I. Regulatory Limits on Claims Handling

A. Timing for Responses and Determinations

Effective January 1, 2001, Kansas codified the Kansas Health Care Prompt Payment Act at K.S.A. §§ 40-2440 - 40-2442. The statutes cover all new and renewed accident and illness policies in the state of Kansas. The legislation gives the insurer thirty (30) days from the date of receipt to pay the claim in full, or to send acknowledgment of receipt of a claim and a request for additional information if needed as well as specific reasons for denial if necessary. Kansas Health Care Prompt Payment Act, ch. 134, sec. 2, § 40-2442(a), 2008 Kan. Sess. Laws. If the insurer fails to comply with subsection (a), such insurer must pay interest at the rate of 1% per month on the amount of the claim that remains unpaid thirty (30) days after receipt. § 40-2442(b).

The insured must submit all additional information requested by the insurer within thirty (30) days after receipt of the request for additional information. § 40-2442(c). Within 15 days after receipt of all requested additional information, the insurer must pay a clean claim in accordance with this section or send a notice to the insured stating that the insurer refuses to reimburse all or part of the claim and the specific reasons for such denial. § 40-2442(d). If the insurer fails to comply with subsection (d), such insurer must pay interest on any amount of the claim that remains unpaid at the rate of 1% per month. Id.

When there is a good faith dispute about the legitimacy of a claim or when there is a reasonable basis supported by specific information that a claim was submitted fraudulently, the provisions of subsection (b) do not apply. § 40-2442(e). If an insurer erroneously pays a claim providing benefits to which the insured or provider is not entitled, the insurer shall not initiate a request for reimbursement of that erroneous payment, unless such action is initiated within eighteen (18) months after the end of the month in which the erroneous payment was made. § 40-2442(f). In cases of fraud by the insured, such action may be initiated within the applicable statute of limitations pursuant to K.S.A. 60-513. Id. Any violation of this act by an insurer with flagrant and conscious disregard of its provisions or with such frequency as to constitute general business practice shall be considered a violation of the unfair trade practices act in K.S.A. 40-2401 et seq. § 40-2442(g).
B. **Standards for Determinations and Settlements**

Under K.S.A. § 40-219, whenever the insurer becomes liable for a loss to any person in the state, after all appeals have become final, it has three months from the date of judgment to pay the claim, or it may be enjoined from doing business within the state.

Section 40-2404 codifies Kansas's unfair methods of competition or unfair deceptive acts legislation. It sets forth the standards for unfair claim settlement practices. Section 40-2404(9) specifically sets forth in pertinent part:

It is an unfair claim settlement practice if any of the following or any rules and regulations pertaining thereto are committed flagrantly and in conscious disregard of such provisions, or committed with such frequency as to indicate a general business practice:

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(b) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(c) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(d) refusing to pay claims without conducting a reasonable investigation based upon all available information;

(e) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(f) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(g) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

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

(i) attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

(j) making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;

(k) 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;
(l) delaying the investigation or payment of claims by requiring the 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;

(m) 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

(n) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

C. State Privacy Laws, Rules, and Regulations

K.S.A. § 40-2404(15) gives the state insurance commissioner the authority to generate rules and regulations necessary to carry out title V of the Federal Gramm-Leach-Bliley Act. The privacy act passed by the United States Congress on November 11, 1999, has had profound effects on both state and federal privacy issues. As of this date, the Kansas insurance commissioner has not passed any substantive privacy laws in addition to Gramm-Leach-Bliley.

II. Principles of Contract Interpretation

As with any other contract, the language of an insurance policy, must, if possible, be construed in such a way as to give effect to the intention of the parties. American Family Mutual Ins. Co. v. Wilkins, 179 P.3d 1104, 1109 (Kan. 2008); Hall v. Shelter Mutual Ins. Co., 253 P.3d 377, 380 (Kan. Ct. App. 2011). In construing a policy, a court should consider the document as a whole and endeavor to ascertain the intent of the parties from the language used, while taking into account the situation of the parties, the nature of the subject matter, and the purpose to be accomplished. American Family, 179 P.3d at 1109.

Because the insurer writes the policies, it has a duty to make the meaning clear. Id. If the insurer intends to restrict or limit coverage under the policy, it must use clear and unambiguous language. Id. Clear and unambiguous language will be taken in its plain, ordinary, and popular sense. Id. If the terms of the policy are ambiguous, uncertain, conflicting, or susceptible of more than one construction, the policy will be construed in favor of the insured. Id. Whether a policy is ambiguous is a question of law to be decided by the courts, and the test for determining whether a policy is ambiguous is what a reasonably prudent insured would understand the language to mean. Id. at 1110; First Financial Ins. Co. v. Bugg, 962 P.2d 515, 519 (Kan. 1998).

In construing an endorsement to an insurance policy, the endorsement and policy must be read together. Thornburg v. Schweitzer, 240 P.3d 969, 976 (Kan. Ct. App. 2010). The policy remains in full force and effect except as altered by the words of the endorsement. Id.

III. Choice of Law

In the absence of a contractual provision stating a choice-of-law agreement, Kansas courts have traditionally applied the rule of lex loci contractus. Dragon v. Vanguard Indus., Inc., 89 P.3d 908, 914 (Kan. 2004). Specifically, when a case calls for the interpretation of an original insurance
contract, the principle of lex loci contractus applies, meaning the court will apply the law of the state where the contract was made. Layne Christensen Co. v. Zurich Canada, 38 P.3d 757, 766-67 (Kan. Ct. App. 2002); Restatement (First) of Conflict of Laws, § 334. In general, a contract is made where the last act necessary for its formation occurs. Layne, 38 P.3d at 767. In cases involving insurance policies, the contract is made where the policy is delivered. Id. In the case of group policies, the contract is made where the master policy is delivered. Id.

Section 334 of the Restatement (First) of Conflict of Laws also contains the principle that the law of the place of performance determines the manner and method of performance. See Layne, 38 P.3d at 766. Therefore, if issues including the manner, method, time and sufficiency of performance are involved in a case, the law of the place of performance would apply. Id.; see also Dragon, 89 P.3d 908, 914 (in most instances the courts apply the substantive law of the state where the contract was made, although in some instances, the courts look to the place of performance).

IV. Extracontractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

Kansas does not recognize the tort of bad faith against a liability insurance company by the insured in a first-party relationship. Spencer v. Aetna Life & Gas. Ins. Co., 227 Kan. 914, 926, 611 P.2d 149, 158 (1980). The Kansas Supreme Court held that the legislature provides sufficient remedies for insureds for claims against insurers for lack of good faith. Id. Any insurance contract duties, whether the duty to settle, defend, act in good faith or otherwise, are contractual, and any remedies are limited thereto. See Glenn v. Fleming, 247 Kan. 296, 312-13, 799 P.2d 79, 89-90 (1990).

However, "[i]n refusing to pay a claim, an insurance company has a duty to make a good faith investigation of the facts surrounding the claim." Johnson v. Westhoff Sand Co., 31 Kan. App. 2d 259, 274, 62 P.3d 685, 697 (2003). "If there is a bona fide and reasonable factual ground for contesting the insured’s claim, there is no failure to pay without just cause or excuse." Id. When an insurer refuses to pay a loss until its challenge to liability raising a substantial legal question of first impression is settled by the court, the insurer has not acted in bad faith or refused to pay without just cause. See Narron v. Cincinnati Ins. Co., 278 Kan. 365, 376, 97 P.3d 1042, 1050-51 (2004).

"An insurance company may become liable for an amount in excess of its policy limits if it fails to act in good faith and without negligence when defending and settling claims against its insured. When the insurer determines whether to accept or reject an offer of settlement, it must give at least the same consideration to the interests of its insured as it does to its own interests." Glenn v. Fleming, 247 Kan. 296, 305, 799 P.2d 79, 85 (1990).

B. Fraud

There are five elements to a fraud claim in Kansas. The elements include: (1) an untrue statement of fact; (2) known to be untrue by the party making it; (3) made with the intent to deceive, or with reckless disregard for the truth; (4) where the other party justifiably relies on the statement; and (5) acts to his injury or detriment. Alires v. McGehee, 277 Kan. 398, 403, 85 P.3d 1191, 1195 (2004).
Under Kansas law, the falsity of any material statement in the application for any policy may not bar the right to recovery unless the false statement has actually contributed to the contingency or event on which the policy is to become due and payable. K.S.A. § 40-2205(C); see also Waxse v. Reserve Life Ins. Co., 248 Kan. 582, 586, 809 P.2d 533, 536-37 (1991).

C. Intentional or Negligent Infliction of Emotional Distress

To recover on a claim for negligent infliction of emotional distress in Kansas, the plaintiff must prove that the conduct was accompanied by, or resulted in, immediate physical injury. Curts v. Dillard’s Inc., 30 Kan. App. 2d 814, 815, 48 P.3d 681, 682 (2002) (overruled on other grounds). "A plaintiff must show that the physical injuries complained of were the direct and proximate result of the emotional distress caused by the [defendant's] alleged negligent conduct." Id. (citations omitted); see also Burdett v. Harrah's Kan. Casino Corp., 311 F. Supp. 2d 1166, 1178 (D. Kan. 2004) (citing Reynolds v. Highland Manor, Inc., 24 Kan. App. 2d 859, 861 (1998)). A major exception to the physical injury rule is when the defendant is charged with acting in a willful and wanton manner or with the intent to injure. Curts, 30 Kan. App. 2d at 815; see also Burdett, 311 F. Supp. 2d at 1178-79.

Under Kansas law the tort of intentional infliction of emotional distress is the same as the tort of outrage. Hallam v. Mercy Health Ctr. of Manhattan, Inc., 278 Kan. 339, 340, 97 P.3d 492, 494 (2004). The elements are as follows: (1) The conduct of defendant must be intentional or in reckless disregard of plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between defendant’s conduct and plaintiff’s mental distress; and (4) plaintiff’s mental distress must be extreme and severe. Taiwo v. Vu, 249 Kan. 585, 592, 822 P.2d 1024, 1029 (1991). Further, "Liability for extreme emotional distress has two threshold requirements which must be met and which the court must, in the first instance, determine: (1) whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery; and (2) whether the emotional distress suffered by plaintiff is in such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it." Id. (citing Roberts v. Saylor, 230 Kan. 289, 292-93, 637 P.2d 1175, 1179 (1981)).

D. State Consumer Protection Laws and Regulations

The Kansas legislature defines unfair methods of competition and unfair or deceptive acts or practices in the business of insurance in K.S.A. § 40-2404. The act protects against misrepresentations and false advertising in insurance policies, defamation, false advertising generally, boycott, coercion and intimidation, false statements and entries, unfair discrimination, rebates, unfair claim settlement practices, failure to maintain complaint handling procedures, misrepresentation in insurance applications and disclosure of nonpublic personal information.

If the insurance commissioner determines that the insurer has engaged in any of the above practices, the insurer will be served with a statement of charges and a public hearing will be held. § 40-2406. If unfair or deceptive practices are found, the commissioner has the discretion to order the cessation of the action and the monetary penalty of not more than $1,000 for each violation, not to exceed $10,000 in the aggregate. §40-2407(a)(1). However,
if the person knew, or should have known that the actions were in violation of the act, the penalty shall not be more than $5,000 for each violation, not to exceed $50,000 in the aggregate in any six-month period. Id.

E. State Class Actions

Class actions may be brought in Kansas pursuant to K.S.A. § 60-223 under Article 2, Rules of Civil Procedure. To maintain a class action under § 60-223, the plaintiffs must satisfy all elements of subdivision (a) and at least one element of subdivision (b). In relevant part, (a) requires plaintiffs to prove that: (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. § 60-223(a).

The numerosity requirement is typically not difficult to satisfy. No set number of class members must be shown to warrant maintaining the action as a class action. Sternberger v. Marathon Oil Co., 257 Kan. 315, 344, 894 P.2d 788, 807 (1995). Joinder of all parties need not be impossible, just impracticable. Id.

Subsection (b) alternatives include the following:

(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 interests; 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 prosecuting or defending 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 a class action. § 60-223(b)(1)-(3).

Section 60-223(b) allows an action brought by or against an unincorporated association as a class by naming certain members as class representatives, as long as the court is satisfied that they adequately protect the interests of the association and its members.

In addition, “the claims, issues or defenses of a certified class may be settled, voluntarily dismissed or compromised only with the court’s approval.”
§ 60-223(e).

V. **Defenses in Actions Against Insurers**

A. **Misrepresentations/Rescission of Insurance Contract for Misrepresentation**

K.S.A. § 40-418 governs misrepresentations for life insurance policies and states:

No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable.

Kansas has recognized that an insurer may rescind a life insurance policy after a misrepresentation is made on the insurance application with reckless disregard for the truth. Chism v. Protective Life Ins. Co., 290 Kan. 645, 662, 234 P.3d 780, 791 (2010).

Health insurance is handled differently and is governed by § 40-2205. Section (C) of this statute adds a causal relation requirement to the misrepresentation and states:

(C) The falsity of any material statement in the application for any policy covered by this act may not bar the right to recovery thereunder unless the false statement has actually contributed to the contingency or event on which the policy is to become due and payable: Provided, however, that any recovery resulting from the operation of this section shall not bar the right to render the policy void in accordance with its provisions.

The Kansas courts have not yet construed this section of the statute, but in Waxse v. Reserve Life Ins. Co., 248 Kan. 582, 809 P.2d 533 (1991), the court found that the falseness of the application statement will not bar recovery under the policy unless it actually contributes to the event upon which the policy becomes due and payable. Id. at 586, 809 P.2d at 536-37. The last sentence of (C) stating "any recovery resulting from the operation of this section shall not bar the right to render the policy void in accordance with its provisions" has not been tested in court, but it may allow an insurance company to void a policy for misrepresentations before a loss occurs.

B. **Preexisting Illness or Disease Clauses**

Kansas has adopted the following rule with respect to pre-existing, or latent diseases: "In the event an insured sustains physical disability resulting from an accidental injury which aggravates or causes a dormant disease or ailment to become active, the disability will be regarded as having been caused solely by the injury, so as to render the insurer liable therefor under an accident policy, even though such disability might later have resulted regardless of the accident, and even though the accident might not have affected a normal person to the same extent." Boring v. Haynes, 209 Kan. 413, 421, 496 P.2d 1385, 1392 (1972); see also Foster v. Stonebridge Life Ins. Co., 291 P.3d 105 (Kan. Ct. App. 2012) (the Kansas Supreme Court has liberally interpreted language contained in accidental death policies, so relief is not always precluded when a preexisting condition is present). "Where an accidental injury
activates or aggravates a dormant disease or physical infirmity, the accident may be said [to be] the proximate cause of the resulting disability [or death].” Boring, at 421, 496 P.2d at 1392.

It is the general rule that the origin or inception of a sickness or disease, within the meaning of a health or accident policy requiring that sickness and disease be contracted after the effective date of the policy, is that point in time when the disease becomes manifest or active or when there is a distinct symptom or condition from which one learned in medicine can diagnose the disease. Crumm v. Allstate Life Ins. Co., 24 F.Supp.2d 1134 (D. Kan. 1998); Southards v. Cent. Plains Ins. Co., 201 Kan. 499, 501, 441 P.2d 808, 811 (1960).

C. Statutes of Limitation


VI. Beneficiary Issues

In general, where a right to change the beneficiary is reserved in an insurance policy, the beneficiary has no vested interest in the policy. Wear v. Mizell, 946 P.2d 1363, 1366 (Kan. 1997). Rather, the beneficiary has only an inchoate right to the proceeds of a policy, subject to being divested at any time during the lifetime of the insured, by transfer, assignment, or change of beneficiary. Id.; Holloway v. Selvidge, 548 P.2d 835, 839 (Kan. 1976); Nicholas v. Nicholas, 83 P.3d 214, 223 (Kan. 2004). Where a right to change the beneficiary is reserved, the insured can change the beneficiary without the consent of the original beneficiary. Hollaway, 548 P.2d at 839.

In terms of the effect of a divorce on a beneficiary's rights, Kansas courts have recognized the principle that in the absence of terms in an ordinary life insurance policy that the rights of the beneficiary are conditioned upon the continuance of the marriage between the insured and the beneficiary, the general rule is that the rights of the beneficiary are not affected by the fact that the parties are divorced subsequent to the issuance of the policy. Cincinnati Life Ins. Co. v. Palmer, 94 P.3d 729, 733 (Kan. Ct. App. 2004).

Importantly, § 23-2802(d) (formerly § 60-1610(b)(1)) of the Kansas Statutes sets forth a rigid requirement that is relevant here. Section 23-2802(d) provides that a divorce “decree shall provide for any changes in beneficiary designation on: (1) any insurance or annuity policy that is owned by the parties, or in the case of group life insurance policies, under which either of the parties is a covered person...Nothing in this section shall relieve the parties of the obligation to effectuate any change in beneficiary designation by the filing of such change with the insurer or issuer in accordance with the terms of such policy.” Kan. Stat. Ann. § 23-2802(d) 2012.

The Kansas Court of Appeals has construed this statute to require any change in beneficiary on any insurance or annuity policy to be specified in the
divorce decree. Cincinnati Life Ins. Co., 94 P.3d at 733 (Kan. Ct. App. 2004). “[A]bsent such an express provision in the decree, an active beneficiary designation of either spouse at the time of the divorce is not changed.” Id. (emphasis added). The court determined that “just as the decree shall divide the real and personal property of the parties, the decree shall provide for any changes in beneficiary designation on any insurance policy owned by the parties.” Id.

VII. Interpleader Actions

A. Availability of Fee Recovery

K.S.A. § 60-222 provides that a stakeholder may bring an interpleader action if the stakeholder is or may be exposed to double or multiple liability. "Interpleader protects the stakeholder from multiple suits, and from determining at its peril the validity and priority of disputed claims; it also protects the claimants by bringing them together in one action so that a fair and equitable distribution of the fund may be made." Farmers State Bank & Trust Co. v. Yates Center, 229 Kan. 330, 336, 624 P.2d 971, 977 (Kan. 1981).


B. Differences in State vs. Federal Circuit

K.S.A. § 60-222 mimics the federal interpleader rule, F.R.C.P. 22(a). Under F.R.C.P. 22(a), the decision to award attorney fees to the stakeholder lies within the discretion of the trial court. Aetna U.S. Healthcare v. Higgs, 962 F. Supp. 1412, 1414 (D. Kan. 1997). As a general rule, fees are charged against the fund and deposited with the court. Id. Fees are normally awarded to an interpleader stakeholder who (1) is disinterested; (2) conceives its liability in full; (3) deposits the disputed fund in court; (4) seeks discharge; and (5) who is not in some way culpable as regards the subject matter of the interpleader proceeding.” Transamerica Premier Ins. Co. v. Growney, 1995 U.S. App. LEXIS 31836, 4 (10th Cir. Kan. Nov. 13, 1995).