I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

An insurer must respond with reasonable promptness, in no more than fifteen working days, and adequately address the concerns of any communications. Hawaii Revised Statutes (“H.R.S.”) § 431:13-103(11)(B). While failure to do so constitutes an unfair claims settlement practice, Chapter 431 is only enforceable by the insurance commissioner and is not a statute granting private remedies to individuals. Genovia v. Jackson Nat’l Life Ins. Co., 795 F. Supp. 1036 (Haw. 1992).

For accident and health or sickness insurance providers, uncontested claims should be reimbursed not more than thirty days after receiving the claim. H.R.S. § 431:13-108(c). An uncontested claim filed electronically must be reimbursed within fifteen days. Id. The insurer contesting, denying, or reviewing claims, shall notify the insured within fifteen days or seven days after receipt of an electronically filed claim. Id.

For Personal Injury Protection (PIP) benefits under motor vehicle policies, payments must generally be made within thirty days after receipt of reasonable proof of the benefits accrued. H.R.S. § 431:10C-304(3). Full or partial denial of claims must be made in writing within thirty days. Id.

B. Standards for Determination and Settlements

According to H.R.S. § 431:13-103(11), an insurer commits unfair claims settlement or determination practices by committing the following:

a. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

b. Refusing to pay claims without conducting a reasonable investigation based upon all available information;
c. Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

d. Failing to offer payment within thirty calendar days of affirmation of liability, if the amount of the claim has been determined and is not in dispute;

e. Failing to provide the insured, or when applicable the insured’s beneficiary, with a reasonable written explanation for any delay, on every claim remaining unresolved for thirty calendar days from the date it was reported; Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;

f. Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds;

g. Attempting to settle a claim for less than the amount to which a reasonable person would have believed the person was entitled by reference to written or printed advertising material accompanying or made part of an application.

II. PRINCIPLES OF CONTRACT INTERPRETATION

Because an insurer’s duty to defend its insureds is contractual in nature, one must look to the language of the policy involved to determine the scope of that duty. Hawaiian Holiday Macadamia Nut Co. v. Industrial Indemnity Co., 76 Haw. 166, 873 P.2d 230 (1994).

All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured. Sentinel Insurance Company, Ltd. v. First Insurance Company of Hawaii, Ltd., 76 Haw. 277, 875 P.2d 894 (1994).


When ambiguity exists, the rule of construction is applied only when the policy taken as a whole is reasonably subject to differing interpretation. Hawaiian Ins & Guar., supra 68 Haw at 341. This was most recently upheld in Sakal v. Assn. of Apt. Owners of Hawaiian Monarch, 143 Haw. 219, 426 P.3d 443, 2018 Haw. App. LEXIS 356, 2018 WL 3583580.

Absent an ambiguity, the terms of the policy should be interpreted according to their plain, ordinary, and accepted sense in common speech. Hawaiian Ins. & Guar., supra 68 Haw at 342.


Lastly, the Hawaii Supreme Court recently held in *Willis v. Swain*, 2013 WL 2459880 (Hawaii) that an insurer’s extracontractual duty of good faith is owed even to a person to whom it did not issue an insurance policy.

**III. CHOICE OF LAW**

Choice of law in Hawaii requires a two-part inquiry. “The first part of the choice of law inquiry is best understood as determining if there is an actual or real conflict between the potentially applicable laws.” *Hammersmith v. TIG Ins. Co.*, 480 F.3d220, 230(3d Cir.2007). “If two jurisdictions’ laws are the same, then there is no conflict at all, and a choice of law analysis is unnecessary.” Id. See also, *Hawaiian Telecom Comm’n, v. Tata Am. Int’l. Corp*, 2010 WL 2594482, at *5 (D. Haw. May 24, 2010).

“Hawaii resolves its conflict of laws issues by deciding which State has the strongest interest in seeing its law applied to a particular case.” *Lemen v. Allstate Ins. Co.*, 938 F. Supp. 640, 643(D. Haw. 1995). See also, *Mikelson v. United Servs. Auto. Ass’n*, 107 Haw. 192, 111 P.3d 601, 2005 Haw. LEXIS 257. (“This court has ‘moved away from the traditional and rigid conflicts-of-laws rules in favor of the modern trend towards a more flexible approach looking to the state with the most significant relationship to the parties and subject matter.’) “The interests of the states and applicable public policy reasons should determine whether Hawaii law or another state’s law should apply.” Id. In making this determination, courts “look to factors such as (1) where relevant events occurred, (2) the residence of the parties, and (3) whether any of the parties had any particular ties to one jurisdiction or the other.” *Kukui Gardens Corp. v. Holco Cap. Grp*, 2010 WL 145284, at *5(D. Haw. Jan. 12, 2010). “Hawai’i’s choice-of-law approach creates a presumption that Hawaii law applies unless another state’s law would best serve the interests of the states and persons involved.” *Abrahamson v. Aetna Cas.& Sur. Co.*, 76 F.3d 304, 305(9th Cir 1996).

Federal courts sitting in diversity must apply “the forum state’s choice of law rules to determine the controlling substantive law.” *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002).

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

The insurer’s duty to defend is broader than the duty to pay and arises whenever there is the mere potential for coverage, such as indemnification liability of insurer to insured under the terms of the policy. Sentinel Insurance Company, Ltd. v. First Insurance Company of Hawaii, Ltd., 76 Haw. 277, 875 P.2d 894 (1994).

1. Standard for Determining Duty to Defend

The duty to defend rests primarily on the possibility that coverage exists. The possibility may be remote, but if it exists, the insurer owes the insured a defense. Id. The possibility of coverage must be determined by a good faith analysis of all information known to the insurer or all information reasonably ascertainable by inquiry and investigation. Standard Oil Co. of California v. Hawaiian Insurance Guaranty Company, 65 Haw. 521 (1982), citing Spruill Motors, Inc. v. Universal Under Ins. Co., 512 P.2d 168 (1968).

Where a suit raises a potential for indemnification liability of the insurer to the insured, the insurer has the duty to accept the defense of the entire suit even though other claims of the complaint fall outside of the policy’s coverage. Commerce & Industry Insurance Company v. Bank of Hawaii, 73 Haw. 322 (1992).

2. Issues with Reserving Rights

Once the insurer receives information concerning the possible absence of coverage, the insurer must promptly serve upon the insured a reservation of rights. AIG Insurance Co., Inc. v. Smith, 78 Haw. 174, 891 P.2d 261 (1995).

A reservation of rights agreement is notice by the insurer to the insured that the insurer will defend the insured but that the insurer is not waiving any defenses it may have under the policy. First Ins. Co. of Hawaii v. State, 66 Haw. 413, 665 P.2d 648 (1983).

When the insurer begins the defense of its insured and then determines that it is not obligated to do so, it cannot withdraw if that action would prejudice the insured unless the insurer has expressly reserved its right to withdraw. Commerce & Industry Insurance Company v. Bank of Hawaii, 73 Haw. 322 (1992).

B. State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

1. Criminal Sanctions

According to H.R.S. § 711-1111: Violations of the Hawaii eavesdropping statute and privacy in the first degree are class C felonies and are “punishable by up to five years imprisonment and fines of up to $10,000.” The intentional or endeavoring to intercept personally or by other agent any wire, oral, or electronic communication is a class C felony. Violation of
privacy in the second degree is a misdemeanors and “punishable by fines up to $2,000 and up to one year of imprisonment”.

2. **The Standards for Compensatory and Punitive Damages**

   According to *Bright v. Quinn*, 20 Haw. 504, 511–12 (1911):

   [Actions] of tort punitive damages may, under certain circumstances, be awarded in addition to such sum as the plaintiff may be found entitled to purely by way of compensation for his injuries and suffering. Such damages may be awarded in cases where the defendant “has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations”; or where there has been “some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences”. In such cases a reckless indifference to the rights of others is equivalent to an intentional violation of them (citations omitted).

   The court in *Kaopuiki* went on to state:

   [the] proper measure of punitive damages is (1) the degree of intentional, willful, wanton, oppressive, malicious or grossly negligent conduct that formed the basis for [the] prior award of damages against [the tortfeasor] and (2) the amount of money required to punish [the tortfeasor] considering [his or her] financial condition. *Kaopuiki v. Kealoha*, 104 Hawai‘i 241, 256, 87 P.3d 910, 925 (App, 2003).

   According to Jury Instruction No. 14, nominal damages can be awarded: “If you find for the plaintiff but you find that the plaintiff has failed to prove damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.”

3. **Insurance Regulations to Watch**

   None at this time.

4. **State Arbitration and Mediation Procedures**

   Hawaii Revised Statutes § 658A - Uniform Arbitration Act outlines the basic procedures for arbitration.

   In Hawaii, all tort cases “worth” $150,000 or less are automatically assigned to the Court Annexed Arbitration Program (“CAAP”) in the interest of saving time and costs. A volunteer arbitrator presides at a hearing and any decision made by the arbitrator is non-binding. However,
the arbitration award becomes the judgement if a Notice of Appeal and Request for Trial de Novo is not filed in a timely manner. Rules governing CAAP can be found here.

Outside arbitration and mediation is almost exclusively handled by Dispute Prevention & Resolution, Inc. (“DPR”). The American Arbitration Association (“AAA”) has no presence in Hawaii. Rules and procedures for mediation can be found here. DPR’s rules and procedures for arbitration can be found here.

5. State Administrative Entity Rule-Making Authority

The Department of Commerce & Consumer Affairs, Insurance Division (“INS”) is responsible for overseeing the insurance industry in the State of Hawaii. This includes insurance companies, insurance agents, self-insurers and captives. The division ensures that consumers are provided with insurance services meeting acceptable standards of quality, equity and dependability at fair rates by establishing and enforcing appropriate service standards. The division provides for the licensing, supervision and regulation of all insurance transactions in the State. Prepaid Legal Services also falls within the division duties.

The Office of Administrative Hearings (“OAH”) is responsible for conducting administrative hearings and issuing recommended or final decisions for all divisions within the Department of Commerce and Consumer Affairs that are required to provide contested case hearings pursuant to the provisions of H.R.S. Chapter 91 and H.R.S. § 92.

The Office of Consumer Protection (“OCP”) was created in 1969 to protect the interests of consumers and legitimate businesses. The primary purpose of the office is to promote fair and honest business practices by investigating alleged violations of consumer protection laws, by taking legal action to stop unfair or deceptive practices in the marketplace, and by educating the consumer public and businesses regarding their respective rights and obligations.

V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A. Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

1. First Party

Hawaii recognizes a cause of action for bad faith against a first-party insurer. Best Place, Inc. v. Penn America Ins. Co., 920 P. 2d 334 (Haw. 1996). “Every contract contains an implied covenant of good faith and fair dealings (bad faith) that neither party will do anything that will deprive the other of the benefit of the agreement.” Id. While a breach of good faith results in a cause of action under contract principles, “[w]hether a breach of this duty will give rise to a cause of action in tort, depends on the duty or duties inherent in a contract”. Id.

An insured must show two things in order to maintain a bad faith claim under Hawaii law: (1) benefits due under the policy were withheld; and (2) the reason for withholding the
benefits was unreasonable or without proper cause. *Id.* at 347 (adopting California’s bad faith test articulated in *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973)).

An unreasonable delay in payment of benefits constitutes bad faith. *Id.* However, an insurer’s denial of benefits based on a reasonable interpretation of the insurance policy does not constitute bad faith. *Id.* Nor does an erroneous decision not to pay benefits constitute bad faith. *Id.* See also, *Enoka v. AIG Hawaii Insurance Company, Inc.*, 128 P.3d 850 (Haw. 2006). The determinative factor is whether the decision not to pay the claim was made in bad faith, i.e., based on unfair dealing rather than mistaken judgment. *Best Place, Inc.*, 920 P.2d 334.

An insured may recover compensatory damages in a bad faith action. An insured may also recover punitive damages if he/she establishes by clear and convincing evidence that the insurer acted “wantonly or oppressively,” “with such malice as implies a spirit of mischief or criminal indifference to civil obligations,” with “willful misconduct,” or with a “conscious indifference to consequences.” *Id.* at 348. See also, H.R.S. Section 663-1.2 regarding tort liability for breach of contract; punitive damages, which states that no person may recover damages, including punitive damages, in tort for a breach of contract in the absence of conduct that: (1) violated a duty that is independently recognized by principles of tort law; and (2) transcended the breach of the contract.

However, punitive damages are not covered by insurance policies. See *Francis v. Lee Enterprises, Inc.*, 971 P.2d 707 (Haw. 1999). See also, H.R.S. Section 431:10-240, which states that “coverage under any policy of insurance issued in this State shall not be construed to provide coverage for punitive or exemplary damages unless specifically included.”


A policyholder may be entitled to reasonable attorneys’ fees and the cost of suit. H.R.S. Section 431:10-242.


An insurer’s potential liability is not restricted to common-law bad faith tort actions. Statutory restrictions on an insurer also serve as a source for potential liability. As previously set forth, H.R.S. Section 431:13-103 outlines numerous specific examples that constitute unfair claims handling practices by an insurer. These include the failure to respond to a communication from an insured within 15 business days, misrepresenting the benefits of an insurance policy in advertising, and not attempting in good faith to effectuate prompt, fair, and equitable settlement of claims in which liability has become relatively clear, among others.

2. **Third-Party**

Third parties cannot sue for bad faith on statutory grounds in Hawaii. However, there is a common law judicially created bad faith cause of action (i.e., the implied covenant of good faith)
which is set forth in *Best Place*, which states that “there is a legal duty, implied in a first-and third-party insurance contract, that the insurer must act in good faith with its insured, and a breach of that duty gives rise to an independent tort cause of action.” “We note that that in the context of suits against an insurer for bad faith refusal to settle a third-party claim, courts [of other jurisdictions] have concluded that the plaintiff must show that the third-party claimant extended a reasonable settlement offer which the insurer then rejected.” Wittig v. Allianz, A.G., 145 P.3d 738 (Haw. App. 2006).

A liability insurer does not owe a duty of good faith and fair dealing to the tort claimant. *Young v. Allstate Ins. Co.*, 198 P.3d 666, 691 (Haw. 2008)) (“Absent a contract and because Young’s claim [for bad faith against Allstate] was premised upon the existence of a contract, her claim for breach of the assumed duty of good faith and fair dealing must fail.”)

**B. Fraud**

*Guajardo v. AIG Haw. Ins. Co.*, 118 Haw. 196, 187 P.3d 580, 2008 Haw. LEXIS 149 quotes *Zanakis-Pico v. Cutter Dodge, Inc.*, 98 Hawai’i 309, 320, 47 P.3d 1222, 1233 (2002) that “in order to maintain a claim for relief grounded in fraud or deceit, the plaintiff must have suffered substantial actual damage, not nominal or speculative.” Punitive damages, in addition to nominal damages, can be awarded in relation to a fraud claim. *Id.*

**C. Intentional or Negligent Infliction of Emotional Distress**

Under H.R.S. § 663-8.5(a) "[n]oneconomic damages which are recoverable in tort actions include damages for pain and suffering, mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and all other non-pecuniary losses or claims."

Tort damages, including emotional distress from a financial loss are recoverable in Hawaii pursuant to the California case of *Gruenburg v. Aetna Insurance Co.*, 9 Cal 3d 566 (1973). The court in *Gruenburg* determined that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of. The seminal case regarding an emotional distress claim arising from a bad faith action against an insurer is *Young v. Allstate Ins. Co.*, 119 Haw. 403, 406, 198 P.3d 666, 669 (2008).

The tort of intentional infliction of emotional distress consists of four elements: “1) that the act allegedly causing the harm was intentional or reckless, 2) that the act was outrageous, and 3) that the act caused (4) extreme emotional distress to another.” The term “outrageous” has been construed to mean without just cause or excuse and beyond all bounds of decency. *Enoka v. AIG Hawaii Ins. Co., Inc.*, 109 Haw 537, 559, 128 P.3d 850 872 (2006).

In Hawaii, if a first-party insurer commits bad faith, an insured need not prove that the insured suffered economic or physical loss caused by the bad faith in order to recover emotional distress damages caused by the bad faith. *Miller v. Hartford Life Insurance Company*, 126 Haw. 165, 268 P.3d 418 (2011).
The Hawaii Supreme Court held in *Miller* that “our subsequent case law evidence an intent to provide the insured with a vehicle for all damages incurred as a result of the insurer’s misconduct, including damages for emotional distress, without imposing a threshold requirement of economic or physical loss.” *Id.* at 430.

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

The Department of Commerce and Consumer Affairs (“DCCA”) governs the insurance industry in Hawaii and serves as a conduit for consumers to file complaints against insurers.

**VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS**

**A. Discoverability of Claims Files Generally**

In Hawaii, while claims files in general may be discoverable, certain documents may be protected under the work product doctrine: “For general guidance purposes only, the Court notes that the work product doctrine provides a qualified protection from discovery in a civil action when the documents materials are (1) document and tangible things otherwise discoverable, (2) prepared in anticipation of litigation, and (3) by or for another party or by that other party’s representative.” *American Savings Bank v. Pain Webber Inc.*, 210 F.R.D. 721, 723 (D. Hawaii 2001). To satisfy the second element of the work product doctrine, there must be some threat of litigation, and the document must have been generated after that threat had materialized. *Id.*

There is very little case law in Hawaii regarding discovery issues in actions against insurers. However, mainland cases are instructive in litigating this issue.

Underwriting files can be relevant because they may contain an insurer’s position on coverage, claims and relations with policyholders. *See Hoechst Celanese Corporation v. National Fire Insurance Company of Pittsburgh, Pennsylvania*, 623 A.2d 1099, 1107 (Del. Super. 1991). The court in *Hoechst* allowed discovery of underwriting files and reinsurance materials reasoning that they were relevant because they may provide evidence as to how the insurance company intended to apply the insurance policy. *Id.* at 1107.

In *Open Software Foundation Inc. v. United States Fidelity & Guaranty Co.*, 191 F.R.D. 325 (D. Mass.), the court held that the underwriting file must be produced by the insurer if was non-privileged.

In *Nestle Foods Corp. v. Aetna Casualty and Surety Co.*, 135 F.R.D. 101 (D. NJ. 1990), the court ruled that the underwriting files were discoverable and relevant because they may help with interpreting the policies and the intent of the drafters.

With regards to claims files, the law is clear that an insured may obtain the claims file maintained by the insurer. *Terrell v. Western Casualty Ins. Co.*, 427 S.W.2d 825, 828 (Ky. Ct. App. 1979).

**B. Discoverability of Reserves**
There are no specific Hawaii cases that address the discoverability of reserves; however, several mainland cases establish that reserves may be relevant to establish a bad faith case. *Lipton v. Superior Court*, 48 Cal. App.4th 1599, 1614 (Cal.App. 2d 1996).

While loss reserve files may be relevant in a bad faith claim, there are instances when they are not and thus not open to discovery. *In re Couch*, 80 B.R. 512, 518 (Bankr.S.D.Cal. 1987) (Court ruled that, because reserve policy is established by legislature and the Insurance Commissioner, it cannot be fairly equated with an admission of liability or the value of any particular claim.)

Other courts have ruled that if the reserves files were established as part of an attorney’s work or in expectation of litigation, then the reserve files would be protected by the attorney-client privilege or work product doctrine. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987).

**C. Discoverability of Existence of Reinsurance and Communications with Reinsurers**

There is no case law in Hawaii about the discoverability regarding the existence of reinsurance and/or communications with reinsurers. However, there are several California cases which are instructive on these issues. In *Fireman’s Fund Ins. Co. v. Superior Court*, 233 Cal.App.3d 1138, 1141 (Cal. App. 1st Dist. 1991), the court ruled that reinsurance documents may be relevant in the bad faith claim and decided that, before ruling on the relevancy of the documents, it would review the documents *in camera* to determine if any documents should be withheld from disclosure.

In contrast, the court in *Lipton v. Superior Court*, 48 Cal. App.4th, 1599 (Cal. App. 2d 1996) stated that because the reinsurance contract does not alter the original contract between the insurer and insured, an argument can be made that reinsurance documents have no relevance and are unlikely to lead to the discovery of admissible information. The court added that correspondence between insurer and reinsurer that is not privileged and which discusses liability exposure, may be relevant and discoverable. *Id.*

As is evident, while mainland courts differ on this issue, ultimately, whether reinsurance documents are discoverable is largely dependent on their relevancy.

**D. Attorney/Client Communications**


Attorney/Client privilege is set forth in *HRE Rule 503* and exists for the purposes of “facilitating the rendition of professional legal services to the client”. Notably, there are seven
exceptions in HRE Rule 503(d) for which “[t]here is no privilege under this rule”, but there is no
exception that suggests that attorney-client privilege is inapplicable when a bad faith claim is asserted. In Anastasi (2014), the Intermediate Court of Appeals ("ICA") held that the “assertion of a bad faith claim does not nullify the attorney-client privilege.” (Anastasi (2014) was reviewed by the Hawaii Supreme Court in Anastasi v. Fid. Nat'l Title Ins. Co., 137 Haw. 104, 366 P.3d 160, 2016 Haw. LEXIS 30, which affirmed ICA’s decision regarding attorney-client privilege but vacated in part as to other issues.)

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

H.R.S. § 431:13-103 (13) specifically prohibits misrepresentations in insurance applications. It is well settled in Hawaii that under contract law, a party to a contract can typically avoid its obligations if the contract was formed based upon material misrepresentations made by the other party. Restat 2d of Contracts, § 164 (2nd 1981).

As long as insureds continue to make material misrepresentations to either obtain benefits they would not be entitled to, or to obtain benefits at a lower premium rate, a charge of bad faith per se cannot stand since insurers will have a reasonable basis to challenge the availability of coverage.

A misrepresentation shall not prevent a recovery on the policy unless made with actual intent to deceive or unless it materially affects either the acceptance of the risk or the hazard assumed by the insurer. H.R.S. § 431:10-209 (1987). See also, Vannatta v. Pacific Guardian Life Ins. Co. Ltd., 1 Haw. App. 294, 296, 618 P.2d 317, 319 (1980). A misrepresentation is material where the insurer, as a careful and intelligent person, either would not have issued the policy had the truth been known, or would have issued it only at a higher rate of premium. Park v. Government Employees Ins. Co., 89 Hawai‘i 394, 399, 974 P.2d 34, 39 (1999). A misrepresentation prevents recovery on a policy if it “materially affects the acceptance of the risk or the hazard assumed by the insurer.” First Ins. Co. v. Sariaslani, 80 Haw. 491, 911 P.2d 126, 1996 Haw. App. LEXIS 11. This was most recently upheld in Farmer v. Pac. Specialty Ins. Co., 2010 Haw. App. LEXIS 525, 130 Haw. 349, 310 P.3d 1050, 2010 WL 3819610, in which the ICA entered judgement against the insured for a misrepresentation of the manufacturer of his motorcycle.

To rescind a policy, the insurer must show that the insured’s representations contained in the policy application were: (1) misrepresentations, and (2) made with either an intent to deceive, or (3) materially affected the insurer’s decision to accept the risk or hazard. Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 958 (9th Cir. 1994) (applying Hawai‘i law). The misrepresentation in this context “need only relate to the insurance company’s decision to insure the risk.” Genovia v. Jackson Nat’l Life Ins. Co., 795 F.Supp. 1036, 1041 (D.Haw. 1992). Whether there was a misrepresentation in an insurance application, whether it was made with actual intent to deceive, and whether it materially affected either the acceptance of the risk or hazard assumed by the insurer are disputed questions of fact and are thus jury questions. Vannata at 296, 618 P.2d at 319. See also, Matsuura v. E.I. du Pont de Nemours & Co., 102 Haw. 149, 73 P.3d 687, 2003 Haw. LEXIS 353 (citing Park v. Government Employees Ins. Co., 89 Hawaii
394, 399, 974 P.2d 34, 39 (1999): "the general rule is that 'if a party's misrepresentation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." (quoting Restatement (Second) of Contracts § 164(1) (1979)).

B. Failure to Comply with Conditions

An insured’s failure to comply with conditions of the policy is a “reasonably arguable basis for denying [the insured’s] claim” and also a lack of basis for a bad faith claim. Flowers v. United Servs. Auto. Ass'n, 2008 Haw. App. LEXIS 449. This is due to the fact that an insurance policy is a contract, which must be “construed according to the entirety of its terms and conditions as set forth in the policy.” Flowers, citing Dairy Rd. Partners v. Island Ins. Co., 92 Hawai'i 398, 411-12, 992 P.2d 93, 106-07 (2000).

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

There are no specific Hawaii cases which address this issue.

D. Preexisting Illness or Disease Clauses


Haw. Rev. Stat. § 431:10H-108 governs preexisting conditions in group and individual long-term care insurance policies. In Estate of Doe v. Paul Revere Ins. Group, 86 Haw. 262, 948 P. 2d 1103(Haw. 1997), the Hawaii Supreme Court held that, pursuant to H.R.S. Chapter 431, article 10A, part 1, in general, and H.R.S. Section 431:10A-105(2)(A)(ii), in particular, that the standard “incontestability clause” precludes Defendant from denying Plaintiff the “Total Disability Benefit” for which Plaintiff contracted, notwithstanding that the HIV infection that caused the disability arguably “manifested” itself prior to the effective date of coverage.

E. Statutes of Limitations and Repose

The statute of limitations is two (2) years after the cause of action accrued. H.R.S. § 657-7. In practice, Hawaii courts have upheld that the statute of limitations runs after the “plaintiff discovers or should have discovered the negligent act, the damage, and the causal connection between the two”. Kimberly v. State, 2005 Haw. LEXIS 392 citing Hays v. City & County of Honolulu, 81 Hawai'i 391, 392 n.1, 917 P.2d 718, 719 n.1 (1996); Yamaguchi v. Queen's Medical Center, 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982).

The statute of limitation accrues if the claimant has factual knowledge necessary for an actionable claim; legal knowledge of negligence is not required. Kimberly citing Buck v. Miles, 89 Hawai'i 244, 249-50, 971 P.2d 717, 722-23 (1999).

VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

There are no Hawaii cases regarding this issue.

A. Trigger of Coverage

There are no Hawaii cases regarding this issue.

B. Allocation Among Insurers

There are no Hawaii cases regarding this issue.

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory


H.R.S. § 663-15.5, in pertinent part, states:

(a) A release, dismissal with or without prejudice, or a covenant not to sue or not to enforce a judgment that is given in good faith under subsection (b) to one or more joint tortfeasors, or to one or more co-obligors who are mutually subject to contribution rights, shall:

(1) Not discharge any other party not released from liability unless its terms so provide;
(2) Reduce the claims against the other party not released in the amount stipulated by the release, dismissal, or covenant, or in the amount of the consideration paid for it, whichever is greater; and

(3) Discharge the party to whom it is given from all liability for any contribution to any other party.

B. **Elements**

H.R.S. § 663-12 states the following regarding the right of contribution:

(a) The right of contribution exists among joint tortfeasors.
(b) A joint tortfeasor is not entitled to a money judgment for contribution until the joint tortfeasor has by payment discharged the common liability or has paid more than the joint tortfeasor's pro rata share thereof.
(c) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.
(d) When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares, subject to section 663-17.

In Hawaii, a contribution plaintiff is entitled to contribution from a tortfeasor whose liability was extinguished by the settlement, either in the main action or a separate action. An independent action for contribution will not be allowed if the right can be enforced with a third-party action or cross-claim in the principal lawsuit. *Gump v. Wal-Mart Stores, Inc.*, 5 P.3d 407 (Haw. 2000).

There are no Hawaii cases regarding the “elements” of contribution actions.

X. **DUTY TO SETTLE**


> [I]t is unreasonable for a UIM carrier to precondition its refusal to consent to settle upon the failure of the insurer to achieve a settlement exhausting the tortfeasor’s policy limits.” In other words, by settling for less than the policy limits, the UIM insured agrees to forego compensation for the difference between the settlement amount and the tortfeasor’s liability policy limits. The UIM carrier will not be responsible for covering that “gap” as a component of its obligation to compensate its insured for injury and damage exceeding the tortfeasor’s policy limits. Accordingly,
there is no legitimate reason for the UIM carrier to refuse to consent to a settlement on that basis.

It is well settled that the duty to provide coverage and the duty to defend on the part of an insurer are separate and distinct. **Sentinel Insurance Company, Ltd. v. First Insurance Company of Hawaii, Ltd.**, 76 Haw. 277, 875 P.2d 894 (1994).

**XI. LH&D BENEFICIARY ISSUES**

A. **Change of Beneficiary**

There is limited case law regarding this matter. However, it seems that changing of a beneficiary is bound by and related to the terms of its contracts or any divorce decree (see below).

B. **Effect of Divorce on Beneficiary Designation**

Hawaii case law on this issue in largely contingent upon the factual circumstances in each given case and decisions are based upon the equitable standards set forth in one’s divorce decree. For example, in **Nicoleta Jacoby v. Bennett Jacoby**, 134 Haw. 431, 341 P.3d 1231, 2014 Haw. App. LEXIS 584 it was agreed upon that Bennett maintain a 1.5 million life insurance policy with Nicoleta “being the exclusive primary beneficiary for so long as he has an obligation to pay child support or alimony.” In **Kakinami v. Kakinami**, 125 Haw. 308, 260 P.3d 1126, 2011 Haw. LEXIS 182, the parties’ divorce decree explicitly states that each party was allowed to “change beneficiary designations on his or her insurance policies and retirement plans.”

H.R.S. Section 580-47(a) governs the distribution of assets upon divorce. As set forth in **Labayog v. Labayog**, 83 Haw. 412, 927 P.2d 420 (Haw. App. 1996), “upon granting a divorce…the court may make such further orders as shall appear just and equitable...(3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether held commonly, joint or separate…In making such further orders, the court shall take into consideration: the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left in the divorce…and all other circumstances of the case.”

**XII. INTERPLEADER ACTIONS**

A. **Availability of Fee Recovery**

In an interpleader action, the court has discretion to award attorneys’ fees and costs to the stakeholder when it is fair and equitable to do so. **Gelfgren v. Republic National Life Insurance Co., et. al**, 680 F.2d 79, 81 (9th Cir. 1982). See also, **Wright, Miller & Kane** at Section 1719.

Of note, the Court’s discretion to award attorneys’ fees and costs is limited if the award operates to diminish a distribution of the fund to satisfy a federal tax lien. **Abex Corp. v. Ski’s Enterprises, Inc., et. al**, 748 F.2d 513, 517 (9th Cir. 1984).
B. **Differences in State vs. Federal**