I. Regulatory Limits on Claims Handling

A) Timing for Responses and Determinations

For property insurance claims, an insurer must within thirty days after receipt of a claim specify what constitutes satisfactory proof of loss. MCL § 500.2006. Within sixty days after receipt of a proof of loss, the insurer must pay benefits or provide an explanation why benefits are not being paid, including pointing out specifically how a submitted proof of loss is insufficient. *Id.*

For health plans when paying claims to health professionals, health facilities, home health care providers, and durable medical goods providers, that are not pharmacies, see MCLA § 500.2006(7) to (14). For individual life policies, payment must be made within two months after proof of death. MCLA § 500.4030. For disability policies, see MCLA §§ 500.3412 to 3418, MCLA § 500.3610 (payments “due immediately” on submission of claim). HMO’s, Medicare Supplement, LTC and Industrial Life policies, see MCLA §§ 500.3501 et seq, 500.3801 et seq, 500.3901 et seq and 500.4201 et seq respectively.

B) Standards for Determinations and Settlements

Each insurer and health maintenance organization must establish an internal formal grievance procedure, approved by the Commissioner of Insurance, and such procedure must designate a person responsible for administering a grievance system, provide a telephone number, provide a method that insures full investigation, provides timely notification in plain English of the progress and the ultimate decision reached, allow a participant to be present at a formal hearing, as well as a procedure for all grievances made available for review. Each grieved participant is entitled to an independent review. MCL §§ 550.1902 to 550.1929.

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

All insurers domiciled in the State of Michigan and all other entities and persons regulated by the Division of Insurance that provide products to individuals for personal, family or household purposes are subject to the Title V privacy requirements of the federal Gramm-Leach-Bliley Financial Services Modernization Act, effective November 13, 2000. Mich Admin Code R 500.551, et seq. Title V declares that it is the policy of Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers’ nonpublic personal information. Michigan regulations have been adopted, requiring effective compliance with Federal Trade Commission regulations 16 CFR §313 (2008). See Memorandum from Office of Financial and Insurance Services (OFIS) on Compliance with Title V of the Gramm Leach Bliley Act, Privacy of Consumer Financial Information (October 20, 2000), supplanted by regulations found at R 500.551 et seq. The Regulations make clear that the Commissioner can require action which exceeds FTC requirements.

FTC requirements include the Standards for Safeguarding Customer Information (Safeguard Rule). The Safeguard Rule applies to all businesses licensed or registered by the Office of Financial and Insurance Services. Further, the Safeguard Rule requires an insurance company to: (1) designate one or more employees to coordinate the safeguards; (2) identify and assess risk to customer information and evaluate the effectiveness of current safeguards for controlling these risks; (3) design and implement safeguard programs; (4) select appropriate service providers and contract with them to implement safeguards; and (5) evaluate an adjusted program in light of relevant circumstances. Memorandum from OFIS on Standards for Safeguarding Customer Information (May 23, 2003, supplementing October 20, 2000 Memorandum).
Even where Gramm-Leach-Bliley applies to an entity, courts have held that there is no private right of action created by Congress under that act. *In re Chubb*, 426 B.R. 695 (ED Mich) (2010), and cases cited therein.

Michigan has in place a substantial body of law guaranteeing the privacy of health or medical information and medical records. MCL §§ 600.2157; 333.21515; 550.1406; and 750.410. Generally, such information and records may not be disclosed without the written consent of the patient or his authorized representative; and the sale or disclosure of such information for any consideration is a crime.

Michigan has adopted the Freedom of Information Act, MCLA § 15.231 *et seq*, which governs public access to government records.

II. Principles of Contract Interpretation

Clear and unambiguous language in an insurance policy is to be enforced as written. Courts may not make a new contract for the parties, nor give an insurance contract a meaning contrary to its unambiguous terms. *North River Ins v Endicott*, 151 Mich App 707 (1986). Contract interpretation is generally an issue of law. Since a policy of insurance is a matter of agreement by the parties, where there is a dispute, courts will determine the agreement and enforce it as written. *DiMambro-North End Associates v United Construction Co*, 154 Mich App 306 (1986). Although insurance policies are to be construed in favor of coverage, courts may not create an ambiguity where the language has but one interpretation. *Heniser v Frankenmuth Mut Ins Co*, 201 Mich App 70 (1995). Michigan courts recognize a distinction between “patent” and “latent” ambiguities. If policy language is “patently” ambiguous, that language will be interpreted against the drafter. If policy language is “latently” ambiguous, a court will apply standard rules of contract interpretation to apply the policy language to the specific claim presented. *Grosse Pointe Park v MMLPP*, 473 Mich 188 (2005).

All terms in a contract need not be defined. Courts are to interpret contract language utilizing the plan and ordinary meaning of the words agreed to in the policy, rather than through a technical or stained construction of those terms. *Thomas v Vigilant Ins Co*, 156 Mich App 280 (1986). An insured may not rely on its “reasonable expectations” in order to create an ambiguity under the policy. Absent an ambiguity, the policy is to be enforced as written. *Wilke v Auto-Owners Ins Co*, 469 Mich 41 (2003).

III. Choice of Law
Michigan follows conflict of law rules consistent with those set forth in the Restatement 2d, Conflicts of Law. The first step in the analysis is to determine whether the parties have opted for a particular law to interpret an insurance contract. Where no such provision is set forth in the contract, a Michigan court will look to the criteria set forth in a Restatement, commonly referred to as the most significant relationship test. *Chrysler Corp v Skyline Industrial Services*, 448 Mich 113 (1995).

The *Skyline* court rejected a “forced” utilization of the *lex loci contractus* rule as well as the *lex fori* or *lex loci delicti* rule. The court reasoned that Michigan has a particular interest in having its laws apply to contracts which govern its residents. *Meijer Inc v Gen Star Indemnity Co*, 61 F3d 905 (6th Cir, 1995). A forum state has a strong interest in protecting its citizens’ insurance rights.

IV. Extracontractual Claims Against Insurers: Elements and Remedies

A) Bad Faith

A cause of action for bad faith is ordinarily not available for breach of an insurance contract in the first-party context. *Kewin v Mass Mut Life Ins Co*, 409 Mich 401, 295 NW2d 50 (1980). However, see C., infra.

For first party cases involving § 6 of the Uniform Trade Practices Act, MCLA § 500.2006(4), the concept of “bad faith” is replaced by the award of penalty interest for a failure to make timely payments following the submission of a satisfactory proof of loss. The purpose of the penalty interest statute is to penalize insurers for dilatory practices in settling meritorious claims, and not to compensate plaintiff for delay in recovering benefits to which plaintiff is ultimately determined to be entitled. *Dep’t of Transp v Initial Transport, Inc*, 276 Mich App 318, 740 NW2d 720, rev’d in part, 41 Mich 862, 748 NW2d 239 (2007). See Section III D for Defenses to Penalty Interest Claims.

A claimant can assert an independent tort as a basis for recovery. *LaMothe v ACIA*, 214 Mich App 577 (1995). See also Section E. below.

In the context of a liability insurer’s failure to settle within policy limits, bad faith is the arbitrary, reckless, indifferent, or intentional disregard of the interest of the person to whom a duty is owed. *Commercial Union Ins Co v Liberty Mut Ins. Co.*, 426 Mich 127, 136, 393 NW2d 161 (1986). Good-faith denials, offers of compromise or other
honest errors of judgment are not sufficient to establish bad faith. *Id.* However, if the insurer is motivated by a selfish purpose or by a desire to protect its own interests at the expense of its insured’s interest, bad faith exists, even though the insurer’s actions were not actually dishonest or fraudulent. *Id.*

Under Michigan law, a liability insurer refusing to settle in bad faith will be held liable for the excess judgment only to the extent that the judgment would actually be collectible from the insured. *See Frankenmuth Mut Ins Co v Keeley*, 436 Mich 372, 375-76; 461 NW2d 666, 667 (1990), *on rehearing*, adopting Justice Levin’s dissent in the prior decision in the case, 433 Mich 525, 546; 447 NW2d 691, 699 (1989).

MCL 500.2006(7) – (14) set forth detailed procedures for situations involving health insurers. In addition to penalty interest accruing after a 45 day review period, the Insurance Department may impose penalties including a civil fine of not more than $1,000 for each violation not to exceed $10,000 in the aggregate for multiple violations.

**B) Fraud**

In order to prevail in a claim based on fraud or misrepresentation, the claimant must prove that (1) the defendant made a material misrepresentation; (2) the misrepresentation was false when the defendant made it; (3) that the defendant knew the misrepresentation to be false when made or was made recklessly without knowledge of its truth or falsity; (4) that the defendant made the misrepresentation with the intent that the plaintiff would act upon it; (5) that the plaintiff acted in reliance upon the misrepresentation; and, (6) that the plaintiff suffered damages. *Arim v Gen Motors Corp*, 206 Mich. App. 178, 195, 520 NW2d 695 (1994), *appeal denied*, 530 NW2d 750 (1995).

Michigan also recognizes causes of action for innocent misrepresentation and silent fraud. *See USF&G v Black*, 412 Mich. 99 (1981). Innocent misrepresentation modifies element (3) above to not require actual knowledge of falsity or a reckless disregard for same. Element (4) is automatically proven in that the doctrine of innocent misrepresentation is limited to parties to a contract and parties to that contract that are in privity with each other. Thus, element (4) is presumed. Silent fraud is predicated on a duty to speak created by the relationship between the parties involved. The suppression of facts can form the basis for a claim of silent fraud where the nature of the relationship is one where either a legal or equitable duty to speak exists.
Superior knowledge of the facts surrounding a contractual undertaking can create the duty to speak.

C) **Intentional or Negligent Infliction of Emotional Distress**

A cause of action for intentional infliction of emotional distress is not available for breach of an insurance contract, unless there was a breach of duty independent of the breach of the insurance contract. *Kewin v Mass Mut Life, supra.*

The following four elements must be demonstrated to make out a claim for intentional infliction of emotional distress: (1) extreme and outrageous conduct, 2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Roberts v Auto-Owners Ins Co, 422 Mich 594, 602; 374 NW2d 905 (1985).* In order to constitute “extreme and outrageous” conduct, the conduct must be so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Id.* at 603. Severe emotional distress, while not requiring bodily injury, requires an affliction more than mere outrage and must be such that no reasonable person could be expected to endure it. *Id.* at 608-09.

In the insurance context, while recovery of mental distress damages separate and apart from the recovery of contractual damages for breach of an insurance policy is recognized, the range of circumstance in which prima facie showing of “outrageousness” can be made is “significantly limit[ed].” *Id.* at 605. For instance, outrageous conduct does not result from the mere failure to pay a contractual obligation or an insurer’s request for verification of claims, in the absence of evidence of harassment or similarly egregious conduct. *Id.*

Claims for Negligent Infliction of Emotional Distress are typically limited to cases where plaintiff witnesses an injury to a third party caused by negligence. *Hesse v Ashland Oil,* 466 Mich 21; 642 NW2d 330(2002). No authority presently supports a claim for negligent infliction of emotional distress in the context of an insurance contract.

D) **State Consumer Protection Laws and Regulations**

The Unfair Trade Practices Act has been adopted in Michigan, and allows for 12% penalty interest for benefits not timely paid. MCLA § 500.2001 *et seq*; MCLA §500.2006. See Section II. A. *supra.*
In *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), the Supreme Court held that the Michigan Consumer Protection Act (MCPA) applied to insurance companies. However, subsequent amendments to the MCPA eliminated an insured's ability to enforce the provisions of the MCPA against insurance companies. *Millhouse v Mich Basic Prop Ins Co*, 2005 WL 3501364 (Mich App 2005).

E) **Discriminatory Claims Handling Practices**

An issue existed in Michigan whether the Elliott-Larsen Civil Rights Act, MCLA § 37.2101 et seq (ELCRA), applies to life insurance companies' claims handling practices. In *Kassab v Mich Basic Property Ins Assoc*, 441 Mich 433, 491 NW2d 545, 547-48 (Mich, 1992), the Michigan Supreme Court held that ELCRA did not apply to alleged discriminatory claims handling practices as an insurance office was not a place of public accommodation. However, the Michigan Supreme Court in *Haynes v Neshewat*, 477 Mich 29, 729 NW2d 488, 494-95 (2007) reversed that portion of the *Kassab* holding. A United States District Court in *Brothers v Allstate Ins Co*, 2010 WL 3488698 (E.D. Mich, Case No. 09-13574, rel'd 08/31/10), held that such a claim was viable under Michigan law in light of the *Haynes* decision.

F) **State Class Actions**

MCR 3.500 et seq governs the availability of class actions in general, including class actions against insurance companies. *See Salesin v State Farm*, 229 Mich App 346; 581 NW2d 781 (1998). The principal criteria are:

a. the class is so numerous that joinder of all members is impracticable;

b. there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

c. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

d. the representative parties will fairly and adequately assert and protect the interests of the class; and
the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

V. **Defenses In Actions Against Insurers**

A) **Misrepresentations/Omissions: During Underwriting or During Claim**

Any false statement in an application for insurance that materially affects either the acceptance of the risk, the hazard assumed by the insurer, or the premium for which an insurer will accept that risk will bar the insured’s right to recovery under the policy. MCLA § 500.2218; *Housour v Prudential Life Ins Co of Am.*, 1 Mich App. 455, 136 NW2d 689 (1965). A representation will not be deemed material unless it was material to the risk. MCLA § 500.2218(1). The misstatement, however, need not have been causally related to the particular circumstances of the loss in order to have materially affected the insurer’s acceptance of the risk. *Wickersham v John Hancock Mut Life Ins Co*, 413 Mich 57; 318 NW2d 456 (1982).

In determining materiality, evidence of the practice of the insurer which made the contract with respect to the acceptance or rejection of similar risks shall be admissible. MCLA § 500.2218(3).

Summary judgment is appropriate where the facts misrepresented are such that no reasonable mind could differ as to their importance to the insurer in determining whether to accept the risk. *Genl Am Life Ins Co v Wojciechowski*, 314 Mich. 275; 22 NW2d 371 (1946). Because fraudulent intent on the part of the applicant is not an element of this defense, it need not be proven by the insurer when moving for summary disposition.

Materiality is established not only where the insurer would have rejected the risk altogether, but also where the insurer would have charged a higher premium. *Oade v Jackson Nat’l Life Ins Co*, 465 Mich 244, 632 NW2d 126 (2001).

False statements not only include those statements contained in the application when submitted, but also statements which were true when the application was submitted but became false prior to delivery of the policy, imposing upon the insured a continuing duty until policy delivery to make sure that the answers remained accurate. *Id.*
Traditionally, insurers were held to the duty to discover an insured’s misrepresentation where that misrepresentation was “easily ascertainable.” *Ohio Farmers Ins Co v Michigan Mut Ins Co*, 179 Mich App 355; 445 NW2d 228 (1989). Various courts of appeals panels disagreed over the wisdom of such a holding. Compare *Manier v MIC General Ins Co*, 281 Mich App 485; 760 NW2d 293 (2008) with *Farmers Ins Exchange v Anderson*, 206 Mich App 214; 520 NW2d 686 (1994). The Michigan Supreme Court in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012) held that an insurer could avail itself of traditional legal and equitable remedies, including those associated with misrepresentation, for fraud in the application, even where that fraud was easily ascertainable and the claimant was a third party to the insurance contract. As the court stated:

As is evident, although the doctrines of actionable fraud, innocent misrepresentation, and silent fraud each contains separate elements, none of these doctrines requires that the party asserting fraud prove that the fraud could not have been discovered through the exercise of reasonable diligence. Stated differently, these doctrines do not require the party asserting fraud to have performed an investigation of all assertions and representations made by its contracting partner as a prerequisite to establishing fraud.

*Id* at p 557.

The court added that the common law elements of fraud and the impact of such defenses were well defined at common law. Statutory enactments could alter the scope of any contract defense, or the extent to which that defense is made available in specific circumstances.

A misrepresentation defense must be raised within two years of the date of the issue of the policy. MCLA § 500.3408. Fraudulent misrepresentations may not be subject to this two-year limitation. *Id.*

Where the misrepresentation increased the hazard assumed, no reliance on the misrepresentation by the insurance carrier need be proven. *Smith v Globe Life*, 460 Mich. 446 (1999).

**B) Preexisting Illness Or Disease Clauses**

No claim under a disability policy may be reduced or denied after two years from the date of issue on the grounds that a disease or physical condition existed prior to the effective date of the coverage unless that
disease or physical condition is excluded by name or specific description. MCLA §§ 500.3408; 500.3610.

When analyzing this issue, it is important to look to the policy language to be certain that the policy language conforms with the statutorily mandated language. *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000). The Michigan statute utilizes the term “exist” as opposed to “manifest” in determining whether a condition can be characterized as a “pre-existing” condition. In *Equitable Life Assur Society of US v Poe*, 143 F3d 1013 (6th Cir., 1998), the court held that the term “existed” includes: “All conditions that were in being, whether manifested or not.” Thus, conditions which were in existence, but not manifested, for more than two years, would fall outside of the two-year limitation on asserting a preexisting illness defense regardless of the date of manifestation.

C) Statutes of Limitation

1) General Rules

Contract actions must be filed within 6 years, MCLA § 600.5807, although the insurance policy may modify the limitations period, and provisions as short as one year have been upheld. *Rory v Cont’l Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). Tort actions generally must be filed within three years. MCLA § 600.5805.

Disability policies: no more than 3 years after written proof of loss was required to be furnished. MCLA §§ 500.3422, 500.3610).

A claim of fraud in the payment of benefits is an independent tort claim, and therefore, not subject to statutory rules or, potentially, contract suit limitation provisions. *Cooper v ACIA*, 481 Mich 399 (2008).

2) Tolling

For thirty years, Michigan had recognized “equitable tolling” which allowed the limitations period to be tolled from the date that the insured provided notice of loss until the insurer formally denied liability. *Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588; 242 NW2d 396 (1976). Two recent Michigan Supreme Court decisions overruled the availability of equitable tolling, mandating enforcement of the plain terms of unambiguous insurance contracts containing no such provision. *Devillers v Auto Club Ins Ass’n*, 473 Mich 562; 702 NW2d 539 (2005); *Rory v Cont’l Ins Co*, 473 Mich 457; 703 NW2d 23 (2005).
3) **Interplay with Incontestability Clauses**

Incontestability provisions for disability policies are confusing, and insurers are well-advised to assume that the statute provides for no more than two years MCLA §§ 500.3408, 500.3610. Insurers should also note the distinction between a two year “during the lifetime” provision and a “two years from date of issue” provision. (Compare e.g. MCLA § 500.4014 (individual life) with § 500.4432 (group life)). Actual policies may contain provisions shorter than two years.

For HMO’s, Medicare Supplement, LTC and Industrial Life policies: see MCLA §§ 500.3501 et seq, 500.3801 et seq, 500.3901 et seq and 500.4208 respectively.

**D) Defenses to Claim of Statutory Penalty Interest**


The provision within MCLA § 500.2006(4) which exempts insurers from paying penalty interest where the amount is “reasonably in dispute,” applies only to third party liability cases. A first party insurer must pay the 12% penalty interest if a claim is not timely paid, irrespective of whether the claim is reasonably in dispute. *Griswold Properties II, supra* at page 554.

Where an insurer requests a proof of loss, and that proof of loss is not satisfactory, that insurer must pay that portion of the loss which is not in dispute, and then direct to the insured those specifics which need to be supplemented in order to make the proof of loss satisfactory. Where no notice is provided, the proof of loss is deemed satisfactory, and penalty interest begins to accrue 60 days after that submission. *Griswold I*, at pages 564-67; *Frans v Harleysville Lake States Ins Co*, 2008 WL 4330426 (Mich App) (Ct. of App No. 280173, rel’d 09/23/08).

**VI. BENEFICIARY ISSUES**

A) **Change of Beneficiary**
Michigan enforces written change of beneficiary procedures as those procedures appear in the contract. Whether a change of beneficiary form is effective, depends on whether the person authorized to make that change has the authority to do so. Pursuant to MCL 450.837, electronic signatures are authorized in Michigan. Zulkiewski v American Gen Life Ins Co, 2012 WL 21260608 (Mich App)(No. 299025, rel’d 06/12/12).

Substantial compliance with a change of beneficiary requirement in a policy is sufficient for a court to infer the intent of the policyholder and to enforce a change of beneficiary. Aetna Life Ins Co v Brooks, 96 Mich App 310 (1980). Substantial compliance with change of beneficiary requirements is, traditionally, an issue of fact. Mazaitis v Noel, 2005 WL 2514632 (Mich App)(No. 253959, rel’d 10/11/05). When an insured has done all that an insured can do to change a beneficiary, the original beneficiary loses all rights under the policy. Quist v Western & Southern Life Ins Co, 219 Mich 406 (1922). Where a policy does not require a special form nor receipt of the requested change of beneficiary prior to death, one Michigan court has held that the insured’s writing of a new beneficiary name on a certificate of insurance was sufficient to evidence the intent of the policyholder to change his beneficiary. Aetna Life Ins Co v Parker, 130 F Supp 97 (ED Mich, 1955).


B) Divorce

Divorce judgments which include change of beneficiary provisions are to be enforced as written. Reed Estate v Reed, 293 Mich App 168 (2011). Default judgments of divorce are accorded the same weight as a negotiated divorce. Id. In Reed Estate, the court addressed whether a divorced spouse could claim her ex-husband’s benefits. The court noted that the divorce judgment was clear, and further, any rights that the ex-spouse had were waived based on her actions subsequent to the divorce. Since the ex-spouse did not take any steps to protect her interest in any insurance policy or other benefit within the scope of her divorce judgment, such inaction constituted a waiver.

In In Re Genaw Estate, 486 Mich 940 (2010) (opinion of the court summarily reversing Court of Appeals and reinstating trial court opinion),
the court held that an insurer which paid life insurance benefits to the
decedent’s ex-spouse, who had been identified on the beneficiary form,
acted appropriately. When the ex-spouse filed the claim for insurance, she
noted that she was the ex-spouse. The insurer paid the claim. The
personal representative brought suit, asserting that the carrier did not
have the authority to pay the ex-spouse the insurance benefits. The trial
court held that the insurer was entitled to summary disposition. The
Court of Appeals reversed. The Supreme Court reinstated the probate
court opinion adopting the dissenting opinion from the Court of Appeals.
The dissenting judge, relying on MCL 552.101(2), noted that a judgment
of divorce is determinative of all rights of a spouse. However, the statute
also provides that an insurance company issuing a policy shall be
discharged of all of its liability on the policy by payment of its proceeds in
accordance with the terms of the policy unless: before the payment the
company receives written notice by or on behalf of (1) the insured or the
estate of the insured (2) one of the heirs of the insured, or (3) any other person having an interest in the policy, of a claim and the
divorce.

The trial court held that an ex-spouse is not a “person having an
interest in the policy,” sufficient to provide notice to the carrier of a
potential problem regarding the designation of the beneficiary. The court
noted that the “other person” requirement is to place the insurer on notice
of a potential dispute. When the notice comes from an ex-spouse, no such
notice is provided.

In a divorce situation, a lien may be placed on the proceeds of a life
insurance policy in order to enforce a judgment of money owed by one
holding exists despite MCL 500.2207(2) which provides that the proceeds
of a life insurance policy may not be encumbered. The statute is limited to
situations in which the beneficiary is a “lawful beneficiary or assignee,”
and the obligation of a policyholder to commit the policy proceeds to pay a
debt renders the beneficiaries “unlawful,” taking the matter outside the
scope of statute.