I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

Article 26 of New York’s Insurance Law governs what would be considered “unfair” claim settlement practices. Under Ins. L. § 2601, a practice is considered unfair if an insurer fails “to acknowledge with reasonable promptness pertinent communications as to claims arising under its policies.” Insurance Law § 2601 (emphasis added). Insurance companies must have “reasonable standards” by which to promptly investigate claims. Id. (emphasis added). Where liability has become reasonably clear, an insurance company must be “prompt, fair and equitable” in effectuating settlements. Id.

The timeframe is further explained in the New York Code of Rules and Regulations (“NYCRR”) at 11 NYCRR 216.0 et seq.

11 NYCRR 216.4 provides:

(a) Every insurer, upon notification of a claim, shall, within 15 business days, acknowledge the receipt of such notice. Such acknowledgment may be in writing. If an acknowledgment is made by other means, an appropriate notation shall be made in the claim file of the insurer.

In addition, 11 NYCRR 216.5 provides:

(a) Every insurer shall establish procedures to commence an investigation of any claim filed by a claimant, or by a claimant's authorized representative, within 15 business days of receipt of notice of claim. An insurer shall furnish to every claimant, or claimant's authorized representative, a notification of all items, statements and forms, if any, which the insurer reasonably believes will be required of the claimant, within 15 business days of receiving notice of the claim.
11 NYCRR 216.6 provides:

(c) Within 15 business days after receipt by the insurer of a properly executed proof of loss and receipt of all items, statements and forms which the insurer requested from the claimant, the claimant, or the claimant's authorized representative, shall be advised in writing of the acceptance or rejection of the claim by the insurer. [...] If the insurer needs more time to determine whether the claim should be accepted or rejected, it shall so notify the claimant, or the claimant's authorized representative, within 15 business days after receipt of such proof of loss, or requested information. Such notification shall include the reasons additional time is needed for investigation. If the claim remains unsettled, unless the matter is in litigation or arbitration, the insurer shall, 90 days from the date of the initial letter setting forth the need for further time to investigate, and every 90 days thereafter, send to the claimant, or the claimant's authorized representative, a letter setting forth the reasons additional time is needed for investigation. If the claim is accepted, in whole or in part, the claimant, or the claimant's authorized representative, shall be advised in writing of the amount offered. In any case where the claim is rejected, the insurer shall notify the claimant, or the claimant's authorized representative, in writing, of any applicable policy provision limiting the claimant's right to sue the insurer.

(d) The company shall inform the claimant in writing as soon as it is determined that there was no policy in force or that it is disclaiming liability because of a breach of policy provisions by the policyholder. The insurer must also explain its specific reasons for disclaiming coverage.

N.Y. Comp. Codes R. & Regs. tit. 11, § 216.6


B. Standards for Determination and Settlements

There is no specific set of standards for settlements in New York, although as noted above, New York does have protections against unfair claim settlement practices under §2601.
The requirements of New York Insurance Law §2601 are further detailed by 11 NYCRR 216.0, et. seq. In its preamble, 11 NYCRR 216.0(e) prescribes certain claims handling procedures to be followed by insurers, including the following:

1. Have as your basic goal the prompt and fair settlement of all claims.
2. Assist the claimant in the processing of a claim.
3. Do not demand verification of facts unless there are good reasons to do so. When verification of facts is necessary, it should be done as expeditiously as possible.
4. Clearly inform the claimant of the insurer’s position regarding any disputed matter.
5. Respond promptly, when response is indicated, to all communications from insureds, claimants, attorneys and any other interested persons.
6. Every insurer shall distribute copies of this regulation to every person directly responsible for the supervision, handling and settlement of claims subject to this regulation, and every insurer shall satisfy itself that all such personnel are thoroughly conversant with, and are complying with, this regulation.


II. PRINCIPLES OF CONTRACT INTERPRETATION

Agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract. When the terms of the contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract. Policy provisions that are clear and susceptible to only one interpretation, i.e. not ambiguous, must be enforced and the courts cannot vary the contract to accomplish some notion of “abstract justice.” Breed v. Insurance Co. of North America, 46 N.Y.2d 351, 385 N.E.2d 1280, 413 N.Y.S.2d 352 (1978).
In cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it and favorably to a party who had no voice in the selection of its language. In the case of ambiguity in exclusionary terms, the principle of contra proferentem or strictly construing the policy against the insurer-drafter applies, and the insurer must establish that the “plain” meaning of the exclusion is the only interpretation that could be fairly placed on it. National Screen Service Corp. v. U.S. Fidelity & Guaranty Co., 364 F.2d 275, 279 (2d Cir. 1966); Great Northern Ins. Co. v. Dayco Corp., 620 F.Supp. 346 (S.D.N.Y. 1985).

Courts should not strain to find ambiguity. Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 841 N.E.2d 742, 807 N.Y.S.2d 583 (2005)(using “annual” to describe premium payments even though effective date of policy resulted in payment for days that were not covered did not create ambiguity).

Words rather than punctuation marks should guide the analysis. Punctuation may not by itself create ambiguity, although it may be used as a guide to resolve an ambiguity. Mistakes in grammar, spelling or punctuation should not be permitted to alter the intent of the parties as manifest by the language employed. Banco Espirito Santo, S.A. v. Concessionaria Do Rodoanel Oeste S.A., 100 A.D.3d 100, 109, 951 N.Y.S.2d 19, 26 (1st Dept. 2012).

The threshold decision on whether a term is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous. A contract is unambiguous if, on its face, it is reasonably susceptible to only one meaning. Extrinsic evidence is not admissible to create an ambiguity in a written agreement that is complete and clear and unambiguous on its face.

The standard of proof is what a reasonably prudent non-lawyer person would understand the disputed term to mean. In Miller v. Continental Ins. Co., 40 N.Y.2d 675, 358 N.E.2d 258, 389 N.Y.S.2d 565 (1976), the Court found an accidental death provision did not specifically exclude death caused by a heroin overdose. The term accident was given a broader, rather a narrow technical, definition that a layman would use. If an exclusion is intended, then the insurer must make that intention clear by the use of clear, appropriate language, Miller, 40 N.Y.2d 675, 358 N.E.2d 258, 389 N.Y.S.2d at 567.


The court should construe the contract so as to give full meaning and effect to its material provisions. If a contractual provision is to be enforced, it must be sufficiently certain and specific so that what was
promised can be ascertained. Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken rather than confining itself to the implementation of the bargain that the parties have committed themselves.

Excessive emphasis should not be placed upon particular words or phrases. However, a recital paragraph in a document is not determinative of the rights and obligations of the parties to the agreement, and where a handwritten or typewritten provision of a contract conflicts with the language of a preprinted form document, the handwritten or typewritten provision is controlling because it is presumed to express the most recent intentions of the parties. Similarly, where there is an inconsistency between a general provision and a specific provision, the specific provision controls.

The use of different terms in the same agreement strongly implies that the words are to be accorded different meanings. When certain language is omitted from a provision in a contract but placed in other provisions, it must be assumed that this omission was intentional.

When it is clear that the parties intended to be bound, a court should not adopt an interpretation that would render a contract illusory, negate another provision, leave any provision without force or effect, or leave contractual clauses meaningless. Thus, where two seemingly conflicting contractual provisions can be reasonably reconciled, the court is required to do so and to give effect to both. The Court of Appeals has specifically declined to endorse “the first clause governs” view where there are conflicting provisions in the contract. Israel v. Chabra, 12 N.Y.3d 158, 168, 906 N.E.2d 374, 380, 878 N.Y.S.2d 646, 652 (2009); Le Bel v. Donovan, 117 A.D.3d 553, 986 N.Y.S.2d 80 (1st Dept. 2014).

When interpreting a business contract, the tests to be applied are common speech and the reasonable expectation and purpose of the ordinary business person in the factual context in which terms of art and understanding are used, often also keyed to the level of business sophistication and acumen of the particular parties, BP Air Conditioning Corp. v One Beacon Ins. Group, 8 N.Y.3d 708, 871 N.E.2d 1128, 840 N.Y.S.2d 302 (2007).

Technical words should be interpreted as usually understood by persons in the profession or business to which they relate, and must be taken in the technical sense unless the context of the instrument or applicable usage or surrounding circumstances clearly indicate a different meaning. In construing the meaning of the word “registration” in the context of the use of a domain name on the internet, for example, the custom and usage of the word in the particular trade is more relevant than the dictionary definition of the word. Zurakov v. Register.Com, Inc., 304 A.D.2d 176, 760 N.Y.S.2d 13 (1st Dept. 2003).

III. CHOICE OF LAW

Otherwise, under New York's “center of gravity” approach to choice-of-law questions in contract cases, courts apply the law of the state with the “most significant relationship to the transaction and the parties.” Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317, 642 N.E.2d 1065, 618 N.Y.S.2d 609 (1994), quoting Restatement [Second] of Conflict of Laws § 188([1]). This approach generally dictates that a contract of insurance be governed by the law of the state which the parties understood to be the principal location of the insured risk.

In applying the center of gravity test, courts take into consideration the five factors enumerated in the Restatement (Second) of Conflict of Laws § 188—the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the contracting parties' domiciles. Courts also apply an interest analysis under which the respective governmental interests of the competing jurisdictions are considered. See Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp., 36 A.D.3d 17, 21-22, 822 N.Y.S.2d 30, 33 (1st Dept. 2006), aff'd for reasons stated below, 9 N.Y.3d 928, 876 N.E.2d 500, 844 N.Y.S.2d 773 (2007). Under the center of gravity approach, while the Restatement factors are given “heavy weight”, the spectrum of significant contacts—rather than a single possibly fortuitous event—may be considered. Matter of Allstate Ins. Co. (Stolarz), 81 N.Y.2d 219, 226, 613 N.E.2d 936, 597 N.Y.S.2d 404 (1993).

Where the policy insures risks in multiple locations, courts will generally locate the risk in one state, usually the state of the insured's domicile at the time the policy was issued. Liberty Surplus Ins. Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 67 A.D.3d 420, 421, 888 N.Y.S.2d 35 (1st Dept 2009). The center of gravity approach seeks to identify the law of the state with the most significant relationship to the transaction and parties and to avoid inconsistent results where claims are brought under the insurance policy in different states. Foster Wheeler, 36 A.D.3d at 21, 23-24, 822 N.Y.S.2d 33. The location of the insured risk carries little weight in a choice-of-law analysis where the risk is scattered throughout two or more states because, barring extraordinary circumstances, only one state's law should govern an insurance agreement. Fireman's Fund Ins. Co. v. Great Am. Ins. Co., 822 F.3d 620, 643 (2d Cir. 2016); Maryland Cas. Co. v. Continental Cas. Co., 332 F.3d 145, 153 (2d Cir. 2003)(applying New York choice-of-law rules).

IV. EXTRA CONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A. Bad Faith


2. In 2008, the New York Court of Appeals held that a plaintiff can recover consequential damages arising from a breach of the covenant of good
faith and fair dealing as long as plaintiff can show that such consequential damages were contemplated by the parties as a probable result of that breach. Panasia Estates v. Hudson Ins. Co., 10 N.Y.3d 200, 203, 886 N.E.2d 135, 137, 856 N.Y.S.2d 513, 515 (2008); Bi-Economy Market, 10 N.Y.3d at 194, 886 N.E.2d 127, 856 N.Y.S.2d 505; see also Goldmark Inc. v. Catlin Syndicate Ltd., 2011 WL 743568 (E.D.N.Y., Feb. 24, 2011). Additionally, such consequential damages would not be limited to the policy limits. Id.

3. An insured may also assert a claim for punitive damages under New York General Business Law § 349, as an additional and exemplary remedy when a claim derives from a breach of contract, particularly to vindicate a public right. The elements of such a claim are described in New York Univ. v. Continental Ins. Co., 87 N.Y.2d at 319-320, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995) as: (1) the defendant's conduct must be actionable as independent tort; (2) the tortious conduct must be egregious; (3) the egregious conduct must be directed to plaintiffs; and (4) it must be part of pattern directed at public generally. See, e.g., Simon v. Unum Group, 2008 WL 2477471, at *5 (S.D.N.Y. June 19, 2008) (denying motion to dismiss plaintiff’s claim under G.B.L. § 349 for consumer fraud based on denial of disability benefits because it was reasonable to infer that others had been similarly injured).

B. Fraud

In New York, the elements of actual fraud are: (1) that the defendant made a representation, (2) as to a material fact, (3) which was false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party rightfully did so rely, (7) in ignorance of its falsity (8) to his injury. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 178, 944 N.E.2d 1104, 1108, 919 N.Y.S.2d 465, 469 (2011); Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421, 668 N.E.2d 1370, 1373, 646 N.Y.S.2d 76, 80 (1996). A plaintiff cannot establish the reliance element of fraud under New York law by showing only that a third party relied on a defendant's false statements. See Pasternack v. Lab. Corp. of Am. Holdings, 27 N.Y.3d 817, 829, 37 N.Y.S.3d 750, 758, 59 N.E.3d 485, 493 (2016) (denying to extend the reliance element of fraud to include a claim based on the reliance of a third party, rather than the plaintiff).

Constructive fraud, on the other hand, is a breach of a duty which the law declares fraudulent because of its tendency to deceive, to violate a confidence or to injure public or private interests that the law deems worthy of special protection, irrespective of moral guilt and intent. Brown v. Lockwood, 76 A.D.2d 721, 730-731, 432 N.Y.S.2d 186, 193 (2d Dept. 1980).

"The elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud with the crucial exception that the element of scienter upon the part of the defendant, his knowledge of the falsity of his representation, is dropped ... and is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his confidence in the defendant and therefore to relax the care and vigilance he would ordinarily exercise in the circumstances" Levin v. Kitsis, 82 A.D.3d 1051, 1054, 920 N.Y.S.2d 131,134 (2d Dept. 2011), quoting Brown v. Lockwood, supra.

C. Intentional Infliction of Emotional Distress and/or Outrage
There are four elements to the tort of intentional infliction of emotional distress in New York, as adopted from the Restatement (Second) of Torts: extreme and outrageous conduct; intent to cause, or disregard of substantial probability of causing, severe emotional distress; causal connection between conduct and injury; and severe emotional distress. Howell v. New York Post Co., Inc., 81 N.Y.2d 115, 612 N.E.2d 699, 596 N.Y.S.2d 350 (1993); See also Restatement (Second) of Torts § 46 (1984 & Supp.). In practice, the courts have tended to focus on the outrageousness element. Howell, 81 N.Y.2d at 121, 612 N.E.2d at 702, 596 N.Y.S.2d at 353.

In practice, the courts have tended to focus on the outrageousness element. Howell, 81 N.Y.2d at 121, 612 N.E.2d at 702, 596 N.Y.S.2d at 353.

The challenged 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." Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 90, 461 N.Y.S.2d 232 (N.Y. 1993). The cases in which this standard was satisfied involved "some combination of public humiliation, false accusations of criminal or heinous conduct, verbal abuse or harassment, physical threats, permanent loss of employment, or conduct contrary to public policy." Stuto v. Fleishman, 164 F.3d 820, 828-29 (2d Cir. 1999).

In insurance cases, New York courts have been reluctant to award damages for intentional infliction of emotional distress. See, e.g., Simon v. Unum Group, 2008 WL 2477471, *5-6 (S.D.N.Y. 2008) (insurer’s denial of disability benefits failed to meet threshold of extreme and outrageous conduct).


D. State Consumer Protection Laws, Rules and Regulations

New York’s Consumer Protection Act is found in General Business Law § 349. This law prohibits, "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." This applies to regulated industries and consumers in insurance matters, though not if the dispute is a “business to business matter involving an arms length transaction.” Both individuals and the government may make claims under this act, the difference being that the Attorney General may seek injunctive relief without proof of injury.

To show that the challenged act or practice was consumer-oriented, a plaintiff must show that it had 'a broader impact on consumers at large': 'Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute . . . .'" Crawford v. Franklin Credit Mgmt., 758 F.3d 473, 490 (2d Cir. 2014)(quoting Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25, 647 N.E.2d 741, 744, 623 N.Y.S.2d 529, 532 (1995)).


E. State Class Actions

Class actions in New York are governed by Article 9 of the Civil Practice Law and Rules. CPLR 901 provides:

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

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

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.


4. Federal Preemption – CPLR 901(b), which prohibits using the class action procedure to recover statutory penalties, was held to be preempted by federal law in Shady Grove Orthopedic Associates v. Allstate Ins. Co., 559 U.S. 393, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010), a class action filed as a diversity case in federal court. A plurality of the justices held that the federal class action rules were a valid exercise of the power granted to the Supreme Court by the Rules Enabling Act. See also Holster v. Gatco Inc., 618 F.3d 214 (2d Cir. 2010)(on remand from Shady Grove).

F. State Privacy Laws, Rules, and Regulations

New York has enacted one of the most comprehensive set of protections concerning AIDS and HIV patient and treatment confidentiality. See N.Y. Public Health Law § 2780 et seq. While insurers may use HIV status as a basis to deny coverage or charge a higher premium, they are required to provide statutory notice to a prospective enrollee prior to testing. N.Y. Insurance Law § 2611.

HIV is a special situation under New York law. Generally, insurers have some latitude in disclosing and sharing information concerning enrollees or potential enrollees, as long as statutory requirements concerning notice are satisfied. N.Y. Insurance Law § 321, entitled “Medical information exchange centers,” requires informed consent of the applicant prior to disclosure of medical information by an insurance company to a third party. Informed consent is determined objectively by the presence in the application of the statutory requirements.

Pursuant to Ins. L. §321(b), this “notice” is required to be given to all applicants when they complete any application for personal insurance.

1. Criminal sanctions

Performing or procuring the performance of an HIV test or disclosure of HIV-related information without complying with the statutory procedures and safeguards is a misdemeanor. N.Y. Pub. Health L. § 2783(2). Physicians and health care providers are immune from criminal liability under certain circumstances. Id. at § 2783(3).

The state may levy a civil penalty of $5,000 per occurrence. N.Y. Pub. Health L. § 2783(1).

2. Standards for Compensatory and Punitive Damages


Although article 27-F does not expressly authorize an award of punitive damages for an improper disclosure of confidential HIV-related information,
an award of such damages is consistent with the legislative scheme and intent. Doe v. Roe, 190 A.D.2d 463, 474, 599 N.Y.S.2d 350, 356 (4th Dept. 1993). As a general proposition, punitive damages may be imposed only where it is shown that the defendant's conduct was so reckless or grossly negligent that it amounted to a conscious disregard of another's rights. Id. at 475, 599 N.Y.S.2d at 356. See also Home Ins. Co. v. Am. Home Prods. Corp., 75 N.Y.2d 196, 551 N.Y.S.2d 481, 550 N.E.2d 930 (1990).

V. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentation/Omissions: During Underwriting or During Claim

No insurance policy may be voided unless the misrepresentation was “material”, and no misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract. N.Y. Ins. Law § 3105(b)(1). See, e.g., Process Plants Corp. v. Beneficial Nat'l Life Ins. Co., 42 N.Y.2d 928, 366 N.E.2d 1361, 397 N.Y.S.2d 1007 (1977) (“undisclosed medical information was material to defendant in that if it had known of the true health history it would not have issued the policy that was issued”); John Hancock Life Ins. Co. v. Perchikov, 553 F. Supp. 2d 229 (E.D.N.Y. 2008) (policy would be void ab initio if insured made misrepresentation in application material to issuance of policy); Chicago Ins. Co. v. Kreitzer & Vogelman, 265 F. Supp.2d 335, 342-43 (S.D.N.Y. 2003) (misrepresentation is material if insurer shows that “the misrepresentation induced it to accept an application that it might otherwise have refused”).

A 2011 amendment to the statute provides that a misrepresentation may not avoid “a policy of hospital, medical, surgical, or prescription drug expense insurance” unless it was intentional. Ins. L. § 3105(b)(2).

The practice of an insurer with respect to the acceptance or rejection of similar risks is admissible in determining the question of materiality. Ins. L. § 3105(c). Section 3105 also places the burden of proof in any action to rescind a policy on the insurer.

B. Pre-existing Illness or Disease Clauses

The burden is on the insured to show that his or her alleged illness did not precede issuance of the policy or within a stated time. Goldman v. Nat’l Cas. Co., 33 N.Y.S.2d 717 (App. Term, 2d Dept., 1941). See also Balinsky v. Nat’l Cas. Co., 33 N.Y.S.2d 737 (App. Term, 2d Dept., 1941) (error to impose on the defendant the burden of proving the exceptions to the policy).

However, the burden shifts to the insurer after plaintiff has set forth a prima facie case. See Sachs v. American Central Ins. Co., 34 Misc.2d 687, 695-696, 230 N.Y.S.2d 126, 135-136 (Sup. Ct., Kings Co., 1962), aff’d, 18 A.D.2d 841, 238 N.Y.S.2d 508 (2d Dept. 1963) (commenting on cases).

An intermediate appellate court has, in dicta, cited cases holding that an illness or condition is deemed to have first manifested itself whenever the insured experienced such symptoms as would cause an ordinarily prudent person to seek medical advice. Furthermore, the symptoms must be such that

Pre-existing condition provisions in accident and health policies are subject to New York’s Insurance Law § 3232 which, among other things, contains a portability provision requiring insurers to credit the time a person previously was covered under a comparable plan when determining the applicability of a preexisting condition provision. The portability provision is designed to enable individuals to change jobs or change plans without fear of having to wait for coverage to take effect. Section 3232 prescribes a 12-month maximum time frame for preexisting condition provisions. A health insurer may only limit or preclude coverage for preexisting conditions during the first 12 months of coverage.

N.Y. Ins. L. § 3232 was amended with effect from Jan. 1, 2012 to conform to certain requirements of the federal Affordable Care Act, including those relating to coverage of individuals under age nineteen.

C. Statutes of Limitations and Repose

New York’s statutory incontestability clause (Insurance Law §3216(d)(1)(B)(i)) states in relevant part:

TIME LIMIT ON CERTAIN DEFENSES: (i) After two years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two year period. (The foregoing policy provision shall not be so construed as to affect any legal requirement for avoidance of a policy or denial of a claim during such initial two year period, nor to limit the application of subparagraphs (A) through (E), inclusive, of this paragraph in the event of misstatement with respect to age or occupation or other insurance.) (A policy which the insured has the right to continue in force subject to its terms by the timely payment of premium until at least age fifty or, in the case of a policy issued after age forty-four, for at least five years from its date of issue, may contain in lieu of the foregoing the following provision (from which the clause in parentheses may be omitted at the insurer's option) under the caption "INCONTESTABLE": After this policy has been in force for a period of two years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application.)

See, e.g., Burke v. First Unum Life Ins. Co., 975 F. Supp. 310 (S.D.N.Y. 1997) (holding insurer permitted to contest validity of policy on basis of
innocent or negligent misrepresentation in application only if insurer presents its position in litigation within two years of date of issuance of policy) [emphasis added].

Another effect of Insurance Law § 3216 is that a policy may not prescribe a shorter limitations period for bringing an action on a contract than that prescribed by New York law. Terry v. Unum Life Ins. Co. of America, 394 F.3d 108 (2d Cir. 2005).

Further, New York’s Insurance Law § 3210 extends the incontestability clause to reinstated policies. See e.g., Equitable Life Assurance Society v. Madis, 240 A.D.2d 100, 669 N.Y.S.2d 599 (1st Dept. 1998).

VI. BENEFICIARY ISSUES

A. Changing the beneficiary

As a general rule, the method prescribed by the insurance contract must be followed in order to effect a change of beneficiary. McCarthy v. Aetna Life Ins. Co., 92 N.Y.2d 436, 440, 704 N.E.2d 557, 560, 681 N.Y.S.2d 790, 793 (1998). Strict compliance with the rule is not always required; however, mere intent on the part of the insured is not enough; there must be some affirmative act on the part of the insured to accomplish the change. Id. See also Lamarche v. Metropolitan Life Ins. Co., 236 F.Supp.2d 34 (D. Me. 2002) (applying New York law).

The policy provisions generally determine the effective date of the change. Otherwise, a change of beneficiary will be effective where there has been substantial compliance with the policy. MetLife Life and Annuity Co. of Connecticut v. Sobie, 326 Fed.Appx. 3, 5 (2d Cir. 2009).

B. Effect of Divorce on Beneficiary Designation


A statute (EPTL 13-3.2) provides that the designation of a beneficiary in a life insurance policy shall not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy. In Storozynski v. Storzynski, 10 A.D.3d 419, 781 N.Y.S.2d 141 (2d Dept. 2004), a divorcee’s claim as beneficiary of a life insurance policy was upheld because the decedent did not execute a change in beneficiary after the divorce, and the divorcee did not explicitly waive her interest in the policy.


VII. INTERPLEADER ACTIONS

A. General

NY CPLR 1006(a) provides that a stakeholder may commence an action of interpleader against two or more claimants. See, e.g., Lincoln Life and
A defendant stakeholder may bring in a claimant who is not a party by filing a summons and interpleader complaint. NY CPLR 1006(b).

Service of process must be made within the state, except when the stakeholder has a basis for asserting long-arm jurisdiction over the claimants under CPLR 301 or 302. Under the interpleader compact which New York enacted in 1962, New York courts will treat personal service made in other contracting states (currently, Maine, New Hampshire, New Jersey, and Pennsylvania) as if it were made in New York. See Note following CPLR 1006.

Most of the traditional limitations on interpleader were abolished by NY CPLR 1006(d). The claims against the stakeholder need not be identical, and the stakeholder need not be completely indifferent. However, it remains the law in New York that a stakeholder must be exposed to multiple liability as the result of adverse claims in order to use the interpleader procedure.

An interpleader action is equitable in nature and is not triable by a jury unless the parties are asserting legal claims and defenses against each other. See Geddes v. Rosen, 22 A.D.2d 394, 255 N.Y.S.2d 585 (1st Dep’t), aff’d, 16 N.Y.2d 816, 263 N.Y.S.2d 10, 210 N.E.2d 362 (1965).

An interpleader action to adjudicate rights and obligations relating to a money debt, as opposed to a specific res, requires personal jurisdiction over all the parties. Hanna v. Stedman, 230 N.Y. 326, 130 N.E. 566 (1921).

CPLR 1006(g) provides that a stakeholder may move for an order permitting it to pay the disputed proceeds into court, and that sum of money shall be deemed a res within the state for jurisdictional purposes. However, it raises due process issues to the extent that it empowers the court to adjudicate the rights of an absent claimant without requiring in personam jurisdiction. See Cordner v. Metropolitan Life Ins. Co., 234 F. Supp. 765, 770-71 (S.D.N.Y. 1964), citing New York Life Ins. Co. v. Dunlevy, 241 U.S. 518, 36 S.Ct. 613, 60 L.Ed. 1140 (1916).

B. Availability of Fee Recovery

The court has discretion to award the stakeholder reasonable attorneys’ fees. See Republic Nat’l Bank of New York v. Lupo, 215 A.D.2d 467, 627 N.Y.S.2d 402 (2d Dep’t 1995). Such an award is appropriate if the plaintiff is a neutral stakeholder forced to participate in the dispute between the claimants. Sun Life Ins. & Annuity Co. of New York v. Braslow, 38 A.D.3d 529, 831 N.Y.S.2d 497 (2d Dep’t 2007). However, courts expect the fees to be relatively modest. See Charles Schwab & Co. v. Makowska, No. 11-CV-03755 DRH AKT, 2015 WL 590237 (E.D.N.Y. Feb. 11, 2015).

C. Differences between state and federal practice

Federal interpleader practice permits nationwide service of process, and may be more efficacious than New York practice in dealing with out-of-state claimants provided that the amount in controversy exceeds $500 and at least two of the claimants are of diverse citizenship. See 28 U.S.C. §§ 1335, 2361.
The federal district court does not have subject matter jurisdiction until adverse claimants of diverse citizenship are served. See Allstate Ins. Co. v. Turner, No. 7:01 CIV. 6973(DC), 2002 WL 531002, at *2 (S.D.N.Y. Apr. 8, 2002); Metropolitan Life Ins. Co. v. Dumpson, 194 F. Supp. 9, 11 (S.D.N.Y. 1961).