I. **Regulatory Limits on Claims Handling**

A. **Timing for Responses and Determinations**

A health insurance claim must be paid, denied or settled within 30 days after receipt by the carrier if submitted electronically, and within 45 days if submitted by other means. C.R.S. § 10-16-106.5(4)(a). A claim requiring additional information shall not be considered a “clean” claim. See C.R.S. § 10-16-106.3 (Uniform claims-billing codes-electronic claim forms) and Amended Insurance Regulation 4-2-24 (Concerning Clean Claim Requirements for Health Carriers). A “clean claim” means a claim for payment of health care expenses that is submitted to a carrier on the uniform claim form adopted pursuant to § 10-16-106.3 with all required fields completed with correct and complete information, including all required documents. If additional information is required to process the claim, the carrier must provide the insured with a complete written explanation of the information required including any additional medical or other information related to the claim within 30 days after receipt of the claim. C.R.S. § 10-16-106.5(4)(b); Amended Insurance Regulation 4-2-24.

The minimum standards, including time limits, for handling grievances involving utilization review determinations are set forth by Insurance Regulation. See Insurance Regulation 4-2-17, “Prompt Investigation of Health Claims Involving Utilization Review and Denial of Benefits.”

B. **Standards for Determinations and Settlements**

Under C.R.S. § 10-3-1115(1)(a), “[a] person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant.” Under C.R.S. § 10-3-1116(1)(a), “[a] first-party claimant as defined in section 10-3-1115 whose claim for payment of benefits has been unreasonably delayed or denied may bring an action in a district court to recover reasonable attorney fees and court costs and two times the covered benefit.” These statutory provisions are discussed further below in Section IV(A).

The claim handling standards of the Unfair Claims Practices Act, C.R.S. §§ 10-3-1101, *et seq.*, are applicable to claims made under health and life insurance policies. In addition, health insurance policies are subject to the Colorado Health Care Coverage Act, C.R.S. §§ 10-16-101, *et seq.*, as well as the
Colorado Consumer Protection Standards Act for the Operation of Managed Care Plans, C.R.S. §§ 10-16-701, et seq.

Provisions relating to viatical settlements, defined as “a written agreement establishing the terms under which compensation or anything of value is paid, which compensation or value is less than the expected death benefit of the policy, in return for the viator's assignment, transfer, sale, devise, or bequest of the death benefit or ownership of any portion of the policy,” C.R.S. § 10-7-602(13), are set forth in the Viatical Settlements Act. C.R.S. §§ 10-7-601 to 10-7-620.

C. State Privacy Laws, Rules, and Regulations

Amended Insurance Regulation 6-4-1 provides privacy protections of nonpublic personal financial and health information of persons who obtain products or services from insurance companies. Insurance Regulation 6-4-2 establishes standards for developing and implementing administrative, technical and physical safeguards to protect the security, confidentiality and integrity of customer information pursuant to Sections 501, 505(b), and 507 of the Gramm-Leach-Bliley Act, codified at 15 U.S.C. §§ 6801, 6805(b) and 6807.


Article II, Section 7 of the Colorado Constitution affords persons a reasonable expectation of privacy in their personal telephone toll records and banking transaction records. People v. Mason, 989 P.2d 757, 759 (Colo. 1999). Colorado law also prohibits wiretapping under C.R.S. § 18-9-303, and eavesdropping under C.R.S. § 18-9-304. Each Colorado governmental entity must create a privacy policy for the purpose of standardizing within such governmental entity the collection, storage, transfer, and use of personally identifiable information by such governmental entity. C.R.S. § 24-72-502(1).

Privacy of medical information pertaining to certain diseases and conditions is addressed to a certain extent by C.R.S. §§ 25-1-122 and 25-4-1405.5. Privacy laws concerning developmental disabilities are set forth in C.R.S. §§ 25.5-10-201, et seq. Privacy safeguards restricting the use or disclosure of information concerning applicants, recipients, and former and potential recipients of federally aided public assistance and welfare are addressed in C.R.S. § 26-1-114. See generally Lincoln v. Denver Post, 501 P.2d 152 (Colo. App. 1972). Privacy safeguards concerning child support are set forth in C.R.S. § 26-1-114, adoption in C.R.S. § 25-2-113.5, and abortion in C.R.S. § 25.5-3-106(4)(b). Privacy of student data is protected under C.R.S. § 22-1-123.

II. Principles of Contract Interpretation

A policy term is ambiguous where it is reasonably susceptible of more than one meaning. Thompson v. State Farm Fire & Cas. Co., 165 P.3d 900, 901 (Colo. App. 2007). “However, mere disagreement between the parties concerning the meaning of terms does not create an ambiguity.” Id. at 902. Ambiguous policy language will be construed in favor of coverage. Hecla Mining Co. v. N.H. Ins. Co., 811 P.2d 1083, 1090 (Colo. 1991).


Persons under 18 cannot enter into a legally binding contract. See, e.g., Jones v. Dressel, 623 P.2d 370, 372 n.3 (Colo. 1981) (quoting C.R.S. § 13-22-101(1)(a)). A petition may be made to the probate court to approve a settlement with a minor pursuant to Rule 16 of the Colorado Rules of Probate Procedure, to ensure that the minor is bound by the agreement.

III. Choice of Law

In Colorado, an insurance policy is a contract and is construed according to the law for the construction of contracts. State Farm Mut. Auto. Ins. Co. v. Mendiola, 865 P.2d 909, 912 (Colo. App. 1993). In the absence of an effective choice of law provision in a policy, a Colorado court will apply the most significant relationship test when determining which state’s law should govern an insurance policy dispute. Under that test, a court will consider the following factors: (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile or residence of the parties to determine which state bears the most significant relationship to the contract. Id. at 911.

IV. Extra Contractual Claims Against Insurers: Elements and Remedies

A. Bad Faith
Colorado recognizes the tort of bad faith breach of an insurance contract, which arises from an insurer’s implied duty of good faith and fair dealing to its insured. Farmers Group, Inc. v. Trimble, 691 P.2d 1138, 1141-42 (Colo. 1984). Evidence of intent, such as intentional misconduct, dishonesty, fraud, or concealment is not a prerequisite to an action for bad faith breach of insurance contract. Id. at 1142. Bad faith claims are not subject to the time limit for claims set forth in the insurance policy. Flickinger v. Ninth Dist. Prod. Credit Ass’n, 824 P.2d 19, 25 (Colo. App. 1991).


The duty of good faith and fair dealing has been applied not only to insurance companies, but also to self-insured companies. Scott Wetzel Serv., Inc. v. Johnson, 821 P.2d 804, 811 (Colo. 1991). This duty has even been applied to insurers in the absence of a contractual relationship with an insured. In Ballow v. PHICO Ins. Co., 875 P.2d 1354 (Colo. 1993), the Colorado Supreme Court completely undermined the existence of a contractual relationship between an insurer and insured as the theoretical underpinning of a bad faith claim. The Court held that an insurer owed a duty to act in good faith in the negotiation and renewal of insurance contracts.

After the Ballow case, the Colorado Supreme Court further expanded the scope of the duty of good faith and fair dealing to third-party administrators. Cary v. United of Omaha Life Ins. Co., 68 P.3d 462, 469 (Colo. 2003). In Cary, an insured employee and spouse brought an action against the self-insured employer, the administrator of the health insurance plan, and certain third-party administrators to recover for breach of contract and bad faith. The Colorado Supreme Court held that third-party administrators owed a duty of good faith and fair dealing to the insured in the investigation and servicing of the insurance claim. Id. at 469. The Court reasoned that the third-party administrators had this duty based on the fact that they were performing many of the tasks of an insurance company and they bore some of the financial risk of the loss for the claim.
Finally, bad faith breach of insurance claims may be brought in the context of workers’ compensation claims and are not barred by the Workmen’s Compensation Act. Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1271 (Colo. 1985).

1. First Party

In the direct or first party context (where an insured sues his or her own insurance company for acting in bad faith), a plaintiff “must establish that the insurer acted unreasonably and with knowledge of or reckless disregard for the fact that no reasonable basis existed for denying the claim.” Savio, 706 P.2d at 1274. The claimant bears the burden of establishing the insurer’s knowledge or reckless disregard of the fact that a valid claim was submitted. Pham v. State Farm Mut. Auto. Ins. Co., 70 P.3d 567, 572 (Colo. App. 2003).

In 2008, the General Assembly passed House Bill 1407, which creates a new cause of action allowing first-party claimants, who have first exhausted their administrative remedies, to bring an action for de novo review by the court if their claim for benefits was unreasonably delayed or denied. C.R.S. §§ 10-3-1115 and 10-3-1116. A first-party claimant, as defined in § 10-3-1115 (1)(b)(I), may now recover attorney fees, court costs and two times the covered benefit under § 10-3-1116. Pursuant to § 10-3-1116(5), if the court deems the claim frivolous, it must award costs and attorney fees to the defendant insurer. The legislation exempts workers’ compensation, life insurance, title insurance, and statutory child support enforcement from its provisions. C.R.S. § 10-3-1115.

This legislation also prohibits a health or disability insurance contract from giving the plan administrator sole discretion in determining eligibility for benefits. C.R.S. § 10-3-1116(2). In another potential area of exposure, C.R.S. § 10-3-105(4)(c) expands the definition of “restitution” to include costs and expenses for lost time from work and attorney fees. The remedies provided under C.R.S. §§ 10-3-1115 and 10-3-1116 are in addition to, and do not limit or affect, other actions available by statute or common law. However, any award recovered by the insured is not recoverable in any other action or claim.

C.R.S. § 10-3-1108 states the monetary penalties the Commissioner of Insurance can impose on insurance companies and agents for violations of law. Specifically, the Commissioner of Insurance may impose a penalty of $3,000 per act, not to exceed an aggregate penalty of $30,000. However, the Commissioner of Insurance may impose a penalty of $30,000 for acts a person knew or reasonably should have known were in violation of law, not to exceed an aggregate penalty of $750,000 annually. Also, if a health insurer fails to comply with the prompt payment laws, a penalty of twenty percent of the total amount ultimately allowed on the claim must be paid to the insured or health care provider. C.R.S. § 10-16-106.5(5)(b).

2. Third Party

In the third party context (where a third party makes a claim against the insured’s policy, and the insured alleges that its insurance company acted in bad faith), “[t]he question of whether an insurer has breached its duties of good faith and fair dealing with its insured is one of reasonableness under the circumstances. The relevant inquiry is whether the facts pleaded show the absence of any reasonable basis for denying the claim, ‘i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.’” Trimble, 691 P.2d at 1142 (quoting Anderson
However, this type of claim may be brought only by the insured and not by the injured third party, who has no contractual relationship with the insurance company. See Schnacker v. State Farm Mut. Auto. Ins. Co., 843 P.2d 102, 104-05 (Colo. App. 1992).

An insurer seeking to avoid its duty to defend an insured bears a heavy burden. Thompson v. Md. Cas. Co., 84 P.3d 496, 502 (Colo. 2004). An insurer’s duty to defend arises when the underlying complaint against the insurer alleges any facts that might fall within the coverage of the policy. Hecla Mining, 811 P.2d at 1089. A liability insurer’s duty to defend and its duty to indemnify are separate and distinct. Id. at 1086 n.5. Therefore, a bad faith claim for breach of each individual duty may accrue at different times. See Daugherty v. Allstate Ins. Co., 55 P.3d 224, 227 (Colo. App. 2002) (claim based on failure to defend accrues when insured is named in a complaint and is aware of insurer's refusal of coverage; claims based on liability insurer's failure to indemnify accrues when judgment enters against the insured).

The ultimate determination of a liability insurer’s duty to defend differs as between those insurers that provide a defense under a reservation of rights until completion of the underlying litigation and those that refuse to defend. See Cotter Corp. v. Am. Empire Surplus Lines Ins. Co., 90 P.3d 814, 827-28 (Colo. 2004). Whether an insurer ultimately has a duty to indemnify ordinarily presents a fact issue to be determined based upon evidence extrinsic to the complaint after the insured’s liability is fixed through trial or settlement. See Cyprus Amax Minerals, 74 P.3d at 301-02.

3. Damages


The insured must, as with all claims for punitive damages, establish the requisite circumstances of fraud, malice, or willful and wanton conduct before a claim for punitive damages may be properly submitted to the factfinder. Ballow, 878 P.2d at 682. Further, even if a plaintiff has established the requisite elements for recovery of punitive damages, a punitive damages award remains discretionary with the trier of fact. Id.; cf. Harvey v. Farmers Ins. Exch., 983 P.2d 34, 40 (Colo. App. 1998), aff’d on other grounds sub nom. Slack v. Farmers Ins. Exch., 5 P.3d 280 (Colo. 2000) (statutory language regarding enhancement of punitive damages, C.R.S. § 13-21-102(3), is permissive rather than mandatory and decision is entrusted to trial court’s sound discretion).

An insurer’s failure to conduct a reasonable investigation in its handling of a claim may be sufficient to support a punitive damages claim. See Giampapa
The insured must bear the cost of attorney fees incurred in bringing a common law bad faith breach of insurance contract action, but a prevailing insured need not bear the cost of any attorney fees in a statutory bad faith action under C.R.S. §§ 10-3-1115, -1116. See Bernhard v. Farmers Ins. Exch., 915 P.2d 1285, 1291 (Colo. 1996); cf. Estate of Casper v. Guar. Trust Life Ins. Co., 2016 COA 167, ¶¶ 49-54 (distinguishing Bernhard and C.R.S. §§ 10-3-1115, -1116). Again, under C.R.S. § 10-3-1116, a first-party claimant, as defined in C.R.S. § 10-3-1115(1)(b)(I), may recover attorney fees, court costs and two times the covered benefit. If the court deems the claim frivolous, though, it must award costs and attorney fees to the defendant insurer. C.R.S. § 10-3-1116. Notably, damages for bad faith breach of an insurance contract are not limited to the policy limits. Tait v. Hartford Underwriters Ins. Co., 49 P.3d 337, 341 (Colo. App. 2001).

In Goodson, 89 P.3d 409, the Colorado Supreme Court determined that a plaintiff can recover damages for emotional distress without proving substantial property loss or economic loss.

**B. Fraud**

"To establish a prima facie case of fraud, a plaintiff must present evidence that the defendant made a false representation of a material fact; that the party making the representation knew it was false; that the party to whom the representation was made did not know of the falsity; that the representation was made with the intent that it be acted upon; and that the representation resulted in damages." Brody v. Bock, 897 P.2d 769, 775-76 (Colo. 1995).

The term “false representation” is defined at Colorado Jury Instruction – Civil 4th 19:3 (hereafter “CJI-Civ.4th”) to mean “any oral or written words, conduct, or combination of words and conduct that creates an untrue or misleading impression in the mind of another.” CJI-Civ.4th 19:4 provides, in part, that “[a] fact is material if a reasonable person under the circumstances would regard it as important in deciding what to do.”

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

The Colorado Supreme Court has recognized a cause of action for severe emotional distress even without accompanying physical injury. See Rugg v. McCarty, 476 P.2d 753, 756 (Colo. 1970). The Court in Rugg adopted the formulation for this cause of action set out in the Restatement (Second) of Torts § 46 (1965): "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Id. “Extreme and outrageous conduct” is defined in CJI-Civ.4th 23:2 as follows:
[C]onduct that is so outrageous in character, and so extreme in degree, that a reasonable member of the community would regard the conduct as atrocious, going beyond all possible bounds of decency and utterly intolerable in a civilized community. . . . The extreme and outrageous character of conduct may arise from a person’s knowledge that another is peculiarly susceptible to emotional distress because of some physical or mental condition or peculiarity. . . .

The Colorado Supreme Court has fashioned the Restatement rule into a three-part test: "(1) the defendant engaged in extreme and outrageous conduct; (2) the defendant engaged in the conduct recklessly or with the intent of causing the plaintiff severe emotional distress; and (3) the plaintiff incurred severe emotional distress which was caused by the defendant’s conduct." Culpepper v. Pearl St. Bldg., 877 P.2d 877, 882 (Colo. 1994). “A person acts recklessly in causing severe emotional distress in another if, at the time of the conduct, he knew or reasonably should have known that there was a substantial probability that his conduct would cause severe emotional distress to the other person.” Id. at 882-83. Although whether conduct is extreme and outrageous under these tests is generally a jury question, the trial court must make the threshold determination of whether reasonable persons could differ on the question. Id. at 883. In deciding whether a plaintiff has alleged behavior outrageous as a matter of law, the trial court must analyze the totality of the defendant’s conduct. Green v. Qwest Servs. Corp., 155 P.3d 383, 385 (Colo. App. 2006).

Colorado also recognizes a cause of action for negligent infliction of emotional distress. See Towns v. Anderson, 579 P.2d 1163, 1164-65 (Colo. 1978) (adopting Restatement (Second) of Torts § 436A (1965)). “Under that provision of the Restatement, recovery of damages is limited to a plaintiff who suffers emotional distress because he is personally subjected to an unreasonable risk of bodily harm by virtue of the negligence of another.” Hale v. Morris, 725 P.2d 26, 28 (Colo. App. 1986). To establish a prima facie case of negligent infliction of emotional distress, a plaintiff must present evidence from which a jury could reasonably conclude that “defendant’s negligence subjected her to an unreasonable risk of bodily harm and caused her to be put in fear for her own safety, that plaintiff’s fear was shown by physical consequences or long continued emotional disturbance, and that plaintiff’s fear was the cause of the damages she claimed.” Scharrel v. Wal-Mart Stores, 949 P.2d 89, 93 (Colo. App. 1997).

This claim requires proof that the plaintiff either sustained physical injury or was in the “zone of danger,” meaning he or she was close enough to the injurious event to have been subject to physical harm. Colwell v. Mentzer Invs., Inc., 973 P.2d 631, 638 (Colo. App. 1998). A plaintiff who was not in the zone of danger cannot recover for emotional distress resulting solely from the observation of injury to a family member. Draper v. DeFrenchi-Gordineer, 282 P.3d 489, 497 (Colo. App. 2011).

D. State Consumer Protection Laws, Rules, and Regulations

The statutes regulating insurance in Colorado are found in Title 10 of the Colorado Revised Statutes. C.R.S. § 10-1-103 establishes the Division of Insurance, which is responsible for executing the laws relating to insurance and for supervising the business of insurance in the state. The Commissioner of
Insurance, who is responsible for investigating violations of the insurance laws, heads the Division of Insurance and determines which violations should be presented to a district attorney or the Attorney General for prosecution. C.R.S. § 10-1-108(5).

Unfair methods of competition and unfair or deceptive acts or trade practices in the business of insurance are prohibited by the Colorado Unfair Competition - Deceptive Trade Practices Act ("UCDPA"), C.R.S. §§ 10-3-1101 to 1116. The UCDPA defines certain specified acts as unfair methods of competition and unfair or deceptive acts or practices, and the Commissioner of Insurance is authorized to promulgate regulations identifying specific methods of competition or acts or practices that violate the certain provisions of the UCDPA. C.R.S. §§ 10-3-1104, 10-3-1110(1). The UCDPA vests in the Commissioner of Insurance the authority to investigate violations of the Act and to impose regulatory penalties. C.R.S. §§ 10-3-1106 to -1109.

An insured may also bring a claim under the Colorado Consumer Protection Act, C.R.S. § 6-1-101, et seq. ("CCPA"). See Showpiece Homes Corp. v. Assurance Co. of Am., 38 P.3d 47, 58 (Colo. 2001) (holding that the sale of insurance can be classified as a sale of goods, services or property and is thus subject to the CCPA). In Showpiece Homes, the Colorado Supreme Court also held the UCDPA does not preempt a claim by an insured against an insurer pursuant to the CCPA. Id. at 55. The CCPA is available in a civil action for any claim against any person who has engaged in or caused another to engage in any deceptive trade practice. C.R.S. § 6-1-113(1); see Crowe v. Tull, 126 P.3d 196, 204 (Colo. 2006).

The CCPA contains a list of actions considered to be deceptive trade practices. C.R.S. § 6-1-105. However, this list is not exhaustive, and other actions not specifically described in the statute may be determined to be deceptive trade practices. Showpiece Homes, 38 P.3d at 54. The Attorney General or a district attorney may bring an action in the district court to enforce the CCPA. C.R.S. § 6-1-110. In addition, like the UCDPA, the CCPA expressly provides for a private cause of action against a party accused of violating its terms. C.R.S. § 6-1-113. Prior to filing a claim under the CCPA, a party must exhaust any administrative remedies that may be available. City of Aspen v. Kinder Morgan, Inc., 143 P.3d 1076, 1081-82 (Colo. App. 2006).

To prove a private cause of action under the CCPA, a plaintiff must show that: (1) the defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the challenged practice caused the plaintiff's injury. Rhinolinings USA, Inc. v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142, 146-47 (Colo. 2003).

In a private civil action, a party found guilty of violating the CCPA will be liable for the greater of (1) the actual amount of damages, (2) $500, or (3) three times the actual amount of damages if it is established by clear and convincing evidence that the party acted in bad faith. C.R.S. § 6-1-113(2)(a). The party bringing the action may also recover its costs and attorney fees in a successful enforcement action. C.R.S. § 6-1-113(2)(b).

E. State Class Actions
Rule 23 of the Colorado Rules of Civil Procedure sets forth the standards for bringing a class action lawsuit. Rule 23(a) provides the prerequisites to a class action: “(1) The class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” In addition to satisfying these prerequisites, a party seeking to maintain a class action must show that:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

   (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

   (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

   (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

   (B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

   (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

   (D) The difficulties likely to be encountered in the management of class action.

C.R.C.P. 23(b).

The court will direct the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. C.R.C.P. 23(c)(2). When appropriate an action may be brought or maintained as a class action with respect to particular issues, or a class
may be divided into subclasses and each subclass treated as a class. C.R.C.P.
23(c)(4).

“The decision of whether to certify a class action lies within the
discretion of the trial court and will not be disturbed unless the decision is
clearly erroneous and an abuse of discretion.” Friends of Chamber Music v. City
& Cnty. of Denver, 696 P.2d 309, 317 (Colo. 1985); see Jackson v. Unocal Corp.,
262 P.3d 874, 880 (Colo. 2011). The burden is on the plaintiff to establish the
right to maintain a class action. Levine v. Empire Sav. & Loan Ass’n, 592 P.2d
410, 413 (Colo. 1979). Courts may consider matters outside of the pleadings in
determining whether to certify a class and may even conduct an evidentiary
App. 1990) (“[T]he determination of an action’s class status may require more
than a review of the pleadings; its resolution may well demand consideration of
the nature of the evidence that will be presented.”). In interpreting Rule 23,
Colorado courts may look to federal cases analyzing the parallel federal Rule
987 (Colo. 2004); State v. Buckley Powder Co., 945 P.2d 841, 844 (Colo. 1997).

Stat. 4, amended 28 U.S.C. § 1332(d) to confer federal jurisdiction over class
actions involving at least 100 members and over $5 million in controversy when
minimal diversity (between any defendant and any plaintiff class member) is
met. CAFA also added its own removal statute, permitting any defendant to remove
a qualifying action without regard to the residence or consent of other
defendants, 28 U.S.C. § 1453(b), and providing discretionary appellate review
of rulings on motions for remand notwithstanding the bar in 28 U.S.C. § 1447(d)
to appeals from remand orders, 28 U.S.C. § 1453(c)(1). CAFA applies “to any
civil action commenced on or after [February 18, 2005].” 119 Stat. at 14.

V. Defenses in Actions Against Insurers

A. Misrepresentations/Rescission of Insurance Contract For
Misrepresentation

Under Colorado law, to rescind or avoid a policy on the basis of a false
statement or misrepresentation in the policy application, the insurer must prove
the following: (1) that the applicant knowingly made a false statement of fact
or knowingly concealed a fact in his application; (2) that the false statement
of fact or the concealed fact materially affected either the insurer’s
acceptance of the risk or the hazard assumed; (3) that the insurer was ignorant
of the false statement of fact or concealment and is not chargeable with
knowledge of the fact; (4) that the insurer relied, to its detriment, on the
false statement of fact or concealment in issuing the policy. Hollinger v. Mut.
Investors Life Ins. Co., 764 P.2d 408, 412 (Colo. App. 1988); W. Coast Life
Ins. Co. v. Hoar, 505 F. Supp. 2d 734, 743 (D. Colo. 2007), aff’d, 558 F.3d
1151 (10th Cir. 2009). It is not necessary that the misrepresentation be made
with intent to deceive. See Hollinger, 560 P.2d at 827; Wade v. Olinger Life
Ins. Co., 560 P.2d 446, 453 (Colo. 1977). This test applies to an application
for reinstatement to the same degree as the original application. See Spencer,
764 P.2d at 412.

The insurer need not prove that the insured made the misrepresentation
with an intent to deceive. See Wade, 560 P.2d at 451-52. Rather, it is sufficient
that the insured is “reasonably chargeable with knowledge that the facts omitted or misrepresented were within the scope of questions asked on the application.” Id. at 452.

The materiality of a false statement by an insurance applicant does not depend on the applicant’s subjective knowledge; instead an objective or “reasonable person” test is to be applied. Hollinger, 560 P.2d at 826; Golden Rule Ins. Co. v. Lease, 755 F. Supp. 948, 953 (D. Colo. 1991). The misrepresentation “not only must be actually material to the insurer’s risk, as demonstrated by customary underwriting procedures, it also must be such that a reasonable person would, under the circumstances, have understood that the question calls for disclosure of specific information.” Wade, 560 P.2d at 452 (emphasis in original). It is the insurer’s burden to show both that it relied upon the representations and that it was reasonable for the insured to expect the insurer to do so. Id. at 452 n.6.

An insurer’s attempt to rescind a policy may be precluded by an incontestability clause. The inclusion of incontestability provisions in life insurance policies is mandated by C.R.S. § 10-7-102, which provides, in part, as follows: “(1) It is unlawful for any foreign or domestic life insurance company to issue or deliver in this state any life insurance policy unless the same contains the following provisions: . . . (b) A provision that the policy shall constitute the entire contract between the parties and shall be incontestable after it has been in force during the lifetime of the insured for two years from its date . . .” Such provisions are to be strictly construed, as they represent a limitation on the general right of contract. Pappageorge v. Fed. Kemper Life Assur. Co., 878 P.2d 56, 59 (Colo. App. 1994). Also, because the incontestability clause is required by statute, it may not be used to interpret any ambiguous provision in the policy. See Coxen v. W. Empire Life Ins. Co., 452 P.2d 16, 17-18 (Colo. 1969) (construing ambiguity against insurer despite presence of incontestability clause). Further, in accordance with the rule that the terms of the policy govern the parties’ rights as to reinstatement, the time limits on an incontestability clause run anew as to matters affecting the validity of the policy’s reinstatement. See Spencer, 764 P.2d at 410-12.

B. **Preexisting Illness or Disease Clauses**

1. **Statutes**

Pursuant to the Affordable Care Act, a carrier offering an individual or small employer health benefit plan shall not impose any preexisting condition exclusion with respect to coverage under the plan. C.R.S. § 10-16-118; see also Insurance Regulation 4-2-18 (establishing the method health coverage plans must use to credit and certify creditable coverage when determining exclusions for preexisting conditions as required by C.R.S. § 10-16-118).

Additional restrictions on all policies of insurance, which are defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance include the following:

- Making adverse underwriting decisions because an applicant or an insured has demonstrated concerns related to AIDS by seeking counseling from health care professionals. C.R.S. § 10-3-1104(1)(f)(IX). However, under § 10-3-1104(2)(d), it is not a violation of the statute for a person to request that an applicant or insured take an HIV related test when such request has
been prompted by either the health history or current condition of the applicant or insured or by threshold coverage amounts which are applied to all persons within the risk class, as long as such test is conducted in accordance with the provisions of C.R.S. § 10-3-1104.5;

- Making adverse underwriting decisions on the basis of the existence of nonspecific blood code information received from the medical information bureau, but this prohibition shall not bar investigation in response to the existence of such nonspecific blood code as long as the investigation is conducted in accordance with the provisions of section 10-3-1104.5, C.R.S. § 10-3-1104(1)(f)(X);

- Reducing benefits under a health insurance policy by the addition of an exclusionary rider, unless such rider only excludes conditions which have been documented in the original underwriting application, original underwriting medical examination, or medical history of the insured, or which can be shown with clear and convincing evidence to have been caused by the medically documented excluded condition. C.R.S. § 10-3-1104(1)(f)(XI).

Any entity that receives “genetic information” may not seek, use, or keep the information for any nontherapeutic purpose or for any underwriting purpose connected with the provision of health care insurance or Medicare supplement insurance coverage. C.R.S. § 10-3-1104.6(3)(b)(I). Any entity that receives information derived from genetic testing may not seek, use, or keep information derived from “genetic testing” for any nontherapeutic purpose or for any underwriting purpose connected with the provision of group disability insurance or long-term care insurance coverage. C.R.S. § 10-3-1104.7(3)(b). Effective July 1, 2013, “health care insurance” is now included in this limitation.

2. Case Law

Usick v. Am. Family Mut. Ins. Co., 131 P.3d 1195 (Colo. App. 2006): The plaintiff purchased an individual health insurance policy from defendant insurer, disclosing a history of endometriosis in her application. The declarations page of her policy waived coverage for “endometriosis or complications” for a minimum period of 24 months, and required that the insured request removal of the waiver following the 24-month period. The plaintiff sought reimbursement for treatment for endometriosis, arguing that C.R.S. § 10-16-118(1)(a)(II) unambiguously proscribed the exclusion of a particular preexisting condition. The Court of Appeals disagreed, finding the statute applied only to the general category of preexisting conditions, and did not prohibit the exclusion of a specifically identified condition such as endometriosis. The Court of Appeals found that the specific exclusion for endometriosis neither diluted statutory coverage nor violated public policy. However, the Court of Appeals distinguished the statutory provision relating to group plans, which incorporated the broader definition of a pre-existing condition found in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Court of Appeals further rejected the plaintiff’s argument that the requirement to request removal of the waiver was ambiguous, and upheld the trial court’s finding of no coverage under the policy.

Carroll v. Cuna Mut. Ins. Soc’y, 894 P.2d 746 (Colo. 1995): The Colorado Supreme Court held that language in an accidental death and dismemberment policy, which stated that coverage was provided for bodily injury caused by an accident and “resulting directly and independently of all other causes,” meant
that the accident must be the predominant cause of injury in order for the injury to be compensable. The court rejected the Court of Appeals’ ruling that the phrase “directly and independently of all other causes” meant that coverage was precluded where injury or death was due, even in part, to a preexisting bodily infirmity.

**Bumpers v. Guar. Trust Life Ins. Co., 826 P.2d 358 (Colo. App. 1991):** The Court addressed policy language in five successive health insurance policies, which contained a limitation for pre-existing conditions for which treatment or expense was incurred within six months immediately preceding the effective date of coverage. The policies provided that “[b]enefits are payable for covered expenses incurred within 52 weeks from the date of first medical treatment/expense for an injury or sickness which is the basis of the claim.” In 1984, while the initial policy was in effect, the plaintiff sustained facial injuries. Apparent complications necessitated subsequent surgical and medical treatments in 1985, 1986, 1987 and 1988. In 1989, the insured sought reimbursement for these expenses under her various annual policies. The insurer denied reimbursement, arguing that the expenses the insured incurred in the policy years 1985-86 and 1986-87 were not covered based on the initial 1984 policy’s 52-week provision. In rejecting this argument, the Court explained that each policy was a separate annual policy and that, as a matter of law, the 52-week provision must be interpreted to provide fifty-two weeks of prospective coverage for any sickness or injury which occurs and is the basis for a claim during the annual policy period, unless such sickness or injury falls within the express preexisting condition of the applicable annual policy.

**C. Statutes of Limitation**


“A cause of action for breach of contract accrues on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence.” Daugherty, 55 P.3d at 226. A cause of action for fraud or misrepresentation accrues on the date the “claimant has knowledge of facts which would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another.” Jones v. Cox, 828 P.2d 218, 223-24 (Colo. 1992). A bad faith claim accrues when both the nature of the injury and its causes are known or should be known through the exercise of reasonable diligence. Cork v. Sentry Ins., 194 P.3d 422, 427 (Colo. App. 2008).

The standard is objective, and “[t]he focus is on a plaintiff’s knowledge of facts that would put a reasonable person on notice of the general nature of damage and that the damage was caused by the wrongful conduct of [the defendant].” Peltz v. Shidler, 952 P.2d 793, 796 (Colo. App. 1997). “Each bad faith act constitutes a separate and distinct tortious act, on which the statute of limitation begins to run anew when the plaintiff becomes aware of the injury and its cause.” Cork, 194 P.3d at 427. The existence of an ongoing relationship between insurer and insured does not provide a basis for tolling the statute of
VI. Beneficiary Issues

A. Designated Beneficiaries

Colorado’s Designated Beneficiary Agreement Act, C.R.S. §§ 15-22-101 et seq., allows two people to execute a designated beneficiary agreement (DBA), which is an agreement by two people for the purpose of designating each person as the beneficiary of the other person and for the purpose of ensuring that each person has certain rights and financial protections based upon the designation. C.R.S. § 15-22-103(2). Both parties to a DBA must be: at least eighteen years old; competent to enter into a contract; unmarried; not a party to a civil union; not a party to another DBA; and able to enter into the DBA without force, fraud, or duress. C.R.S. § 15-22-104(1)(a). Unless the DBA specifically excludes statutory rights, a person named a designated beneficiary in a DBA is entitled to, among other things, the right to be designated as a beneficiary and recognized as a dependent for purposes of insurance policies for life insurance coverage, and for health insurance policies or health coverage if the employer of the designated beneficiary elects to provide coverage for designated beneficiaries as dependents. C.R.S. §§ 15-22-105(3)(c)(III)-(IV). The DBA is terminated on the death of either party to it, but the rights or powers conferred on the other party to the DBA survive the first party’s death, and the surviving party may enter into another DBA. C.R.S. §§ 15-22-112(1), (2).

A DBA can be negated by various “superseding legal documents,” one of which is a beneficiary designation in an insurance policy or policy of health care coverage—unless the superseding legal document is found to be invalid or unenforceable, in which case the DBA will control. C.R.S. §§ 15-22-103(3)(f); 15-22-105(7).

All benefits under any blanket sickness and accident policy must be paid to the insured; to the insured’s agent; to the insured’s designated beneficiary; or to the insured’s estate, but if the insured is a minor, such benefits may be paid to the minor insured’s parent or guardian, or other person actually supporting the minor insured. C.R.S. § 10-16-215(3).

B. Divorce

The filing of a petition for dissolution of marriage or legal separation creates a temporary injunction that prohibits both parties from canceling, modifying, terminating, or allowing to lapse for nonpayment of premiums, any policy of health insurance, homeowner’s or renter’s insurance, or automobile insurance that provides coverage to either of the parties or their minor children; or any policy of life insurance that names either of the parties or their minor children as a beneficiary, without at least fourteen days’ advance notification and the written consent of the other party or an order of the court. C.R.S. § 14-10-107(4)(b)(I)(D).

Unless the statutory default is altered by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:
(a) Revokes any revocable (i) disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and (iii) nomination in a governing instrument nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(b) Severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship or as community property with the right of survivorship, transforming the interests of the former spouses into tenancies in common.

C.R.S. § 15-11-804(2). However, if the divorced spouses are remarried to each other, or the divorce is otherwise nullified, the formerly revoked entities are reinstated. C.R.S. § 15-11-804(5).

Colorado law also offers protections for entities that, after a decedent dies, pay out funds to beneficiaries of that decedent in reliance on the governing instrument and without receiving written notice that the decedent divorced the beneficiary. If the payor entity receives written notice that the decedent divorced the beneficiary, the payor entity is liable only for actions taken two days after receiving the written notice. Once the payor entity receives the written notice, the payor entity may pay to the court any funds that would have been owing to the beneficiary. C.R.S. § 15-11-804(7).

C. Change of Beneficiary Forms

With respect to funds owing under life insurance policies, every change of beneficiary form issued by an insurance company under any life or endowment insurance policy or annuity contract to an insured or owner who is a resident of this state must request the following information: (a) the name of each beneficiary, or if a class of beneficiaries is named, the name of each current beneficiary in the class; (b) the address of each beneficiary; and (c) the relationship of each beneficiary to the insured. C.R.S. § 38-13-109.5(7). In addition, if the life insurance company learns of the death of the insured or annuitant and the beneficiary has not communicated with the insurer within four months after such death, the company is required to take reasonable steps to pay the proceeds to the beneficiary. C.R.S. § 38-13-109.5(6).

D. Other Considerations Respecting Beneficiaries

Where insurers distribute settlement proceeds to the surviving spouse in a wrongful death action, the insurers satisfy their statutory duty under the Colorado wrongful death law and are not required under some sort of common law duty to monitor the distribution of the proceeds to all potential beneficiaries. Campbell v. Shankle, 680 P.2d 1352, 1354 (Colo. App. 1984).
VII. Interpleader Actions

A. Availability of Fee Recovery

Neither the text of C.R.C.P. 22, Colorado’s interpleader rule, nor the cases interpreting it, allow for recovery of fees incurred in bringing the action. Indeed, not even statutory interest is available in interpleader actions, because there is no right to obtain interest where the funds must be paid into the registry of the court. Ritter v. Wysowatcky, 514 P.2d 333, 334 (Colo. App. 1973); see C.R.S. § 10-7-112(1) (“If the claim [for life insurance benefits or proceeds] is denied and a judgment is rendered against the insurer, the annual rate of interest from the date the action was filed until payment of the claim shall be four percentage points above the federal discount rate, except to the extent such proceeds were deposited with the court in an interpleader action.”).

Instead, in the limited situation where a power of attorney (below, “agency instrument”) purports to be in effect, if an insurer is faced with a dispute between two parties over life insurance proceeds, and the insurer has reasonable cause to question the authenticity, validity, or authority of an agency instrument or agency may make prompt and reasonable inquiry of the agent, the principal, or other persons involved for additional information and may submit an interpleader action to the district court or the probate court of the county in which the principal resides by depositing any funds or other assets that may be affected by the agency instrument with the appropriate court. In such an interpleader action, if the court finds that the third party had reasonable cause to commence the action, the third party shall be entitled to all reasonable expenses and costs incurred by the third party in bringing the interpleader action. C.R.S. § 15-14-607(3).

B. Differences between Colorado Interpleader and 10th Circuit Interpleader

The primary difference between Colorado interpleader and 10th Circuit Interpleader is that Colorado interpleader does not allow recovery of fees incurred by the insurer in interpleading the funds, as indicated above, but recovery of such fees is permitted under Fed. R. Civ. P. 22 in the Tenth Circuit. See, e.g., United States Fid. & Guar. Co. v. Sidwell, 525 F.2d 472, 475 (10th Cir. 1975); United States v. Chapman, 281 F.2d 862, 870 (10th Cir. 1960); John Hancock Mut. Life Ins. Co. v. Jordan, 836 F. Supp. 743, 749 (D. Colo. 1993); see also Combined Ins. Co. of Am. v. Glass, 2015 U.S. Dist. LEXIS 25499, at *28 (D. Colo. Mar. 3, 2015).

In addition, the Colorado rule on interpleader states, “In any civil action of interpleader, a district court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of this state affecting the property, instrument, or obligation involved in the interpleader action until further order of the court. Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.” C.R.C.P. 22(2). No such language appears in the federal rule.