I. Regulatory Limits on Claims Handling

A. Timing for Responses and Determinations

The New Mexico Insurance Code, Unfair Claims Practices, N.M.S.A. 1978, § 59A-16-20 sets forth general rules regarding the time limits for adjusting claims. The only definite period specified is ninety (90) days from reporting, for settlement of catastrophic claims. N.M.S.A. 1978, § 59A-16-20(F). All other time requirements are more general. The Act requires insurers to act "reasonably promptly," in acknowledging claims. § 59A-16-20(B). The Act requires "prompt," investigation of the claim. § 59A-16-20(C). The Act also requires affirming or denying coverage within a "reasonable time." § 59A-16-20(D). Finally, the Act requires prompt settlement of a claim where liability is apparent, so not to influence settlement of other policy coverage and a prompt explanation of the basis for a denial of the claim or settlement offer. § 59A-16-20(M)(N).

B. Standards for Determinations and Settlements

The New Mexico Insurance Code, Unfair Claims Practices, N.M.S.A. 1978, § 59A-16-20 sets forth the requirements for claims handling and settlement. Insurers are not permitted to misrepresent coverage § 59A-16-20(A). Insurers are required to act in good faith to effectuate prompt, fair, and equitable settlements after liability is "reasonably clear." § 59A-16-20(E). Insurers are precluded from attempting to settle for less than an insured would believe he is entitled to by reference to written advertising material. § 59A-16-20(H). Insurers are prohibited from compelling insureds to litigate to recover amounts due under the policy by offering substantially less than the amounts ultimately recovered when the insured has made a claim for similar amounts to those ultimately recovered. § 59A-16-20(G). The Act also precludes insurers from a regular practice of appealing arbitration awards, multiple claim forms, delayed reservation of rights. § 59A-16-20(K)(L)(N) respectively.

C. State Privacy Laws, Rules, and Regulations

New Mexico has several relevant laws in addition to the Federal privacy laws generally applicable to insurers. N.M.S.A. 1978, § 59A-2-9.3 authorizes the Superintendent of Insurance to promulgate rules establishing the confidentiality of certain consumer information. Acting upon the enabling legislation, the New Mexico Department of Insurance has promulgated Rules
13.1.3.2 through 13.1.3.28 N.M.A.C. Included in these regulations are the Confidential Abuse Information. 13.1.3.75 N.M.A.C. Other relevant statutes include: the Domestic Abuse Insurance Practices Act, N.M.S.A. 1978 § 59A-16B-6, which requires abuse claim information be kept private; and the Genetic Information Privacy Act, N.M.S.A. 1978 § 24-21-3, which prohibits persons from obtaining genetic information or samples for genetic analysis from a person without first obtaining informed and written consent from the person or the person's authorized representative. Furthermore, New Mexico has a confidentiality of health records statute which prohibits the disclosure of health information. N.M.S.A. 1978 § 14-6-1(A).

II. Principles of Contract Interpretation


Insurance contracts are construed as a whole, including declarations, endorsements, and any other attachments. Jaramillo v. Providence Washington Ins. Co., 1994-NMSC-015, 117 N.M. 337, 871 P.2d 1343 (1994). The traditional rules of punctuation, syntax, and grammar may also help clarify a contractual ambiguity. Id. If any provisions appear questionable or ambiguous, New Mexico courts look to whether their meaning and intent is explained by other parts of the policy. Id. The resolution of ambiguities becomes a matter for the court and is often described as a matter of law rather than a factual determination. Id. If ambiguities cannot be resolved by examining the language of the insurance policy, courts may look to extrinsic evidence such as the premiums paid for insurance coverage, the circumstances surrounding the agreement, the conduct of the parties, and oral expressions of the parties' intentions. Id. See also, Mark V, Inc. v. Mellekas, 1993-NMSC-001, 114 N.M. 778, 845 P.2d 1232 (1993).

III. Choice of Law
New Mexico interprets insurance contracts according to the law of the place where the contract was executed, which is referred to as *lex loci contractus*. *State Farm Mut. Auto. Ins. Co. v. Ballard*, 2002-NMSC-030, ¶7, 132 N.M. 696, 698, 54 P.3d 537, 539. See also, *Shope v. State Farm Ins. Co.*, 1996-NMSC-052, 122 N.M. 398, 925 P.2d 515. To overcome *lex loci contractus*, there must be a countervailing interest that is fundamental and separate from general policies of contract interpretation. Id. Application of the rule must result in a violation of “fundamental principles of justice” in order to apply New Mexico law rather than the law of the jurisdiction where the contract was signed. Id.

IV. **Extra Contractual Claims against Insurers: Elements and Remedies**

A. **Bad Faith**

1. **First Party Claims**

Insureds have private causes of action for bad faith at common law and by statute. The Unfair Claims Practices Act, N.M.S.A. 1978 § 59A-16-20, provides first party claimants a private cause of action for violation of any of its provisions. Insureds also may have claims pursuant to New Mexico's Unfair Trade Practices Act N.M.S.A. 1978 § 57-12-10. See Valley Imp. Ass’n v. U.S. Fidelity & Guar. Corp., 129 F.3d 1108 (1997).

Uniform Jury Instruction 13-1702 provides:

> An insurance company acts in bad faith when it refuses to pay a claim of the policyholder for reasons which are frivolous or unfounded. An insurance company does not act in bad faith by denying a claim for reasons which are reasonable under the terms of the policy.

Therefore, New Mexico further recognizes common law Bad Faith claims where the denial of an insured's first-party claim is “frivolous or unfounded.” *Chavez v. Chenoweth*, 1976-NMCA-076, ¶ 31, 89 N.M. 423, 429, 553 P.2d 703, 709. The insurer's action in denying coverage must rest upon a reasonable basis. Where payment of policy proceeds depends on an issue of law or fact that is “fairly debatable” the insurer is entitled to debate that issue. *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 1985-NMSC-090, ¶ 54, 103 N.M. 480, 492, 709 P.2d 649, 661.

The Court concluded that under New Mexico law, bad faith conduct by an insurer typically involves a culpable mental state, and therefore the determination whether the bad faith evinced by a particular defendant warrants punitive damages is ordinarily a question for the jury to resolve. Id. Accordingly, an instruction on punitive damages will ordinarily be given whenever the plaintiff's insurance-bad-faith claim is allowed to proceed to the jury. Id. The Court did decide, however, to afford the trial court the discretion to withhold a punitive-damages instruction in those rare instances in which the plaintiff has failed to advance any evidence tending to support an award of punitive damages. Id.

2. Third Party Claims; Limited to Mandatory Liability Coverage

In Hovet v. Allstate Ins. Co., the New Mexico Supreme Court held that third-party claimants under an automobile liability policy may sue the insurer for unfair settlement practices under the Insurance Code. 2004-NMSC-010, ¶ 21, 135 N.M. 397, 403, 89 P.3d 69, 75. The Court, however, placed certain limitations on the third-party right of action. The most significant limitation is that lawsuits for unfair settlement practices cannot proceed simultaneously with the underlying negligence litigation. Instead, the third-party action may only be brought after the underlying negligence action is resolved in favor of the third party. Id. at ¶ 26. Further, if the third-party settles the underlying negligence case, no cause of action ever accrues against the insurer for unfair settlement practices under the Code. Id. In King v. Allstate, the New Mexico Court of Appeals reaffirmed the ruling in Hovet that the third-party right of action does not accrue unless and until there has been an adjudication of the underlying negligence action in favor of the third party. 2007-NMCA-044, 141 N.M. 612, 159 P.3d 261.

Importantly, however, the Supreme Court limited the types of third party claims that it recognized in Hovet and King, holding that a third party does not have a claim against insurers providing nonmandatory excess liability insurance coverage. Jolley v. Associated Electric & Gas Ins. Servs. Ltd. (AEGIS), 2010-NMSC-029, 148 N.M. 436, 237 P.3d 738. The United States District Court for the District of New Mexico declined to extend the holding in Hovet to third party suits against a homeowner’s policy. See Williams v. Foremost Ins. Co., 102 F.Supp.3d 1230 (D.N.M. 2015).

B. Fraud

The Trade Practices and Frauds section of New Mexico's Insurance Code prohibits fraudulent conduct by an insurer. N.M.S.A. 1978, § 59A-16-3. In New Mexico a claim or defense of fraud requires the establishment of the following elements:

1. A representation of fact was made which was not true;

2. Either the falsity of the representation was known to the party making it or the representation was recklessly made;

3. The representation was made with the intent to deceive and to induce the party claiming fraud to rely on the representation;
4. The party claiming fraud did in fact rely on the representation.

UJI 13-1633 NMRA. While this instruction allows a party to recover damages that are proximately caused by fraud, it does not allow for a recovery of damages for emotional distress. William v. Steward, 2005-NMCA-061, 137 N.M. 420, 112 P.3d 281.

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

In New Mexico to recover for intentional infliction of emotional distress a plaintiff must prove that:

1. The conduct of the defendant was extreme and outrageous under the circumstances; and

2. The defendant acted intentionally or recklessly; and

3. As a result of the conduct of defendant plaintiff experienced severe emotional distress.

Extreme and outrageous conduct is that which goes beyond bounds of common decency and is atrocious and intolerable to the ordinary person. Emotional distress is "severe" if it is of such an intensity and duration that no ordinary person would be expected to tolerate it.

UJI 13-1628. In addition, conduct that occurs in the context of a special relationship between parties is more likely to be extreme and outrageous. Baldonado v. El Paso Natural Gas Co., 2008-NMSC-005, ¶ 26, 143 N.M. 288, 294, 176 P.3d 277, 283.

While New Mexico has considered the claim of negligent infliction of emotional distress, it has never recognized the cause of action except for bystander liability. Akutagawa v. Laflin, Pick & Heer, P.A., 2005-NMCA-132, ¶ 21, 138 N.M. 774, 779, 126 P.3d 1138, 1143. Negligent infliction of emotional distress to a bystander requires three elements: (1) claimant’s close family relationship with the victim; (2) suffering severe emotional distress as a result of seeing or perceiving the occurrence; and (3) the occurrence resulted in physical injury or death to the victim. UJI 13-1629.

The Court has also refused to recognize recovery for emotional distress for damages to property or for a plaintiff that suffers severe emotional distress by witnessing the injury of another in the same accident. Castillo v. City of Las Vegas, 2008-NMCA-141, ¶¶ 27, 31, 145 N.M. 205, 213, 195 P.3d 870; 878; Montoya v. Pearson, 2006-NMCA-097, 140 N.M. 243, 142 P.3d 11.

Finally, negligent infliction of emotional distress is not allowed in any cause of action to proceed in the context of contractual or extra-contractual damage claims, unless the “specialized nature” of the contract requires reasonable care to be taken to avoid the infliction of severe emotional distress. Akutagawa, 2005-NMCA-132, ¶ 21, 138 N.M. 774, 779, 126 P.3d 1138, 1143.
D. **State Consumer Protection Laws, Rules and Regulations**

The New Mexico Legislature has created a consumer relations division. N.M.S.A. 1978 § 8-8-8. That division shall:

1. receive and investigate non-docketed consumer complaints and assist consumers in resolving, in a fair and timely manner, complaints against a person under the authority of the commission, including mediation and other methods of alternative dispute resolution; provided, however, that assistance pursuant to this paragraph does not include legal representation of a private complainant in an adjudicatory proceeding;

2. work with the consumer protection division of the attorney general's office, the governor's constituent services office and other state agencies as needed to ensure fair and timely resolution of complaints;

3. advise the commission on how to maximize public input into commission proceedings, including ways to eliminate language, disability and other barriers;

4. identify, research and advise the commission on consumer issues;

5. assist the commission in the development and implementation of consumer policies and programs; and

6. perform such other duties as prescribed by the commission.

The complaints that the division receives, regarding quality or quantity of services provided by a regulated entity, are recorded in order to determine the concerns of consumers. N.M.S.A. 1978 § 8-8-8(B).

New Mexico has provided additional protection to consumers by adopting the Unfair Practices Act, which prohibits unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce. Private remedies include, injunctions, attorney fees and costs and treble damages. See N.M.S.A. 1978 §§ 57-12-1 to -26.


E. **State Class Actions**

Class Actions in New Mexico are governed by Rule 1-023 N.M.R.A. of the state's Rules of Civil Procedure. The language of Rule 1-023 N.M.R.A. creates the following requirements for Class Actions:
A. Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

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.

Although similar to the Federal Rule 23, New Mexico has not adopted the 2003 amendments to the rule. O'Hare v. Valley Utilities, Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App. 1976), rev'd in part on other grounds, Valley Utilities, Inc. v. O'Hare, 89 N.M. 262, 550 P.2d 274 (1976). Under New Mexico Rule 1-023 the crucial question is the species of class, which requires an examination of the abstract nature of the rights involved. Id. at 109, 547 P.2d at 1151. While the court may look to the federal law for guidance, it should complete its own analysis as to whether the state class action rule has been satisfied. Davis v. Devon Energy Corp., 2009-NMSC-048, 147 N.M. 157, 218 P.3d 75.

New Mexico has seen an increase in the amount of class action litigation in the context of life insurance. The New Mexico appellate courts have generally affirmed the District Court's certification of classes applying the criteria contained in Rule 1-023. See, e.g., Davis v. Devon Energy Corp., 2009-NMSC-048, 147 N.M. 157, 218 P.3d 75; Berry v. Federal Kemper Life Assur. Co., 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1166.

F. State Privacy Laws, Rules and Regulations

New Mexico has several relevant laws in addition to the Federal privacy laws generally applicable to insurers. Other relevant statutes include: the Domestic Abuse Insurance Practices Act, N.M.S.A. 1978 § 59A-16B-6, which requires abuse claim information be kept private; and the Genetic Information Privacy Act, N.M.S.A. 1978 § 24-21-3, which prohibits persons from obtaining genetic information or samples for genetic analysis from a person without first obtaining informed and written consent from the person or the person's authorized representative.

1. Criminal Sanctions

The privacy regulations themselves do not contain any criminal sanctions or penalties.

2. The Standards for Compensatory and Punitive Damages

The regulations do not contain any provisions regarding damages. However, the authorizing statute states that willful violations of any
regulations shall subject the violator to applicable penalties under the Insurance Code. N.M.S.A. 1978, § 59A-2-9(D).

3. **Insurance Regulations to Watch**

Rules 13.1.3.2 through 13.1.3.28 N.M.A.C. regulate insurance companies’ use of non-public information. These regulations require certain personal financial and health information to remain private.

4. **State Arbitration and Mediation Procedures**

The Office of Superintendent of Insurance has a Consumer Assistance Bureau that will resolve complaints against insurers. If the insured is represented by an attorney or has filed a lawsuit, the Office of Superintendent of Insurance will not resolve any Complaint. The Office will investigate the claim and determine if a statute or regulation has been violated.

5. **State Administrative Entity Rule-Making Authority**

N.M.S.A. 1978, § 59A-2-9.3 authorizes the Superintendent of Insurance to promulgate rules establishing the confidentiality of certain consumer information. Acting upon the enabling legislation, the New Mexico Department of Insurance has promulgated Rules 13.1.3.2 through 13.1.3.28 N.M.A.C.

V. **Defenses in Actions against Insurers**

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

Substantial prejudice must be shown by insurer in cases of misrepresentation, concealment or non-cooperation of insured in order to void a policy. Eldin v. Farmers Alliance Mut. Ins. Co., 1994-NMCA-172, ¶ 18, 119 N.M. 370, 375, 890 P.2d 823, 828. This substantial prejudice rule was also extended to consent-to-settle provisions. State Farm Mut. Auto. Ins. v. Fennema, 2005-NMSC-010, ¶ 8, 137 N.M. 275, 277, 110 P.3d 491, 493. However this rule does not extend to an insured's material breach of a fraud provision. Eldin, 1994-NMCA-172, ¶ 10, 119 N.M. at 372, 890 P.2d at 828.

In the case of Crow v. Capitol Bankers Life Ins. Co., the court held that a material misrepresentation in answering a question regarding the existence of a significant bodily disorder will render the policy void. 1995-NMSC-018, ¶¶ 40-41, 119 N.M. 452, 459, 891 P.2d 1206, 1213. A misrepresentation is material if the insurer would not have entered into the contract but for the misrepresentation. Id.

B. **Preexisting Illness or Disease Clauses**

1. **Statutes**

New Mexico Statute § 59A-20-3 provides in part:

No insurer shall deliver or issue for delivery in the state any life insurance policy unless the policy contains in substance all of the applicable standard provisions required by Sections 369 through 380 [59A-
Pre-existing condition clauses are permitted life insurance policies in New Mexico.

2. Case Law

There is no case law in New Mexico specifically discussing the enforceability of pre-existing illness/disease clauses. In Ellingwood v. N.N. Investors Life Insurance Company, Inc., the Court held that there was an issue of material fact as to whether life and health insurance applicant misrepresented his medical condition, which precluded summary judgment for insurer. 1991-NMSC-006, 111 N.M. 301, 805 P.2d 70. In Ellingwood, the agent obtained information from the life insurance applicant which was inconsistent and incomplete. In addition, the applicant's health problems were readily apparent. 1991-NMSC-006, ¶ 19, 111 N.M. 301, 307, 805 P.2d 70, 76. The Court held that even though the applicant misrepresented his pre-existing health conditions, when the applicant gives sufficient information to alert insurance company to his particular medical condition or history, company is bound to make such further inquiry as is reasonable under the circumstances in order to ascertain facts surrounding information given. Id. Regardless of whether an insured is covered under a contract for temporary insurance or a permanent policy, where a jury finds that an insurer has been given sufficient information to alert it to a serious medical condition, and an insurer has failed to investigate records of that condition made available by applicant, the insurer is charged with information in those records. Id.

If the insurer undertakes an investigation of disclosed medical records after issuing a binder for temporary insurance, any information in those records that might cause the insurer to reevaluate its position may form the basis of a right to cancel the policy, prior to the time the insured files a claim for benefits; however, any risk should be shifted to the insurer with respect to any loss that arises in the interim. The Ellingwood court refused to grant summary judgment to the life insurance carrier even though there were material misrepresentations of the applicant's pre-existing condition, where such misrepresentations could easily have been detected by the agent and underwriters. Id.

In a Tenth Circuit case out of New Mexico, Fought v. Unum Life Ins. Co. Of Am., the Tenth Circuit declined to enforce a preexisting illness clause where the disability was from surgery related to the preexisting condition. 379 F.3d 997 (10th Cir. 2004). The policy did not specifically exclude disability as a result of the surgery, but only referred to preexisting conditions. Id. The Court found that, had the insurer intended to exclude the results of surgery, it could have done so. Id. Therefore, under these circumstances, the disability was covered under the policy. Id.

Even when there has been a substantial and material breach of the insured's obligations and a resulting failure of a condition precedent to the insurer's liability, the breach and nonoccurrence of the condition does not discharge the insurer absent a showing that the insurer has been substantially prejudiced. Roberts Oil Co. v. Transamerica Ins. Co., 1992-NMSC-032, 113 N.M. 745, 833 P.2d 222.
3. **Statutes of Limitations**

The statute of limitation varies depending upon the type of claim being asserted. For example, if the claim is based upon contract then it is governed by New Mexico’s six year statute of limitation. N.M.S.A. 1978, § 37-1-3. This section provides that an action upon a written contract must be filed no later than six years "after their causes accrue." N.M.S.A. 1978, § 37-1-1. In Brooks v. State Farm Ins. Co., the Court found that an auto accident did not trigger the limitations period for uninsured motorist coverage recovery under an insurance policy because the theory for recovery was breach of contract, not a tort theory of recovery; therefore, the date of the breach of the insurance contract is the date from which limitations begins to run. 2007-NMCA-033, ¶ 11, 141 N.M. 322, 325, 154 P.3d 697, 700.

If the claim is based upon fraud, then N.M.S.A. 1978 § 37-1-4 requires the claim be filed within four years. N.M.S.A. 1978 § 37-1-4 also requires other claims founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property and all other actions not otherwise provided be made within four years. In these cases, the cause of action will not accrue until the fraud, mistake, injury or conversion complained of, is discovered by the aggrieved party. N.M.S.A. 1978 § 37-1-7.

The “common thread” in New Mexico cases is that, for the statute of limitations, a cause of action accrues from the injury rather than the wrongful act. Zamora v. Prematic Serv. Corp., 936 F.2d 1121 (10th Cir. 1991). However, the time that an injury occurs is different under N.M.S.A. 1978 §§ 37-1-3 and 37-1-4. In Zamora, the Court held that where the insured knew that the auto liability policy had been cancelled and that the insurer would neither defend nor indemnify against loss or pay for the damages, the claim was governed by the six-year contract statute of limitations under N.M.S.A. 1978 § 37-1-3. 936 F.2d 1121 (10th Cir. 1991).

In Torrez v. State Farm Mut. Auto. Ins. Co., when discussing an insured's claim for wrongful refusal to settle, it applied N.M.S.A. 1978 §§ 37-1-4. 705 F.2d 1192 (10th Cir. 1982) Although the Court applied the four year statute of limitations, it rejected the insurer’s statute of limitations defense because the cause of action accrued from the time the judgment. Id. The court found that the action accrued at the time of judgment, and not when the accident occurred or when the lawsuit was filed, because liability was not determined until the jury rendered its verdict. Id.

Lastly, contractual provisions that negate or reduce the time when a suit may be filed are likely to be void. See, Electric Gin Co. v. Firemen's Fund Ins. Co., 1935-NMSC-001, ¶ 2, 39 N.M. 73, 39 P.2d 1024, 1024 (A provision in the fire policy that no suit could be maintained unless commenced within twelve months after a loss, was held void as against public policy and contrary to New Mexico's six-year limitation).

VI. **Beneficiary Issues**

Where a statute unambiguously confers insured with a right to designate a beneficiary, New Mexico courts have held that the insured’s right to change beneficiaries, for whatever reason, is absolute and is not to be denied by either a federal or state court. Hook v. Hook, 1984-NMSC-068, ¶ 5, 101 N.M. 390, 391, 683 P.2d 507, 508. Absent an irrevocable designation of
beneficiary, New Mexico law grants insureds with the right to designate and change health insurance beneficiaries.

Unless the insured makes an irrevocable designation of beneficiary, the right to change of beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

N.M.S.A. § 59A-22-15. In order to change the beneficiaries, the insured must generally comply with procedures adopted by the insurer or imposed by statute. Matter of Schleis' Estate, 1982-NMSC-010, ¶ 11, 97 N.M. 561, 563, 642 P.2d 164, 166. If no such procedures exist the courts may recognize a change desired by the insured if the intent is declared in an appropriate manner. Id. New Mexico has adopted a two-pronged test, which requires evidence of insured’s clear expression of intent and evidence of reasonable efforts to change the beneficiary. Id.

In determining whether a beneficiary of an insurance policy has been changed, New Mexico courts apply the theory of equity which regards as done that which ought to be done in carrying out the intention of parties. In Mut. Life Ins. Co. of New York v. Owens, an insured delivered to his former wife a signed request for change of beneficiary of his insurance policy from his then wife, to his former wife. 1935-NMSC-072, 39 N.M. 421, 48 P.2d 1024, 1029. Insured died, before he formally executed the change of beneficiary. Id. The court held that insured's wife was entitled to recover on the policy as the beneficiary, since insured “had not done everything in his power” to effect the change of beneficiary to his former wife. Id.

Divorce alone does not automatically divest a former spouse of the proceeds of a life insurance policy in which the former spouse was a named beneficiary. Romero v. Melendez, 1972-NMSC-041, ¶ 12, 83 N.M. 776, 779, 498 P.2d 305, 308. The beneficiary's interest may be terminated, however, by an agreement between the parties which may reasonably be construed as a relinquishment of the spouse's rights to the insurance. Id. In Harris v. Harris, the couple’s divorce decree made no disposition of policies on husband's life insurance and the court reasoned that the husband and ex-wife owned policies as tenants in common from the time of the divorce. 1972-NMSC-005, ¶ 6, 83 N.M. 441, 442, 493 P.2d 407, 408. Where a divorce decree or property settlement agreement requires a party to keep a life insurance policy in effect and to retain a specific beneficiary, that beneficiary has a vested interest in the insurance policy proceeds and may assert that vested interest. Bernal v. Nieto, 1997-NMCA-067, 123 N.M. 621, 943 P.2d 1338.

VII. Interpleader Actions

A. Availability of Fee Recovery

New Mexico Rule 1-022 NMRA provides for interpleader actions. Rule 1-022 provides as follows:

A. Who May Interplead. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or
multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 1-020.

B. Order to Interplead. Upon the filing of any complaint, cross-claim or counterclaim by way of interpleader pursuant to Paragraph A of this rule, the district court shall take full and complete jurisdiction of the matter or thing in dispute and shall order all who have or claim an interest therein to interplead in said action within the time now by law allowed for plea and answer. Service of a copy of such order shall be made as provided in these rules for service on adverse parties.

C. Service Upon Nonresidents. In any action under the provisions of this rule, where it is made to appear to the satisfaction of the court by affidavit filed in said cause, that any person claiming an interest in or to any property in the custody of said court, is in fact a nonresident of New Mexico, the court shall order service to be made upon such nonresident by publication.

D. Disposition. The decree of the district court shall determine the disposition of the matter or thing in dispute and shall be binding upon all parties to the action on whom service has been made.

NMRA Rule 1-022.

Rule 1-022 does not explicitly provide for fee recovery. New Mexico does not have case law regarding the recovery of fees. However, New Mexico Courts will look to the Federal Rule counterpart for guidance. As explained below, the Tenth Circuit has given the trial court discretion over the “common practice” of reimbursing an interpleader plaintiff's litigation costs out of the fund on deposit with the court.

B. Differences in State vs. Federal Circuit

The United States Court of Appeals for the Tenth Circuit “has recognized the ‘common practice’ of reimbursing an interpleader plaintiff’s litigation costs out of the fund on deposit with the court.” Transamerica Premier Ins. Co. v. Growney, No. 94-3396, 1995 WL 675368, at *1, 1995 U.S.App. 1995 WL 675368, at *3 (10th Cir., Nov. 13, 1995) (internal quotations omitted). The award of fees and costs to an interpleader plaintiff is an equitable matter that lies within the discretion of the trial court. Id. The rationale for the award is that the plaintiff has, at its own expense, facilitated the efficient resolution of a dispute in which it has no interest Id. In an interpleader action, attorneys fees are normally awarded to a plaintiff who: “[i] is disinterested (i.e., does not itself claim entitlement
to any of the interpleader fund); [ii] concedes its liability in full; [iii] deposits the disputed fund in court; and [iv] seeks discharge, and who is not in some way culpable as regards the subject matter of the interpleader proceeding. Id.