CHART OF LIABILITY INSURER CONTRACTUAL BREACHES

> As a general matter, insurance carriers owe their insureds three [contractual] duties, two express and one implied. These are the duties to indemnify, the duty to defend, and the duty to treat settlement proposals with equal consideration. Any breach, actual or anticipatory, of these duties deprives the insured of the security that he has purchased because the breach leaves him exposed to personal judgment and damage which may not be covered or may exceed the policy limits. Accordingly, when such a breach occurs, the insured is generally held to be freed from his obligations under the cooperation clause.

Arizona Property and Cas. Ins. Guar. Fund v. Helme, 735 P.2d 451, 459 (Ariz. 1987) (citations omitted) (citing A. Windt, Insurance Claims and Disputes: Representation of Insurance Companies and Insureds §§ 3.10 to 3.11, at 97-99, § 4.01 to § 6.37, at 100-297 (1982)). Once an insurer breaches any duty to its insured, the insured is no longer fully bound by the cooperation clause. *Id*. (citing 7C J. APPLEMAN, supra § 4714; A. WINDT, supra § 3.10, at 97 and § 4.09, at 120). No other rule is sensible. The insured exposed by his insurer "to the sharp thrust of personal liability ... need not indulge in financial masochism...." Id. (citing Damron, 105 Ariz. at 153, 460 P.2d at 999, quoting Critz v. Farmers Insurance Group, 230 Cal.App.2d 788, 801, 41 Cal.Rptr. 401, 408 (1964).

#	Duty Breached	Standard for Triggering Duty	Relief Available to Insured	Permissible Defenses	Impermissible Defenses
1	**Duty to Defend**	Potential for Liability: anything less than an unequivocal demonstration that there is no possibility for covered liability. *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶¶ 22, 24.	Insured may confess or stipulate to judgment in exchange for a covenant not to execute. *Nielsen v. TIG Ins. Co.*, 442 F. Supp. 2d 972, 980 (D. Mont. 2006).	Duty Never Triggered: Insurer may prove that there was never any possibility of covered liability. *Schwan v. St. Farm Mut. Auto. Ins. Co.*, DV-10-049 at 10-12 (Oct. 5, 2012). Fraudulent Settlement. *Nielsen v. TIG Ins. Co.*, 442 F. Supp. 2d 972, 980 (D.	Settlement Violated Cooperation Clause: An insurer in breach of its defense obligations may not raise as a defense that the insured subsequently breached a cooperation duty. *Mora v. Phoenix Indem. Ins. Co.*, 996 P.2d 116, 120 (Ariz. App. 1999). "Reasonable Basis" or "Liability Not Reasonably Clear:" These

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				Mont. 2006). Rule 60(b)(3) should be the procedural mechanism.	are defenses to statutory violations. They are not defenses to breaches of contractual obligations. Intervention: Insurer loses right to intervene if it refuses to defend. See, e.g., *Mora v. Phoenix Indem. Ins. Co.*, 996 P.2d 116, 120-21 (Ariz. App.1999); *Manny v. Anderson's Estate*, 574 P.2d 36, 38 (Ariz. App. 1977); *Damron v. Sledge*, 460 P.2d 997, 1001 (Ariz. 1969). Reasonableness of Settlement: Where insurer breaches duty to defend, it "has no right to contest the stipulated damages on the basis of reasonableness, but rather may contest the settlement only for fraud or collusion" *Parking Concepts Inc. v. Tenney*, 83 P.3d 19, 22 n. 3 (Ariz. 2004). Only an insurer that has complied with its defense obligation is entitled to a reasonableness hearing. *Himes v. Safeway Ins. Co.*, 66 P.3d 74, 84 (Ariz. App. 2003) ("Safeway, by meeting its duty to defend, was entitled to a reasonableness hearing on the issue of damages in spite of the alleged failure to treat settlement offers with equal consideration").

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					Policy Limits: *Nielsen*, 442 F. Supp. 2d at 981; *Lee v. USAA Cas. Ins. Co.*, 2004 MT 54, ¶ 22, 320 Mont. 174, 86 P.3d 562.
2a	**Duty to Settle Within Limits** (Where Insurer Is Defending Under ROR)	Implied Covenant of Good Faith and Fair Dealing: Insured must take into account the interests of the insured and give him at least as much consideration as insurer gives to its own interests. *St. Farm Mut. Auto Ins. Cov. v. Brewer*, 406 F.2d 610, 612-13 (9th Cir. 1968). Showing of bad faith does not require proof of fraud, deceit, or conscious wrongdoing. Sufficient that insurer failed to give equal consideration to the interests of its insureds as it would give to its own interests. *Trujillo v. State Farm Mut. Auto. Ins. Co.*, 1992 WL 175910, 3 (9th Cir. 1992). Insurer has affirmative duty to explore settlement possibilities under circumstances in which it would have initiated settlement negotiations if its own potential liability was equal to that of the insured. *Gibbs v. St. Farm Mut. Ins. Co.*, 544 F.2d 423, 427 (9th	Settle Without Voiding Coverage: Cooperation clause will not prevent insured from settling. *Lozier v. Auto Owners Ins. Co.*, 951 F.2d 251, 256 (9th Cir. 1991). Faced with a breaching insurer, insured's counsel has ethical duty to agree to whatever settlement amount will obtain a covenant not to execute for his client. *Himes v. Safeway Ins. Co.*, 66 P.3d 74, 83 (Ariz. App. 2003).	No Coverage: Coverage defenses set forth in the ROR were meritorious, there was no coverage and therefore no duty to settle. Insurer Did Not Unreasonably Fail to Settle: Fact finder determines that insurer's failure to settle did not breach implied covenant, *i.e.*, that insurer's conduct was consistent with the choice it would have made had its own resources been at issue. No Notice: Settlement must be made fairly, with notice to the insurer, and without fraud or collusion on the insurer. *Lozier v. Auto Owners Ins. Co.*, 951 F.2d 251, 256 (9th Cir. 1991). Settlement Fraudulent, Collusive, or Against Public Policy: Insurer's breach narrows obligations under cooperation clause, permits insured to take reasonable	Policy Limits: Not a defense. *Lozier* at 256. "Reasonable Basis" or "Liability Not Reasonably Clear:" These are defenses to statutory violations. They are not defenses to breaches of contractual obligations. See *Gibbs v. St. Farm Mut. Ins. Co.*, 544 F.2d 423, 427 (9th Cir. 1976).

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		Cir. 1976); *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 667 P.2d 548, 550-51 (Or. 1983).		steps, among which is reasonable settlement with claimant. So long as that settlement is neither fraudulent, collusive, nor otherwise against public policy, insured has not breached cooperation clause. *Arizona Property and Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451, 460 (Ariz. 1987). Reasonableness: Claimant must show that the settlement was reasonable and prudent. *Lozier v. Auto Owners Ins. Co.*, 951 F.2d 251, 256 (9th Cir. 1991). Test is what a reasonably prudent person in insureds' position would have settled for on merits of claimant's case. *Lozier*, at 256. "Reasonably prudent person" is one with ability to pay from his own funds and who makes settlement decision as though he will do so. *Himes.*, 66 P.3d at 82. Intervention: Where an insurer has provided a defense and moved to intervene to participate in a damages determination, any judgment will be vacated	

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				that does not allow the insurer to intervene. *Himes v. Safeway Ins. Co.*, 205 66 P.3d 74, 86 (Ariz. App. 2003).	
2 b	**Duty to Settle Within Limits** (Insurer Defending and Does Not Dispute Indemnity Coverage)	Implied Covenant of Good Faith and Fair Dealing: Insurer must take into account the interests of the insured and give him at least as much consideration as insurer gives to its own interests. *Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 274-75, 682 P.2d 725, 730 (1984). Factors to consider include: 1) whether, given severity of plaintiff's injuries any verdict is likely to be greatly in excess of policy limits; 2) Whether facts indicate a defense verdict on liability is doubtful; 3) whether insurer gave due regard to recommendations of trial counsel; 4) whether insured was informed of all settlement demands and offers; 5) whether insured demanded insurer settle within limits; 6) whether insurer gave due consideration to any offer of contribution made by the insured. No one factor is decisive. *Thompson v. State Farm Mut. Auto. Ins. Co.*, 161 Mont. 207, 215, 505 P.2d 423,	Settle Without Voiding Coverage: Insured can settle without waiving limits or allow the case to proceed to verdict. Insurer liable for consequential damages that arise naturally from the breach and are such that may reasonably be supposed to have been contemplated by parties at time contract was made. This necessarily includes judgment or settlement in excess of policy limits imposed on an insured because of company's earlier breach of duty to settle. Windt, *Ins. Claims & Disputes* (2nd ed. 1988), § 5.11, at pp. 254-55; *Crisci v. Security Ins. Co.*, 426 P.2d 173 (Cal. 1967).	Reasonableness: Insurer liable for settlement to extent settlement is reasonable and in good faith. *Besel v. Viking Ins. Co. of Wisconsin*, 49 P.3d 887, 890 (Wash. 2002). Factors relevant to reasonableness are: the person's damages; merits of releasing person's liability theory; merits of released person's defense theory; released person's relative faults; risks & expenses of continued litigation; released person's ability to pay; any evidence of bad faith, collusion, or fraud; extent of releasing person's investigation & preparation of case; and interests of parties not being released. *Besel*, 49 P.3d at 891.	Policy Limits: Not a defense. *Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 274-75, 682 P.2d 725, 730 (1984); *St. Farm Mut. Auto Ins. Cov. v. Brewer*, 406 F.2d 610, 612 (9th Cir. 1968); *Besel v. Viking Ins. Co. of Wisconsin*, 49 P.3d 887, 890 (Wash. 2002). "Reasonable Basis" or "Liability Not Reasonably Clear:" These are defenses to statutory violations. They are not defenses to breaches of contractual obligations. No Malice: Malice on part of insurer not a necessary component to impose liability for bad faith refusal to settle. *Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 275-76, 682 P.2d 725, 731 (1984).

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		427-28 (1972)[1] (citing *Jessen v. O'Daniel* (D. Mont. 1962), 210 F. Supp. 317, 326-27).			

[1] Overruled on other grounds in Watters v. Guaranty Nat. Ins. Co., 2000 3 P.3d 626, 632, 300 Mont. 91.

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3a	**Duty to Indemnify** (Anticipatory Repudiation of Indemnity Obligations, But Insurer Is Providing a Defense) Occurs when party repudiates contractual duty before time for performance. Distinct from a denial of liability based on factual issues. Mont. Sup. Ct. has set a high bar for "positive statement" that qualifies as repudiation. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 104 (citing *Continental Casualty Co. v. Boerger*, 389 S.W.2d 255 568–69 (Tex. Ap. 1965) (anticipatory repudiation because insurer did not offer to reconsider its decision); *Group Life & Health Ins. v. Turner*, 620 S.W.2d 670, 673–74 (Tex. App. 1981) (anticipatory repudiation where insurer, after initially expressing willingness to reconsider, thereafter told claimant to quit calling because his file was closed).	Insurer complying with defense obligations, but erroneously disclaims indemnity coverage in a manner that rises to the level of an anticipatory breach of the insurance contract. *Arizona Property & Casualty Insurance Guaranty Fund v. Helme*, 735 P.2d 451, 459 (Ariz. 1987). Coverage provisions interpreted broadly to afford greatest possible protection to insured. Exclusions interpreted narrowly against the insurer. Burden on insured to establish claim is within coverage and on insurer to establish exclusion. *Manzarek v. St. Paul Fire & Marine Ins. Co.* 519 F.3d 1025, 1032 (9th Cir. 2008).	Settle Without Voiding Coverage: Insured can settle over insurer's objection without voiding coverage irrespective of any cooperation clause in the policy. *Arizona Property & Casualty Insurance Guaranty Fund v. Helme*, 735 P.2d 451 (Ariz. 1987) (anticipatory repudiation of duty to indemnify).	No Coverage: Insurer may prove that its denial of indemnity coverage was correct on the merits. Not an Anticipatory Repudiation: Insurer may succeed in arguing that it was not repudiating the contract but merely mistaken as to coverage and should be treated as having provided a defense under an ROR. Settlement Fraudulent, Collusive, or Against Public Policy: Entering into such a settlement would constitute a breach of the cooperation clause even though insurer had disclaimed coverage. *Arizona Property and Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451, 460 (Ariz. 1987). Policy Limits: *Grace v. Insurance Co. of North America*, 944 P.2d 460, 468, 944 P.2d at 468, n. 20 (insurer liable for reasonable settlement "within the coverage provided by the policy").	Settlement Violated Cooperation Clause: Insurer that erroneously disclaimed indemnity coverage may not argue that insured breached a cooperation clause by settling. "Reasonable Basis" or "Liability Not Reasonably Clear:" These are defenses to statutory violations. They are not defenses to breaches of contractual obligations.

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3 b	**Duty to Indemnify** (Defending Under Reservation of Rights)[2]	Coverage provisions interpreted broadly to afford greatest possible protection to insured. Exclusions interpreted narrowly against the insurer. Burden on insured to establish claim is within coverage and on insurer to establish exclusion. *Manzarek v. St. Paul Fire & Marine Ins. Co.* 519 F.3d 1025, 1032 (9th Cir. 2008). Apply the standard rules for insurance contract interpretation. *Schwann v. State Farm Mut. Auto. Ins.* Co., DV-10-049, at pp. 10-12 (Oct. 5, 2012).	Settle Without Voiding Coverage: Even absent actual breach of the insurance contract, insurer's reservation of rights leave insured in precarious position of having to satisfy uninsured judgment. Thus, where insurer defends but disputes coverage, courts permit insured to protect itself by settling claim without jeopardizing its right to whatever insurance coverage is subsequently adjudicated to exist. *Gates Formed Fibre Products Inc. v. Imperial Cas. & Indem. Co.*, 702 F. Supp. 343, 347 (D. Me. 1988). When insurer has raised doubts about availability of indemnity coverage, insureds cannot be compelled to forego a settlement offer that effectively relieves them of personal liability. *Miller v. Shugart*, 316 N.W.2d 729, 733-34 (Minn. 1982).	No Coverage: insurer may prove that the coverage defenses set forth in the ROR were meritorious. No Notice: Insurer must be given notice and an opportunity to participate. *Gates Formed Fibre Products Inc. v. Imperial Cas. and Indem. Co.*. 702 F. Supp. 343, 347 (D. Me. 1988). Settlement Fraudulent, Collusive, or Against Public Policy: Settlement must be reasonable, prudent, made fairly, with notice to insurer, and without fraud or collusion. *USAA v. Morris*, 154 Ariz. 113, 121, 741 P.2d 246, 252-53 (Ariz. 1987). Settlement Not Reasonable: If plaintiff cannot show entire amount of stipulated judgment was reasonable, he may recover only the portion that he proves was reasonable. *USAA v. Morris*, 741 P.2d at 254. Policy Limits. *Miller v. Shugart*, 316 NW2d 729 (Minn. 1982).	Settlement Violated Cooperation Clause: Insurer that erred in belief that it might have legitimate defenses to coverage cannot raise as a defense that insured breached a duty to cooperate by settling. "Reasonable Basis" or "Liability Not Reasonably Clear:" These are defenses to statutory violations. They are not defenses to breaches of contractual obligations.

[2] Insurer defending under ROR has not "abandoned" its insureds, but nor has it accepted full responsibility for the liability exposure, leaving its insureds in a precarious position. *USAA v. Morris*, 741 P.2d 246, 251 (Ariz. 1987). A majority of courts permit an insured to reject a defense offered under a reservation of rights and thereby force the insurer to elect between defend unconditionally or refusing to do so at its peril. *Id*.