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 the 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 state where the contract is made and where it is to be performed, assuming both incidents occur in same state, is subject to a qualification that parties have not made a 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 the 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 more significant relationship to transaction and parties. Id.
IV. Duties Imposed by State Law

A. Duty to Defend

The terms of the pertinent insurance contract govern the parties' relationship and define the scope of coverage as well as the existence of the insurer's duty to defend its insured. Tackett v. American Motorists Ins. Co., 584 S.E.2d 158 (W.Va. 2003). An insurer's obligation to defend (implied in all liability insurance policies unless clearly excluded) is broader than the obligation to provide coverage, and this duty does not depend on the precise use of terms within the complaint that would unequivocally delineate a claim which, if proved, would be within the insurance coverage. Butts v. Royal Vendors, Inc., 504 S.E.2d 911 (W.Va. 1998). Any questions as to an insurer's duty to defend under a contract of insurance will be construed liberally in favor of the insured. Id. An insurer must look beyond the bare allegations of the complaint and conduct a reasonable inquiry into the facts to determine whether the claim comes within the scope of the coverage. Farmers and Mechanics, Mut. Ins. Co. of West Virginia v. Cook, 557 S.E.2d 801 (W.Va. 2001). When attempting to avoid the duty to defend or the duty to provide coverage, the insurer bears the burden of proving facts necessary to trigger a policy exclusion. State Auto. Mutual Ins. Co. v. Alpha Engineering Services, Inc., 542 S.E.2d 876 (W.Va. 2000). Where part of claims against an insured fall within coverage and part do not, the insurer must defend all claims, despite the fact that it might eventually be required to pay only some claims. State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co., 483 S.E. 2d 228 (W.Va. 1997). Generally, a liability insurer's duty to defend is tested by whether the allegations in the plaintiff's complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy. Aluise v. Nationwide Mut. Fire Ins. Co., 625 S.E.2d 260 (W.Va. 2005). A defense attorney, employed to represent an insured in a liability matter, is not bound by the Unfair Trade Practices Act and is not an agent of the insurance company, because the attorney is professionally obligated to represent only the interests of the client/insured, not the insurance company. Barefield v. DPIC Companies, Inc., 600 S.E.2d 256 (W.Va. 2004).

B. Duty to Settle

The Unfair Trade Practices Act ("UTPA") establishes a legislative policy in West Virginia encouraging prompt settlement of meritorious insurance claims that parallels the longstanding judicial policy that encourages compromise and settlement of disputed claims. Barefield v. DPIC Companies, Inc., 600 S.E.2d 256 (W.Va. 2004). Insurers owe policy holders a duty of good faith and fair dealing and to refrain from statutory unfair claim settlement practices. However, insurers owe no common law duty of good faith and fair dealing and no fiduciary duty to third parties. Therefore, a third party has no cause of action against an insurance carrier for common law breach of the implied covenant of good faith and fair dealing or for common law breach of fiduciary duty. Elmore v. State Farm, 504 S.E.2d 893 (W.Va. 1998).
V. 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 at 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 § 33-11-4a(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 § 33-11-4a(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 fraudfeasor, 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.

VI. Discovery Issues in Actions Against Insurers

A. Discoverability of Claims Files Generally

The West Virginia Supreme Court of Appeals has not specifically addressed whether claim files are generally discoverable. However, under the West Virginia Rules of Civil Procedure, claim files would appear to be relevant to a bad faith action and therefore may be discoverable. The discovery of these materials is subject to the attorney-client privilege, work product privilege, and any applicable privacy rights. In the context of third-party bad faith actions, which have since been eliminated in West Virginia, West Virginia had recognized that an insurer should be permitted a "quasi attorney-client privilege" with respect to the claim file of an insured. State ex rel. Allstate Ins. Co. v. Gaughan, 508 S.E. 2d 75 (W.Va. 1998); and State ex rel. Medical Assur. of W. Va. Inc. v. Recht, 583 S.E.2d 80 (W.Va. 2003). The Court has held, however, that retention agreements and billing statements are discoverable. State ex rel. Monpelier U.S. Ins. Co. v. Bloom, 757 S.E.2d 788, 801 (W. Va. 2014).

B. Discoverability of Reserves

The West Virginia Supreme Court of Appeals has declared that when individual case reserves information is set by an attorney or by a non-lawyer representative with the primary intent of preparing for litigation, then the individual case reserves information is subject to protection from discovery as opinion work product pursuant to Rule 26(b)(3). However, aggregate reserves documents not developed primarily in anticipation of specific litigation, but produced for general business purposes, are not protected by the work product rule and are therefore discoverable. State ex rel. Erie Ins. Property & Casualty Co. v. Mazzone, 648 S.E.2d 31 (W.Va. 2007).

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

The West Virginia Supreme Court of Appeals has not specifically addressed whether the existence of reinsurance or communications with reinsurers is discoverable. Generally, reinsurance information and communications between carrier and reinsurer may be relevant and discoverable in a bad faith action to the extent it addresses
liability, exposure, the likelihood of a verdict in excess of policy limits, or coverage issues.

D. Attorney/Client Communications

In order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be intended to be confidential. See State v. Burton, 254 S.E.2d 129 (W.Va. 1979). The West Virginia Supreme Court of Appeals has specifically found that, where the interests of an insured and his or her insurance company are in conflict with regard to a claim for underinsured motorist coverage and the insurance company is represented by counsel, the bringing of a related first-party bad faith action by the insured does not automatically result in a waiver of the insurance company's attorney-client privilege concerning the underinsurance claim. See State ex rel. Brison v. Kaufman, 584 S.E.2d 480 (W.Va. 2003).

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or Claim

An insurance policy obtained fraudulently after the occurrence of an “insured event” is void ab initio. See Brown v. Community Moving & Storage, Inc., 414 S.E.2d 452 (1992). In Brown, the defendant, a moving company, was involved in a motor vehicle accident which resulted in plaintiff’s death. At the time of the accident the defendant did not have motor vehicle insurance. Before a lawsuit was initiated the defendant obtained insurance coverage for the motor vehicle by failing to mention the accident and falsely stating in submitted letters of the insurer that there were no claims on the vehicle in question.

W.Va. Code § 33-6-7 provides that misrepresentations, omissions, concealments of facts, and incorrect statements only prevent a recovery under a policy if (a) 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.

B. Failure to Comply with Conditions

The failure of an insured to cooperate with the insurer has been held to be a material breach of the contract and a defense to a suit on the policy. This is so whether the failure to cooperate is manifested by a refusal to submit to an examination under oath, or a refusal to produce documents. Courts have also found a failure of cooperation when the insured refused to answer material questions during the examination, because an insurer has a right to examine as to any matter material to its liability. However, the insurer is limited by a rule of reasonableness and specificity. It may not roam at will through all of

C. Challenging Stipulated Judgments: Consent and/or No Action Clauses

A stipulated judgment may be set aside in West Virginia if the method of procuring the judgment constituted fraud upon the court or a party. Gum v. Dudley, 505 S.E.2d 391 (W.Va. 1997). The essential elements for an action for fraud are: that the act claimed to be fraudulent was an act of the party or induced by him, that it was material and false, that the innocent relied upon it and was justifiably under the circumstances in relying upon it, and that the innocent party was damaged because he relied upon it. Romano v. New England Mut. Life Ins. Co., 362 S.E.2d 334 (W.Va. 1987).

D. Statutes of Limitation

The statute of limitations in an insurance coverage action depends upon whether the plaintiff asserts a cause of action based upon contract or tort theories. Actions based upon breach of written contract are generally subject to a ten year statute of limitations period. W.Va. Code § 55-2-6. While actions based upon tort are subject to a two year limitations period. W.Va. Code § 55-2-12. Additional statutes of limitations can be found throughout W.Va. Code §§ 55-2-1 et seq.

VIII. Trigger and Allocation Issues for Long-Tail Claims

With respect to liability coverage, if injury or damage is continuous or progressive throughout several policy periods, coverage is triggered under all policies in effect during those policy periods. It is the date when covered offenses occurs, not the date of injury, which triggers personal injury coverage under a liability insurance policy. State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co., 483 S.E.2d 228 (W.Va. 1997).

IX. Duty to Settle

The Unfair Trade Practices Act ("UTPA") establishes a legislative policy in West Virginia encouraging prompt settlement of meritorious insurance claims that parallels the longstanding judicial policy that encourages compromise and settlement of disputed claims. Barefield v. DPIC Companies, Inc., 600 S.E.2d 256 (W.Va. 2004). Insurers owe policy holders a duty of good faith and fair dealing and to refrain from statutory unfair claim settlement practices. However, insurers owe no common law duty of good faith and fair dealing and no fiduciary duty to third parties. Therefore, a third party has no cause of action against an insurance carrier for common law breach of the implied covenant of good faith and fair dealing or for common law breach of fiduciary duty. Elmore v. State Farm, 504 S.E.2d 893 (W.Va. 1998).