I. Regulatory Limits On Claims Handling

A. Timing for Responses and Determinations

In 1999, the Nevada State Legislature enacted “Prompt Pay Provisions” for claims brought under health benefit plans, which include HMOs, accident and health insurance policies, and medical service contracts. The legislation was codified under NRS §§ 683A.0879, 689A.410, 689B.255, 689C.485, 695B.2505, and 695C.185. The provisions set forth the relevant time limitations involved with approving, denying, and paying a claim. Under the provisions, the insurer shall approve or deny a claim within 30 days after the claim is received. If the claim is approved, it must be paid within 30 days. If the approved claim is not paid within that period, the insurer must pay interest on the claim at the rate of interest equal to the prime rate at the largest bank in Nevada, plus six percent (however, the provisions allow the parties to establish a different rate of interest by contract).

If the insurer requires additional information to determine whether to approve or deny a claim, it must notify the claimant of its request for additional information within 20 days after it receives the claim. After receiving the additional information, the insurer must approve or deny the claim within 30 days. If the approved claim is not paid within that period, the insurer shall pay interest on the claim at the rate of interest equal to the prime rate at the largest bank in Nevada, plus six percent.

B. Standards for Determinations and Settlements

The standards for claims handling are also addressed in Nevada’s “Prompt Pay Provisions” listed above. In making a determination, an insurer cannot request a claimant to resubmit information that the claimant has already provided, unless the insurer has a legitimate reason for the request and the request is not meant to delay payment, harass the claimant, or discourage the filing of claims. Additionally, an insurer is prohibited from only paying part of a claim when the claim has been approved and is fully payable.

The Nevada Unfair Claims Settlement Practices Act ("Act"), found at NRS § 686A.310, enumerates several unfair trade practices for the determinations and settlement of claims. Under the statute, insurers are prohibited from:

(a) Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage 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 and processing of claims arising under insurance policies.

(d) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.

(e) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.

(f) 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, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.

(g) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

(h) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, his representative, agent or broker of the insured.

(i) Failing, upon payment of a claim, to inform insureds or beneficiaries of the coverage under which payment is made.

(j) Making known to insureds or claimants a practice of the insurer 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.

(k) Delaying the investigation or payment of claims by requiring an insured or a 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.

(l) Failing to settle claims promptly, 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.

(m) Failing to comply with the provisions of NRS §§ 687B.310 to 687B.390, inclusive, or 687B.410.

(n) Failing to provide promptly to an insured a reasonable explanation of the basis in the insurance policy, with respect to the facts of the insured’s claim and the applicable law, for the denial of his claim or for an offer to settle or compromise his claim.

(o) Advising an insured or claimant not to seek legal counsel.

(p) Misleading an insured or claimant concerning any applicable statute of limitations.

Moreover, the statute’s plain language provides a private right of action for an insured party or claimant. NRS § 686A.310(2); see Bergerud v. Progressive Cas. Ins., 453 F. Supp. 2d 1241, 1250 (D. Nev. 2006).

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

Nevada has not adopted by statute “The Insurance Information and Privacy Protection Model Act.” However, under NRS § 679B.135, the Nevada Insurance Commissioner may adopt the same provisions as provided in the model legislation.
originally drafted by the National Association of Insurance Commissioners. At this time, the Commissioner has not formally adopted any provisions of the Act.

Nevertheless, the Commissioner has adopted several regulations meant to protect the privacy of insureds. According to NAC § 679B.842, insurers must provide an “initial privacy notice” to all new customers. Thereafter, the insurer must continue to provide similar privacy notices every twelve months, so long as the insured maintains a policy with the insurer. The notices must accurately reflect privacy policies and practices of the insurer. A complete list of the information to be included in privacy notices can be found in NAC § 679B.846.

Further, Nevada prohibits the disclosure of non-public personal information in a manner contrary to federal law. NRS § 686A.025.

II. Principles of Contract Interpretation


Nevada courts will not rewrite contract provisions that are otherwise unambiguous. Farmers Ins. Group v. Stonik, 110 Nev. 64, 67 (Nev. 1994). In addition, Nevada courts will not increase an obligation to the insured where such was intentionally and unambiguously limited by the parties. Senteney v. Fire Ins. Exchange, 101 Nev. 654, 707 P.2d 1149 (1985).

III. Choice of Law

Nevada allows contracting parties to insurance contracts broad limits to choose the law that will determine the validity and effect of their contract. Progressive Gulf Ins. Co. v. Faehnrich, 327 P.3d 1061 (Nev. 2014). However, the agreement must not be contrary to the public policy of the forum or other interested state. Id.

IV. Extra Contractual Claims Against Insurers: Elements And Remedies

A. Bad Faith

According to the Nevada Supreme Court, bad faith is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct. Guaranty Nat’l Ins. Co. v. Potter, 112 Nev. 199, 205, 912 P.2d 267, 272 (1996). An insurer’s duty to its policy holder is “akin” to a fiduciary relationship, but does not rise to that level. Powers v. United States Services Auto. Ass’n., 114 Nev. 690, 700, 962 P.2d 596, 602 (1998). When investigating claims, insurers must act with the interest of the insured in mind. Misconduct, such as misrepresenting or concealing facts to gain an advantage over the insured, is a breach of the insurer’s fiduciary responsibility. Id. Bad faith can apply to denial or delay of a claim and also to an insurer’s failure to adequately inform an insured of a settlement offer. Allstate Insurance Co. v. Miller, 212 P.3d 318, 325 (2009). Failure to inform can be a proximate cause of an insured’s damages. Id. at 327.

Additionally, there are three elements required to establish an insurance bad faith claim; absent any of these three elements, a claim for bad faith must

1. The insurer denies or refuses to pay an insurance claim;
2. with no reasonable basis for its denial or refusal to pay the claim; and
3. the insurer must either have knowledge of, or recklessly disregard for, the fact that there was no reasonable basis for denying or refusing to pay the claim.


In Nevada, until the insured has established “legal entitlement,” no claim for bad faith will lie. Pemberton v. Farmers Ins. Exch., 109 Nev. 789, 796-797, 858 P.2d 380 (1993). In order to establish legal entitlement, and thus a claim for bad faith, an insured must demonstrate fault by the tortfeasor, which gives rise to damages, and must prove the extent of the damages. Id. However, an insured is not required to obtain a judgment against the tortfeasor before he or she is entitled to receive proceeds under a UM policy. Id.

In a bad faith tort action, a plaintiff is entitled to recover all damages proximately caused by the insurer’s conduct, which can include punitive damages. Guaranty Nat’l Ins. Co., 112 Nev. at 207-208, 912 P.2d at 273. However, a plaintiff is not automatically entitled to recover punitive damages. Bongiovi v. Sullivan, 138 P.3d 433, 450 (Nev. 2006). Pursuant to NRS § 42.005(1), tort claims may be subject to punitive damages only “where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied.” Id. at 451. The court has defined “oppression” as a conscious disregard for the rights of others “which constitutes an act of subjecting plaintiffs to cruel and unjust hardship.” United Fire Ins. Co. v. McClendon, 105 Nev. at 512-513, 780 P.2d at 673, 675 (1988). A plaintiff is never entitled to punitive damages as a matter of right because their allowance or denial rests in the discretion of the trier of fact. Powers v. United Servs. Auto. Ass’n, 114 Nev. 690, 705, 962 P.2d 596, 605 (1998). The trier of fact must determine that there is proof of motive and intent to violate a duty. Allstate Insurance Co. v. Miller, 212 P.3d 318, 327-28 (2009).

There are no statutory limitations on the amount of punitive damages that can be awarded in bad faith lawsuits against insurers. NRS § 42.005(2)(b). However, the Supreme Court of Nevada has reduced or set aside bad faith jury awards it considered excessive. See Wohlers & Co. v. Bartgis, 114 Nev. 1249, 969 P.2d 949 (1998). The court has ruled that “damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the...misconduct of the tortfeasor under the circumstances of a given case.” Id. at 962 (quoting Ace Truck & Equipment Rentals, Inc. v. Kahn, 103 Nev. 503, 509, 746 P.2d 132, 136-37 (1987)). The court set out several factors to help determine whether punitive damages are excessive, including the financial position of the defendant, culpability and blameworthiness of the insurer, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public’s sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind. Id.

B. Fraud

According to Nevada law, the plaintiff has the burden of proving each element of a fraud claim by clear and convincing evidence. Lubbe v. Barba, 91 Nev. 596, 540 P.2d 115 (1975). The elements of fraud include: (1) a false representation made by the defendant; (2) defendant's knowledge or belief that the representation is false (or that the defendant had an insufficient basis for making the representation); (3) defendant intended to induce the plaintiff to act, or to refrain from acting, in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance. J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc., 120 Nev. 277, 290, 89 P.3d 1009, 1018 (2004) (citing Wohlers v. Bartgis, 114 Nev. 1249, 1260-1261, 969 P.2d 949, 957-58 (1998), cert. denied 527 U.S. 1038 (1999). Justifiable reliance upon an alleged misrepresentation is established when a plaintiff shows that the false misrepresentation necessarily played a material and substantial part the plaintiff's adoption of his particular course. Blanchard v. Blanchard, 108 Nev. 908, 839 P.2d 1320, 1322 (1992).

Nevada law specifically recognizes a cause of action for constructive fraud, which is defined as the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others or to violate confidence. Perry v. Jordan, 111 Nev. 943, 946, 900 P.2d 335, 337 (1995) (citing Long v. Towne, 98 Nev. 11, 13, 839 P.2d 528, 529-530 (1992)). Constructive fraud is characterized by a breach of duty arising out of a fiduciary duty or confidential relationship. Id.

The statute of limitations for relief on the ground of fraud is three years. NRS § 11.190(3)(d). However, the time period begins to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake. Id.

C. Intentional or Negligent Infliction of Emotional Distress

1. Intentional Infliction of Emotional Distress

In order to recover under the theory of intentional infliction of emotional distress, a plaintiff must establish the following: (1) defendant's extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress; (2) the plaintiff actually suffered severe or extreme emotional distress; and (3) the defendant's conduct actually or proximately caused the distress. Olivero v. Lowe, 116 Nev. 395, 398, 995 P.2d 1023, 1025 (2000); see Bartmettler v. Reno air, Inc., 114 Nev. 441, 956 P.2d 1382 (1998); Pasadas v. City of Reno, 109 Nev. 448, 851 P.2d 438 (1993); Nelson v. City of Las Vegas, 99 Nev. 548, 665 P.2d 1141 (1983). Extreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community. Maduikke v. Agency Rent-a-Car, 114 Nev. 1, 4, 953 P.2d 24, 26 (1997) (citing California Book of Approved Jury Instructions ("BAJI") No. 12.74).

2. Negligent Infliction of Emotional Distress

The Nevada Supreme Court decided that in cases where emotional distress damages are not secondary to physical injuries, either a physical impact must have occurred or proof of serious emotional distress causing physical injury or illness must be presented. Bartmettler, 956 P.2d at 1387.

D. State Consumer Protection Laws and Regulations

NRS § 686A.310(2) expressly provides a private right of action for an insured party or claimant against an insurer for breaches of the list of unfair practices in settling claims. Bergerud v. Progressive Cas. Ins., 453 F. Supp. 2d 1241, 1250 (D. Nev. 2006). See Section I, B above. But the same statute does

The Nevada Unfair Claims Settlement Practices Act was not intended to codify the common law tort of bad faith; while the statute and the common law may overlap, the statute reaches different conduct than that which is contemplated by the common law tort. Hart v. Prudential Property & Casualty Insurance Co., 848 F. Supp. 900, 904-905 (D. Nev. 1994). While the Nevada Unfair Claims Settlement Practices Act prohibits conduct that is similar to that prohibited by the common law tort of bad faith, the Act actually specifies the manner in which an insurer should handle determinations of coverage on an insured’s claim. The Act also limits damages to those specifically attributable to the breach. Essentially, bad faith under the Act is not as broad in scope as the common law tort, which is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct. Guaranty National Insurance Company, 112 Nev. 199, 912 P.2d 267, 272 (1996).

E. State Class Actions

In Nevada, the prerequisites for a class action suit are governed by Nevada Rule of Civil Procedure (NRCP) 23. NRCP 23 is functionally identical to its federal counterpart. The rule authorizes one or more persons to sue as representative parties on behalf of a class only if four prerequisites, set forth in NRCP 23(a), are satisfied: (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 will fairly and adequately protect the interests of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Additionally, at least one of the prerequisites of either NRCP 23(b)(1)(A), (b)(1)(B), (b)(2), or (b)(3) must be satisfied. See Johnson v. Travelers Insurance Co., 89 Nev. 467, 471, 515 P.2d 68, 71 (1973).

The decision to use the class action “is a discretionary function wherein the district court must pragmatically determine whether it is better to proceed as a single action, or many individual actions in order to redress a single fundamental wrong.” Cummings v. Charter Hospital of Las Vegas, Inc., 111 Nev. 639, 643, 896 P.2d 1137, 1140 (1995) (quoting Deal v. 999 Lakeshore Association, 94 Nev. 301, 306, 579 P.2d 775, 778-79 (1978)). In determining whether it should certify a class, a district court should generally accept the allegations of the Complaint as true. See Meyer v. Eighth Judicial Dist. Court, 110 Nev. 1357, 1363, 885 P.2d 622, 626 (1994). An extensive evidentiary showing is not required. Id.

In Tallman v. Eight Jud. Dist. Ct., 359 P.3d 113 (2015), the Nevada Supreme Court abrogated its previous decision invalidating class action waivers in consumer arbitration agreements, see Picardi v. Eighth Judicial Dist. Court, 251 P.3d 723 ( Nev. 2011), as conflicting with the United States Supreme Court’s more recent decision in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011). In Tallman, the court stated that Concepcion does not permit a state court to invalidate a class waiver in a transaction involving commerce on the basis that individual arbitration hampers effective vindication of an individual’s state-law-based claim. Tallman, 359 P.3d 122 (2015). Thus, consumer class waivers in the context of consumer contracts are enforceable.

V. Defenses In Actions Against Insurers

A. Misrepresentation/Rescission of Insurance Contract For Misrepresentation

The rule against misrepresentations in insurance policies is a function of common and statutory law. Nevada case law provides that “one has an obligation not to speak falsely when inducing another to make a bargain.”

Specifically, NRS § 687B.110 provides as follows with respect to misrepresentations made by insurance applicants:

All statements and descriptions in any application for an insurance policy or annuity contract, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:

1. Fraudulent;
2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
3. The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

The ‘Good Faith’ exception contained in subsection (3) may swallow the rule. In Randono v. Cuna Mut. Ins. Group, 106 Nev. 371, 793 P.2d 1324 (1990), the Nevada Supreme Court stated, "[t]he introductory language of NRS § 687B.110 offers hope to consumers that insurance contracts will not be made voidable by inaccuracies and omissions in their applications, but the exceptions, especially the one contained in NRS § 687B.110(3), largely consume the rule.” Pursuant to the good faith exception, any exclusion or omission that would have resulted in a higher premium, had the omission been known at the time the policy was issued, will serve to negate enforcement of an insurance contract. The misrepresentation does not need to be the cause of the claim against the insurance company, as long as it would have raised the premium. Griffin v. Old Republic Insurance Co., 122 Nev. 479, 483-84 (2006).

Courts have refused to apply common law and statutory rules against misrepresentation where either waiver or estoppel is present. If the insurance company knew or could have reasonably discovered the misrepresentation, then Nevada courts will not apply the rule against misrepresentation in contacts. Violin, 81 Nev. at 462-463. However, absent proof of waiver or estoppel, an insurer is not bound to an insurance contract that it was induced to make by misrepresentation. Id. at 458.

B. Preexisting Illness or Disease Clauses

1. Statutes

Nevada defines the term “preexisting condition” in NRS § 689A.585 as follows:

Preexisting condition” means a condition, regardless of the cause of the condition, for which medical advice, diagnosis, care or treatment was recommended or received during the 6 months preceding the effective date of the new coverage. The term does not include
genetic information in the absence of a diagnosis of the condition related to such information.

Other statutory provisions regarding preexisting conditions include: NRS § 689B.450 and NRS § 689C.082, which further define the term "preexisting condition"; and NRS § 689B.500 and NRS § 689C.190, which regulate coverage of preexisting conditions, exclusionary periods, and affiliation periods required by HMOs.

2. **Case Law**

In Nevada, there have been no cases specifically interpreting preexisting illness clauses in insurance policies. However, clauses incorporated within an insurance contract generally will be construed as written absent any ambiguity; only when ambiguity exists will Nevada courts go beyond the language of the policy and consider the intent of the parties, the subject matter of the policy, and the circumstances surrounding issuance. Farmers Ins. Exchange v. Young, 108 Nev. 328, 334, 832 P.2d 376, 379 (1992).

If ambiguities exist, the policy will be judged from the perspective of one not trained in law or insurance; the ambiguity will be construed against the drafting party and in favour of the insured. Farmers Ins. Group v. Stonik, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994).

C. **Statute of Limitations**

Pursuant to NRS § 11.190, there is a six-year statute of limitations for causes of action based upon contract. The Nevada Supreme Court has determined that the six-year statute of limitations is applicable to insurance contracts. Clark v. Truck Ins. Exch., 95 Nev. 544, 598 P.2d 628 (1979). In regards to violations of the Unfair Claims Settlement Practices Act, NRS § 686A.310 is governed by NRS § 11.190(3)(a), which provides a three year statute of limitations. Lebie v. Encompass Ins. Co. of Am., 2015 U.S. Dist. LEXIS 30859, 4 (D. Nev. Mar. 10, 2015). In regards to a claim for common law bad faith, the same is subject to a four year statute of limitations provided by NRS § 11.190(2)(c). Schumacher v. State Farm Fire & Cas. Co., 467 F. Supp. 2d 1090, 1091 (D. Nev. 2006)

VI. **Beneficiary Issues**

Generally, an intended third-party beneficiary is bound by the terms of a contract even if he/she is not a signatory. Whether an individual is an intended third-party beneficiary, however, depends on the parties’ intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771 (Nev. 2005).

The Nevada Supreme Court has held that neither a divorce decree nor an unsigned, undated change of beneficiary card was sufficient to establish the insured’s intent to change his designated beneficiary. Ohran v. Sierra Health and Life Insurance Company, 111 Nev. 688, 690 (Nev. 1995). However, divorce revokes any revocable disposition of property by operation of law between former spouses, unless the express terms of a governing instrument or a court order provide otherwise. Primerica Life Ins. Co. v. Abah, 2014 U.S. Dist. LEXIS 148283, 3 (D. Nev. Oct. 16, 2014)—not on westlaw. An oral agreement as to property division does not divest an ex-wife or ex-husband of any insurance benefits of the ex-spouse absent a written agreement to the contrary. Id. Ohran v. Sierra Health & Life Ins. Co., 111 Nev. 688, 690 (Nev. 1995).

VII. **Interpleader Actions**

A. **Availability of Fee Recovery**
In Nevada, there have been no holdings specifically interpreting the availability of fee recovery in interpleader actions. However, in Nevada, it generally must be authorized by statute in order to recover for costs and attorney’s fees. *Las Vegas v. Sw. Gas Corp.*, 90 Nev. 178, 179, 521 P.2d 1229, 1230 (1974).

In insurance cases, the Nevada Supreme Court has held that the insurer disclaims any interest in the sum it deposits with the court when it files interpleader. *Farmers Ins. Exch. v. Civil Serv. Empls. Ins. Co.*, 94 Nev. 733, 733, 587 P.2d 420, 420 (1978). Therefore, the court seemingly disfavors awarding attorneys’ fees to the insurer from the deposited sum because they have no interest in the amount in controversy at that time. The dispute is likely to be controlled by the specific contract language.

**B. Differences in State vs. Federal Circuit**

The key difference is that in the 9th Circuit, “[g]enerally, courts have discretion to award attorney fees to a disinterested stakeholder in an interpleader action.” *Abex Corp. v. Ski’s Enterprises, Inc.*, 748 F.2d 513, 516 (9th Cir. 1984). The 9th Circuit recognizes that interpleader by an insurer offers two benefits. First, it benefits all parties by “promoting early litigation on the ownership of the fund, thus preventing dissipation.” *Trustees of Directors Guild of Am.-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 426 (9th Cir. 2000). Second, it allows insurance companies to “disclaim any position as to which of the claimants is entitled to the fund.” *Id.*

The amount of attorneys’ fees awarded in the 9th Circuit is generally modest in order to avoid depleting the fund at the expense of those who are entitled to it. *Id.* at 427. Fees that are compensable by the Plaintiff insurer are include “preparing the complaint, obtaining service of process on the claimants to the fund, and preparing an order discharging the plaintiff from liability and dismissing it from the action.” *Id.* at 426-27. Attorneys’ fees are limited to those that are incurred in filing and obtaining a release from liability, not litigation, because an interpleader plaintiff must be a disinterested party to the litigation. *Id.*