MARYLAND

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I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

An insurer must acknowledge its receipt of notice of a claim within 15 working days of such receipt. Md. Code Regs. 31.15.07.03(B)(10). Failing “to provide promptly on request a reasonable explanation of the basis for a denial of a claim” constitutes an unfair claim settlement practice. Md. Code Ann., Ins. § 27-303(6). Additionally, an insurer must affirm or deny coverage within 15 working days after receiving properly completed claim forms. Md. Code Regs. 31.15.07.03(B)(12). If an insurer has not completed its investigation within 45 days of notification, it must: (1) write to the insured and provide the “actual reason” that additional time is necessary to investigate the claim, and (2) write the insured every 45 days thereafter until the insurer either affirms or denies coverage. Md. Code Regs. 31.15.07.04(B).

B. Standards for Determination and Settlements

In Maryland, an insurer must adopt and implement reasonable standards for the prompt investigation of claims that arise under insurance policies. Additionally, Maryland law prohibits insurers from the following acts, which constitute unfair claim settlement practices:

(1) misrepresentation of pertinent facts or policy provisions that relate to the claim or coverage at issue;
(2) refusing to pay a claim for an arbitrary or capricious reason based on all available information;
(3) attempting to settle a claim based on an application that is altered without notice to, or the knowledge or consent of, the insured;
(4) failing to include with each claim paid to an insured or beneficiary a statement of the coverage under which payment is being made;
(5) failing to settle a claim promptly whenever liability is reasonably clear under one part of a policy, in order to influence settlements under other parts of the policy;
(6) failing to provide promptly on request a reasonable explanation of the basis for a denial of a claim;
(7) failing to meet the requirements . . . for preauthorization for a health care service; . . .


II. PRINCIPLES OF CONTRACT INTERPRETATION


III. CHOICE OF LAW

Maryland follows the rule of lex loci contractus, “which requires that the construction and validity of a contract be determined by the law of the state where the contract was made.” Commercial Union Ins. Co. v. Porter Hayden Co., 97 Md. App. 442, 451, 630 A.2d 261, 266 (1993), vacated on other grounds, 339 Md. 150, 661 A.2d 691 (1995); see also Erie Ins. Exch. v. Heffernan, 399 Md. 598, 618, 925 A.2d 636, 648 (2007); Allstate Ins. Co. v. Hart, 327 Md. 526, 529, 611 A.2d 100, 101 (1992) (stating that “Maryland courts ordinarily should apply the law of the jurisdiction where the contract was made. This is referred to as the principle of lex loci contractus”.)

With respect to causes of action sounding in tort, Maryland adheres to the lex loci delicti rule in analyzing choice of law problems. B-Line Med., LLC v. Interactive Digital Sols., Inc., 209 Md. App. 22, 49, 57 A.3d 1041, 1057 (2012); Heffernan, 925 A.2d at 648-49; Lab. Corp. of Am. v. Hood, 395 Md. 608, 911 A.2d 841, 844 (2006). Under lex loci delicti, the law of the state where the tort or wrong was committed applies. Hood, 395 Md. at 613, 911 A.2d at 844. Where the events giving rise to a tort action occur in more than one state, the court must apply “the law of the State where the injury - the last event required to constitute the tort - occurred.” Heffernan, 925 A.2d at 649; see also Hood, 911 A.2d at 845. Similarly, Section 377 of the First Restatement of Conflict of Laws states that “[t]he place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.” RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934).

The Court of Appeals, however, has recognized a public policy exception to this general lex loci delicti rule. Lab. Corp. of Am., 911 A.2d at 849 (extending the public policy exception to lex loci delicti to tort causes of action). Under this exception, the law of Maryland will be applied if application of the law of the place of the injury violates a “clear, strong, and important Maryland public policy.” Id. at 849-51 (citing Reed v. Campagnolo, 332 Md. 226, 630 A.2d 1145 (1993)).

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend

The obligation of an insurer to defend its insured under a contract provision such as here involved is determined by the allegations in the tort actions. If the plaintiffs in the tort suits allege a claim covered by the policy, the insurer has a duty to defend. Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842 (1975). Even if a tort plaintiff does not allege facts which clearly bring the claim within or without the policy coverage, the insurer still must defend if there is a potentiality that the claim could be covered by the policy. Id.

If there is any doubt as to whether there is a duty to defend, it is resolved in favor of the insured. Springer v. Erie Ins. Exch., 439 Md. 142, 94 A.3d 75 (2014); see also Aetna Cas. & Sur. Co. v. Cochran, 337 Md. 98, 651 A.2d 859 (1995). Nonetheless, in permitting the use of extrinsic evidence to establish a potentiality of coverage, Maryland courts have made clear that an insured cannot assert a frivolous defense to establish an insurer’s duty to defend. Aetna, 337 at 111-12, 651 A.2d at 866. “Only if an insured demonstrates that there is a reasonable potential that the issue triggering coverage will be generated at trial can evidence to support the insured's assertion be used to establish a potentiality of coverage under an insurance policy.” Id.
2. **Issues with Reserving Rights**

The insurer, in drafting its policy, may include a provision limiting its duty to defend the insured when a conflict of interests arises. However, the insured will not be deprived of her contractual rights because of the failure of the insurer to limit its obligations. A conflict of interest does not relieve the insurance company of the responsibility for providing for the defense of the insured. *Brohawn*, 276 Md. at 412, 347 A.2d at 852. The contractual duty which the insurance company has assumed cannot be removed by the insurer’s simply creating its own conflict of interest. Rather, the insurer must either provide an independent attorney to represent the insured, or pay for the cost of defense incurred by the insured hiring an attorney of his choice.

An insurer may, however, avoid its duty to defend on the ground of delayed notice, provided that the insurer establishes by a preponderance of affirmative evidence that the delay in giving notice has resulted in actual prejudice to the insurer. *Maynard v. Westport Ins. Corp.*, 208 F. Supp. 2d 568, 574 (D. Md. 2002), aff'd, 55 Fed. Appx. 667 (4th Cir. 2003).

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

1. **Criminal Sanctions**

Under Maryland Code Ann., Cts. & Jud. Proc. § 10-402, it is unlawful for any person to:

   a. Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
   b. Willfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle; or
   c. Willfully use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle.

An individual who violates this section is guilty of a felony and is subject to imprisonment for not more than 5 years or a fine of not more than $10,000, or both.

Under Maryland Code Ann., Com. Law § 14-3502, *et al.*, a state resident’s privacy and personal information is protected, including employees and job applicants. When destroying a customer's, an employee's, or a former employee's records that contain personal information, the business shall take reasonable steps to protect against unauthorized access to or use of the personal information, taking into account:
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1. The sensitivity of the records;
2. The nature and size of the business and its operations;
3. The costs and benefits of different destruction methods; and

An individual who violates this section is guilty of a misdemeanor and, on conviction, is subject to a fine not exceeding $1,000 or imprisonment not exceeding one year or both, in addition to any civil penalties.

2. The Standards for Compensatory and Punitive Damages

Compensatory damages include plaintiff's reasonable costs and expenses resulting from the defendant's malicious and tortuous conduct, including the expenses of the litigation. Bowden v. Caldor, Inc., 350 Md. 4, 38 (1998). If the amount of these damages is not covered by an award for compensatory damages, these "are matters which appropriately can be considered in judicially reviewing an award of punitive damages." Id. The Supreme Court has held that the United States Constitution imposes limits upon awards of punitive damages, and that such an award cannot be "grossly excessive" in relation to "the State's legitimate interests in punishment and deterrence." BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996). Exemplary damages must bear a reasonable relationship to compensatory damages is well-established. Bowden, 350 Md. at 38. "Awarding punitive damages based upon the heinous nature of the defendant's tortuous conduct furthers the historical purposes of punitive damages—punishment and deterrence." Bowden, 350 Md. at 22–23 (citing Owens–Illinois v. Zenobia, 325 Md. 420, 454 (1992)). Punitive damages may only be awarded when "the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud." Bowden, 350 Md. at 23 (quoting Owens–Illinois, 325 Md. at 460)). A plaintiff must establish the basis for an award of punitive damages by clear and convincing evidence. Owens–Illinois, 325 Md. at 469, 601.

3. Insurance Regulations to Watch

None at this time.

4. State Arbitration and Mediation Procedures

Maryland arbitration procedures are governed by Maryland Code Ann., Cts. & Jud. Proc., § 3-201, et seq. To initiate arbitration proceedings, a notice of the initial petition for an order shall be served in the manner provided by law or rule of court for the service of summons in an action. Md. Code Ann., Cts. & Jud. Proc. § 3-205. A written agreement between the parties to submit any existing controversy to arbitration or a provision in a written contract to submit to any controversy to arbitration is valid and enforceable, and is irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract. Id. at § 3-206. The majority of the arbitrators may determine any question and render a final award. Id. at § 3-215. The arbitration award must be finalized in writing and signed by the arbitrators who joined in the award. Id. Once an award is made, a copy must be delivered to each party as provided by the agreement, personally, or by certified mail, return receipt requested, bearing a postmark from the United
States Postal Service. Id. at § 3-219. A party must raise any objections within the time required, otherwise, that objection is waived. Id. Any party may petition the court to confirm the award. Md. Code Ann., Cts. & Jud. Proc. § 3-227. The award must be confirmed by the court “unless the other party has filed an application to vacate, modify, or correct the award within the time provided in §§ 3-222 and 3-223 of this subtitle.” Id. If a party does apply “to vacate, modify, or correct the award has been filed, the court shall proceed as provided in §§ 3-223 and 3-224 of this subtitle.” Id.


a. The parties are required to mediate by law;

b. The parties are referred to mediation by an administrative agency or arbitrator; or

c. The mediator states in writing to any and all parties to the mediation and persons with whom the mediator has engaged in mediation communications that:
   i. The mediation communications will remain confidential in accordance with this subtitle; and
   ii. The mediator has read and, consistent with State law, will abide by the Maryland Standards of Conduct for Mediators during the mediation.

iii. Anyone participating in a mediation at the request of a mediator must maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding. Id. at § 3-1803.

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

The Maryland Administrative Procedure Act ("Act") is found in Title 10, Subtitle 1, 2 and 3 of the Maryland State Government Code Annotated. According to the Act a regulation is not effective unless it contains the citation of statutory authority for the regulation. The Act also provides that the promulgating unit must submit the proposed regulation to the Committee and the Department of Legislative Services, at least 15 days before the date a proposed regulation is submitted to the Maryland Register ("register") for publication. Maryland State Government Code Ann. § 10-111.1 provides that an administrative agency cannot adopt a proposed regulation until the proposed regulation is submitted to the Committee for preliminary review and unless at least 45 days have passed after its first publication in the register. Before the expiry of the review period the Committee of Legislative Services ("committee") by a majority vote can oppose the adoption of any proposed regulation. The factors considered by the agency while reviewing the proposed regulation are:

a. If the proposed regulation is in conformity with the statutory authority of the promulgating agency; and

b. If the proposed regulation reasonably complies with the legislative intent of the statute under which the regulation was promulgated.
If an agency desires to change the text of a proposed regulation and if any part of the new text differs substantively from the text previously published in the register, the agency cannot adopt the proposed regulation without proposing it anew and adopted in accordance with the requirements of the Act.

Maryland State Government Code Ann. § 10-114 provides that after adopting a regulation, the agency must submit to the administrator a notice of adoption for publication in the register. Further, according to Maryland State Government Code Ann. § 10-116 dictates that an agency can withdraw a proposed regulation any time before its adoption. The failure to adopt a proposed regulation within 1 year after its last publication in the Register also constitutes withdrawal of regulation.

Maryland State Government Code Ann. § 10-123 provides that any interested person can petition the agency for adoption of a regulation. Within 60 days after the receipt of the petition, the agency can either initiate the procedures for adoption of the regulation or can deny the petition after stating the reasons in writing.

Maryland State Government Code Ann. § 10-125 states that any person can seek declaratory judgment on the validity of any regulation in the circuit court for the county where the petitioner resides or has a principal place of business. The court can determine the validity of the regulation, if it finds that the regulation or its threatened application interferes or threatened to interfere with or impairs with the legal rights and privileges of the petitioner.

Maryland State Government Code Ann. § 10-208 provides that in a contested case an agency must give the parties a reasonable notice of hearing which includes:

a. Statement of the date, time, place, and nature of the hearing;
b. Statement saying parties’ right to call witnesses and submit documents or other evidence;
c. Description of any applicable right to request subpoenas for witnesses and evidence and specify the costs associated with such a request;
d. Statement that a copy of the hearing procedure is available on request and specify the costs associated with such a request;
e. Statement of any right or restriction pertaining to representation;
f. Statement that failure to appear for the scheduled hearing may result in an adverse action against the party; and
g. Statement that, unless otherwise prohibited by law, the parties can agree to the evidence and waive their right to appear at the hearing.

If not prohibited by any other law an agency can dispose of a contested case by stipulation, settlement, consent order, default, withdrawal, summary disposition or dismissal.

According to Maryland State Government Code Ann. § 10-221, an agency’s final decision or order adverse to a party in adjudication proceeding must be in writing or stated in the record. The final decision must include findings of fact, conclusions of law and the order. Parties and his/her attorney must be notified about the decision or order either personally or by mail.
Maryland State Government Code Ann. § 10-222 provides that any person aggrieved by the final agency decision is entitled to judicial review by filing a petition in the circuit court for the county where any party resides or has a principal place of business. An agency is also entitled to judicial review of a decision if that agency was a party before the agency. Filing of a petition for judicial review will not stay the enforcement of the final decision of a contested case. In a proceeding for judicial review, the court can remand the case for further proceedings, affirm the decision or reverse or modify the decision if any substantial right of the petitioner is prejudiced.

Any party to a contested case can timely seek civil enforcement of an administrative order by filing a petition for civil enforcement in an appropriate circuit court for the county where any party resides or has a principal place of business. In an action for civil enforcement, the court can provide any of the following relief:

a. Declaratory relief;
b. Temporary or permanent injunctive relief;
c. A writ of mandamus; or
d. Any other civil remedy provided by law.

Further, any party or an agency aggrieved by the final decision of the circuit court can appeal to the Court of Special Appeals.

According to Maryland State Government Code Ann. § 10-226, if the licensee has made timely and sufficient application for renewal, then the license will not expire until the agency has made its final determination. Before suspending, revoking or withdrawing a license, the agency must give reasonable notice to the licensee of facts or conduct which justifies the intended action. Summary suspension of license by an agency is permitted when the agency finds that public health, safety and welfare requires an emergency action to be taken.

Any interested person can submit a petition to the agency for a declaratory ruling with respect to the manner in which the agency applies a regulation, order of the agency or a statute that the agency enforces to a person or property. An agency can issue a declaratory ruling and the ruling binds the petitioner and the agency regarding the facts specified in the petition. Declaratory ruling is also subject to review in a circuit court similar to the review of a contested case.

V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

1. First Party
   Elements and Remedies in Claims Against Insurers for Failure to Pay Benefits
In 2007, the Maryland General Assembly amended the Unfair Claims Settlement Practices Act and created a new cause of action that an insured may bring against an insurer after exhausting administrative procedures before the Maryland Insurance Administration (“MIA”). Md. Code Ann., Ins. §§ 27-301 et seq.; Md. Code Ann., Cts. & Jud. Proc. § 3-1701. Under this amendment, insurers can receive damages in civil actions arising from first-party insurance claim disputes. The insured must prove that the insurer acted in bad faith in denying the claim. Id. In addition, the amendment makes an insurer’s failure to settle a claim in good faith a violation of the Unfair Claims Settlement Practices Act and allows for enhanced administrative sanctions. Id. However, this statute does not apply to policies of life, health or disability insurance. Id. § 3-1701(b) (stating that the “subtitle applies only to first-party claims under property and casualty insurance policies issued, sold, or delivered in the State.”).

House Bill 990, effective October 1, 2016, states that any first-party claimant can seek recovery of actual damages, expenses, litigation costs, and interest against a disability insurer for failure to act in good faith. H.B. 990, 729 (2016).

2. **Third-Party**

   Elements and Remedies in Claims Against Insurers for Failure to Defend or Settle Third Party Actions

   It is well established in Maryland that there is a significant difference between a first-party claim and a third-party claim against the insured. In the third-party claim situation, the standard “liability policy gives the insurer exclusive control over the investigation, litigation, and settlement of claims against the insured”. *Johnson v. Fed. Kemper Ins. Co.*, 74 Md. App. 243, 247, 536 A.2d 1211 (1988). Thus, the insurer owes a fiduciary duty to the third-party insured “to attempt to settle the claim within the limits of the policy since the insured has surrendered the right to do so itself.” Id. at 247, 536 A.2d at 1213. A liability insurer may be sued for “bad faith” if it unjustifiably refuses to settle a claim within the policy limits, and thereby exposes the insured to an “excess” judgment. *Wolfe v. Anne Arundel Cty.*, 135 Md. App. 1, 17, 761 A.2d 935 (2000), aff’d, 374 Md. 20, 821 A.2d 52 (2003). The recovery on such a tort, if established, is “for the amount of judgment obtained against the insured which is in excess of the policy limits.” *Allstate Ins. Co. v. Campbell*, 334 Md. 381,394, 639 A.2d 652 (1994).

   A liability insurer’s mistaken refusal to provide any defense whatsoever, on the grounds that there is no valid insurance contract or that there is no coverage under an insurance contract, gives rise to a breach of contract action against the insurer; however, it does not give rise to the tort action for an alleged bad faith failure to settle a third-party claim against the insured. *Mesmer v. Maryland Auto. Ins. Fund*, 353 Md. 241, 725 A.2d 1053 (1999).

B. **Fraud**

   Elements and Remedies in Cause of Action Against Insurers

   In order to recover damages for fraud under Maryland law, a plaintiff must prove the following elements:
1. the defendant made a false representation to the plaintiff;
2. the defendant knew that the representation was false or made the representation with reckless indifference as to its truth;
3. the misrepresentation was made for the purpose of defrauding the plaintiff;
4. the plaintiff relied on the misrepresentation and had the right to rely on it; and
5. the plaintiff suffered compensable injury resulting from the misrepresentation.


Moreover, the plaintiff must establish these elements by clear and convincing evidence. See *VF Corp. and Blue Bell, Inc. v. Wrexham Aviation Corp.*, 350 Md. 693, 704, 715 A.2d 188, 193 (1998); *Gross v. Sussex*, 332 Md. 247, 258, 630 A.2d 1156, 1161 (1993).

In Maryland, there is ordinarily no duty imposed on parties to a transaction to disclose material facts. See *Sass v. Andrew*, 152 Md. App. 406, 430, 832 A.2d 247, 260 (2003). Thus, concealment of a material fact only constitutes fraud where one party had a duty to disclose. See *id*. The only exception to this rule is in the case of facts which materially qualify representations made to another party. *Id.*

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

In *Harris v. Jones*, 281 Md. 560, 566, 380 A.2d 611, 614 (1977), the Court of Appeals of Maryland recognized the tort of intentional infliction of emotional distress and listed its four elements as follows:

1. the conduct must be reckless;
2. the conduct must be extreme and outrageous;
3. there must be a causal connection between the wrongful conduct and the emotional distress; and
4. the emotional distress must be severe.


Since the *Harris* decision, Maryland courts have limited recovery for intentional infliction of emotional distress to the most *extreme and unusual circumstances*. See *Khalifa v. Shannon*, 404 Md. 107, 945 A.2d 1244 (2008); see also *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 2019 ALFA International Insurance Law Compendium
Kentucky Fried Chicken Nat’l Management Co. v. Weathersby, 326 Md. 663, 607 A.2d 8 (1992), demonstrates just how difficult it is for a plaintiff to satisfy the stringent standards of this tort. In that case, an employee of the defendant brought an action seeking damages for the intentional infliction of emotional distress after she suffered a nervous breakdown in response to her demotion from store manager to assistant manager. The employee suffered from a personality disorder that made her particularly susceptible to stress, but because the employer did not know of her vulnerability, its actions in demoting her did not reach the level of outrageousness the tort requires, and did not support the employees cause of action. Id. at 680.

Maryland does not recognize the separate and distinct tort of negligent infliction of emotional distress; in other words, unintended emotional distress negligently inflicted by conduct that is not itself tortuous, is not a recognized tort. Lapides v. Trabbic, 134 Md. App. 51, 758 A.2d 1114 (2000).

D. State Consumer Protection Laws, Rules and Regulations

The Maryland Consumer Protection Act is found in Title 13 of the Commercial Law Article of the Annotated Code of Maryland. The Consumer Protection Act prohibits certain unfair and deceptive trade practices, as defined in Section 13-301 of the Commercial Law Article, in the sale, lease rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the offer for sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the extension of consumer credit; or the collection of consumer debts. Md. Code Ann., Com. Law § 13-303. Title 13 prohibits a person from engaging in any unfair or deceptive trade practice and authorizes a private cause of action for recovery of damages, and possibly attorneys fees at the discretion of the court. See Brooks v. Lewin Realty III, Inc., 378 Md. 70, 835 A.2d 616 (2003); Richwind Joint Venture v. Brunson, 335 Md. 661, 645 A.2d 1147 (1994) overruled in part on other grounds, Brooks.

The Act defines sales to include not only sales, but also offers and attempts to sell. See Md. Code Ann., Com. Law, § 13-101(i). It defines consumer goods as goods which are primarily for personal, household, family, or agricultural purposes. See id., § 13-101(d). Any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by the Act. Id., § 13- 408(a). Attorneys fees may also be awarded under the Act if a claimant is successful. See id., § 13- 408(b). In determining the damages due to the consumer in a private action, the court must look only to his actual loss or injury caused by the unfair or deceptive trade practices. See Marwani v. Catering by Uptown, 416 Md. 312, 316, 6 A.3d 928, 930 (2010) (denying consumers’ claim for damages where they could not prove actual loss); Hallowell v. Citaramanis, 88 Md. App. 160, 594 A.2d 591 (1991), aff’d, 328 Md. 142, 613 A.2d 964 (1992).

Title 27 of the Insurance Article of the Annotated Code of Maryland addresses unfair trade practices and other prohibited practices. The purpose of this title is to regulate trade practices in the business of insurance in accordance with the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 through 1015, by defining, or providing for the determination of, all trade practices in the business of insurance in Maryland that are unfair methods of competition or unfair or deceptive acts or practices and by prohibiting those trade practices. See Md. Code Ann., Ins. §
The commission of an act prohibited under subtitle 2 of Title 27 of the Insurance Article of the Annotated Code of Maryland is defined as an unfair method of competition and an unfair and deceptive act or practice in the business of insurance. See id. § 27-201.

Title 27 of the Insurance Article of the Annotated Code of Maryland provides administrative remedies only. It does not provide or prohibit a private right or cause of action to, or on behalf of, a claimant or other person in any state, nor does it impair the right of a person to seek redress in law or equity for conduct that otherwise is actionable. See id. § 27-301.

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

Maryland courts have ordered the production of an insurer’s claim file in bad faith cases. In APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10 (Md. 1980), Plaintiff APL sought indemnification from its insurer as a result of employee theft. When the insurer refused to indemnify the Plaintiff, claiming policy exclusions, the Plaintiff filed a bad faith lawsuit. Id. at 12. The Plaintiff sought the claim file from the Defendant’s senior claim examiner that contained documents regarding the examiner’s investigation into the occurrence. The Court held that the documents were not prepared in anticipation of litigation, and that even if they were, that the Plaintiff had met its burden of showing substantial need and undue hardship. To the Court, a substantial probability of litigation did not arise until after the insurer completed its investigation and denied the claim. Id. at 21. Consequently, the Defendant was ordered to produce the claim file. Id.

B. Discoverability of Reserves

Maryland case law has not addressed the discoverability of loss reserves, many courts have held that loss reserves may be discoverable and admissible on any number of issues which commonly are presented in bad faith actions. See, e.g., Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 813 (Ky. 2004) (finding evidence of reserve settling procedures was relevant to bad faith claim because it would help to show whether insurer followed statutory and regulatory requirements and whether system for setting reserves was aimed at achieving unfairly low values); CIGNA Ins. Co. v. Cooper Tire & Rubber, Inc., 180 F. Supp. 2d 933, 936 (N.D. Ohio 2001) (finding reserves discoverable, relevant to issues of mistake and intent); Kirchoff v. American Cas. Co. of Reading, Pennsylvania, 997 F.2d 401 (8th Cir. 1993); Samson v. Transamerica Ins. Co., 30 Cal. 3d. 220, 240, 178 Cal. Rptr. 343, 636 P. 2d. 32 (1981).

In these cases, loss reserves information may lead to admissibility of evidence regarding whether an insurance company adjusted a claim in good faith or made a prompt investigation, assessment or settlement of a claim.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers
Maryland law has not addressed the discoverability of existence of reinsurance and communications with reinsurers.

D. **Attorney/Client Communications**  
**Issues Relating to Tripartite Relationship/Advice of Counsel Defense**

When a claim is made against an insured person under a typical liability policy, a tripartite relationship is established between an insurance company, its insured, and the defense attorney hired to represent their joint interests in resolving the claim. The tripartite relationship between insurer, insured, and defense counsel makes potential conflicts of interest inevitable. Insureds are threatened by conflicts because of the effect on their defense. Conflicts of interest may strip insurers of coverage defenses and expose them to the threat of extra-contractual damages. From defense counsel’s perspective, with potential conflicts of interest come potential malpractice claims. The fundamental malpractice danger posed by conflicts of interest is that the insured (the client) will allege that defense counsel protected the insurer’s interest at the insured's expense, and to the insured's ultimate detriment. See, e.g., *Nat’l Union Fire Ins. Co. of Pittsburgh v. Wadsworth Golf Const. Co. of Midwest*, 160 Md. App. 257, 863 A.2d 347 (2004); *Fidelity & Cas. Co. v. McConnaughy*, 179 A.2d 117, 121 (Md. 1962) (stating that an attorney can represent insured and insurer unless a conflict develops).

Ironically, even some defense attorneys mistakenly believe they represent only the insured. As pointed out in a Maryland ethics opinion, however, this assumption conflicts with substantive law and could jeopardize some of the insured's rights, especially in the area of attorney-client privilege, when necessary information must be disclosed to the insurer. See *Md. State Bar Ass'n Comm. on Ethics*, Ethics Doc. 00-23 (2000), LEXIS, Ethics Library, ETHOP File.

VII. **DEFENSES IN ACTIONS AGAINST INSURERS**

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

Maryland decisions interpreting § 12-207 of the Insurance Article and its statutory predecessors have uniformly held that an insurance policy issued in reliance upon an incomplete or false statement or an omission as to a matter which is material to the risk of being assumed is avoidable and may be rescinded by the insurer. See *Jackson v. Hartford Life & Annuity Ins. Co.*, 201 F. Supp. 2d 506, 511-12 (D. Md. 2002). This right to rescission is available simply by virtue of the material misrepresentation—the insurer is under no duty to investigate the applicant’s medical history or go any further than the four corners of the insurance application. See *Chawla v. Transamerica Occidental Life Ins. Co.*, 440 F.3d 639, 647 (4th Cir. 2006). It is also irrelevant whether the material misrepresentation was made in good faith. See *Calomiris v. Woods*, 353 Md. 425, 438, 727 A.2d 358, 364 (1999); *Fitzgerald v. Franklin Life Ins. Co.*, 465 F. Supp. 527, 537, aff’d, 634 F.2d 622 (4th Cir. 1980); *Stumpf v. State Farm Mut. Auto. Ins. Co.*, 252 Md. 696, 711, 251 A.2d 362, 369 (1969). As an alternative to rescission, the insurer may use the applicant’s misrepresentation as a complete defense to an action on the policy. See id.; *Hofmann v. John Hancock Mut. Life Ins. Co.*, 400 F. Supp. 827, 829 (D. Md. 1975); *Nationwide Ins. Co. v.*
One widely quoted definition of materiality is:

A false representation in an application for insurance is material to the risk if it is such as would reasonably influence the insurers' decision as to whether or not it should issue the policy requested.


If the undisclosed ailment is not minor, the question of materiality is at issue and is normally one of fact for the jury to decide. Whenever it is manifest, either shown from uncontradicted testimony or from the mere nature of the misrepresentation, that the misrepresentation has been material to the risk, the court should rule so as a matter of law.

Maryland courts have frequently found that an applicant or beneficiary may not be relieved of an error or omission in an application by contending that the omission was innocent or was the fault of the agent, and Maryland law places upon an insured a heavy burden to examine an application attached to a policy delivered to him or her to verify its accuracy.

In order to sustain a defense to a claim on a policy or rescission on the basis of a material misrepresentation, an insurer is not required to establish any causal connection between the condition misrepresented or omitted from the application and the condition giving rise to the claim on the policy.

In order to obtain a decree rescinding a policy, an insurer must prove that it has fully and promptly tendered to the insured the return of all premiums paid plus interest to the date of tender.

B. Failure to Comply with Conditions

Assistance and Cooperation/Late Notice
Pursuant to Md. Code Ann., Ins. § 19-110:

“An insurer may disclaim coverage on a liability insurance policy on the ground that the insured or a person claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of cooperation or notice has resulted in actual prejudice to the insurer.”

In Maryland, the cooperation clause of an insurance policy may be either an express condition or a covenant. Snyder v. Chester Cty. Mut. Ins. Co., 264 F. Supp. 2d 332 (D. Md. 2003). However, substantial compliance with the cooperation clause in insurance policy exists when the insured: (1) supplies reasonably requested information to a reasonable extent, and (2) undertakes to submit the balance when it is reasonably possible. Id.

With respect to the notice requirement, in order to avoid its duty to defend or indemnify on the ground of delayed notice, the insurer must establish by a preponderance of affirmative evidence that the delay in giving notice resulted in actual prejudice to the insurer. Pac. Emp’rs Ins. Co. v. Eig, 160 Md. App. 416 864 A.2d 240, (2004). An insurer may not, therefore, disclaim coverage for either lack of notice or failure to cooperate unless it demonstrates that the deficiency has resulted in actual prejudice to the insurer. Prince George’s Cty. v. Local Gov’t Ins. Trust, 859 A.2d 353, 159 Md. App. 471 (2004), aff’d, 388 Md. 162, 879 A.2d 81 (2005).

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


Moreover, although Md. Code Ann., Ins. § 19-110 permits a liability insurer to disclaim coverage based on an insured’s failure to cooperate or give timely notice only if the insurer was prejudiced, the statute is inapplicable when an insurer defends on the basis that its insured failed to meet the condition precedent in a no-action clause requiring a final judgment against the insured or a settlement with the written consent of the insurer. Phillips Way, Inc. v. Am. Equity Ins. Co., 795 A.2d 216, 143 Md. App. 515 (2002).

D. Preexisting Illness or Disease Clauses

1. Statutes

Under the Maryland Health Insurance Portability and Accountability Act, Md. Code Ann., Ins. § 15-1401, “preexisting condition” means: (1) a condition existing during a specified
period immediately preceding the effective date of coverage, that would have caused an ordinarily prudent person to seek medical advice, diagnosis, care, or treatment; or (2) a condition for which medical advice, diagnosis, care, or treatment was recommended or received during a specified period immediately preceding the effective date of coverage. Id. at § 15-1201(p). A “preexisting condition provision” means a provision in a health benefit plan that denies, excludes, or limits benefits for an enrollee for expenses or services related to a preexisting condition. Id. at § 15-1401(n).

An insurance carrier may not impose any preexisting condition provisions: (a) on an individual who, as of the last day of the 30-day period beginning with the date of birth, is covered under creditable coverage; (b) on a child who is adopted or placed for adoption before attaining 18 years of age, and as of the last day of the 30-day period beginning on the date of adoption or placement for adoption, is covered under creditable coverage; or (c) related to pregnancy. Id. at § 15-508. A carrier may, however, impose a preexisting condition exclusion or limitation on an individual for a condition that was not discovered during the underwriting process for an individual health benefit plan only if the exclusion or limitation:

1. relates to a condition of the individual, regardless of its cause, for which medical advice, diagnosis, care, or treatment was recommended or received within the 12-month period immediately preceding the effective date of the individual's coverage;
2. extends for a period of not more than 12 months after the effective date of the individual's coverage; and
3. is reduced by the aggregate of any applicable periods of creditable coverage.

Id. at § 15-508.1.

2. Case Law

Maryland courts have ruled pre-existing condition clauses must be strictly construed and that a pre-existing condition will ordinarily be deemed to have arisen when it was first manifest or active or could be diagnosed by a person with medical knowledge. See Lawrence v. Nat'l Life Ins. Co., 716 F. Supp. 883, 885 (D. Md. 1989); Mutual of Omaha v. Goldfinger, 254 Md. 272, 278-79, 254 A.2d 683, 686-87 (1969). The Court, however, has ruled that a policy’s incontestability clause applies to bar use of a pre-existing condition exclusion when such condition was first manifest prior to the issuance of the policy. See Mutual Life Ins. Co. of N.Y. v. Insurance Comm'r, 352 Md. 561, 573-74, 723 A.2d 891, 897-98 (1999).

A divided Fourth Circuit Court of Appeals has issued a per curiam decision reinstating a decision by the Chief Judge of the United States District Court for the District of Maryland holding where an insured received treatment for fibrocystic breast disease during the pre-existing period was not a pre-existing condition under a group health insurance plan, which would bar coverage for the expenses of removing the tumor, because the record reflected that the carcinoma was merely present but had not yet been diagnosed or treated, it was luckily coincident with the large fibrocystic mass so it could be treated, but there was no causal or

Consequently, at least in the Fourth Circuit, a successful use of the defense of a pre-existing condition clause may be limited to situations in which it can be shown that an insured received care, consultation or treatment for the same condition as that which gives rise to a present claim. See id.

3. **Statutes of limitations**

Under Maryland law, each policy of health insurance must contain the following provision:

Legal actions: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three (3) years after the written proof of loss is required to be furnished.

Md. Code Ann., Ins. § 15-217. A life insurance or health insurance policy, or an annuity contract, may not be delivered or issued for delivery in Maryland if the policy or contract provides a period shorter than three years within which an action may be brought on the policy or contract. Id. at § 12-209(3). A provision in an insurance contract or surety contract that sets a shorter time to bring an action under or on the insurance contract or surety contract than required by the law of the state when the insurance contract or surety contract is issued or delivered is against state public policy, illegal, and void. Id. at § 12-104. For an insurance policy to comply with the required comparison to the statute, its contractual limitations provision must recognize that the period of limitations may not begin to run earlier than the date of traditional accrual. See *St. Paul Travelers v. Millstone*, 412 Md. 424, 987 A.2d 116 (2010).

E. **Statutes of Limitations and Repose**

Generally, civil actions must be filed within three (3) years from the date the claim accrues. Md. Code Ann., Cts. & Jud. Proc. § 5-101. It is noted, however, that the statute of limitations does not begin to run on an insured’s claim that the insurer breached its duty to defend the insured in a tort suit brought by a third party until the underlying action is completed, because while the underlying tort action is continuing, the insurer can always step in and cure its breach. See *Vigilant Ins. Co. v. Luppino*, 352 Md. 481, 492, 723 A.2d 14, 19 (1999).

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

A. **Trigger of Coverage**
The most frequently offered theories for the trigger of coverage are (1) the exposure theory, (2) the manifestation theory, and (3) the continuous-trigger theory. At least two other less-frequently followed theories exist. One is the “injury-in-fact” (or “damages-in-fact”) approach, which holds that coverage is triggered by a showing of actual injury or damage-producing event; and the other is the “double-trigger” theory, which holds that injury occurs at the time of exposure and the time of manifestation, but not necessarily during the intervening period. **Mayor & City Council of Baltimore v. Utica Mut. Ins. Co., 145 Md. App. 256, 802 A.2d 1070 (2002).** The Court of Appeals of Maryland has concluded that: “[M]anifestation is not the sole trigger of coverage in environmental pollution cases. Rather, . . . coverage under the policies may be triggered during the policy period at a time earlier than the discovery or manifestation of the damage.” **Harford Cty. v. Harford Mut. Ins. Co., 327 Md. 418, 610 A.2d 286 (1992).**

**B. Allocation Among Insurers**

On February 3, 2012, the United States Court of Appeals for the Fourth Circuit, in **Pennsylvania Nat. Mut. Cas. Ins. Co. v. Roberts, 668 F.3d 106 (4th Cir. 2012), cert. denied, 133 S. Ct. 191 (2012),** reaffirmed the application of pro rata, time-on-the-risk, allocation of liability coverage under Maryland law. The underlying plaintiffs had presented claims of bodily injury to a minor arising from exposure to lead-based paint in a residential property owned by the policyholder. The insurer acknowledged coverage and agreed to provide a defense to the policyholder but maintained that it would be responsible for no more than its pro rata share of any damages awarded – as measured by the length of the period of coverage compared to the length of the period of alleged exposure.

Following a jury trial and entry of an $850,000 judgment in favor of the minor plaintiff, Pennsylvania National brought a declaratory judgment action asserting that it was contractually liable to pay no more than forty percent of the judgment. The minor plaintiff disagreed, contending that the insurer must pay the entire judgment in light of the joint and several liability of its policyholder with other tortfeasors. The district court, relying primarily on **Mayor & City Council of Baltimore v. Utica Mut. Ins. Co., 802 A.2d 1070 (Md. Ct. Spec. App. 2002),** noted that Maryland courts had settled law concerning allocation of insurance coverage for long-tail claims and held in favor of Pennsylvania National that the pro rata allocation by time on the risk method would control.

On review, the Fourth Circuit largely agreed with the district court, holding that under Maryland law, and its own precedent in **In re Wallace & Gale Co., 385 F.3d 820 (4th Cir. 2004),** pro rata allocation would apply without regard to the number of insureds or tortfeasors. The Court noted that this conclusion was further consistent with the public policy of encouraging parties to obtain liability insurance to cover risks.

**IX. CONTRIBUTION ACTIONS**

**A. Claim in Equity vs. Statutory**

The right to contribution exists under common law, by statute and rule. A right to contribution exists under common law based on principles of equity, where one person
discharges more than his or her just share of a common burden. See Wallace v. Jones, 110 Md. 143, 146-47, 72 A. 769, 770-71 (1909). At common law, however, there was no liability and thus no right of contribution among joint tortfeasors. See Hashmi v. Bennett, 416 Md. 707, 720, 7 A.3d 1059, 1067 (2010).

The Maryland Uniform Contribution Among Tortfeasors Act, codified at Md. Code Ann., Cts. & Jud. Proc. §§ 3-1401 through 3-1409, was developed to promote “some common policy” to legislatively establish contribution among joint tortfeasors. Hashmi, 416 Md. at 721, 7 A.3d at 1067. The Act provides a right to contribution among joint tortfeasors on a pro rata basis even if there has been no joint judgment against them. See Wassel v. Eglowsky, 399 F. Supp. 1330, 1366, aff’d, 542 F.2d 1235 (4th Cir. 1976 (overruled in part on other grounds by Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101 (4th Cir. 1989)). Each defendant may be liable to the plaintiff for the full amount of damages. See Md. Code Ann., Cts. & Jud. Proc. § 3-1401(c). Moreover, a tortfeasor has an action for contribution against another joint tortfeasor who signs a release and agrees he is a joint tortfeasor or who is so determined by a court. A joint tortfeasor who has paid more than his pro rata share of the judgment may enforce the right of contribution by making a post-trial motion for Judgment of Contribution or Recovery Over pursuant to Md. Rule 2-614 (Circuit Court) or 3-614 (District Court) even if he did not file a cross-claim against his joint tortfeasors. Lerman v. Heemann, 347 Md. 439, 444-48, 701 A.2d 426, 429-31 (1997). The statute of limitations is three years from the date of payment or judgment. Md. Code Ann., Cts. & Jud. Proc. § 5-101; Tadjer v. Montgomery Cty., 61 Md. App. 492, 496-97, 487 A.2d 658, 660 (1985).

B. Elements

To recover for contribution based on equitable principles, the plaintiff joint debtor must show that:

1. The parties are under a common burden or liability;
2. The property of the plaintiff as a co-debtor was taken in satisfaction of the debt;
3. The person paying is under a legal obligation to pay; and
4. The amount paid was the whole amount due or at least more than his or her pro rata share of the common obligation.


To recover for contribution under the Maryland Uniform Contribution Among Joint Tortfeasors Act, the plaintiff joint tortfeasor must show that:

1. There is a common liability to an injured person in tort (in fact, where an original plaintiff has no right of action against a third party, there can be no contribution entitling the defendant to join a third party as a defendant under the
2. The joint tortfeasor has by payment discharged the common liability of has paid more than his or her pro rata share thereof.


X. DUTY TO SETTLE

A liability insurer’s bad faith failure to settle a claim within policy limits gives rise only to a tort action. The tort action based upon a liability insurer’s wrongful failure to settle a claim against its insured within policy limits was first recognized by the Court of Appeals of Maryland in Sweeten, Adm'r. v. Nat'l. Mutual, 233 Md. 52, 194 A.2d 817 (1963). The basis for the tort duty, according to the Court of Appeals of Maryland, was “because the insurer has the exclusive control, under the standard policy, of investigation, settlement and defense of any claim or suit against the insured, and there is a potential, if not actual, conflict of interest giving rise to a fiduciary duty.” Id.; see also Mesmer v. Maryland Auto. Ins. Fund, 353 Md. 241, 725 A.2d 1053 (1999).

“An insurer does not have an absolute duty to settle a claim within policy limits, although it may not refuse to do so in bad faith.” Allstate Ins. Co. v. Campbell, 334 Md. 381, 396, 639 A.2d 652, 659 (1994). The insurer does, however, have “a continuing duty to negotiate in good faith to settle the claim within policy limits.” Id. In determining whether an insurer has acted in good faith in refusing to settle a claim, Courts have looked to the following factors:

- The severity of the plaintiff's injuries giving rise to the likelihood of a verdict greatly in excess of the policy limits
- Whether there was a lack of proper and adequate investigation of the circumstances surrounding the accident
- Whether there was a lack of skillful evaluation of plaintiff's disability
- Whether the insurer failed to inform the insured of a compromise offer within or near the policy limits
- Whether the insurer pressured the insured to make a contribution towards a compromise settlement within the policy limits, as an inducement to settlement by the insurer
- Whether the insurer took any actions which demonstrate a greater concern for the insurer's monetary interests than the financial risk attendant to the insured's predicament

State Farm Mut. Auto. Ins. Co. v. White, 248 Md. 324, 332, 236 A.2d 269, 273 (1967). An insurer is not liable for bad faith failure to settle a claim where the insurer disclaims coverage for a claim, even if the insurer’s denial of coverage is erroneous. Mesmer v. Maryland Auto Ins. Fund, 353 Md. 241, 263, 725 A.2d 1053, 1064 (1999). In such a situation, the insurer remains liable only for breach of contract. Id.

XI. LH&D BENEFICIARY ISSUES
A. **Change of Beneficiary**

An insurer may include in the policy a provision that a designation or change of beneficiary is not binding until endorsed on the policy or otherwise accepted by the insurer. Md. Code Ann., Ins. § 16-212(a)(2).

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

Maryland has no statute that operates to automatically revoke a beneficiary designation in favor of a spouse upon divorce. See *E. v. PaineWebber, Inc.*, 131 Md. App. 302, 311 (2000), aff’d, 363 Md. 408, 768 A.2d 1029 (2001). A former spouse may continue to be entitled to the asset if the insured fails to give notice of a change of beneficiary to the insurer due to divorce. The only exception is if the Divorce Decree specifically revokes the right to inherit life insurance.

In addition, a provision in a separation agreement, incorporated into a divorce decree, that binds a party to maintain in force life policies naming a specific party as primary beneficiary is a type of contract that a court of equity could grant specific performance, entitling the named party to proceeds of the policy; thus, making subsequent changes in the beneficiary ineffective. *Bandy v. Paulin*, CIV. A. No. AW-08-3055, 2010 WL 672940, 3-4 (D. Md. Feb. 19, 2010)(citing *Equitable Life Assur. Soc. of the U.S. v. Jones*, 679 F.2d 356, 358-359 (4th Cir. 1982)); see also *Borotka v. Boulay*, 268 Md. 244, 299 A.2d 803 (Md. 1973).

XII. **INTERPLEADER ACTIONS**

A. **Availability of Fee Recovery**

Rules 2-221 (Circuit Court) and 3-221 (District Court) of the Maryland Rules of Civil Procedure provide that an order of interpleader may “award the original plaintiff costs and reasonable attorney’s fees from the property if that plaintiff brought the action in good faith as an impartial stakeholder.” Md. Rule 2-221(b)(6), 3-221 (b)(6) (2015). An award of attorney’s fees is within the sound discretion of the trial court, and is not to be disturbed unless its discretion is exercised arbitrarily or its judgment is clearly wrong. *Sody v. Sody*, 32 Md. App. 644, 660, 363 A.2d 568, 578 (1975).

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

While the Maryland interpleader rule is substantially similar to the federal counterpart, compare Md. Rules 2-221 and 3-221 with Fed. R. Civ. P. 22. The federal rule does not provide a provision expressly addressing the issue of the availability of a fee recovery. Moreover, a major difference between the state and federal interpleader rules involve the jurisdictional requirements.