I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

Effective January 1, 2001, Kansas codified the Kansas Health Care Prompt Payment Act at K.S.A. §§ 40-2440 - 40-2442. The statutes cover all new and renewed accident and illness policies in the state of Kansas. The legislation gives the insurer thirty (30) days from the date of receipt to pay the claim in full, or to send acknowledgment of receipt of a claim and a request for additional information if needed as well as specific reasons for denial if necessary. Kansas Health Care Prompt Payment Act, ch. 134, sec. 2, § 40-2442(a), 2008 Kan. Sess. Laws. If the insurer fails to comply with subsection (a), such insurer must pay interest at the rate of 1% per month on the amount of the claim that remains unpaid thirty (30) days after receipt. § 40-2442(b).

The insured must submit all additional information requested by the insurer within thirty (30) days after receipt of the request for additional information. § 40-2442(c). Within 15 days after receipt of all requested additional information, the insurer must pay a clean claim in accordance with this section or send a notice to the insured stating that the insurer refuses to reimburse all or part of the claim and the specific reasons for such denial. § 40-2442(d). If the insurer fails to comply with subsection (d), such insurer must pay interest on any amount of the claim that remains unpaid at the rate of 1% per month. Id.

When there is a good faith dispute about the legitimacy of a claim or when there is a reasonable basis supported by specific information that a claim was submitted fraudulently, the provisions of subsection (b) do not apply. § 40-2442(c). If an insurer erroneously pays a claim providing benefits to which the insured or provider is not entitled, the insurer shall not initiate a request for reimbursement of that erroneous payment, unless such action is initiated within eighteen (18) months after the end of the month in which the erroneous payment was made. § 40-2442(f). In cases of fraud by the insured, such action may be initiated within the applicable statute of limitations pursuant to K.S.A. 60-513. Id. Any violation of this act by an insurer with flagrant and conscious disregard of its provisions or with such frequency as to constitute general business practice shall be considered a violation of the unfair trade practices act in K.S.A. 40-2401 et seq. § 40-2442(g).
B. Standards for Determination and Settlements

Under K.S.A. § 40-219, whenever the insurer becomes liable for a loss to any person in the state, after all appeals have become final, it has three months from the date of judgment to pay the claim, or it may be enjoined from doing business within the state.

Section 40-2404 codifies Kansas's unfair methods of competition or unfair deceptive acts legislation. It sets forth the standards for unfair claim settlement practices. Section 40-2404(9) specifically sets forth in pertinent part:

It is an unfair claim settlement practice if any of the following or any rules and regulations pertaining thereto are committed flagrantly and in conscious disregard of such provisions, or committed with such frequency as to indicate a general business practice:

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(b) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(c) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(d) refusing to pay claims without conducting a reasonable investigation based upon all available information;

(e) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(f) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(g) 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 such insureds;

(h) attempting to settle a claim for less than the amount to which a reasonable person would have believed that such person was entitled by reference to written or printed advertising material accompanying or made part of an application;

(i) attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

(j) making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;
(k) making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(l) delaying the investigation or payment of claims by requiring the insured, claimant or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(m) failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

(n) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

II. PRINCIPLES OF CONTRACT INTERPRETATION

As with any other contract, the language of an insurance policy, must, if possible, be construed in such a way as to give effect to the intention of the parties. American Family Mutual Ins. Co. v. Wilkins, 179 P.3d 1104, 1109 (Kan. 2008); Hall v. Shelter Mutual Ins. Co., 253 P.3d 377, 380 (Kan. Ct. App. 2011). In construing a policy, a court should consider the document as a whole and endeavor to ascertain the intent of the parties from the language used, while taking into account the situation of the parties, the nature of the subject matter, and the purpose to be accomplished. American Family, 179 P.3d at 1109.

Because the insurer writes the policies, it has a duty to make the meaning clear. Id. If the insurer intends to restrict or limit coverage under the policy, it must use clear and unambiguous language. Id. Clear and unambiguous language will be taken in its plain, ordinary, and popular sense. Id. If the terms of the policy are ambiguous, uncertain, conflicting, or susceptible of more than one construction, the policy will be construed in favor of the insured. Id. Whether a policy is ambiguous is a question of law to be decided by the courts, and the test for determining whether a policy is ambiguous is what a reasonably prudent insured would understand the language to mean. Id. at 1110; First Financial Ins. Co. v. Bugg, 962 P.2d 515, 519 (Kan. 1998).

In construing an endorsement to an insurance policy, the endorsement and policy must be read together. Thornburg v. Schweitzer, 240 P.3d 969, 976 (Kan. Ct. App. 2010). The policy remains in full force and effect except as altered by the words of the endorsement. Id.

III. CHOICE OF LAW

In the absence of a contractual provision stating a choice-of-law agreement, Kansas courts have traditionally applied the rule of lex loci contractus. Dragon v. Vanguard Indus., Inc., 89 P.3d 908, 914 (Kan. 2004). Specifically, when a case calls for the interpretation of an original insurance contract, the principle of lex loci contractus applies, meaning the court will apply the
law of the state where the contract was made. *Layne Christensen Co. v. Zurich Canada*, 38 P.3d 757, 766-67 (Kan. Ct. App. 2002); Restatement (First) of Conflict of Laws, § 334. In general, a contract is made where the last act necessary for its formation occurs. *Layne*, 38 P.3d at 767. In cases involving insurance policies, the contract is made where the policy is delivered. *Id.* In the case of group policies, the contract is made where the master policy is delivered. *Id.*

Section 334 of the Restatement (First) of Conflict of Laws also contains the principle that the law of the place of performance determines the manner and method of performance. *See Layne*, 38 P.3d at 766. Therefore, if issues including the manner, method, time and sufficiency of performance are involved in a case, the law of the place of performance would apply. *Id.; see also Dragon*, 89 P.3d 908, 914 (in most instances the courts apply the substantive law of the state where the contract was made, although in some instances, the courts look to the place of performance).

IV. **DUTIES IMPOSED BY STATE LAW**

A. **Duty to Defend**

1. **Standard for Determining Duty to Defend**

A liability insurer guilty of wrongfully refusing to defend an action against its insured may be held liable for the amount of a judgment in excess of policy limits on a showing that the excess judgment is traceable to the refusal to defend. *Johnson v. Westhoff Sand Co.*, 31 Kan. App. 2d 259, 276, 62 P.3d 685, 699 (2003).

The appellate courts of Kansas have indicated that an insurance company's duty to defend is controlled as follows:

“The duty to defend and whether the policy provides coverage are not necessarily coextensive. The duty to defend arises whenever there is a "potential of liability" under the policy. The insurer determines if there is a potential of liability under the policy by examining the allegations in the complaint or petition and considering any facts brought to its attention or which it could reasonably discover. Where a petition alleges an act that is clearly not covered, for example, that the defendant acted willfully and intentionally, there would be no potential of liability under the policy for intentional acts. Where the complaint alleges both a negligent and intentional act, these alleged facts give rise to the potential for liability, and the duty to defend arises.” *Allied Mut. Ins. v. Moeder*, 30 Kan. App. 2d 729, 732, 48 P.3d 1, 4 (2002) (*citing Quality Painting, Inc. v. Truck Ins. Exch.*, 26 Kan. App. 2d 473, 476, 988 P.2d 749 (1999)).

2. **Issues with Reserving Rights**

Kansas courts have recognized three possible consequences of the insurer's breach of its duty to defend and its failure to reserve its rights under a policy of insurance: (a) the possibility of an award of damages in excess of policy limits; (b) collateral estoppel; and (c) equitable estoppel. Equitable estoppel to prevent the insurer from raising coverage or policy defenses does

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

1. **Criminal Sanctions**

Although it appears that criminal sanctions have never been ordered by a Kansas court against an insurer for refusal to defend, nothing indicates criminal sanctions cannot be used in such a way.

Under K.S.A. § 60-211, a district court has discretion in awarding sanctions and may consider the following factors when making its determination: “(1) whether the improper conduct was willful or negligent; (2) whether the conduct was part of a pattern or an isolated incident; (3) whether the entire pleading was infected; (4) whether the person has engaged in similar conduct in other litigation; (5) whether there was intent to injure; (6) what effect the conduct had on litigation time or expense; (7) whether the responsible person is an attorney; (8) what is needed to deter the litigant, given the litigant's financial resources, from the same conduct in the future; and (9) what is necessary to deter future litigants from the same conduct.” *Thornburg*, 44 Kan. App. 2d at 626-27, 240 P.3d 969 (citing *Wood v. Groh*, 269 Kan. 420, 430, 7 P.3d 1163, 1171-72 (2000)).

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


The Kansas insurance commissioner may also order penalties against an insurer. Under K.S.A. § 40-2406(a), when the commissioner believes a person has engaged in any unfair or deceptive act or practice, she may hold a proceeding and issue charges. The commissioner may order the charged party to pay a monetary penalty for each violation, revoke the license of the charged party, or order a refund of any payments withheld from the consumer. § 40-2407(a). The commissioner may also order the charged party to pay the costs incurred as a result of conducting the proceeding, including witness fees, mileage allowances, costs associated with reproduction of documents which become a part of the hearing record, and the expense of making a record of the hearing. § 40-2406(b).

3. **Insurance Regulations to Watch**

Kansas lawmakers recently introduced a plan to allow the Kansas Farm Bureau to offer health insurance coverage to members without having to comply with the federal Affordable Care Act. Under this plan, coverage would not be considered “insurance,” and therefore would be exempt not only from federal mandates but also from most state insurance regulations. Farm Bureau would not be required to cover people with preexisting medical conditions.

4. **State Arbitration and Mediation Procedures**


The terms “mediation” and “arbitration” are not interchangeable. *Wasinger*, 55 Kan.App.2d at 83. Arbitration is a process in which “a neutral person or panel hears a formal case presentation and makes an award, which can be binding or nonbinding upon the parties relative to a prior agreement.” K.S.A. § 5-502(g). An arbitration clause requiring parties to an agreement to submit any existing or subsequent controversy to arbitration is “valid, enforceable, and irrevocable, except upon a ground that exists at law or in equity for the revocation of a contract.” § 5-428(a).

To initiate an arbitration proceeding, a party must give notice in a record to the other parties to the agreement in the agreed manner between the parties. K.S.A. § 5-431(a). In the absence of agreement, the notice must be given by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. *Id.* The notice must describe the nature of the controversy and the remedy sought. *Id.* If the parties agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. § 5-433(a). If the parties have not agreed upon a method, the method fails, or the chosen arbitrator is unable to act, the court, on motion by a party, shall appoint an arbitrator. *Id.* An arbitrator may issues subpoenas for witnesses and permit discovery and depositions. See K.S.A. § 5-439. Parties in an arbitration proceeding may be represented by counsel. § 5-438. After presentation of any evidence by the parties, the arbitrator must make a signed record of an award and give notice to each party. § 5-441. After parties receive notice of the award, the prevailing
party must make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order.  § 5-444. The court has discretion to add reasonable attorneys’ fees and other expenses of litigation incurred in a judicial proceeding after the award is made.  § 5-447(c).

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

K.S.A. § 40-2404(15) gives the state insurance commissioner the authority to generate rules and regulations necessary to carry out title V of the Federal Gramm-Leach-Bliley Act. The privacy act passed by the United States Congress on November 11, 1999, has had profound effects on both state and federal privacy issues. As of this date, the Kansas insurance commissioner has not passed any substantive privacy laws in addition to Gramm-Leach-Bliley.

V.  **EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES**

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

1.  **First Party**

   Kansas does not recognize the tort of bad faith against a liability insurance company by the insured in a first-party relationship. *Spencer v. Aetna Life & Cas. Ins. Co.*, 227 Kan. 914, 926, 611 P.2d 149, 158 (1980). The Kansas Supreme Court held that the legislature provides sufficient remedies for insureds for claims against insurers for lack of good faith. *Id.* Any insurance contract duties, whether the duty to settle, defend, act in good faith or otherwise, are contractual, and any remedies are limited thereto. *See Glenn v. Fleming*, 247 Kan. 296, 312-13, 799 P.2d 79, 89-90 (1990).

   However, "[i]n refusing to pay a claim, an insurance company has a duty to make a good faith investigation of the facts surrounding the claim." *Johnson v. Westhoff Sand Co.*, 31 Kan. App. 2d 259, 274, 62 P.3d 685, 697 (2003). "If there is a bona fide and reasonable factual ground for contesting the insured’s claim, there is no failure to pay without just cause or excuse." *Id.* When an insurer refuses to pay a loss until its challenge to liability raising a substantial legal question of first impression is settled by the court, the insurer has not acted in bad faith or refused to pay without just cause. *See Narron v. Cincinnati Ins. Co.*, 278 Kan. 365, 376, 97 P.3d 1042, 1050-51 (2004).

   “An insurance company may become liable for an amount in excess of its policy limits if it fails to act in good faith and without negligence when defending and settling claims against its insured. When the insurer determines whether to accept or reject an offer of settlement, it must give at least the same consideration to the interests of its insured as it does to its own interests." *Glenn v. Fleming*, 247 Kan. 296, 305, 799 P.2d 79, 85 (1990).

2.  **Third-Party**

"[I]n third-party claims, a private insurance company, in defending and settling claims against its insured, owes a duty to the insured not only to act in good faith but also to act without negligence." *Miller v. Sloan, Listrom, Eisenbarth, Sloan, & Glassman*, 267 Kan. 245, 256, 978 P.2d 922, 930 (1999). However, "an insurer has no duty to reasonably negotiate and settle with a third-party claimant where there is no contract (or assignment of policy rights) between them." *Benchmark Ins. Co. v. Atchison*, 36 Kan. App. 2d 373, 380, 138 P.3d 1279, 1284 (2006).

**C. Fraud**

There are five elements to a fraud claim in Kansas. The elements include: (1) an untrue statement of fact; (2) known to be untrue by the party making it; (3) made with the intent to deceive, or with reckless disregard for the truth; (4) where the other party justifiably relies on the statement; and (5) acts to his injury or detriment. *Alires v. McGehee*, 277 Kan. 398, 403, 85 P.3d 1191, 1195 (2004).

Under Kansas law, the falsity of any material statement in the application for any policy may not bar the right to recovery unless the false statement has actually contributed to the contingency or event on which the policy is to become due and payable. K.S.A. § 40-2205(C); see also *Waxse v. Reserve Life Ins. Co.*, 248 Kan. 582, 586, 809 P.2d 533, 536-37 (1991).

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

To recover on a claim for negligent infliction of emotional distress in Kansas, the plaintiff must prove that the conduct was accompanied by, or resulted in, immediate physical injury. *Curts v. Dillard's Inc.*, 30 Kan. App. 2d 814, 815, 48 P.3d 681, 682 (2002) (overruled on other grounds). "A plaintiff must show that the physical injuries complained of were the direct and proximate result of the emotional distress caused by the [defendant's] alleged negligent conduct." *Id.* (citations omitted); see also *Burdett v. Harrah's Kan. Casino Corp.*, 311 F. Supp. 2d 1166, 1178 (D. Kan. 2004) (citing *Reynolds v. Highland Manor, Inc.*, 24 Kan. App. 2d 859, 861 (1998)). A major exception to the physical injury rule is when the defendant is charged with acting in a willful and wanton manner or with the intent to injure. *Curts*, 30 Kan. App. 2d at 815; see also *Burdett*, 311 F. Supp. 2d at 1178-79.

Under Kansas law the tort of intentional infliction of emotional distress is the same as the tort of outrage. *Hallam v. Mercy Health Ctr. of Manhattan, Inc.*, 278 Kan. 339, 340, 97 P.3d 492, 494 (2004). The elements are as follows: (1) The conduct of defendant must be intentional or in reckless disregard of plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between defendant's conduct and plaintiff’s mental distress; and (4) plaintiff’s mental distress must be extreme and severe. *Taiwo v. Vu*, 249 Kan. 585, 592, 822 P.2d 1024, 1029 (1991).
Further, liability for “extreme emotional distress” has two threshold requirements. *Id.* The court must determine “(1) whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery; and (2) whether the emotional distress suffered by plaintiff is in such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it.” *Id.* (*citing Roberts v. Saylor*, 230 Kan. 289, 292-93, 637 P.2d 1175, 1179 (1981)).

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

The Kansas legislature defines unfair methods of competition and unfair or deceptive acts or practices in the business of insurance in K.S.A. § 40-2404. The act protects against misrepresentations and false advertising in insurance policies, defamation, false advertising generally, boycott, coercion and intimidation, false statements and entries, unfair discrimination, rebates, unfair claim settlement practices, failure to maintain complaint handling procedures, misrepresentation in insurance applications and disclosure of nonpublic personal information.

If the insurance commissioner determines that the insurer has engaged in any of the above practices, the insurer will be served with a statement of charges and a public hearing will be held. § 40-2406. If unfair or deceptive practices are found, the commissioner has the discretion to order the cessation of the action and the monetary penalty of not more than $1,000 for each violation, not to exceed $10,000 in the aggregate. §40-2407(a)(1). However, if the person knew, or should have known that the actions were in violation of the act, the penalty shall not be more than $5,000 for each violation, not to exceed $50,000 in the aggregate in any six-month period. *Id.*

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

**A. Discoverability of Claims Files Generally**

The Kansas Supreme Court has held: "The initial investigation of a potential claim, made by an insurance company prior to the commencement of litigation, and not requested by or made under the guidance of counsel, is made in the ordinary course of business of the insurance company, and not in anticipation of litigation or for trial ...." *Henry Enters., Inc. v. Smith*, 225 Kan. 615, 623, 592 P.2d 915, 921 (1979). This is not the case when the initial investigation was requested by counsel retained by an insurance company, and the claim file was prepared in anticipation of litigation. *See Heany v. Nibbelink*, 23 Kan. App. 2d 583, 589, 932 P.2d 1046, 1050 (1997).

**B. Discoverability of Reserves**

Kansas courts have not dealt directly with the discoverability of insurance reserve information. Discovery of documents is governed by K.S.A. § 60-226. Unless otherwise limited by order of the court, if documents are relevant to the subject matter involved in the pending action and are not privileged, they should be discoverable. § 60-226(b).
C. **Discoverability of Existence of Reinsurance and Communications with Reinsurers**

Kansas courts have not dealt directly with the discoverability of the existence of reinsurance and communications with reinsurers. Discovery of documents is governed by K.S.A. § 60-226. Unless otherwise limited by order of the court, if documents are relevant to the subject matter involved in the pending action and are not privileged, they should be discoverable. § 60-226(b).

D. **Attorney/Client Communications**

The Kansas Supreme Court has held that "[t]he mere fact an insurance company retains an attorney to represent the insured against a lawsuit does not mean the attorney is also the insurance company's attorney capable of binding the insurance company." *Bell v. Tilton*, 234 Kan. 461, 465, 674 P.2d 468, 472 (1983). Kansas recognizes the joint defense privilege: where several persons employ an attorney and a third party seeks to have communications made therein disclosed, none of the several persons--not even a majority--can waive this privilege. *State v. Maxwell*, 10 Kan. App. 2d 62, 65, 691 P.2d 1316, 1320 (1984) (citing 81 Am.Jur.2d, Witnesses § 189). This rule extends the attorney-client privilege to communications made in the course of joint defense activities. *Id.* "Where two or more persons jointly consult an attorney concerning mutual concerns, their confidential communications with the attorney, although known to each other, will be privileged in controversies of either or both of the clients with the outside world." *Id.*

VII. **DEFENSES IN ACTIONS AGAINST INSURERS**

A. **Misrepresentations/Omissions: During Underwriting or During Claim**

K.S.A. § 40-418 governs misrepresentations for life insurance policies and states:

> No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable.

Kansas has recognized that an insurer may rescind a life insurance policy after a misrepresentation is made on the insurance application with reckless disregard for the truth. *Chism v. Protective Life Ins. Co.*, 29 Kan. 645, 662, 234 P.3d 780, 791 (2010).

Health insurance is handled differently and is governed by § 40-2205. Section (C) of this statute adds a causal relation requirement to the misrepresentation and states:

> (C) The falsity of any material statement in the application for any policy covered by this act may not bar the right to recovery thereunder unless the false statement has actually contributed to the contingency or event on which the policy is to become due and payable:
Provided, however, that any recovery resulting from the operation of this section shall not bar the right to render the policy void in accordance with its provisions.

The Kansas courts have not yet construed this section of the statute, but in *Waxse v. Reserve Life Ins. Co.*, 248 Kan. 582, 809 P.2d 533 (1991), the court found that the falseness of the application statement will not bar recovery under the policy unless it actually contributes to the event upon which the policy becomes due and payable. *Id.* at 586, 809 P.2d at 536-37. The last sentence of (C) stating "any recovery resulting from the operation of this section shall not bar the right to render the policy void in accordance with its provisions" has not been tested in court, but it may allow an insurance company to void a policy for misrepresentations before a loss occurs.

B. Failure to Comply with Conditions

The insurer may raise defenses based upon the failure of the insured to comply with conditions of the insurance policy, such as failure to give notice to the insurer or failure to cooperate. *See Johnson v. Westhoff Sand Co.*, 31 Kan. App. 2d 259, 268-69, 62 P.3d 685, 694 (2003). However, to prevail on a defense of failure to notify, the insurer has the burden to prove it was actually prejudiced by the lack of notice by the insured. *Id.* Such prejudice is not presumed and the burden is on the insurer to show that the prejudice is substantial. *Id.* Moreover, "[t]he breach of a cooperation clause in a liability insurance policy does not by itself relieve the insurer of the responsibility. The breach must cause substantial prejudice to the insurer's ability to defend itself and the burden to establish this policy defense is on the insurer." *Id.* at 270, 62 P.3d at 695.

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

Kansas courts have not squarely addressed the issue of the effect of the insured's breach of a no-action clause. The United States District Court for the District of Kansas held that Kansas courts would most likely hold that the insurer must show it was prejudiced by the insured's breach before relying on breach for a defense. *See Cessna Aircraft Co. v. Hartford Acc. & Indem. Co.*, 900 F. Supp. 1489, 1517 (D. Kan. 1995). The court based its holding in part on the fact that Kansas case law does require proof of prejudice for breach of similar clauses, such as cooperation clauses. *Id.*

D. Preexisting Illness or Disease Clauses

Kansas insurance policies may impose a preexisting conditions exclusion for mental or physical conditions. K.S.A. § 40-1109f(a). The exclusion may not exceed 90 days following the effective date of enrollment and shall run concurrently with any waiting period. § 40-1109f(a). The exclusion limits or excludes benefits relating to a condition based upon the fact that the condition was present before the date of enrollment for such coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before such date. § 40-1109f(h). A group policy providing hospital, medical or surgical expense benefits must not impose any preexisting condition exclusion relating to pregnancy as a preexisting condition. § 40-2209(a)(6).
E. **Statutes of Limitations and Repose**

There is a five year statute of limitations under Kansas law for causes of action based upon contract theories. See K.S.A. § 60-511. An action accrues when the plaintiff has the right to maintain a legal action. *Avien Corp. v. First Nat'l. Oil Corp.*, 32 Kan. App. 2d 106, 110, 79 P.3d 223, 226 (2003). Because a cause of action for breach of a written contract accrues at the time of the breach, regardless of when the breach is discovered or is discoverable, there is not a statute of repose with respect to breach of contract claims. *Dunn v. Dunn*, 47 Kan.App.2d 619, 628, 281 P.3d 540, 548 (2012).

VIII. **TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS**

A. **Trigger of Coverage**

A trigger of coverage enters the discussion when the policyholder's claim implicates more than one policy period, and particularly when the claim implicates policies purchased over a number of years. *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 275 Kan. 698, 739, 71 P.3d 1097, 1125 (2003). Five theories for the trigger of coverage in cases involving slowly evolving injuries are described in Atchison:

1. The exposure theory,
2. The manifestation theory,
3. The continuous-trigger theory,
4. The injury-in-fact approach, and
5. The double-trigger theory.


An explanation of the five theories is as follows:

1. The exposure theory places the occurrence at the time the injury-producing agent first contacts the claimant's body. (2) The manifestation theory holds that there is no occurrence until the injury resulting from exposure manifests itself. (3) The continuous trigger theory includes the continuous period from first exposure to manifestation of injury in the occurrence. (4) The injury-in-fact approach holds that coverage is triggered by an inchoate injury which may be inferred by calculating backward from discovery of the injury to the time when that harm actually began. (5) The 'double-trigger' theory holds that injury occurs at the time of exposure and the time of manifestation, but not necessarily during the intervening period. *Id.*

B. **Allocation Among Insurers**
There seems to be no general rule for allocation of risk among insurers. Courts tend to look first to the language of the insurance policy. Different allocation methods include pro rata, allocation based on time-on-the-policy and joint and several liability. See Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co., 275 Kan. 698, 71 P.3d 1097 (2003). Kansas also recognizes the right of insurers to engage in voluntary allocation amongst themselves, as long as "the voluntary allocation of risk between themselves by subscribing insurers is in accord with the general rule that a prerequisite to enforcing contribution between insurers is that their policies insure the same interest. However, the right of insurers to this allocation of risk must be determined not by an adjustment of equities, but by the provisions of the contracts which were made." W. Cas. & Sur. Co. v. Trinity Universal Ins. Co., 13 Kan. App. 2d 133, 136, 764 P.2d 1256, 1259 (1988).

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

Under Kansas law, the doctrine of equitable contribution is as a remedy available to one who is forced to bear more than his fair share of a common burden or liability to recover from the others their chargeable proportion of the amount paid by him. American States Ins. Co. v. Hartford Acc. & Indem. Co., 218 Kan. 563, 571, 545 P.2d 399, 407 (Kan. 1976).

Under Kansas law, there is no right to contribution among joint tort-feasors because no defendant is liable for the fault of any other. K.S.A. § 60-258(a).

B. Elements

To bring a claim for equitable contribution, a plaintiff needs to show (1) the parties are equal under a common liability or burden and (2) that the policy insures the same interest. American States Ins. Co. v. Hartford Acc. & Indem. Co., 218 Kan. 563, 571, 545 P.2d 399, 407 (Kan. 1976).

X. DUTY TO SETTLE

Cases in Kansas concerning the duty of an insurer to settle actions against the insured focus on the failure of the insurer to accept or initiate a settlement offer. Miller v. Sloan, Listrom, Eisenbarth, Sloan and Glassman, 978 P.2d 922, 928 (Kan. 1999). If an insurance policy explicitly reserves the right to settle to the insurer, the insured cannot complain that the insurer settles or refuses to settle within policy limits absent a showing of bad faith or negligence on the part of the insurer. Saucedo v. Winger, 22 Kan. App. 2d 259, 265, 915 P.2d 129, 134 (1996). Further, if the policy requires consent of the insured before the insurer enters into settlement with an injured party, the insured should not be allowed to withhold consent except at its own risk. Id. However, when the language in the policy is ambiguous, the policy must be interpreted in favor of the insured. See id. at 268, 915 P.2d at 136.
XI. LH&D BENEFICIARY ISSUES

A. Change of Beneficiary

In general, where a right to change the beneficiary is reserved in an insurance policy, the beneficiary has no vested interest in the policy. Wear v. Mizell, 946 P.2d 1363, 1366 (Kan. 1997). Rather, the beneficiary has only an inchoate right to the proceeds of a policy, subject to being divested at any time during the lifetime of the insured, by transfer, assignment, or change of beneficiary. Id.; Holloway v. Selvidge, 548 P.2d 835, 839 (Kan. 1976); Nicholas v. Nicholas, 83 P.3d 214, 223 (Kan. 2004). Where a right to change the beneficiary is reserved, the insured can change the beneficiary without the consent of the original beneficiary. Hollaway, 548 P.2d at 839.

B. Effect of Divorce on Beneficiary Designation

In terms of the effect of a divorce on a beneficiary’s rights, Kansas courts have recognized the principle that in the absence of terms in an ordinary life insurance policy that the rights of the beneficiary are conditioned upon the continuance of the marriage between the insured and the beneficiary, the general rule is that the rights of the beneficiary are not affected by the fact that the parties are divorced subsequent to the issuance of the policy. Cincinnati Life Ins. Co. v. Palmer, 94 P.3d 729, 733 (Kan. Ct. App. 2004).

Importantly, § 23-2802(d) (formerly § 60-1610(b)(1)) of the Kansas Statutes sets forth a rigid requirement that is relevant here. Section 23-2802(d) provides that a divorce “decree shall provide for any changes in beneficiary designation on: (1) any insurance or annuity policy that is owned by the parties, or in the case of group life insurance policies, under which either of the parties is a covered person…Nothing in this section shall relieve the parties of the obligation to effectuate any change in beneficiary designation by the filing of such change with the insurer or issuer in accordance with the terms of such policy.” K.S.A. § 23-2802(d).

The Kansas Court of Appeals has construed this statute to require any change in beneficiary on any insurance or annuity policy to be specified in the divorce decree. Cincinnati Life Ins. Co., 94 P.3d at 733 (Kan. Ct. App. 2004). “[A]bsent such an express provision in the decree, an active beneficiary designation of either spouse at the time of the divorce is not changed.” Id. (emphasis added). The court determined that “just as the decree shall divide the real and personal property of the parties, the decree shall provide for any changes in beneficiary designation on any insurance policy owned by the parties.” Id.

XII. INTERPLEADER ACTIONS

A. Availability of Fee Recovery

K.S.A. § 60-222 provides that a stakeholder may bring an interpleader action if the stakeholder is or may be exposed to double or multiple liability. “Interpleader protects the stakeholder from multiple suits, and from determining at its peril the validity and priority of disputed claims; it also protects the claimants by bringing them together in one action so that a


B. Differences in State vs. Federal

K.S.A. § 60-222 mimics the federal interpleader rule, F.R.C.P. 22(a). Under F.R.C.P. 22(a), the decision to award attorney fees to the stakeholder lies within the discretion of the trial court. Aetna U.S. Healthcare v. Higgs, 962 F. Supp. 1412, 1414 (D. Kan. 1997). As a general rule, fees are charged against the fund and deposited with the court. Id. Fees are normally awarded to an interpleader stakeholder who (1) is disinterested; (2) concedes its liability in full; (3) deposits the disputed fund in court; (4) seeks discharge; and (5) who is not in some way culpable as regards the subject matter of the interpleader proceeding." Transamerica Premier Ins. Co. v. Growney, 1995 U.S. App. LEXIS 31836, 4 (10th Cir. Kan. Nov. 13, 1995).