the "pleading test." St. Paul Fire & Marine Ins. Co. v. Torpoco, 879 S.W.2d 831, 835 (Tenn. 1994). The court will only take into consideration the insurance

policy at issue and the allegations set forth in the pleadings in order to determine whether an insurer has a duty to defend an insured. If the allegations are within the risk insured against and the insured has demonstrated that there is a potential basis for recovery, then the insurer must defend regardless of the actual facts or the ultimate grounds on which the liability to the injured parties may be predicated. Id. If the underlying petition does not allege facts within the scope of coverage, the insurer has no duty to defend. Id. However, the pleading test is based exclusively on the facts as they are alleged in the pleadings rather than on the facts as they actually are. Id. Once coverage is found for any portion of a suit, an insurer must defend the entire suit. See Am. Indem. Co. v. Iron City Lumber & Pallet, Inc. , No. M2002-00650-COA-R3-CV, 2003 WL 724483 (Tenn. Ct. App., Mar. 4, 2003).

If there exists any dispute as to the meaning of a term/provision regarding what is covered in a contract, the court shall construe any ambiguity in favor of the insured, thereby triggering the insurance company's duty to defend. Id. Additionally, if the allegations in the pleadings are ambiguous and there is any doubt as to whether the pleadings sufficiently state a cause of action which would impose the insurer's duty to defend, the court shall construe any such ambiguity in favor of the insured. Gordon Constr., Inc., No. M1999-00785-COA-R3-CV, 2001 WL 513884 (Tenn. Ct. App. May 15, 2001).

2. Duty to Settle

An insurer having exclusive control over the investigation and settlement of a claim may be held liable by the insured for an amount in excess of the policy limits if, as a result of bad faith , it fails to effect settlement within the policy limits; and this may be true even though the injured party did not make an offer of settlement within the policy limits. However, in order to prevail in such a case, the insured must prove that the failure to settle within policy limits is "fraudulent or in bad faith." See Johnson v. Tennessee Farmers Mut. Inc. Co., 205 S.W.3d 365, 370 (Tenn. 2006); citing State Automobile Ins. Co. v. Rowland, 427 S.W.2d 30(1968).

"Bad faith" will be determined by consideration of the following factors: (1) That good faith required the Company to investigate the claim to such an extent that it would be in position to exercise an honest judgment as to whether the claim should be settled; (2) That the material question was not what the

actual facts were but what facts relative to the accident and injuries were known to the insurer and its agents 'which they should have considered in deciding whether it should or should not settle an action brought against the insurer as the reasonable thing to be done'; (3) That a mere mistake of judgment would not constitute bad faith; (4) That while the right of the insurer to control negotiations for settlement must be subordinated to the purpose of the contract to indemnify the insured to the limit of the policy, there must be bad faith with resulting injury to the policy holder before a cause of action accrues; (5) That if the insurer dealt fairly with the insured and acted honestly and according to its best judgment it would not be liable; (6) That it owed its insured no duty to settle merely because a settlement could be made within the limits of the policy. Stubblefield v. Tennessee Farmers Mut. Ins. Co., No. 01—A—019102CV00036, 1991 WL 117569 (Tenn. Ct. App. July 3, 1991) (other citations omitted).

"If the proof, in the light of all the relevant circumstances, and inferences to be drawn therefrom is such as to leave a reasonable basis for disagreement among reasonable minds, the question of good faith of the insurer in the handling of the claim and conducting compromise negotiations is for the jury." Id.

V. Extracontractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

1. First Party

The covenant of good faith and fair dealing is implied in all contracts in Tennessee. Tennessee recognizes the tort of bad faith in the insurance context. Brown v. St. Paul Fire & Marine Ins. Co., 604 S.W.2d 863 (Tenn. Ct. App. 1980) citing Carne v. Md. Casualty Company, 346 S.W.2d 259 (Tenn. 1961). However, Tennessee does not recognize the tort of bad faith for failure to pay a claim; instead, bad faith failure to pay a claim promptly is actionable under Tennessee Code Annotated § 56-7-105. Chandler v. Prudential Ins. Co., 715 S.W.2d 615 (Tenn. Ct. App. 1986). This statute provides an insured a right of action to recover a 25% penalty against an insurer for refusing to pay a claim in bad faith. Tenn. Code Ann. § 56-7-105. The relevant portions of this statute are as follows:

> (a) The insurance companies of this state, and foreign insurance companies and other persons or corporations doing an insurance or fidelity bonding business in this state, in

> all cases when a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy or fidelity bond on which the loss occurred, shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest thereon, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury including attorney fees upon the holder of the policy . ..

Tenn. Code Ann. § 56-7-105(a).

> However, prior to recovery under this section:
>
> (1) the policy of insurance must, by its terms, have become due and payable, (2) a formal demand for payment must have been made, (3) the insured must have waited 60 days after making his demand before filing suit (unless there was a refusal to pay prior to the expiration of the 60 days), and (4) the refusal to pay must not have been in good faith.

Palmer v. Nationwide Mut. Fire Ins. Co., 723 S.W.2d 124, 126 (Tenn . Ct. App. 1986).

Moreover, the plaintiff must prove the insurer's bad faith and the issue of whether the insurer acted in good faith is a fact question for the jury. See id.; Johnson v. Tennessee Farmers Mut. Ins. Co., 205 S.W.3d 365, 370 (Tenn. Ct. App. 2006). However, where there is evidence that the insured made no formal demand or failed to wait sixty (60) days after the formal demand was made before filing suit, the insured will not be entitled to the bad faith penalty. Hurley v. Tennessee Farmers Mut. Ins. Co., 922 S.W. 2d 887 (Tenn. Ct. App. 1995).

It is not bad faith for an insurer adjusting a first party claim to delay or refuse payment of disputed benefits where there exists "substantial legal grounds that the policy does not afford coverage for the alleged loss." Nelms v. Tenn. Farmers Mut. Ins. Co., 613 S.W.2d 481 (Tenn. Ct. App. 1978). Also, a finding of bad faith refusal to pay could expose an insurance company to punitive or treble damages, because Tenn. Code Ann. § 56-7-105 does not foreclose liability pursuant to the Tennessee Consumer Protection Act. See Lance v. Owner’s Ins. Co., 2016 Tenn. App. LEXIS 369 at * 38-41 (Tenn. Ct. App. May 25, 2016) appeal denied, @016 Tenn App.

LEXIS 762 (Tenn. Oct. 20, 2016); Riad v. Erie Ins. Exchange, 436 S .W.3d 256, 275-76 (Tenn. Ct. App. 2013).

2. Third Party

The implied covenant of good faith and fair dealing runs only between the insurer and the insured, so a third party cannot sue for breach based upon a refusal to settle claims for an excess judgment over the policy limits. Clark v. Hartford Accident and Indent. Co., 457 S.W.2d 35 (Tenn. Ct. App. 1970). However, a plaintiff's cause of action for bad faith may be assigned so long as it survives the test of "assignability." Carne v. Md. Cas. Co., 346 S.W.2d 259 (Tenn. 1961). In addition, an insured's cause of action based on an automobile carrier's bad faith in failing to settle a claim within the policy limits survives the death of the insured and passes to the insured's personal representative. Tenn. Code Ann. § 20-5-120(a).

3. Damages

Plaintiff's damages for bad faith failure to pay are limited to the amount of the loss, pre-judgment interest plus an additional penalty, not to exceed twenty-five percent (25%) of the loss suffered. Tenn. Code Ann. § 56-7-105. In suits brought for bad faith pursuant to tort law, the plaintiff is entitled to recover all damages proximately caused by the insurer's conduct, including punitive damages. Carne v. Md. Cas. Co., 346 S.W.2d 259 (Tenn. 1961).

B. Fraud

In order to maintain an action for fraudulent misrepresentation in Tennessee, a plaintiff must prove the following: (1) that the defendant made a representation of fact; (2) that the representation was false when made; (3) the representation was in regard to a material fact; (4) the representation was made either knowingly, recklessly, or without belief in its truth; (5) the plaintiff acted reasonable in relying on the misrepresented material fact; and (6) that plaintiff suffered damage as a result of the misrepresentation. See The Judds v. Pritchard, No. 01A01-9701-CV-00030, 1997 WL 589070 (Tenn. Ct. App. Sept. 24, 1997) (citing Metro. Gov't, of Nashville & Davidson Co. v. McKinney, 852 S.W. 2d 233 (Tenn. Ct. App. 1992)).

The two key elements necessary in succeeding on a claim for fraud against the insurer are (1) misrepresentation; and (2) reasonable reliance on the misrepresentation. Holt v. Am. Progressive

Life Ins. Co., 731 S.W.2d 923, 927 (Tenn. Ct. App. 1987) (other citations omitted).

C. Intentional or Negligent Inflection of Emotional Distress (IIED or NIED)

In Tennessee, to recover for a claim of intentional infliction of emotional distress, the plaintiff must show that he or she suffered severe emotional harm as a result of the extreme and outrageous, and intentional conduct of another. However, if the actor directed the conduct at a third party, he or she may be liable if he or she intentionally or recklessly causes severe emotional distress to (1) a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (2) to any other person who is present at the time, if such distress results in bodily harm. See Restatement (Second) of Torts § 46.

Conduct will be considered extreme and outrageous when it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and otherwise "shocks the conscience." Id.

Conduct is intentional or reckless where the actor desires to inflict severe emotional distress, or where he knows that such distress is certain, or substantially certain to result from his conduct. Id.

The Tennessee Supreme Court has established three primary elements necessary to succeed on a claim for intentional infliction of emotional distress: (1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct must result in serious mental injury to the plaintiff. Bain v. Wells, 936 S.W.2d 618 (Tenn. 1997). The plaintiff is not required to prove his emotional distress through expert testimony. Miller v. Willbanks, 8 S.W.3d 607 (Tenn. 1999).

To recover for a claim of negligent infliction of emotional distress, in additional to the five general elements of negligence, (l) duty, (2) breach of duty, (3) injury or loss, (4) causation in fact, and (5) proximate, or legal cause, the plaintiff must show that he or she suffered a "serious" or "severe" emotional injury. Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996) citing Kilpatrick v. Bryant, 868 S.W.2d 594 , 598 (Tenn. 1993); Bradshaw v. Daniel, 854 S.W.2d 865, 869 (Tenn. 1993)). Plaintiff is no longer required to show that he or she sustained a physical injury or suffers from physical manifestations of the injury. Camper, 915 S.W.2d at 446. However, for negligent infliction, the plaintiff must prove the serious mental injury by expert proof. Miller v . Willbanks, 8 S.W.3d 607, 614-615 (Tenn. 1999).

D. State Consumer Protection Laws, Rules and Regulations

A Tennessee statute limits the applicability of the Tennessee Consumer Protection Act on insurance providers. It provides:

> Notwithstanding any other law, title 50 and this title shall provide the sole and exclusive statutory remedies and sanctions applicable to an insurer, person, or entity licensed, permitted, or authorized to do business under this title for alleged breach of, or for alleged unfair or deceptive acts or practices in connection with, a contract of insurance as such term is defined in § 56-7-101(a). Nothing in this section shall be construed to eliminate or otherwise affect any:
> (1) Remedy, cause of action, right to relief or sanction available under common law;
> (2) Right to declaratory, injunctive or equitable relief, whether provided under title 29 or the Tennessee Rules of Civil Procedure; or
> (3) Statutory remedy, cause of action, right to relief or sanction referenced in title 50 or this title.

The import of this statute is that unless an alleged cause of action is a common law cause of action, seeks declaratory, injunctive or equitable relief, or rights to relief as sanctioned by Title 50 (Workers Compensation) and title 56 (Insurance), the Tennessee Consumer Protection Act is inapplicable. Riad v. Erie Ins. Exchange, 436 S.W.3d 256, 269 (Tenn. Ct. App. 2013).

VI. Discovery Issues in Actions Against Insurers

A. Discoverability of Claim Files Generally

This specific issue would be a case of first impression in the State of Tennessee. One could argue that claim files are not discoverable under standard objections (not reasonably calculated to lead to the discovery of admissible evidence). Moreover, objecting on grounds of attorney client privilege or work product may be appropriate if your client is the insurer. See Bongartz v. State Farm Fire & Cas. Co ., No. 93-5996, 1994 WL 315240 (6th Cir. June 29, 1994); see also Medic Ambulance Serv. Inc. v. McAdams, 392 S.W.2d 103, 110 (Tenn. 1965) (extending the work product doctrine to statements and reports made by the party's employee's or agents, where made in anticipation of, or preparation for, litigation).

B. Discoverability of Reserves

Again, no case in Tennessee is on point with this issue, except cases dealing with Federal Rule 26. However, an argument can be made that "loss reserves" are not reasonably calculated to lead to the discovery of admissible evidence. It could also be argued that it was prepared in anticipation of litigation.

C. Discoverability of Existence of Reinsurance and Communication with Reinsurers

Reinsurance agreements are discoverable under Rule 26 of the Federal Rules of Civil Procedure.

D. Attorney/Client Communications

The Supreme Court of Tennessee holds that there is no attorney client relationship formed between the insurer and the attorney they hire to represent the insured. Therefore, an insurer would not be able to afford themselves of the attorney client relationship when they are not the client. However, in cases where the insurance company is sued directly, the above would not be applicable. In re Petition of Youngblood, 895 S.W. 2d 322 (Tenn. 1995).

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

Under Tennessee law, in order to prove an action for fraudulent misrepresentation, the plaintiff must prove the following:

1. That defendants made a representation of fact;

2. That the representation was false;

3. The representation related to a material fact;

4. The representation was made either knowingly recklessly or without belief in its truth;

5. That plaintiff acted reasonably in relying on the representation; and

6. That plaintiff suffered damages as a result of the representation.

City State Bank v. Dean Ritter Reynolds, Inc., 948 S.W.2d 729, 738 (Tenn. Ct. App. 1996).

Tennessee Courts have held as a general rule that a party may also be held liable for damages caused by a failure to disclose material facts to the same extent the party would be liable for damages under fraudulent or negligent misrepresentation. Gray v. Boyle Inv. Co., 803 S .W.2d 678, 683 (Tenn. Ct. App. 1990). For an action to constitute fraud by concealment or suppression of the truth, the Courts have stated that there must be more proof than mere silence or a mere failure to disclose known facts. Instead, the Courts have stated that there must be concealment and that the silence must amount to fraud. Concealment may consist of withholding information asked for, or making use of some device to mislead, thus involving act and intention. Concealment generally infers that the defendant in some way was called upon to make a disclosure. As a result, the Courts have stated that in addition to a failure to disclose known facts, there must likewise be "some trick or contrivance intended to exclude suspicion and prevent inquiry, or else that there must be a legal or equitable duty resting on the party knowing such facts to disclose them." Benton v. Snyder, 825 S.W.2d 409, 414 (Tenn. 1992).

B. Failure to Comply with Conditions

In certain instances, an insurance company may avoid coverage if the insured fails to meet a condition precedent for coverage. For instance, in a UM coverage case, a policy may require the insured to provide suit papers "at once" to the insurance company. Under certain circumstances, the insurance company may avoid coverage if the insured fails to fulfill this condition. In Alcazar v. Hayes, 982 S.W.2d 845 (Tenn. 1998), the Tennessee Supreme Court stated the rule in such a case as follows:

> [O]nce it is determined that the insured has failed to provide timely notice in accordance with the insurance policy, it is presumed that the insurer has been prejudiced by the breach. The insured, however, may rebut this presumption by proffering competent evidence that the insurer was not prejudiced by the insured's delay.

Moreover, Tenn. Code Ann. § 56-7-103 provides that no written or oral misrepresentation by the insured will avoid coverage unless the misrepresentation was made with "actual intent to deceive, or unless the matter represented increases the risk of loss."

C. Statutes of Limitation

Most policies of insurance state a limitations period for filing a complaint against an insurance company for failure to pay a claim. Otherwise, a claim for breach of contract is subject to a six year limitations period. Tenn. Code Ann. § 28-3-109(a)(3). A claim for personal injury must be brought within one (1) year. Tenn. Code Ann. § 28-3-104(a)(1).

VIII. Trigger and Allocation Issues for Long-Tail Claims

A. Trigger of Coverage

Trigger of coverage and the law of allocation among insurers in a "long-term exposure" or long tail case is not well settled in a majority of states, Tennessee included. Rajesh Bagga and Paul Rose, The Law of Allocation — Who's Winning the Battle Anyway!, American Bar Association Section of Litigation, July/August 2002 at 1. The case of United States Fire Ins. Co. v. Vanderbilt University, et. al, suggests that Tennessee may be leaning toward adoption of the "all sums" approach, whereby continuous or progressive injuries or damages trigger the full extent of liability policy coverage if any part of the injury or damage occurs during the policy period; however, the court's ruling is inconclusive. 82 F. Supp.2d 788, 798 (M.D. Tenn. 2000).

B. Allocation Among Insurers

Tennessee has no clear rule for allocation of liability among multiple insurers in a long tail claim. However, as referenced above, in a long tail claim, under the "all sums" approach, insurers would be held liable to the full extent of liability policy coverage, regardless of whether the injury or damage only occurred during part of the coverage period. Id. at 798; Rajesh Bagga and Paul Rose, The Law of Allocation — Who's Winning the Battle Anyway!, American Bar Association Section of Litigation, July/August 2002 at 4.

IX. Contribution Actions

A. Claim in Equity vs. Statutory

The Tennessee Supreme Court in McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992), adopted the doctrine of comparative fault and simultaneously characterized the doctrine of joint and several liability as obsolete. However, the Court did not completely abolish joint and several liability. See Bervoets v. Harde Ralls Pontiac-Olds, Inc., 891 S.W.2d 905, 907 (Tenn. 1994). Since McIntyre, the Court has clarified the extent to which the doctrine remains applicable and determined that joint and several liability and the doctrine of contribution are still viable in certain limited circumstances in equity as follows:

1. Products liability cases in which strict liability is asserted against defendants in the chain of distribution. Owens v. Truckstops of Am., 915 S.W.2d 420 (Tenn. 1996).

2. Cases in which an injury is caused by multiple defendants who breached a common duty. Resolution Trust Corp. v. Block, 924 S.W.2d 354 (Tenn. 1996).

3. Cases in which an injury is caused by the concerted or collective action of the defendants. Gen. Elec. Co. v. Process Control Co., 969 S.W.2d 914 (Tenn. 1998).

4. Vicarious liability cases, involving liability under the family purpose doctrine, respondeat superior, or other circumstances presenting agency-type relationships between the active wrongdoer and the one who is vicariously responsible. Browder v. Morris, 975 S.W.2d 308 (Tenn. 1998); Camper v. Minor, 915 S.W.2d 437 (Tenn. 1996).

5. Cases in which a negligent defendant fails to prevent foreseeable intentional conduct. Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73 (Tenn. 2001) (applying joint and several liability when the harm arising from the tortious acts of an intentional tortfeasor was a foreseeable risk created by a negligent defendant , and all tortfeasors have been made a party to the suit).

6. Other "appropriate case[s]" in which "fairness demands." Process Control Co., 969 S.W.2d at 916 (citing Owens, 915 S.W.2d at 430 (allowing contribution when "fairness demands"); Bervoets, 891 S.W.2d at 907 (recognizing contribution in the "appropriate case")). Note, however, that this category is not a broad "catch-all" provision that defeats the fundamental concepts of comparative fault; it should only be applied in cases in which the failure to allow contribution would impose an injustice. Id.

Statutory contribution also exists and is codified in the Uniform Contribution among Tort-Feasors Act, Tenn. Code Ann. §§ 29-11-101 - 107. Under § 29-11-107(a), if multiple defendants are found liable in a civil action governed by comparative fault, a defendant shall only be severally liable for the percentage of damages for which fault is attributed to such defendant by the trier of fact, and no defendant shall be held jointly liable for any damages. However, notwithstanding subsection (a), joint and several liability remains in effect in the following circumstances set forth in subsection (b):

1. To apportion financial responsibility in a civil conspiracy among two (2) or more at-fault defendants who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish by concert a lawful purpose by unlawful means, which results in damage to the plaintiff; and

2. Among manufacturers only in a product liability action as defined in Tenn. Code Ann. § 29-28-102, but only if such action is based upon a theory of strict liability or breach of warranty.

Nothing in § 29-11-107 eliminates or affects the doctrines of vicarious liability or respondeat superior, or limits the ability of the trier of fact to allocate fault to a nonparty to the suit, including, but not limited to, an immune third party or settling party, person, or

entity. Tenn. Code Ann. § 29-11-107(c), (d).

In determining the proportionate share of the shared liability between two (2) or more tortfeasors for the same injury or wrongful death, for purposes of pursuit of contribution among tortfeasors, the reasonable amount of the settlement and the relative degree of fault of the tortfeasors and the injured party or parties in bringing about the injury or wrongful death shall be compared, and the party seeking contribution shall be entitled to recover only to the extent that the party has paid more than the proportionate share of the common liability , with the proportionate share to be determined solely by comparison of the relative degrees of fault of the parties. Tenn. Code Ann. § 29-11-103.

If equity requires, the collective liability of some as a group shall constitute a single proportionate share. Id. Principles of equity generally applicable to contribution shall apply. Id. The tortfeasor's total recovery is limited to the amount paid by the tortfeasor in excess of this proportionate share. Tenn. Code Ann. § 29-11-102. There is no right of contribution for an intentional tortfeasor; thus, a negligent tortfeasor may seek contribution from an intentional tortfeasor, but not vice versa. See id.

Whether or not judgment has been entered in an action against two (2) or more tortfeasors for the same injury or wrongful death, the right of contribution may be enforced by a separate action in either circuit or chancery court, to be tried according to the forms of chancery. Tenn . Code Ann. § 29-11-104. Where a judgment has been entered, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action. Id. If there has been a judgment, the statute of limitations for commencing an action to enforce a right of contribution must be brought within one (1) year after satisfaction of the judgment. Id.

B. Elements

The right of contribution exists when two (2) or more persons are jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, even though judgment has not been recovered against all or any of them. See Tenn. Code Ann. § 29-11-102. The right exists only in favor of a tortfeasor who has paid more than his proportionate share of the shared liability between two (2) or more tortfeasors for the same injury or wrongful death. Id.