I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

Ohio Administrative Code § 3901-1-07 defines unfair practices in the insurance context. It is an unfair practice for an insurance company to fail “to acknowledge pertinent communications with respect to claims arising under insurance policies in writing, or by other means so long as an appropriate notation is made in the claim file of the insurer, within fifteen (15) days of receiving the notice of claim in writing or otherwise.” Ohio Admin. Code § 3901-1-07(C)(2). Insurers must reply to all other pertinent communications and/or inquiries of the Department of Insurance respecting a claim within twenty-one (21) days. Ohio Admin. Code § 3901-7-07(C)(3). Furthermore, insurers must implement reasonable procedures to commence an investigation of any claim filed by either a first party or third party claimant within twenty-one (21) days of receipt of notice of a claim. Ohio Admin. Code § 3901-7-07(C)(4).

Regarding sickness and accident insurance policies specifically, the Ohio Revised Code requires that such a policy contain a provision that written notice of a claim must be given to the insurer within 20 days after the occurrence or commencement of any loss covered by the policy or as soon thereafter as is reasonably possible. Ohio Rev. Code § 3923.04(E). With regard to credit life and accident and health insurance, all claims shall be promptly reported to the insurer or its designated claim representative, and the insurer shall maintain an adequate claim file. Ohio Rev. Code § 3918.10(A). All claims shall be settled as soon as possible in accordance with the terms of the insurance contract. Id.

Every policy of sickness and accident insurance delivered, issued for delivery, or used in Ohio must contain certain standard provisions. Ohio Rev. Code § 3923.04. Regarding the timing for responses and determinations, the following provision is a standard provision required by Ohio law:

Time of payment of claims. Indemnities payable under this policy for any loss, other than loss for which this policy provides any periodic payment, will be paid immediately upon, or within thirty days after, receipt of due written proof of such loss. Subject to due written proof of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid ......... and any balance
remaining unpaid upon the termination of liability will be paid immediately upon receipt of due written proof.

Ohio Rev. Code § 3923.04(H).

B. Standards for Determinations and Settlements

Ohio statutes provide a procedure under which one can pursue an insurance claim. See Ohio Rev. Code §§ 3901.19-3901.221. However, “Nowhere in the Ohio statutory or regulatory framework proscribing deceptive trade practices in insurance does it provide a civil remedy to a private party aggrieved by an insurer.” Elwert v. Pilot Life Ins. Co., 77 Ohio App.3d 529, 542, 602 N.E.2d 1219 (1st Dist. 1991).

With regard to life insurance, the Revised Code expressly prohibits the issuance of any life insurance policy containing a provision for any mode of settlement at maturity of less value than the amount insured on the face of the policy plus dividend additions, less any indebtedness to the insurer on the policy and less any premium that may be by the terms of the policy deducted. Ohio Rev. Code 3915.09(C).

The insurer’s liability under an accident or health insurance policy is limited by the terms of the policy. State Auto. Mut. Ins. Co. v. Dolosich, 135 Ohio App.3d 601, 735 N.E.2d 38 (8th Dist. 1999). Thus, the insurer’s liability will be determined on a case-by-case basis using the principles of contract interpretation described below.

As with other types of disputes, the law favors compromise or settlement of an insurance claim provided no fraud or deception is practiced. Accordingly, settlement agreements reached with insurers are enforceable notwithstanding subsequent change of heart by the insured regarding the terms of such an agreement. Feathers v. Tasker, 9th Dist. Summit No. 26318, 2012-Ohio-4917, 2012 Ohio App. LEXIS 4299. Parties are bound by the terms of their settlement agreement as in any other contract where they have manifested intent to enter into the agreement. Id. Regular contract defenses apply to settlement agreements in the insurance contract, including mutual mistake, Morgan v. State Farm Mut. Auto. Ins. Co., 8th Dist. Cuyahoga No. 47841, 1985 Ohio App. LEXIS 8130 (1985), or fraud Stoller v. Fidelity Guar. Ins. Underwriters, Inc., 6th Dist. Wood No. WD-87-64, 1988 Ohio App. LEXIS 3097 (1988).

Once an insured cashes a check received by an insurer as settlement of a claim, the insured can no longer challenge the settlement. Fraley v. Allstate Ins. Co., 5th Dist. Richland No. 03-CA-67, 2004-Ohio-2272, 2004 WL 1047412.

II. Principles of Contract Interpretation

Insurance policies are written contracts between the insurer and insured. Thus, the meaning of the contract terms must be determined according to the same rules as are applicable to other written contracts. Chiquita Brands Internatl., Inc. v. National Union Ins. Co., 2013-Ohio-759, 988 N.E.2d 897 (Ohio St. App. 1st Dist. Hamilton County 2013); Auto-Owners Ins. Co. v. Marillat, 167 Ohio App. 3d 148, 2006-Ohio-2491, 954 N.E.2d 513 (6th Dist. Fulton County 2006). When confronted with an issue of contract interpretation, courts must give effect to the intent of the parties in the agreement. Indeed, the fundamental goal in an insurance policy is to
ascertain the intent of the parties from a reading of the contract in its entirety and to settle upon a reasonable interpretation of any disputed terms in a manner calculated to give the agreement its intended effect. Med. Assur. Co., Inc. v. Dillaplain, 186 Ohio App. 3d 635, 2010-Ohio-841m 929 N.E.2d 1084 (2d Dist. Greene County 2010).


Contract terms are to be given their plain and ordinary meaning. Cincinnati Indemn. Co. v. Martin, 85 Ohio St. 3d 604, 1999-Ohio-322, 710 N.E.2d 677 (1999); Gomolka v. State Auto. Mut. Ins. Co., 70 Ohio St.2d 166, 436 N.E.2d 1347, 1348 (1982). A court may only deviate from the plain and ordinary meaning of the policy terms and construe a different meaning if the plain meaning would cause an absurd result. Blohm v. Cincinnati Ins. Co., 39 Ohio St.3d 63, 529 N.E.2d 433 (1988). Thus, only in the rarest of circumstances may a court substitute a different meaning to provisions of a policy that are unambiguous. See Herschell v. Rudolph, 2002-Ohio-1688, 2002 WL 549980 (Ohio Ct. App. 11th Dist. Lake County 2002). However, in the absence of plain meaning, a term must be defined by reference to extrinsic evidence. Aetna Casualty & Surety Co. v. Roland, 47 Ohio App.3d 93, 96, 547 N.E.2d 379 (10th Dist. Franklin County 1988).

When a contract term is defined in the policy, that definition controls what the term means. Watkins v. Brown, 97 Ohio App.3d 160, 646 N.E.2d 485 (2nd Dist. Montgomery County 1994). When a term is not defined in the policy, the court must look to its plain and ordinary meaning, and the fact that an insurance policy does not define a term does not necessarily mean it is ambiguous. Fahlbush v. Crum-Jones, 176 Ohio App. 3d 328, 2008-Ohio-1953, 891 N.E.2d 1242 (1st Dist. Hamilton County 2008). Nor is it true that a term is ambiguous because the policy could have been more clearly drafted. Milburn v. Allstate Ins. Co. Prop. & Cas., 2009-Ohio-5476, 185 Ohio App.3d 796, 925 N.E.2d 1018 (10th Dist. 2009). Terms or phrases that have a technical meaning in the business to which the contract refers will be interpreted according to such meaning unless a contrary intention is clearly expressed. Govt. Emps. Ins. Co. v. Hughes, 184 Ohio App.3d 397, 2009-Ohio-5023, 921 N.E.2d 269 (10th Dist. Franklin County 2009); Mastellone v. Lightning Rod Mut. Ins. Co., 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130 (8th Dist. Cuyahoga County 2008); Fosterwheeler Envireponse, Inc. v. Franklin Cty. Conv. Facilities Auth., 79 Ohio St.3d 853 (1997).

“A court will resort to extrinsic evidence in its effort to give effect to the parties' intentions only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with special meaning.” Kelly v. Med. Life Ins. Co., 31 Ohio
St.3d 130, 509 N.E.2d 411, 413 (1987). Furthermore, where words in the policy have a special meaning within a particular trade or industry which is not reflected on the face of the agreement, courts may resort to extrinsic evidence to establish that meaning. Roland, 47 Ohio App.3d at 95.

Since the insurer generally is the party who drafts the policy language, a policy which is reasonably susceptible to more than one interpretation, i.e. it is ambiguous, is to be construed liberally in favor of the insured and strictly against the insurer. Marusa v. Erie Ins. Co., 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232 (2013); Clark v. Scarpelli, 91 Ohio St.3d 271, 2001-Ohio-39, 744 N.E.2d 719 (2001); Crabtree v. 21st Century Ins. Co., 176 Ohio App. 3d 507, 2008-Ohio-3335, 892 N.E.2d 925 (4th Dist. Ross County 2008); Cincinnati Ins. Co. v. ACE INA Holdings, Inc., 175 Ohio App.3d 266, 2007-Ohio-5576, 886 N.E.2d 876 (1st Dist. 2007). If a policy provision is ambiguous, any reasonable construction which results in coverage for the insured must be adopted by the trial court. Columbiana Cty. Bd. of Commrs. v. Nationwide Ins. Co., 130 Ohio App.3d 8, 719 N.E.2d 561 (7th Dist. 1998). As a limitation, the general rule of liberal construction of insurance policies in favor of the claimant who seeks coverage cannot be used to create an ambiguity where one does not exist. Lager v. Miller-Gonzalez, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666 (2008); Auto-Owners Ins. Co. v. Merillat, 167 Ohio App.3d 148, 2006-Ohio-2491, 854 N.E.2d 513 (6th Dist. Fulton County 2006). Exclusions or exceptions from coverage must be expressly provided or must arise by necessary implication from the policy language. Dublin Bldg. Sys. v. Selective Ins. Co. of South Carolina, 172 Ohio App.3d 196, 2007-Ohio-494, 874 N.E.2d 788 (10th Dist. 2007). Thus, provisions that provide for exclusions or exemptions from coverage must be narrowly construed in favor of the insured.

III. CHOICE OF LAW

The Ohio Supreme Court has adopted Sections 187 and 188 of the Restatement of Conflicts of Law. Ohayon v. Safeco Ins. Co. of Illinois, 91 Ohio St.3d 474, 479, 2001-Ohio-100, 747 N.E.2d 206 (2001). Section 187 of the Restatement generally provides that the law of the state chosen by the parties to a contract will govern their contractual rights and duties. Thus, Ohio courts will honor choice of law provisions in insurance policies. Where choice of law is not designated in the policy, Section 188 governs. Section 188 provides the “most significant relationship” test. The rights and duties of the parties must be determined by the law of the state which has the most significant relationship to the transaction and the parties. This also section also enumerates factors that courts should consider in the absence of such a choice.

In absence of an effective choice of law provision in the insurance policy, the contacts to be taken into account to determine the law applicable include:

a) The place of contracting,
b) The place of negotiation,
c) The place of performance,
d) The location of the subject matter, and
e) The domicile, residence, nationality, place of incorporation, and place of business of the parties.

The above contacts are to be evaluated according to their relative importance with respect to the particular issue.
The focus on the various factors above will often correspond with the Restatement’s view that the rights created by an insurance contract should be determined “by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship…to the transaction and the parties.” Ohayon, 91 Ohio St.3d at 479 (emphasis in original).

A separate choice of law analysis applies to the underlying loss. Thus, the state law that applies to an insurance contract may not be the same law that applies to the underlying claim. If the underlying claim is a tort, the law of the state where the tort occurred controls, but if the underlying claim is contractual, the Restatement will determine the choice of law. See Kurent v. Farmers Ins. Of Columbus, Inc. 62 Ohio St.3d 242, 581 N.E.2d 533 (1991).

IV. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES
A. Bad Faith

An insurer has a duty under Ohio law to act in good faith in the processing and payment of the claims of its insured. Zoppo v. Homestead Insurance Company, 71 Ohio St.3d 552, 554, 644 N.E.2d 397, 1994-Ohio-461 (1994); Staff Builders, Inc. v. Armstrong, 37 Ohio St.3d 298, 525 N.E.2d 783 (Ohio 1988). The liability arises from the breach of the positive legal duty imposed by law due to the relationship between the insurer and the insured. Staff Builders, at 302. The duty of good faith operates to ensure that an insurer’s performance or refusal to perform under the contract does not impair the insured’s right to receive benefits that he might reasonably expect to flow from the contract. See Buckeye Union Ins. Co. v. State Farm Mut. Auto. Ins. Co., 1st Dist. Hamilton No. C-960282, 1997 Ohio App. LEXIS 1472 (Apr. 16, 1997).

However, it still remains unclear whether, under Ohio law, a bad faith plaintiff must be able to point to a specific contract provision or duty in order to prevail as a matter of law. The Staff Builders court and the Zoppo court both stated that an insurer has a duty of good faith in the processing and payment of the claim. Staff Builders, 37 Ohio St.3d at 302; Zoppo, 71 Ohio St.3d at 554-55. Thus, it seems that a bad faith claim must, as a matter of law, be premised on the insurer’s failure to “process” or “pay” a covered claim. The process or payment language in both cases suggest that the bad faith claim must be tied to some contractual duty.

Some courts will require an underlying breach of contract claim. See, e.g., Bob Schmitt Homes, Inc. v. The Cincinnati Ins. Co., 8th Dist. Cuyahoga No. 75263, 2000 Ohio App. LEXIS 659 (Feb. 24, 2000), at *13 (holding that the “initial factual prerequisite” for a bad faith claim was an allegation that the insured was denied some contractual coverage to which the insured was entitled); Pasco v. State Auto. Mut. Ins. Co., 10th Dist. Franklin No. 99AP-430 (Dec. 21, 1999) at *15, 17 (there can be no bad faith claim without an insurer having an “obligation to pay or settle a claim” covered by the policy); Toledo-Lucas County Port Auth. v. Axa Marine & Aviation Ins. (UK) Ltd., 220 F.Supp. 2d 868, 873 (N.D. Ohio 2002) (“[A]n insured may not maintain a claim of bad faith in the absence of coverage under the policy.”); Hahn’s Elec. Co. v. Cochran, 10th Dist. Franklin Nos. 01AP-1391, 01AP-1394, 2002-Ohio-5009 (Sep. 24, 2002) (allowing the trial court to stay the bad faith claim pending the outcome of the underlying contract claim); Emerson v. Medical Mut., 1st Dist. Hamilton No. C-030074, 2004-Ohio-3892, 2004 Ohio App. LEXIS 3512 (Jul. 23, 2004), ¶ 35 (holding that because the plaintiff was not covered under the policy, he could not maintain a claim for bad faith based on the refusal to pay).
On the other hand, some Ohio courts have held that a breach of the duty of good faith will give rise to a cause of action in tort irrespective of any liability arising from breach of contract. See, e.g., Staff Builders, 37 Ohio St.3d at 302; Bullet Trucking, Inc. v. Glen Falls Ins. Co., 83 Ohio St.3d 327, 333, 616 N.E.2d 1123 (2d Dist. 1992)("the tort of bad faith is an independent claim which does not necessarily rely on a breach of contract claim for its existence."); Wagner v. Midwestern Indem. Co., 83 Ohio St.3d 287, 1998-Ohio-111, 699 N.E.2d 507 (1998)(holding that jury issue on coverage does not prove absence of bad faith); Essad v. Cincinnati Cas. Co., 7th Dist. Mahoning No. 00 CA 207, 2002-Ohio-1947 (Apr. 16, 2002)(Bad faith claim based on “failure to investigate” without reasonable justification could be asserted without proving coverage); Simpson v. Permanent General Ins. Co., 8th Dist. Cuyahoga No. 81216, 2003-Ohio-1157, 2003 Ohio App. LEXIS 1094 (Mar. 13, 2003)(holding that the duty of good faith is independent from any contractual duties and bad faith can exist in the absence of coverage).


Even though the “reasonable justification” standard has been around since 1949, the Ohio Supreme Court modified it in 1992 when it required plaintiffs to show that a bad faith tort arises when an insurer intentionally refuses to satisfy a claim where there is either (1) no lawful basis for the refusal, and (2) an intentional failure to determine whether there was any lawful basis for such a refusal. Motorists Mutual Insurance Company v. Said, 63 Ohio St.3d 690 (1992). The 1994 Zoppo decision, however, overruled the Said decision and the “reasonable justification” standard returned. Zoppo, 71 Ohio St.3d at 554, 525 N.E.2d 397. Now, proof of actual intent is no longer required. Wagner v. Midwestern Indemnity Company, 83 Ohio St.3d 287, 290, 699 N.E.2d 507 (1998)(acknowledging that the Zoppo decision sets forth a lower standard of proof for a bad faith action).

An insurer lacks a reasonable justification when it acts arbitrarily or capriciously. Hoskins v. Aetna Life Ins. Co., 6 Ohio St.3d 272, 277 (1983). In an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage. Boone v. Vanliner Ins. Co., 91 Ohio St.3d 209 (2001).

The burden of proof is on the insured to establish bad faith on the part of the insurer; it is not the insurer’s burden to prove it acted in good faith. McCurdy v. Hanover Fire & Cas. Ins. Co., 2013 WL 4050909 (N.D. Ohio 2013). However, the mere refusal to pay an insurance claim is not, in itself, conclusive of the insurer’s bad faith. Maxey v. State Farm Fire & Cas. Co., 689 F. Supp.2d 946 (S.D. Ohio 2010); Helmick v. Republic-Franklin Ins. Co., 39 Ohio St.3d 71, 529 N.E.2d 464 (1988).
B. Fraud

In Ohio, fraudulent conduct that is intended to induce a person to enter into a contract is a cause of action. See Stecz et al. v. Travelers Insurance Co., Common Pleas Medina No. 08CIV2299 August 28, 2009. To prove fraudulent inducement, a plaintiff must show that a defendant made a knowing, material misrepresentation, or where there is a duty to disclose, concealment of a material fact, with the intent of inducing the plaintiff’s reliance and that the plaintiff relied upon that misrepresentation or omission to his or her detriment. ABM Farms, Inc. v. Woods, 81 Ohio St.3d 498, 502, 692 N.E.2d 574 (1998). Stated differently, a claim of fraud consists of six elements: a representation of fact, which is material, made falsely—either with knowledge of its falsity or utter disregard and recklessness as to falsity—with the intent to mislead, with justifiable reliance thereupon, and a resulting injury. Tokles & Son, Inc. v. Midwestern Indem. Co., 65 Ohio St.3d 621, 632, 605 N.E.2d 936 (1993).

Like the duty of good faith, the tort of fraud in the inducement is separate and distinct from the insurance contract. Stecz at ¶ 21. Thus, any contractual statutes of limitations or limitations enforceable pursuant to a policy are not applicable to fraud claims.

C. Intentional Infliction of Emotional Distress and/or Outrage

A claim for intentional infliction of emotional distress requires plaintiff to show that (1) defendant intended to cause emotional distress, or knew or should have known that actions taken would result in serious emotional distress; (2) defendant's conduct was extreme and outrageous; (3) defendant's actions proximately caused plaintiff’s psychic injury; and (4) the mental anguish plaintiff suffered was serious. Pyle v. Pyle, 11 Ohio App.3d 31, 34, 463 N.E.2d 98 (8th Dist. 1983). Defendant’s conduct must be so extreme and outrageous “as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Hanly v. Riverside Methodist Hosp., 78 Ohio App.3d 73, 82, 603 N.E.2d 1126 (10th Dist. 1991). A defendant can avoid liability for plaintiff’s emotional distress “if defendant does no more than insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.” Id.; see Griffith v. Buckeye Union Ins. Co., 10th Dist. Franklin No. 86AP-1063, 1987 Ohio App. LEXIS 8971; William Hammann, Inc. v. Continental Cas. Co., 1st Dist. Hamilton No. C-850803, 1987 Ohio App. LEXIS 9051, *10 (holding that an action for intentional infliction of emotional distress is a purely independent tort and not derivative of a contract claim).

D. State Consumer Protection Laws, Rules and Regulations

The Ohio Consumer Sales Practices Act is Ohio’s most encompassing consumer protection law. The CSPA generally has no application to controversies concerning insurance policies. Johnson v. Lincoln Nat’l Life Ins. Co., 69 Ohio App.3d 249, 590 N.E.2d 761 (2d Dist. 1990); see also Schaller v. Nat’l Alliance Ins. Co., 496 F. Supp. 2d 890 (S.D. Ohio 2007)(granting summary judgment to an insurer on a claim brought by the owners of a motor home who claimed their damaged motor home should have been declared a total loss by the insurer).

However, the insurance company exception to the OCSPA does not provide a blanket exemption for all activities conducted by an insurance company;
rather, a court must make a practical inquiry into whether the insurer was actually operating as an insurance company in the transaction at issue. Thornton v. State Farm Mut. Auto Ins. Co., 2006 U.S. Dist. LEXIS 83968 (N.D. Ohio Nov. 17, 2006); see also Hofstetter v. Fletcher, 905 F.2d 897 (6th Cir. 1988) (holding that defendant’s acts of selling life insurance by fraudulently advising the investor to set up a home-based business in order to avoid paying tax fall within the statutory definition of "consumer transactions" contained in Ohio Rev. Code § 1345.01(A)).

Furthermore, as stated above, Ohio Rev. Code §§ 3901.19-3901.221 prohibit unfair and deceptive acts regarding insurance and provide the procedure under which one can pursue a claim. Ohio Rev. Code § 3901.22 provides for both an administrative hearing process and penalties for committing an unfair or deceptive act. The Superintendent of the Department of Insurance may revoke an offender's license to engage in the business of insurance, prohibit the company or agency from employing the person who committed the act, order the person to return any payments received as a result of the violation and pay statutory interest on such payments. Ohio Rev. Code § 3901.22(D). The Superintendent may also request that the Ohio Attorney General prosecute the person who committed the act, and this may be commenced as a class action. Id. at § 3901.22(E). The Superintendent may also impose monetary damages. Id. at 3901.22(F).

E. State Class Actions

Pursuant to Ohio Rule of Civil Procedure 23(A), "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."

Ohio Rule of Civil Procedure 23(B)(3) provides that an action may be maintained as a class action if, in addition to the prerequisites of subdivision (A), "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action."

It is now well established that "a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." Cope v. Metro. Life Ins. Co., 82 Ohio St. 3d 426, 429-30, 696 N.E.2d 1001 (1998).
As explained in the 1966 Advisory Committee Notes to Fed.R.Civ.P. 23(b)(3):

Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. * * *

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action. * * * On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.

"Courts generally find that the existence of common misrepresentations obviates the need to elicit individual testimony as to each element of a fraud or misrepresentation claim, especially where written misrepresentations or omissions are involved." Cope, 82 Ohio St.3d at 430. "They recognize that when a common fraud is perpetrated on a class of persons, those persons should be able to pursue an avenue of proof that does not focus on questions affecting only individual members." Id. "If a fraud was accomplished on a common basis, there is no valid reason why those affected should be foreclosed from proving it on that basis." Id.

"Courts also generally find that a wide variety of claims may be established by common proof in cases involving similar form documents or the use of standardized procedures and practices." Id., citing Hamilton v. Ohio Sav. Bank, 82 Ohio St.3d 67, 77 (1998). Also, claims based on an underlying scheme are particularly subject to common proof. Id., citing Murray v. Sevier, 156 F.R.D. 235, 248-249 (D. Kan. 1994).

In Cope, the Court found that the insureds satisfied the requirements of predominance and superiority for a class action. The insureds alleged that the life insurer's agents targeted existing policyholders, sold them replacement insurance as new insurance, and intentionally omitted mandatory disclosure warnings. Each insured's written statement on replacement of existing policies could establish intent, proving on a class-wide basis that agents knew or should have known need for written disclosure warnings. Further, an inference of inducement and reliance could arise as to the entire class.

F. State Privacy Laws, Rules and Regulations

1. Criminal Sanctions
The Revised Code imposes penalties on insurance companies for violations of, or noncompliance with, insurance regulations, including violations of various regulatory provisions, such as those regarding insurance agents generally, crimes relating to insurance, foreign life insurance companies’ failure to make an annual statement, sickness and accident insurance companies, and ratings bureaus.

Ohio Rev. Code § 3999.99 provides the penalties for committing insurance-related crimes. Some of the crimes and their associated penalties follow. No medical examiner for a life insurance company or for an applicant for insurance therein shall knowingly make a false statement or report to such company or to an officer thereof concerning the health or physical condition of an applicant for insurance, or other matter or thing affecting the granting of such insurance. Ohio Rev. Code § 3999.02. Whoever violates this section is guilty of a misdemeanor of the second degree. Id. at § 3999.99(A).

No trustee, officer, agent, or employee of a corporation, company, or association organized to transact the business of life or accident or life and accident insurance on the assessment plan shall knowingly insure a person, or permit him to be insured without that person’s knowledge or consent, or insure a fictitious person, a person over sixty-five or under fifteen years of age, or a sickly or infirm person. Ohio Rev. Code § 3999.03. A person who violates this provision is guilty of a misdemeanor in the first degree.

Insurers are required under the Revised Code to make a reasonable effort to notify every certified holder who is covered under an insurance policy whenever the person fails to make a premium payment or contribution that results in the termination of coverage. The notice must be in writing and must clearly state that the person failed to make the required premium payment, the reason for the failure, and the effect of the failure on the coverage of the certificate holder under the policy or contract. Ohio Rev. Code § 3999.32. A person who knowingly violates this section is guilty of a felony of the fourth degree. Id. at § 3999.99(F).

2. The Standards for Compensatory and Punitive Damages

If an insurer fails to act in good faith with respect to a settlement, the insurer becomes liable to respond in damages to the insured, including actual damages, compensatory damages, and on a showing of malice or aggravated or egregious fraud, punitive damages. Dardinger v. Anthem Blue Cross & Blue Shield, 98 Ohio St.3d 77, 2002-Ohio-7113, 781 N.E.2d 121 (2002).


An insured’s request for “any and all relief Court deems just and proper” is insufficient to state a claim for compensatory damages where the entire crux of the insured’s claim is that the insured had a duty to defend; a blanket prayer for relief in no way afforded the insurer notice of a claim

3. **State Arbitration and Mediation Procedures**

Except as otherwise provided by statute, a provision in any written contract to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, is valid, irrevocable, and enforceable except upon grounds that exist at law or in equity for the revocation of any contract. Ohio Rev. Code § 2711.01(A).

Although the provisions of the statute are applicable to insurance contracts, application of the statute requires that the procedure required by the policy be arbitration, which requires that the dispute be submitted to a neutral and independent arbitrator for a decision which is final and binding regardless of the outcome. Where the procedure lacks the binding nature and finality required to constitute it an arbitration, the statute does not compel the parties to the policy to submit to it. Schaefer v. Allstate Ins. Co., 63 Ohio St.3d 708, 590 N.E.2d 1242 (1992).

The general rule that persons selected as arbitrators should be impartial and nonpartisan applies to appraisers selected in pursuance of the provisions of an insurance policy. An arbitration award may be set aside on a showing that there was evident partiality or corruption on the part of the arbitrator. However, only relationships from which one could reasonably infer bias, and not those which are peripheral, superficial, or insignificant, will require vacating the award. Staff v. State Farm Mut. Ins. Co., 87 Ohio App.3d 440, 622 N.E.2d 434 (8th Dist. 1993).

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

The Department of Insurance has all powers and must perform all duties formerly vested in and imposed upon the Department of Commerce and Superintendent of Insurance. Ohio Rev. Code § 121.081. The Revised Code provides for the creation of the Department of Insurance, which is administered by the Superintendent of Insurance as director and designated deputies, assistants, and employees. Id. at § 121.02(M). The Superintendent is appointed by the Governor with advice and consent of the Senate, holds office during the term of the appointing governor and is subject to removal at the pleasure of the Governor. Id. at § 121.03(H).

The Superintended has the authority and duty to make sure that the laws relating to insurance are enforced. Ohio Rev. Code § 3901.011. The Superintendent also has the duty to adopt, amend, and rescind rules and make adjudications, necessary to discharge the Superintendent’s duties and exercise the Superintendent’s powers. Id. at §§ 3901.041, 3901.042. The Superintendent may adopt rules in accordance with the Revised Code that the Superintendent considers necessary and advisable for the purpose of implementing the Health Insurance Portability and Accountability Act of 1996. Id. at § 3901.044. Additionally, the Superintendent may adopt rules in accordance with statute to establish reasonable fees for any service or transaction performed by the Department of Insurance pursuant to certain
provisions, if no fee is otherwise provided for such service or transaction. Id. at § 3901.043.

Among the other functions authorized for the Superintendent of Insurance are the powers:

- to require reports, administer oaths, summon witnesses, request declaratory judgment action, and initiate criminal proceedings. Ohio Rev. Code § 3901.04.
- to examine the financial affairs of any insurer. Ohio Rev. Code § 3901.07.
- to make written requisitions upon the officers or directors of any bank, trust company, clearing corporation, direct participant, or member bank, for information relating to the financial transactions with any insurance company, fraternal beneficiary association, or assessment association. Ohio Rev. Code § 3901.08.
- to conduct hearings in the case of a suspected violation by insurance companies of the regulations as to the acquisition of stock of other insurers and interlocking directorates. Ohio Rev. Code § 3901.13.
- to conduct hearings in the case of a suspected violation by insurance companies of the regulations as to unfair or deceptive practices. Ohio Rev. Code § 3901.22(A).
- to examine rating bureau and determine whether to grant a license to a rating bureau. Ohio Rev. Code § 3935.06.
- to examine a managing general agent as if it were the insurer under the provision regarding examination of insurance companies. Ohio Rev. Code § 3905.75(B).

V. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

Under Ohio insurance law, a “representation” is a verbal or written statement by the insured to the insurer, prior to the completion of the contract, as to the existence of some fact or state of facts, made for the purpose of inducing, and tending to induce, the insurer more readily to assume the risk. Allstate Ins. Co. v. Boggs, 27 Ohio St.2d 216, 271 N.E.2d 855 (1971). A "misrepresentation" is a statement, as a fact, of something which is untrue and which the insured states with the knowledge that it is untrue and with an intent to deceive, or which the insured states positively as true without knowing it to be true, and which has a tendency to mislead, where such fact in either case is material to the risk. A half-truth or failure to speak when necessary to qualify an insurance applicant's misleading prior statements also amounts to a misrepresentation.

A claim or defense based on an alleged material representation by the insured in an insurance application begins with Ohio Rev. Code § 3911.06, which states:

No answer to any interrogatory made by an applicant in his application for a policy shall bar the right to recovery upon any policy issued thereon, or be used in evidence at any trial to recover upon such a policy, unless it is clearly proved that such answer is willfully
false, that is was fraudulently made, that it is material, and that it
induced the company to issue the policy, that but for such answer the
policy would not have been issued, and that the agent or company had no
knowledge of the falsity or fraud of such an answer.

Ohio Rev. Code § 3911.06. Ohio courts have explicitly recognized that the
"clearly prove" language imposes a "clear and convincing" burden of proof on
*4 (7th Dist. 1991).

Courts routinely find that nothing more completely vitiates a contract
of insurance than false answers to material questions in an insurance
application. An insurer can avoid coverage if an insured knowingly gives
false answers to material questions on the application. Further, Ohio courts
do not recognize a distinction between misrepresentation in the application
(or underwriting) and misrepresentation in a claim. Both may be grounds for
voiding the policy. If the insured, upon issuance of the policy, notes false
answers and conceals such falsity from the insurer, then the insurer can
similarly void the policy. Redden v. Constitutional Life Ins. Co., 172 Ohio

As a general rule, the mere fact that a misrepresentation is false does
not in and by itself void the policy. In order to relieve the insurer of
liability, the untrue representation must relate to a material matter. James
N.E.2d 599 (8th Dist. 2011). A fact may be "material" in relation to an
insurance contract if the fact, communicated to the insurer, would either
induce it to decline insurance altogether or not to accept it unless at a
higher premium; any fact is material if knowledge or ignorance of it would
naturally influence the insurer in making the contract at all or in
estimating the degree and character of the risk or in fixing the rate of the
insurance. American Continental Ins. Co. v. Estate of Gerkins, 69 Ohio App.3d
697, 591 N.E.2d 774 (3d Dist. 1990).

"[A] misrepresentation will be considered material if a reasonable
insurance company, in determining its course of action, would attach
importance to the fact misrepresented." Abon, Ltd. V. Transcon. Ins. Co., 5th
False sworn answers by an insured are material if they might have affected
the attitude and action of an insurer. They are equally material if they may
be said to have been calculated either to discourage, mislead or deflect the
company's investigation in any area that might seem to the company, at that
time, a relevant or productive area to investigate. Id.

Example: A lawyer's failure to disclose affiliations with business
entities in an application for professional malpractice insurance was not a

Under Ohio's statutory framework, a false statement in the application
for sickness or accident insurance does not bar recovery unless the insurer
clearly proves five elements: 1.) the statement was willfully false, 2.) the
statement was fraudulently made, 3.) that it materially affects the
acceptance of risk or the hazard assumed by the insurer, 4.) that it induced
the insurer to issue the policy, and 5.) but for the false statement the
policy would not have been issued. Ohio Rev. Code § 3923.14.
If the misrepresentation or misstatement is a warranty, the policy is void ab initio. The Boggs case established a two-part test for deciding if a misrepresentation or misstatement qualifies as a warranty. "The first prong requires that the misrepresentation appear on the policy's face or be plainly incorporated into the policy. Under the second prong, the policy must plainly warn that a misstatement or misrepresentation renders the policy void from its inception." Care Risk Retention Group v. Martin, 191 Ohio App.3d 797, 947 N.E.2d 1214 (2d Dist. 2010). Thus, in order for a misstatement to render an insurance policy void ab initio, that fact must appear clearly and unambiguously from the terms of the policy, rendering the misstatement a warranty.

B. Preexisting Illness or Disease Clauses

Under Ohio statutory law, individual policies for sickness and accident insurance are subject to preexisting conditions provisions. Ohio Rev. Code § 3923.57. Preexisting conditions provisions cannot exclude or limit coverage for a period beyond twelve months following the policyholder's effective date of coverage and may only relate to conditions during six months immediately preceding the effective date of coverage. Ohio Rev. Code § 3923.57(A).

In determining whether a pre-existing conditions provision applies to a policyholder or dependent, each policy shall credit the time the policyholder or dependent was covered under a previous policy, contract, or plan if the previous coverage was continuous to a date not more than thirty days prior to the effective date of the new coverage, exclusive of any applicable service waiting period under the policy. Ohio Rev. Code § 3923.57(B).

The Affordable Care Act, however, contains a provision that requires health plans to offer coverage to people even if they have a preexisting condition. Under this provision, health plans cannot deny coverage for a preexisting condition. The provision took effect on January 1, 2014 for all health plans. This reform provision does not apply to grandfathered individual health insurance policies.

C. Statutes of Limitations and Repose

In Ohio, the statute of limitations for a written contract is eight (8) years. Ohio Rev. Code § 2305.06. However, insurance policies usually contain a clause limiting the time within which suit must be brought under the policy. Parties may limit the statute of limitations time period on a contract "to a period that is shorter than the general statute of limitations for a written contract, as long as the shorter period is a reasonable one." Sarmiento v. Grange Mut. Ins. Co., 106 Ohio St.3d 403, 2005-Ohio-5410, 835 N.E.2d 692, ¶ 11. If the insurance contract does reduce the time provided in the statute of limitations, it must be "in words that are clear and unambiguous to the policyholder." Id.; Lane v. Grange Mut. Companies, 45 Ohio St.3d 63, 543 N.E.2d 488 (1989). The Ohio Supreme Court held that a two-year limitation period would be a "reasonable and appropriate" period of time in which to require an insured who has suffered a bodily injury to commence an action under the uninsured/underinsured motorist provision of an insurance policy. Miller v. Progressive Ins. Co., 69 Ohio St.3d 619, 624, 635 N.E.2d 317 (1994). It also held in Miller, however, that a one-year period to commence such a lawsuit would be unenforceable as against public policy. Id.

Actions on an insurance contract not in writing, or upon a liability created by statute other than a forfeiture or penalty, must be brought within
six years. Ohio Rev. Code § 2305.07. Actions for fraud growing out of a contract for insurance must be brought within four years, and the period of limitation in such regard runs from the time of discovery of the fraud. Ohio Rev. Code § 2305.09.

Under Ohio statutory law, all life insurance contracts must contain a provision that the insurance contract shall be incontestable after it has been in force during the lifetime of the insured for a period of not more than two years from its date, except for nonpayment of premium, except for violations of the conditions relating to naval or military service in time of war or to aeronautics, and except at the option of the company, with respect to provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident or by accidental means.... Ohio Rev. Code § 3915.05(C).

VI. BENEFICIARY ISSUES

A. Change of Beneficiary

In Ohio, the "substantial compliance" rule applies when an insured seeks to change the beneficiary of a life insurance policy. "The weight of authority in this country requires the insured, who wishes to exercise his contractual right to change beneficiaries of his life insurance policies, to proceed substantially in accordance with the requirements of such policies." Stone v. Stephens, 155 Ohio St. 595, 600, 99 N.E.2d 766 (1951). See also Rindlaub v. Travelers Ins. Co., 119 Ohio App. 77, 81, 196 N.E.2d 602 (10th Dist. Franklin 1962) (holding that strict compliance is not required when seeking to effectuate a change in the beneficiary).

Every policy of sickness and accident insurance delivered, issued for delivery, or used in Ohio is required to contain a standard provision to the effect that unless the insured makes an irrevocable designation of beneficiary, the right to change the beneficiary is reserved to the insured, and the consent of the beneficiary or beneficiaries is not required to surrender or assignment of the policy or to any change of beneficiary or beneficiaries or to any other changes in the policy. Ohio Rev. Code § 3923.04(L).

B. Effect of Divorce on Beneficiary Designation

Under Ohio common law, “[w]hen a married woman is named as a beneficiary in a policy of insurance on the life of her husband she is entitled to the proceeds of the policy, notwithstanding a divorce obtained by her before his death.” Cannon v. Hamilton, 174 Ohio St. 268, 272, 189 N.E.2d 152 (1963). The right of a spouse to recover the proceeds of a life policy naming him or her as a beneficiary does not hinge on the existence of a relationship of husband and wife but rather the well-established principles of contract law. Id. However, in the case of a separation agreement incorporated into a decree of dissolution where the parties “express their intent to release all rights which each may have as a beneficiary under the policies of the other, such language is sufficient to eliminate each party as beneficiary of the other notwithstanding the fact that no specific change of
beneficiary is made.” Phillips v. Pelton, 10 Ohio St.3d 52, 52, 461 N.E.2d 305 (1984).

Under Ohio Rev. Code § 5815.33(B)(1), unless the designation of beneficiary or the judgment or decree granting the divorce, dissolution, or annulment specifically provides otherwise,

If a spouse designates the other spouse as a beneficiary or if another person having the right to designate a beneficiary on behalf of the spouse designated the other spouse as a beneficiary, and if, after either type of designation, the spouse who made the designation or on whose behalf the designation was made, is divorced from the other spouse, obtains a dissolution of marriage, or has the marriage to the other spouse annulled, then the other spouse shall be deemed to have predeceased the spouse who made the designation or on whose behalf the designation was made, and the designation of the other spouse as a beneficiary is revoked as a result of the divorce, dissolution of marriage, or annulment.

Thus, if two people are married, and one spouse designates the other as the beneficiary on a life insurance policy, and the spouses divorce, the spouse who is the beneficiary is treated as if he or she predeceased the deceased spouse. However, this provision does not apply to insurance contracts entered into prior to the statute’s effective date of May 31, 1990, irrespective of the date of the divorce, dissolution, or annulment. Aetna Life Ins. Co. v. Schilling, 67 Ohio St.3d 164, 168, 616 N.E.2d 893 (1993). However, if the spouses remarry, the other spouse shall not be deemed to have predeceased the spouse who made the designation and the designation is not revoked. Ohio Rev. Code § 5815.33.

VII. INTERPLEADER ACTIONS

Interpleader is the process used when two parties have antagonistic claims to the proceeds of a life insurance policy, and the insurance company is unable to determine which claim is and which claim is not well founded. Civ. R. 22; Mahoney v. Westfield Ins. Co., 124 Ohio App.3d 639, 643, 707 N.E.2d 26 (10th Dist. 1997). After the insurer interpleads the claimants and deposits the money in court, the insurer waives any interest in the outcome of the action and the case proceeds between the respective claimants. Kabbaz v. Prudential Ins. Co., 27 Ohio App.3d 254, 257, 501 N.E.2d 43 (3d Dist. 1985).

For life insurance, “rights which become vested on the death of the insured and thus fixed by law cannot thereafter be affected” by interpleader of the insurer and the deposit of the disputed funds in court. Stone v. Stephens, 155 Ohio St. 595, 99 N.E.2d 766 (1951).

A. Availability of Fee Recovery

Courts in Ohio are reluctant to award attorney’s fees for an insurance company filing an interpleader action. “Ohio law has long followed the American rule as to attorney fees not being included as part of the award of costs to the prevailing party in litigation, and there is no distinction in interpleader, either for the so-called innocent stakeholder or for any other party.” Raack v. Bohinc, 17 Ohio App.3d 15, 17, 477 N.E.2d 1155 (10th Dist. 1983)(quoting Sorin v. Bd. Of Edn., 46 Ohio St.2d 177, 181 (1976) (“the Supreme Court reaffirmed application of the American rule precluding recovery
of attorney fees in the absence of statutory authorization...except where 'the losing party has acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons.’

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

Like the Federal Rules, Ohio Civ. Rule 22 governs interpleader actions. However, the language of the federal rule is slightly different than Ohio Rule 22. The Ohio rule states:

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 20.

In such an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party may deposit all or any part of such sum or thing with the court upon notice to every other party and leave of court. The court may make an order for the safekeeping, payment or disposition of such sum or thing. Ohio Civ. R. 22.

Interpleader is a two-stage action. A stakeholder who controls a fund is subjected to the claims of two or more claimants. The stakeholder does not know who is the proper claimant. The stakeholder does not wish to pay the "wrong" claimant and thus expose himself to suit by the "proper" claimant. In the first stage, the stakeholder, in order to avoid a multiplicity of suits and possible multiple liability, interpleads the claimants. In the second stage, ordinarily, the stakeholder drops out, leaving the claimants to establish the validity of one of the claims. One claimant will be successful in the second stage.