I. Regulatory Limits on Claims Handling

A. Timing for Responses and Determinations

Relevant time limits for the handling of claims are found in West Virginia’s Unfair Trade Practices Regulations at 114 CSR §§ 14-1 et seq. Examples: 15 working days to acknowledge receipt of a claim, unless full payment is made within such time (114 CSR § 14-5.1); 15 working days to respond to communications from claimant to which a reply could reasonably be expected (114 CSR § 14-5.3); every insurer upon receiving notice of a claim, must promptly provide necessary claim forms, instructions, and reasonable assistance so that first-party claimants can comply with the policy conditions and the insurer's reasonable requirements (114 CSR §14-5.4); if an insurer needs more than 30 calendar days from the date a proof of loss or notice of claim is received to determine whether a claim should be accepted or denied, the insurer, within 15 working days after the expiration of the 30 day period expires, must notify the claimant of the need for additional time (114 CSR § 14-6.7); every insurer must pay any amount finally agreed upon in settlement of all or part of any claim no later than 15 working days from the receipt of such agreement by the insurer (114 CSR § 14-6.11). It should also be noted that except where a time limit is specified by statute or legislative rule, no insurer may require a first-party claimant to give notification of a claim or proof of claim within a specified time period (114 CSR § 14-4.4).

B. Standards for Determinations and Settlements

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

W.Va. Code § 33-6F-1 prohibits the disclosure of nonpublic information contrary to the provisions of Title V of the Gramm-Leach-Bliley Act. In addition, various regulations entitled Privacy of Consumer Financial and Health Information can be found at 114 CSR 57-1 et seq.

II. **Principles of Contract Interpretation**

Language in an insurance policy should be given its plain, ordinary meaning. *Soliva v. Shand, Morahan & Co., Inc.*, 345 S.E.2d 33 (W.Va. 1986). Whenever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous. *Prete v. Merchants Property Ins. Co. of Indiana*, 223 S.E.2d 441 (W.Va. 1976). It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured. *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488 (W.Va. 1987). An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion. *Id.* Also, with respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. *Id.*

III. **Choice of Law**

Generally, the insurance contractual relationship is controlled by the law of the state in which policy was issued, even if the triggering event for coverage is a tort. *Lee v. Saliga*, 373 S.E.2d 345 (W.Va. 1988). This traditional contract conflict rule, giving substantial deference to the state where contract is made and where it is to be performed, assuming both incidents occur in same state, is subject to qualifications that the parties have not made choice of applicable law in the contract itself and the law of the other state does not offend West Virginia's public policy. *Id.*

Under the traditional *lex loci delicti* choice-of-law rule, substantive rights between parties in tort are determined by the law of the place of injury, but procedural rules of the forum state still apply. *McKinney v. Fairchild Int'l, Inc.*, 487 S.E.2d 913 (W.Va. 1997). Where a choice of law question arises about whether the tolling provisions of the West Virginia savings statute, or of place where the claim accrued, should be applied to the action, courts should ordinarily apply West Virginia law, unless the place where the claim accrued has a more significant relationship to the transaction and the parties. *Id.*
IV. **Extracontractual Claims Against Insurers: Elements and Remedies**

A. **Bad Faith**

1. **First Party Common Law**

   If the insured files a policy claim and is denied by the insurer based on unreasonable grounds and the “policyholder substantially prevails in a property damage suit against its insurer, the insurer is liable for: (1) the insured’s reasonable attorneys’ fees in vindicating its claim; (2) the insured’s damages for net economic loss caused by the delay in settlement and damages for aggravation and inconvenience.” *Syl. Pt. 1, Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73 (W.Va. 1986). Damages for aggravation and inconvenience “are not limited to damages associated with loss of use of the personal property but relate as well to the aggravation and inconvenience shown in the entire claims collection process.” *Syl. Pt 4, McCormick v. Allstate Ins. Co.*, 475 S.E.2d 507 (W.Va. 1996). When awarding reasonable attorney fees to an insured, “reasonable attorney fees” is presumptively one-third of the face amount of the policy, unless the amount disputed under the policy is either extremely small or enormously large; in the latter circumstances, the judge shall conduct an inquiry concerning reasonable attorney fees. *Richardson v. Kentucky Nat. Ins. Co.*, 607 S.E. 2d 793 (W.Va. 2004).

2. **First Party Statutory**

   In 1981, the West Virginia Supreme Court of Appeals in *Jenkins v. J.C. Penney Casualty Insurance Co.*, 280 S.E.2d 252 (W.Va. 1981) allowed a private cause of action under the West Virginia Unfair Trade Practices Act § 33-11-4, subdivision (9), Unfair Claim Settlement Practices. The insured on a private cause of action under § 33-11-4(9) must show: (1) that there has been a violation or that there have been multiple violations of that subsection in the management of the plaintiff’s claim; and (2) that the violation or violations entailed ‘a general business practice’ on the part of the insurer. W.Va. Code § 33-11-4; *McCormick v. Allstate Ins. Co.*, 475 S.E.2d 507 (W.Va. 1996). A cause of action also exists to hold a claims adjuster employed by an insurance company personally liable for violation of the Unfair Trade Practices Act, even though the adjuster is not a party to the insurance contract and administrative remedies are available for disciplining adjusters. *Taylor v. Nationwide Mut. Ins. Co.*, 589 S.E. 2d 55 (W.Va. 2003).

3. **Third Party Common Law**

   Prior to 1998, West Virginia recognized a cause of action for both statutory and common law third party bad faith, and it was common practice to include bad faith allegations against the insurer in the underlying litigation against the insured. The Supreme Court, in *Elmore v. State Farm Mut. Auto Ins. Co.*, 504 S.E.2d 893, (W.Va. 1998), eliminated this common law action. Currently, in West Virginia, a third-party claimant may not bring a private cause of action or any other action against any person for an unfair claims settlement practice. A third party claimant's sole remedy against a person for an unfair claims settlement practice or the bad faith settlement of a claim is the filing of an administrative complaint with the Insurance...
Commissioner. A third-party may not include allegations of unfair claims settlement practices in any underlying litigation against an insured. Id. See also W.Va. Code § 33-11-4(a).

4. Third Party Statutory

In West Virginia a third-party claimant may not bring a private cause of action or any other action against any person for a violation of the Unfair Claims Settlement Practices Act. A third party claimant's sole remedy against a person for an unfair claims settlement practice or the bad faith settlement of a claim is the filing of an administrative complaint with the Insurance Commissioner. A third-party may not include allegations of unfair claims settlement practices in any underlying litigation against an insured. W.Va. Code § 33-11-4(a).

B. Fraud

In 1990 West Virginia created the Unfair Trade Practice Act, the purpose of the article being to regulate trade practices in the business of insurance. In Morton v. Amos-Lee Secs., Inc., 466 S.E.2d 542 (W.Va. 1995), the executor of an estate brought suit against an insurer for fraud and misrepresentation, and breach of the duty of good faith and fair dealing, in selling a lifetime annuity to an annuitant despite his age and failing health. The West Virginia Supreme Court of Appeals held that a private cause of action existed under W. Va. Code § 33-11-4(1)(a), for misrepresentation and false advertising of insurance policy benefits, advantages, conditions or terms of the insurance policy.

In Mutafis v. Erie Ins. Exch., 561 F. Supp. 192 (N.D. W. Va. 1983), aff'd, 775 F.2d 593 (4th Cir. 1985), an insured brought an action against its insurer arising out of the placement of a memorandum in the insured's file stating that he was involved in the Mafia. The Court held that a private cause of action exists under W. Va. Code § 33-11-4(3), for publishing, disseminating or circulating, directly or indirectly, or aiding, abetting or encouraging a false or malicious statement of the financial condition of any person under W. Va. Code § 33-11-4(5), and for knowingly filing, publishing, disseminating, circulating or delivering to any person, directly or indirectly, a false statement regarding a persons' financial condition. Additionally, the Court held punitive damages can be awarded under the West Virginia Unfair Trade Practice Act, §33-11-6, when the two employees responsible for placing the memorandum into the insured's file had no basis for their statement.

Constructive fraud is a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Wilt v. State Auto. Mut. Ins. Co., 506 S.E.2d 608 (W.Va. 1998). The essential elements for an action for fraud are: that the act claimed to be fraudulent was an act of the defendant or induced by him, that it was material and false, that the plaintiff relied upon it and was justified under the circumstances in relying upon it, and that the plaintiff was damaged because he relied upon it. Romano v. New England Mut. Life Ins. Co., 362 S.E.2d 334 (W.Va. 1987).
C. **Intentional and Negligent Infliction of Emotional Distress**

1. **Intentional Infliction of Emotional Distress**

   In West Virginia, a plaintiff may establish a claim for intentional or reckless infliction of emotional distress by showing: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) that the emotional distress that the plaintiff suffered was so severe that no reasonable person could be expected to endure it. The role of the trial court in such actions is to determine whether the defendant’s conduct may reasonably be considered extreme and outrageous, while the role of the jury is to determine whether the conduct is in fact extreme and outrageous. *Travis v. Alcon Laboratories Inc.*, 504 S.E.2d 419 (W.Va. 1998).

2. **Negligent Infliction of Emotional Distress**

   West Virginia recognizes the tort of negligent infliction of emotional distress. A plaintiff's right to recover for negligent infliction of emotional distress, after witnessing a person closely related to the plaintiff suffer critical injury or death as a result of defendant's negligent conduct, is premised upon the traditional negligence test of foreseeability. A plaintiff is required to prove under this test that his or her serious emotional distress was reasonably foreseeable, that the defendant's negligent conduct caused the victim to suffer critical injury or death, and that the plaintiff suffered serious emotional distress as a direct result of witnessing the victim's critical injury or death. See *Heldreth v. Marrs*, 425 S.E. 2d 157 (W.Va. 1992). In determining whether the serious emotional injury suffered by a plaintiff in a negligent infliction of emotional distress action was reasonably foreseeable to the defendant, the following factors must be evaluated: (1) whether the plaintiff was closely related to the injury victim; (2) whether the plaintiff was located at the scene of the accident and was aware that the accident was causing injury to the victim; (3) whether the victim is critically injured or killed; and (4) whether the plaintiff suffers serious emotional distress. *Id.*

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

Consumers are protected in West Virginia by the West Virginia Consumer Credit and Protection Act. The West Virginia Consumer Credit and Protection Act provides numerous protections to consumers, and can be found at W.Va. Code §§ 46A-1-101 et seq. An example of these consumer protections can be found in the New Motor Vehicle Warranties Act (W. Va. Code §§ 46A-6A-1 et seq.), at W. Va. Code § 46A-6A-4 (Civil Action by Consumer), which allows a consumer to bring a cause of action against a manufacturer if the nonconformity of the vehicle results in a substantial impairment to the use or market value of the new motor vehicle, and the manufacturer has not replaced the new vehicle pursuant
to this section. This section of the Consumer Protection - New Motor Vehicle Warranties Act does not specify a particular remedy. In such a case the fact finder is permitted to select one or more of the remedies provided in the statute. W.Va. Code § 46A-6A-4; Bostic v. Mallard Coach Co., 406 S.E.2d 725 (W.Va. 1991). Another example can be found at W. Va. Code § 46A-6B-3, the Consumer Protection - Automotive Crash Parts Act, which requires all motor vehicle body shops to use genuine crash parts sufficient to maintain the manufacturer’s warranty for repairs made to vehicles in the year of their manufacture and two succeeding years. Additionally, under § 46A-6B-3, no insurance company may require the use of aftermarket crash parts when it is negotiating repairs of a motor vehicle with any repairer, if the repairs take place in the year of the motor vehicle’s manufacture and the two succeeding years. However, the insurance company may require aftermarket crash parts for the motor vehicle if it has the owner’s consent.

E. State Class Actions

According to Rule 23 of the West Virginia Rules of Civil Procedure, to establish and maintain a class action, subdivision (a) and (b) of Rule 23 must be satisfied.

Subdivision (a) requires that: “(1) the class be 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.” W.Va. R. Civ. P. 23(a). The requirements of numerosity, commonality, typicality, and adequacy of representation are explained in the case of In re: West Virginia Rezulin Litigation, 585 S.E. 2d 52 (W.Va. 2003). Further, a class may only be certified if the Circuit Court is satisfied, after a thorough analysis, that the prerequisites of Rule 23 have been satisfied. W.Va. ex rel. Chemtall, Inc. v. Madden, 607 S.E. 2d 772 (2004).

Subdivision (b) requires that in order to maintain a class action:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of, (A) Inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any
questions affecting any 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.


V. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

In West Virginia, an insurance policy obtained fraudulently after the occurrence of an “insured event” is void ab initio. Brown v. Community Moving & Storage, Inc., 414 S.E.2d 452 (W.Va. 1992). Furthermore, W.Va. Code § 33-6-7 provides that misrepresentations, omissions, concealments of facts, and incorrect statements only prevent a recovery under a policy if (1) fraudulent; or (2) material either to the acceptance of the risk, or to the hazard assumed by the insurer; or (3) the insurer in good faith would not have issued the policy, or would not have issued a policy as large in amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise. In addition, it has been found that in order to defend a claim under a disability insurance policy, the insurer “must show that the misrepresentation, omission, concealment of fact, or incorrect statement substantially affected or impaired its ability to make a reasonable decision to assume the risk of coverage.” Massachusetts Mut. Life Ins. Co. v. Thompson, 460 S.E.2d 719 (W.Va. 1995) (applying W.Va. Code § 33-6-7).

B. Preexisting Illness or Disease Claims

The federal “Patient Protection and Affordable Care Act,” Pub. L. 111-148, restricts the ability of insurers to deny coverage based upon a preexisting illness or disease. The effect that statute has upon the health insurance market, as well as the effect of its repeal, is beyond the scope of this article. Below are the relevant provisions of West Virginia state law which would apply to the extent that they are not inconsistent with federal law.

W. Va. Code § 33-16-3k(a)(1), provides that “a health benefit plan issued in connection with a group health plan may not impose a preexisting condition exclusion with respect to an employee or a dependent of an employee for losses incurred by the employee or dependent after more than twelve months (or eighteen months for a late enrollee) after the earlier of the individual’s date of enrollment in the health benefit plan or the first day of a waiting period for enrollment in the plan.”
Under W. Va. Code § 33-16-3k(a)(2), “a health benefit plan may impose a preexisting condition exclusion only if such condition relates to a physical or mental condition, regardless of its cause, for which medical advice, diagnosis, care or treatment was recommended or received within the six-month period ending on the enrollees’ enrollment date.”

C. **Statutes of Limitation**

Applicable West Virginia Statutes of Limitation may be found throughout Chapter 55 of the W. Va. Code. Pertinent Examples include: 10 years for claims involving a written contract, W.Va. Code § 55-2-6; 2 years following death for wrongful death claims, W. Va. Code § 55-7-6; 2 years following the discovery of an injury, but no more than ten total years from date of injury for health care injuries, W. Va. Code § 55-7B-4; and as to foreign judgments, the statute of limitation of the foreign jurisdiction generally controls, so long as such time may never run longer than ten years on any foreign action when the West Virginian has resided in this state during the ten years preceding the action. W. Va. Code § 55-2-13.

VI. **Beneficiary Issues**

The right to change the beneficiary of a life policy depends on the terms of the policy, and the method of accomplishing that change is that provided by the policy. *Gill v. Provident Life & Acc. Ins. Co.*, 48 S.E.2d 165 (W.Va. 1948). A change of beneficiary of life policy under a provision requiring indorsement of change thereon by insurer can be accomplished without strict compliance with such requirement, but substantial compliance with the conditions relating to the change is sufficient. *Id.* Insurer's indorsement on a life policy of change of beneficiary is a ministerial act, which insurer cannot refuse to perform. *Id.* Therefore, when the insured has done substantially all that is required of him to accomplish a change of beneficiary under a life insurance policy, and ministerial acts of the insurer's officers are all that remain to be done, the change is effective, though the formal details are not completed before insured's death. *Id.* Further, where a court may reasonably infer from surrounding facts that the insured intended to effect a change of beneficiary of a life insurance policy by execution of a document, the court should construct the document in accordance with such intention. *Id.*

The Supreme Court of Appeals of West Virginia has not yet addressed the issue of whether a divorce has an effect on the beneficiary of a life insurance policy. Nationally, it appears that most courts have ruled that, unless the life insurance policy is addressed in the divorce decree or similar order of the court, that divorce has no effect on the beneficiary of a life insurance policy. See, *e.g.*, 175 ALR 1220. If an insured wishes to exclude their ex-spouse from receiving their life insurance proceeds, the insured need to execute an appropriate change of beneficiary form. *Id.*