COMMISSIONER OF SECURITIES & INSURANCE

MATTHEW M. ROSENDALE, SR.
COMMISSIONER

OFFICE OF THE MONTANA
STATE AUDITOR

ADVISORY MEMORANDUM

To: **ALL INTERESTED PERSONS**

From: **MATT M. ROSENDALE – Commissioner of Securities and Insurance, Montana State Auditor**

Date: December 13, 2019

ASSERTING COMPARATIVE NEGLIGENCE WITHOUT ADEQUATE FACTUAL INVESTIGATION

This Advisory Memorandum addresses insurers' obligations when asserting comparative negligence in adjusting and settling claims under Montana law. Montana is a modified comparative fault state, which means a plaintiff's negligence is only a bar to recovery if it exceeds the negligence of the defendant. If the plaintiff's negligence is less than 50%, he, she, or it may still recover subject to a reduction in damages proportionate to their own negligence.

This concept is embodied in § 27-1-702 which provides:

> **27-1-702. (Temporary) Comparative negligence — extent to which contributory negligence bars recovery in action for damages.** Contributory negligence does not bar recovery in an action by a person or the person's legal representative to recover damages for negligence resulting in death or injury to the person or property if the contributory negligence was not greater than the negligence of the person or the combined negligence of all persons against whom recovery is sought, but any damages allowed must be diminished in the proportion to the percentage of negligence attributable to the person recovering. (Terminates on occurrence of contingency—sec. 11(2), Ch. 429, L. 1997.)

(2017).[1]

[1] The referenced contingency has not occurred.

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When apportioning negligence to a claimant[2], insurers are reminded of their obligations under the Montana Unfair Trade Practices Act, Title 33, Chapter 18, *et seq.* Pursuant to the Act, before submitting an offer of compromise or denial of liability that includes an apportionment of negligence to the claimant, the insurer must first conduct a reasonable investigation of the facts and circumstances of the incident, and thoroughly document the findings of that investigation in the claim file. A broad statement that the claimant "failed to keep a proper lookout" or "failed to honk horn" is generally insufficient without an explanation of the finding, and how that activity could have prevented the incident.

The Montana Supreme Court has consistently held that

> Issues of comparative negligence are particularly difficult to resolve as a matter of law. *See Mead v. M.S.B., Inc.* (1994), 264 Mont. 465, 478, 872 P.2d 782, 790. Normally, the issue of contributory negligence and the degree of comparative negligence, if any, is an issue for the trier of fact to resolve, *even if the opposing party is negligent as a matter of law.*

Contreras v. Fitzgerald, 2002 MT 208, ¶ 25, 311 Mont. 257, 265, 54 P.3d 983, 987. Accordingly, a statement that the claimant violated a statute that could be considered negligence *per se* does not absolve the insurer of its obligation to investigate, document, and consider the facts surrounding the incident. This comports with the Supreme Court's guidance that comparative negligence cannot be asserted when there is "no evidence" that the claimant was negligent. *Edie v. Gray*, 2005 MT 224, ¶ 19, 328 Mont. 354, 359, 121 P.3d 516, 520 (explaining that, "even in negligence *per se* cases, the fact finder must apportion negligence," but that plaintiff is not negligent by failing to take "unusual precaution[s].")

Insurers must also promptly provide a "reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law" to the claimant if the insurer determines payment should be declined or reduced because of contributory negligence. Mont. Code Ann. § 33-18-201(14) (2017). Failing to inform a claimant of the facts uncovered and their application to contributory negligence principles could be grounds for regulatory action under the Unfair Trade Practices Act.

When the Commissioner receives a consumer complaint alleging inappropriate application of comparative negligence, insurers should be prepared to provide a detailed investigative file indicating the investigation conducted, the factual findings, and how those facts apply to the incident at issue. Proof that this analysis has been conveyed to the claimant, if appropriate, should also be provided. Failing to adopt reasonable standards to implement these requirements will be considered a violation of Mont. Code Ann. § 33-18-201(3).

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[2] Claimant is substituted for Plaintiff to make clear that these obligations apply both before and after suit is filed.