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ARIZONA

I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

Pursuant to Arizona's Unfair Claims Settlement Practices Act, A.R.S. § 20-461, *et seq.*, Arizona's Department of Insurance had adopted as part of Arizona's administrative code regulations setting forth specific required and prohibited conduct. The following regulations, which apply to all insurance policies and insurance contracts except policies of worker's compensation and title insurance, include: (1) insurers are required to acknowledge receipt of notice of a claim within 10 working days in writing or, if orally, with an appropriate notation of the acknowledgment in the claim file; (2) an appropriate reply shall be made within 10 working days on all other pertinent communications from a claimant; (3) upon notification of a claim, an insurer must promptly provide necessary claim forms, instructions and assistance so the claimant can comply with the policy conditions and the insurer's reasonable requirements; (4) every insurer must complete investigation of a claim within 30 days after notification of a claim, unless the investigation cannot be reasonably completed during such time; (5) 15 working days after receipt of proper proofs of loss, the claimant must be advised of the acceptance or denial of the claim; (6) if more time is needed to accept or deny the claim, the claimant must be notified within 15 days of the receipt of the proof of loss the specific reasons why more time is needed.

B. Standards for Determination and Settlements

Standards for handling, determining and settling claims are also set forth in Arizona's Unfair Claims Settlement Practices Act, A.R.S. § 20-461, *et seq.,* and the Arizona Department of Insurance Regulation R-20-6-801. These standards include: (1) an insurer must fully disclose to a first party claimant all pertinent benefits, coverages or other provisions of the policy on which a claim is presented; (2) the insurer may not request a first party claimant to sign a release which extends beyond the subject matter that gave rise to the claim payment; (3) an insurer cannot issue a check or draft in partial settlement of a loss or claim under a specific coverage which contains language that releases the insurer from its total liability; (4) denial must be in writing and cannot be based on a specific policy provision, condition, or exclusion unless referenced in the denial; and (5) insurers cannot continue settlement negotiations of a claim directly with a claimant who is neither an attorney nor represented by an attorney without giving the claimant written notice that claimant's rights may be affected by a statute of limitation, policy, or contract time limit that may be expiring and may affect the claimant's rights. For first-party claims, the

claimant must be given 30 days' written notice, and a third-patty claimant must be given 60 days' notice before the time limit expires.

A breach of Arizona's Unfair Claims Settlement Practices Act and Rules and Regulations, promulgated thereunder, may not be used as a standard for a private cause of action, such as bad faith. A.R.S. §20-461(D) and *Melancon v. USAA Cas. Ins. Co.,* 174 Ariz. 344, 849 P.2d 1374 (App.1992), *pet. for review dismissed,* 177 Ariz. 305, 868 P.2d 318 (1994); *Leal v. Allstate Ins. Co.,* 199 Ariz. 250, 17 P.3d 95 (App.2000*); Rowe ex rel. Rowe v. Bankers Life and Cas. Co.,* 572 F.Supp.2d 1138 (D.Ariz. 2008).

II. PRINCIPLES OF CONTRACT INTERPRETATION

Arizona courts construe provisions in insurance contracts according to their plain and ordinary meaning. *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982). "[A]mbiguity in an insurance policy will be construed against the insurer"; however, this rule applies only to provisions that are "actually ambiguous." *Thomas v. Liberty Mut. Ins. Co.*, 173 Ariz. 322, 325, 842 P.2d 1335, 1338 (App.1992).

In Arizona, "there is no need to make a preliminary finding of ambiguity before the judge considers extrinsic evidence." *See Taylor v. State Farm Mut. Automobile Ins. Co.,* 175 Ariz. 148, 152, 854 P.2d 1134 (1993) (citations omitted). Rather, the court first should consider the extrinsic evidence, and if the court finds that the contract language is "reasonably susceptible" to the interpretation asserted by the party offering the evidence, the evidence is admissible to determine the meaning intended by the parties. *Id.* at 154, 854 P.2d 1134. Whether contract language is reasonably susceptible to more than one interpretation, so that extrinsic evidence is admissible, is a question of law for the court. *Id.* at 158-59. If a clause may be susceptible to different constructions, rather than simply finding ambiguity and resorting to the *contra proferentem* doctrine, the court will first attempt to discern the meaning of the clause "by examining the purpose of the exclusion in question, the public policy considerations involved and the transaction as a whole." *Ohio Cas. Ins. Co. v. Henderson*, 189 Ariz. 184, 186, 939 P.2d 1337, 1339 (1997) (*quoting Transamerica Ins. Group v. Meere*, 143 Ariz. 351, 355, 694 P.2d 181, 185 (1984)).

III. CHOICE OF LAW

In determining choice of law, Arizona follows the Restatement (Second) of Conflict of Laws. *See Beckler v. State Farm Mut. Auto. Ins. Co.*, 195 Ariz. 282, 286, ¶ 16, 987 P.2d 768, 772 (App.1999) (citation omitted). When an Arizona court is faced with questions of contract interpretation, Restatement § 193 governs. Restatement § 193 states:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location

> of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Under Restatement § 6, the relevant factors to be considered are:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Likewise, Arizona courts look to Restatement § 6 when faced with choice of law issues concerning bad faith, but seek further guidance from Restatement §145 for the application of the § 6 factors to tort issues. *Bates v. Superior Court of State of Ariz., In & For Maricopa County*, 156 Ariz. 46, 48-49, 749 P.2d 1367, 1369-70 (1988). Section 145 provides that courts are to resolve tort issues under the law of the state having the most significant relationship to both the occurrence and the parties. *Id.* Section 145(2) lists some of the contacts which are to be considered in determining the choice of law:

> 1. The place where the injury occurred;
> 2. The place where the conduct causing the injury occurred;
> 3. The domicile, residence, nationality, place of incorporation and place of business of the parties;
> 4. The place where the relationship, if any, between the parties is centered.

Id. The inquiry above is qualitative, not quantitative. *Ambrose v. Illinois–California Express Inc.,* 151 Ariz. 527, 530, 729 P.2d 331, 334 (App.1986). The court must evaluate the contacts "according to their relative importance with respect to the particular issue." Restatement § 145(2).

When bad faith claims also include claims of personal injury, Arizona courts then turn to Restatement § 146. *Bates, supra.* Section 146 identifies the following specific qualitative guideline:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the

parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

IV. DUTIES IMPOSED BY STATE LAW

A. Duty to Defend

1. Standard for Determining Duty to Defend

The duty to defend initially is based on the face of the complaint in an action brought against the insured and alleges facts which come within the coverage of the liability policy. *Kepner v. Western Fire Ins. Co.,* 109 Ariz. 329, 509 P.2d 222 (1973). The duty to defend arises when the allegations of a suit bring it within the terms of the policy, even if the suit might ultimately prove to be groundless, false or fraudulent, as long as, if true, the claim would be within policy coverage. *Pesqueria v. Factory Mut. Liability Ins. Co. of America,* 16 Ariz. App. 407, 493 P.2d 1212 (1972). If any claim alleged in the complaint is within the policy's coverage, the insurer has the duty to defend the entire suit. *Western Cas. & Sur. Co. v. International Spas of Arizona,* 130 Ariz. 76, 634 P.2d 3 (App. 1981); *Lennar Corp. v. Auto-Owners Ins. Co.,* 214 Ariz. 255, 151 P.3d 538 (App. 2007).

The duty to defend is triggered by the facts that may give rise to coverage, not by the theories of liability. *Western Cas. & Sur. Co. v. International Spas of Arizona*, 130 Ariz. 76, 634 P.2d 3 (App. 1981). If the complaint alleges facts which fail to bring the case within the policy coverage, the insurer is free of such obligation. *Kepner v. Western Fire Ins. Co.*, 109 Ariz. 329, 509 P.2d 222 (1973). If the alleged facts in the complaint ostensibly bring the case within policy coverage, but other facts which are not reflected in the complaint plainly take the case outside the policy coverage, there is no duty to defend. *Id.* When an insurer relies on facts outside of the complaint for its determination of a duty to defend, the facts should be uncontested. *Id. Lennar Corp. v. Auto-Owners,* 214 Ariz. 255, 151 P.3d 538 (App. 2007).

An insurer has the right to refuse to defend based on the allegations of the complaint and has no duty to further investigate unless the insured provides additional information indicating the true nature of the claim arises out of matters covered by the policy. *U.S. Fidelity & Guar. v. Advanced Roofing,* 163 Ariz. 476, 788 P.2d 1227 (App. 1989); Lennar Corp. v. Auto-Owners, 214 Ariz. 255, 151 P.3d 538 (App. 2007); *Ventana Medical Systems, Inc. v. St. Paul Fire & Marine Ins. Co.*, 709 F.Supp2d 744 (D. Ariz. 2010). If the plaintiff amends the complaint to assert claims within coverage, notice must be given to the insurer before it is required to defend. *Salvatierra v. National Indem. Co.,* 133 Ariz. 16, 648 P.2d 131 (App. 1982).

2. Issues with Reserving Rights

An insurer which intends to preserve coverage defenses must defend its insured under a properly communicated reservation of rights or it will lose its right to later litigate coverage. *U.S.A.A. v. Morris,* 154 Ariz. 113, 741 P.2d 246 (1987). The insurer need not reserve its rights immediately upon learning of a suit; rather, it may subsequently reserve its rights upon learning new information that provides a coverage or policy defense. *Id.*

Upon issuance of a reservation of rights, the cooperation clause in the policy is narrowed and the insured is free to negotiate a settlement of any claim that is subject to a reservation of rights. *U.S.A.A. v. Morris,* 154 Ariz. 113, 741 P.2d 246 (1987); *Parking Concepts, Inc. v. Tenney,* 207 Ariz. 19, 83 P.3d 19 (2004); *Monterey Homes Arizona, Inc. v. Federated Mutual Ins. Co.*, 221 Ariz. 351, 212 P.3d 43 (App. 2009). However, a settlement of claims which are being defended unconditionally is a breach of the cooperation clause, so an insured can only settle claims for which coverage is reserved. *Munzer v. Feola,* 195 Ariz. 131, 985 P.2d 616 (App. 1999). The insured must give the insurer notice of the insured's intent to settle in order to give the insurer an opportunity to withdraw the reservation of rights. *U.S.A.A. v. Morris,* 154 Ariz. 113, 741 P.2d 246 (1987); *Monterey Homes Arizona, Inc. v. Federated Mutual Ins. Co.*, 221 Ariz. 351, 212 P.3d 43 (App. 2009)

If the insurer prevails on the coverage issues in subsequent litigation, the insurer does not have to pay any portion of the settlement. *U.S.A.A. v. Morris,* 154 Ariz. 113, 741 P.2d 246 (1987). Assuming coverage, the plaintiff or insured must prove that the settlement was not fraudulent or collusive. *Id.* In order for the insurer to be bound by the settlement or resulting judgment, the insured or plaintiff also has the burden to prove that the amount of the judgment or settlement is an amount that a reasonably prudent person would pay to settle on the merits. *Himes v. Safeway Ins. Co.,* 205 Ariz. 31, 66 P.3d 74 (App. 2003). A "reasonably prudent person" is one who (a) has the ability to pay from his/her own funds, and (b) makes a settlement decision as though paid from his/her own funds. *Id.* The "reasonableness" of a settlement does not take into account non-covered claims or issues. *Parking Concepts, Inc. v. Tenney*, 207 Ariz. 19, 83 P.3d 19 (2004). The insured or plaintiff, if coverage is found, can only recover the amount of settlement proven to be reasonable. *U.S.A.A. v. Morris,* 154 Ariz. 113, 741 P.2d 246 (1987). If the insured or plaintiff does not prove that any specific amount is reasonable, the insurer is not bound at all and can litigate the insured's liability, and the plaintiff's damages in subsequent litigation. *Id.* The amount of the settlement or judgment to be paid does not become liquidated for prejudgment interest purposes until the court decides what amount is reasonable, if any. *Pueblo Santa Fe Townhomes Owners Ass'n v. Transcontinental Ins. Co.,* 218 Ariz. 13, 178 P.3d 485 (App. 2008).

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

1. Criminal Sanctions

Arizona's Unfair Claim Settlement Practices Act sets forth nineteen (19) actions that constitute unfair claims practices. A.R.S. § 20-461 For example, an insurer can be said to have

acted unfairly if it; fails to adopt and implement reasonable standards for the prompt investigation of claims arising under an insurance policy; or refuses to pay claims without conducting a reasonable investigation based upon all available information; fails to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; or doesn't attempt in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. A.R.S. § 20-461(A)(3)-(6). However, the statute does not create a private right of action for an individual. A.R.S. § 20-461(D). Instead, the Director of the Arizona Department of Insurance is vested with authority to enforce Arizona's Unfair Claim Settlement Practices Act. A.R.S. § 20-142.

2. The Standards for Compensatory and Punitive Damages

On a claim for breach of the duty of good faith and fair dealing, a plaintiff is entitled to collect damages for: (1) the unpaid benefits of the policy; (2) monetary loss or damage to credit reputation experienced and reasonably probable to be experienced in the future; and (3) pain, suffering, emotional distress, humiliation, inconvenience, and anxiety experienced and reasonably probable to be experienced in the future. *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986); *Farr v. Transamerica Occidental Life Ins. Co*., 145 Ariz. 1, 7, 699 P.2d 376, 382 (Ct. App. 1984). An exception to these damages arises in cases involving bad faith handling of workers' compensation claims. For a breach of the duty of good faith and fair dealing claim involving a workers' compensation injury, a plaintiff is only entitled to collect those damages that were proximately caused by the bad faith handling of the workers' compensation claim, not recovery for damages related to the workers' compensation injury. *Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 213 P.3d 288 (App. 2009). The burden of proof on these damages is more probably true than not true. This means that the evidence that favors one party outweighs the opposing evidence.

The tort of bad faith alone is not enough to entitle a plaintiff to punitive damages. In order to obtain punitive damages, a plaintiff must demonstrate, by clear and convincing evidence, "1) evil actions; 2) spiteful motives; or 3) outrageous, oppressive or intolerable conduct that creates a substantial risk of tremendous harm to others." *Volz v. Coleman Co., Inc.*, 155 Ariz. 567, 570, 748 P.2d 1191, 1194 (1987). Clear and convincing evidence is a far heavier burden than mere preponderance of evidence. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986) (punitive damages not justified in bad faith case where insurer followed tough claims policy, but lacked evil intent). When the evidence is slight and inconclusive, it constitutes reversible error to submit the issue of punitive damages to the jury. *Filasky v. Preferred Risk Mut. Ins. Co.*, 152 Ariz. 591, 599, 734 P.2d 76, 84 (1987). "[A] damage award, punitive or otherwise, must be based on more than mere speculation or conjecture." *Hawkins v. Allstate Ins.*, 152 Ariz. 490, 501, 733 P.2d 1073, 1084 (1987).

3. Insurance Regulations to Watch

A new state law is going into effect that will, under certain circumstances, allow a health plan enrollee who receives health care treatment on or after January 1, 2019, to request arbitration of a so-called "surprise out-of-network, or SOON, bill." A SOON billing happens when a health care provider who is not on contract with the health insurance company (also referred to as an "out-of-network provider") bills a patient for expenses that are not covered by the patient's insurance. The new law applies when patients go to an in-network hospital or facility, perhaps believing the medical services would be covered by their health insurance plans, but later get bills from medical professionals or medical equipment suppliers who do not have contracts under their health insurance plans. If the bill is $1,000 or more after the enrollee pays cost-sharing amounts (copayment, coinsurance and deductible), and if certain other conditions are met, the enrollee can ask the Arizona Department of Insurance ("AZDOI") to schedule an arbitration for the bill so that the enrollee only has to pay cost-sharing amounts. The new law requires out-of-network health care providers to give information to enrollees in a disclosure notice a reasonable amount of time before treatment. This way, in non-emergency circumstances, an enrollee can decide to delay treatment for a time when a health care provider contracted with the enrollee's health insurer is available. The law also says an enrollee is not required to sign the disclosure notice to obtain medical care, but if an enrollee signs the disclosure notice, the enrollee waives rights to the SOON billing arbitration process.

4. State Arbitration and Mediation Procedures

Arizona civil courts have mandatory arbitration for all civil actions, except appeals from municipal or justice courts, if: (A) No party seeks affirmative relief other than a money judgment; and (B) No party seeks an award in excess of the jurisdictional limit for arbitration set by applicable local rule of the superior court. Ariz. R. Civ. P. 72 Each county sets its own jurisdictional limit. *See e.g. AZ ST MARICOPA SUPER CT Rule 3.10* (setting jurisdictional limit at $50,000).

For contracts containing arbitration clauses, "[a]rbitration clauses are construed liberally and any doubts about whether a matter is subject to arbitration are resolved in favor of arbitration." *City of Cottonwood v. James L. Fann Contracting, Inc.,* 179 Ariz. 185, 189, 877 P.2d 284, 288 (1994); *see Foy v. Thorp.,* 186 Ariz. 151, 154, 920 P.2d 31, 34 (1996) (holding a trial court's pre-arbitration review is limited to determining whether an arbitration agreement exists and whether the controversy at issue is encompassed by that agreement); *see also* A.R.S. § 12-3001, *et seq.*

5. State Administrative Entity Rule-Making Authority

The Arizona Department of Insurance is administered by the director of insurance. A.R.S. § 20-101, *et seq.* Authority for the Department of Insurance is found in both the Arizona Constitution and the Arizona Revised Statutes. The Arizona Constitution, Article 15, Section 5 requires domestic and foreign insurers to be subject to licensing, control and supervision by a department of insurance as prescribed by law.

Arizona Revised Statutes, Title 20, outlines insurance law and establishes the Department of Insurance. The Director of the Department of Insurance, appointed by the Governor, has general authority to enforce insurance laws, to adopt rules, and to investigate and resolve consumer complaints (A.R.S.§20-101 *et seq*.)

V. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

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

Bad faith claims in Arizona are classified as either a first party (if the insurance involves payment to the insured) or third party (if the insurance involves payment on behalf of an insured to a third party).

1. First Party

First-party bad faith requires the insurer to intentionally deny, fail to process or pay a claim without a reasonable basis for such action. *Noble v. National American Life Insurance Co.*, 128 Ariz. 188, 624 P.2d 866 (1981). The insurer must intend the act or omission and must form that intent without a reasonable or fairly debatable ground, i.e., the insurer must intend its act or omission lacking a belief that such conduct was permitted by the policy. *Rawlings v. Apodaca*, 151 Ariz. 149, 160, 726 P.2d 565, 576 (1986); *Desert Mountain Properties, Ltd. Partnership v. Liberty Mutual Fire Ins. Co.*, 225 Ariz. 194, 236 P.3d 421 (App. 2010). The belief is absent if the insurer either knows that its position is groundless or when it fails to undertake an investigation adequate to determine whether the position is tenable. *Id.*

An insurer can challenge a claim that is fairly debatable. *Zilisch v. State Farm Mutual Automobile Insurance Co.,* 196 Ariz. 234, 995 P.2d 276 (2000); *Desert Mountain Properties, Ltd. Partnership v. Liberty Mutual Fire Ins. Co.*, 225 Ariz. 194, 236 P.3d 421 (App. 2010). A showing that a claim is objectively "fairly debatable" is a necessary condition to avoid a bad faith claim, but it is not always alone a sufficient condition. *Zilisch v. State Farm Mutual Automobile Insurance Co.,* 196 Ariz. 234, 995 P.2d 276 (2000). While an insurer may challenge claims that are fairly debatable, the insurer's belief in fair debatability is usually a question of fact determined by the jury. *Id.* However, if the plaintiff offers no significant probative evidence that calls into question the insurer's belief in fair debatability, the court may rule on the issue as a matter of law. *Knoell v. Metro. Life Ins. Co.,* 163 F.Supp.2d 1072 (D. Ariz. 2001); *Milhone v. Allstate Ins. Co.,* 289 F.Supp.2d 1089 (D. Ariz. 2003); *Prieto v. Paul Revere Life Ins. Co.,* 354 F.3d 1005 (9th Cir. 2004); *Golden Rule Ins. Co. v. Montgomery,* 435 F.Supp.2d 980 (D. Ariz. 2006).

A breach of an express term of the policy is not a necessary prerequisite to an action for bad faith. *Deese v. State Farm Mutual Automobile Insurance Co.,* 172 Ariz. 504, 838 P.2d 1265 (1992).

2. Third-Party

An insured must give its insured's interests equal consideration as its own in a third-party bad faith analysis. The eight factors to consider are listed in *Clearwater v. State Farm Automobile Insurance Co.*, 104 Ariz. 256, 792 P.2d 719 (1990), as:

(1) the strength of the injured claimant's case on the issues of liability and damages;
(2) attempts by the insurer to induce the insured to contribute to a settlement;
(3) failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured;
(4) the insurer's rejection of advice of its own attorney or agent;
(5) failure of the insurer to inform the insured of a compromise offer;
(6) the amount of financial risk to which each party is exposed in the event of a refusal to settle;
(7) the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and
(8) any other factors tending to establish or negate bad faith on the part of the insurer.

Under *Clearwater*, an instruction that the coverage issue was "fairly debatable" was held to be improper, based on the reasoning that that defense only applies in first-party claims.

B. Fraud

Common law fraud requires (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the right to rely on it; (9) his consequent and proximate injuries. The burden of proof is clear and convincing evidence and common law fraud may never be established by doubtful, vague, speculative or inconclusive evidence. *Echols v. Beauty Built Homes, Inc.,* 132 Ariz. 498, 647 P.2d 629 (1982); *Medical Lab. Management Consultants v. American Broadcasting Co.*, 30 F. Supp. 2d 1182, 1198 (D. Ariz. 1998).

C. Intentional or Negligent Infliction of Emotional Distress

In Arizona, the tort of intentional infliction of emotional distress (IIED) requires (1) conduct which is "extreme" and "outrageous"; (2) either intended to cause emotional distress or which recklessly disregards the near certainty that such distress will result from the conduct; and (3) severe emotional distress must indeed occur as a result of the defendant's conduct. *Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580 (1987); *Mintz v. Bell Atlantic Systems Leasing Intern., Inc.,*

183 Ariz. 550, 905 P.2d 559 (App. 1995). In order to be deemed "extreme and outrageous," the conduct must be "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Cluff v. Farmers Ins. Exchange,* 10 Ariz. App. 560, 460 P.2d 666 (1969). The trial court must first determine whether the acts complained of are sufficiently extreme and outrageous to state a claim for relief. *Patton v. First Fed. Sav. & Loan Ass'n of Phoenix,* 118 Ariz. 473, 578 P.2d 152 (1978). Only when reasonable minds could differ in determining whether conduct is sufficiently extreme or outrageous does the issue go to the jury. *Lucchesi v. Frederick N. Stimmel, M.D., Ltd.,* 149 Ariz. 76, 716 P.2d 1013 (1986).

Arizona recognizes two variations of the tort for negligent infliction of emotional distress (NIED) as a separate claim, as opposed to recovery of emotional distress as an element of damages for a bad faith claim. For a direct action for negligent infliction of emotional distress, the plaintiff must prove that: (1) defendant was negligent; (2) defendant's negligence created an unreasonable risk of bodily harm to plaintiff; (3) defendant's negligence was the cause of emotional distress to plaintiff; (4) plaintiff's emotional distress resulted in physical injury or illness to plaintiff; and (5) plaintiff's damages. *Quinn v. Turner*, 155 Ariz. 225, 745 P.2d 972 (App. 1987).

For an indirect NIED claim for witnessing an injury to another, a plaintiff must prove that: (1) defendant was negligent; (2) defendant's negligence created an unreasonable risk of bodily harm to both plaintiff and the person that was injured; (3) defendant's negligence was a cause of bodily harm to the person that was injured; (4) plaintiff's direct observation of the event resulting in bodily harm to the person that was injured caused plaintiff to suffer emotional distress; (5) plaintiff's emotional distress resulted in physical injury or illness to plaintiff; (6) plaintiff and the person directly injured had a close, personal relationship; and (7) plaintiff's damages. *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (S. Ct. 1979). While the relationship of a co-worker and friend is not recognized as a relationship that will allow the recovery for NIED, the relationship is not limited to one of family or quasi-family. *Hislop v. Salt River Project Agr. Imp. and Power Dist.*, 197 Ariz. 553, 5 P.3d 267 (App. 2000).

Arizona does not require a plaintiff to prove the elements of IIED or NIED in order to recover for emotional distress damages for a bad faith claim. *Farr v. Transamerica Occidental Life Ins. Co.,* 145 Ariz. 1, 699 P.2d 376 (App. 1985); *Filasky v. Preferred Risk Mutual Ins. Co.,* 152 Ariz. 591, 734 P.2d 76 (1987). To recover for emotional distress caused by an insurer's bad faith, the insured must demonstrate that the insurer's bad faith resulted in an invasion of the insured's property rights. *Id.* Damages for pain, humiliation or inconvenience, as well as pecuniary losses for expenses such as attorney's fees, trigger an invasion of protected property rights. *Id.*

D. State Consumer Protection Laws, Rules and Regulations

Class actions may be brought in Arizona pursuant to Rule 23 of the Arizona Rules of Civil Procedure. The prerequisites for a class action are that: (1) the class is so numerous that a

joinder of all members is impractical; (2) there are questions of law or fact common to the class; (3) the claim or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. A.R.C.P. 23(a).

An action may be maintained as a class action if the threshold prerequisites of subdivision (a) are satisfied, and in addition:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct to the party opposing the class, or (B) adjudication with respect to individual members of the class would, as a practical matter, be dispositive of interests of the other members not parties, or would substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. A.R.C.P. 23(b).

The party seeking certification of a class bears the burden of showing that all of the prerequisites are satisfied and that the case is appropriate for class certification. *Markiewicz v. Salt River Valley Water Users Ass'n,* 118 Ariz. 329, 576 P.2d 517 (App. 1978); *Carpinteiro v. Tucson School Dist. Number 1 of Pima County,* 18 Ariz. App. 283, 501 P.2d 459 (1972).

Arizona's Consumer Fraud Act, A.R.S. § 44-1521, *et seq.,* prohibits conduct which consists of a deceptive act, false promise, misrepresentation, concealment, suppression or omission of a

material fact in connection with a sale; the hearer must actually rely on the advertisement or deceptive act; the only intent requirement is the intent to do the act, no intent to deceive need be proven. *Parks v. Macro-Dynamics, Inc.,* 121 Ariz. 517, 591 P.2d 1005 (App. 1979); *Peery v. Hansen,* 120 Ariz. 266, 585 P.2d 574 (App. 1978); *State, ex rel. Babbitt v. Goodyear Tire & Rubber Co.,* 128 Ariz. 483, 626 P.2d 1115 (App. 1981); Siler v. Arizona Department of Real Estate, 193 Ariz. 374, 972 P.2d 1010 (App. 1998), review denied, 1999. The reliance must be actual, but need not be reasonable. *Id.*

VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

A. Discoverability of Claims Files Generally

The portion of the claim file leading to the denial of a claim for lack of coverage may be considered in anticipation of litigation and therefore protected from discovery by the work product doctrine, as long as the contract issue of coverage remains unresolved. *Brown v. Superior Court in and for Maricopa County,* 137 Ariz. 327, 670 P.2d 725 (1983). If the coverage claim has been resolved, the claim file leading to the denial for lack of coverage in a bad faith suit becomes relevant and discoverable. *Id.*

Claim files for other insureds may be discoverable if relevant to show a pattern of misconduct. *Hawkins v. Allstate,* 152 Ariz. 490, 733 P.2d 1073 (1987). However, insurers may object on the grounds that such discovery is unduly broad and burdensome, and production is restricted by applicable privacy laws. *State Farm Mut. Auto. Ins. Co. v. Superior Court,* 167 Ariz. 135, 804 P.2d 1323 (App. 1991); *Tritschler v. Allstate Insurance Co.,* 213 Ariz. 505, 144 P.3d 519 (App. 2006).

B. Discoverability of Reserves

Arizona has no appellate opinion that has addressed whether reserves are discoverable.

C. Discoverability of Existence of Reinsurance and Communications with Reinsurers

Arizona has no appellate opinion addressing the discoverability of reinsurance or communications with reinsurers.

D. Attorney/Client Communications

The attorney hired by the insurer to represent the insured to defend litigation owes an undeviating and single allegiance to the insured. *Parsons v. Continental National American Group,* 113 Ariz. 223, 550 P.2d 94 (1976); *Paradigm Ins. Co. v. Langerman Law Offices,* 200 Ariz. 146, 24 P.3d 593 (2000). Therefore, an agency relationship between the assigned attorney and the insurer does not exist. *Barmat v. Jane and John Doe Partners, A-D,* 155 Ariz. 519, 747 P.2d 1218 (1987). Arizona does not allow confidential or privileged communications made by the

insured to the defense attorney to be used as a basis for later denying coverage. *Parsons v. Continental National American Group,* 113 Ariz. 223, 550 P.2d 94 (1976).

In a bad faith action, an insurer waives its attorney/client privilege if it asserts the advice of counsel defense, or defends on the theory that the insurer's subjective mental state was based on its evaluation of the law, if the facts show that the insurer's evaluation included or was formed in part by advice of legal counsel. *State Farm Mutual Automobile Ins. Co. v. Lee,* 199 Ariz. 52, 13 P.3d 1169 (2000); *Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 213 P.3d 288 (App. 2009). If an insurer merely denies bad faith and defends on an objective basis, without advancing its agent's subjective understanding of the law and merely relies on an expert witness to evaluate the reasonableness of the insurer's conduct under the statutes, case law and policy language, then the insurer does not put counsel's advice to the insurer at issue. *Id.* However, where an insurer makes factual assertions in defense of a claim which incorporates, expressly or implicitly, the advice or judgment of counsel, it cannot deny an opposing party an opportunity to uncover the foundation of those assertions in order to contradict them. *Id.*

An insurer who owes the legally imposed duty of good faith to its insured cannot escape its liability for a breach of that duty by delegating it to another, such as an attorney. *Walter v. Simmons*, 169 Ariz. 229, 818 P.2d 214 (App. 1991); Mendoza v. McDonald's Corp., 222 Ariz. 139, 213 P.3d 288 (App. 2009). Because a lawyer is the agent of the insurer, the lawyer's conduct is imputed to the insurer and can be the basis for a finding of bad faith or punitive damages liability. *Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 213 P.3d 288 (App. 2009).

VII. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

A.R.S. § 20-1109 provides that all statements and descriptions in any insurance application or negotiations on behalf of the insured are deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements will not prevent a recovery under a policy unless: (1) it is fraudulent; (2) material either to the acceptance of the risk, or the hazard assumed by the insurer; and (3) the insurer in good faith would either have not issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the truth facts had been known to the insurer as required by the application for the policy or otherwise.

The insurer has the burden of proof of all three conditions of § 20-1109. *State Comp. Fund v. Mar Pac Helicopter Corp.,* 156 Ariz. 348, 752 P.2d 1 (App. 1987). As to the first element, the insurer has the burden and must prove the insured committed actual or legal fraud. *Equitable Life Assurance Soc'y of the United States v. Anderson,* 151 Ariz. 355, 727 P.2d 1066 (App. 1986). Actual fraud requires intent to deceive. *Id.* If the question in the application solicits information that could be characterized as an opinion, then the insurer must prove actual fraud. *Id.*

Legal fraud exists if the question asked in the insurance application is one where the facts are presumably within the personal knowledge of the insured, and are such that the insurer would naturally have contemplated that his answers represented the actual facts. *Ill. Bankers' Life Ass'n v. Theodore,* 44 Ariz. 160, 34 P.2d 423 (1934); *Valley Farms v. Intercontinental Ins. Co.,* 206 Ariz. 349, 78 P.3d 1070 (App. 2003). Under these circumstances, if the representation is false, the insured is guilty of legal fraud even though the insured may not have intended to deceive the insurer. *Id.*

Generally, the insured is under a duty to examine answers on an application to determine if they are accurate and complete. *Stewart v. Mutual of Omaha Ins. Co.,* 169 Ariz. 99, 817 P.2d 44 (App. 1991). However, the knowledge of an insurance agent as a matter of law is imputed to the insurance company whether or not the information is actually communicated to the insurance company by its agent. *Id.; Golden Rule Ins. Co. v. Montgomery,* 435 F.Supp.2d 980 (D.Ariz. 2006). Although an insured is under a duty to examine the answers in an application to determine if they are accurate and complete, an insurer cannot rely on incorrectly recorded answers known to the insured if the incorrect answers were entered pursuant to an agent's advice, suggestion or interpretation. *Id.* The insurance company must show that representations in the applications were those of the insured, and not the mistakes of its own insurance agent. *Id.* However, a prospective insured has a continuing duty to update the insurer about any changes materially affecting the risk to the insurer and about which the insurer has previously inquired that become known to the prospective insured between the time the application for insurance is completed and submitted and the time the insurance policy is issued, even though the insurer does not request an updated historical record. *Valley Farms v. Intercontinental Ins. Co.,* 206 Ariz. 349, 78 P.3d 1070 (App. 2003).

B. Failure to Comply with Conditions

An insurer may assert defenses based upon a breach by the insured of a condition of the policy which operates as a forfeiture of triggered coverage, such as the cooperation clause or late notice, only if the insurer can prove that it was prejudiced thereby. *Lindus v. Northern Ins. Co. of New York,* 103 Ariz. 160, 438 P.2d 311 (1968); *Holt v. Utica Mut. Ins. Co.,* 157 Ariz. 477, 759 P.2d 623 (1988). Arizona follows the "notice-prejudice" rule with respect to late notice of claims under occurrence type liability policies requiring the insurer to show actual prejudice resulting from untimely notice. *Id.* The "notice-prejudice" rule does not apply to late reporting of claims submitted under claims-made-and-reported policies. *Sletten v. St. Paul Fire & Marine Ins.,* 161 Ariz. 595, 780 P.2d 428 (App. 1989); *Thoracic Cardio. Assoc. v. St. Paul Fire & Marine Ins.,* 181 Ariz. 449, 891 P.2d 916 (App. 1994).

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

The basis of a stipulated judgment is not binding on either the insurer or the insured on coverage issues as long as there is a conflict of interest as to whether the judgment would be

based on a covered or non-covered claim. *Farmers Ins. Co. of Arizona v. Vagnozzi,* 138 Ariz. 443, 675 P.2d 703 (1983). Even if an insurer does not provide a defense, it may challenge a stipulated judgment on fraud or collusion. *Damron v. Sledge,* 105 Ariz. 151, 460 P.2d 997 (S. Ct. 1969); *U.S.A.A. v. Morris,* 154 Ariz. 113, 741 P.2d 246 (1987). As long as the insurer provides a defense, a stipulated judgment is only binding to the extent that the insured or plaintiff proves that the judgment is reasonable. *U.S.A.A. v. Morris,* 154 Ariz. 113, 741 P.2d 246 (1987) (see discussion in § II.A.2).

D. Preexisting Illness or Disease Clauses

Arizona has no reported decisions in the accident, health and life insurance field construing pre-existing condition clauses. A limitation is set forth in A.R.S. § 20-1135, which states:

> An insurance contract offered by an insurer pursuant to this chapter shall not exclude coverage of a condition if the insured person has previously had tests for the condition and the condition was not found to exist. There must be evidence that a condition actually existed before the insurance contract was entered into in order to exclude coverage of the condition.

A.R.S. § 20-2310(B) allows for the exclusion of pre-existing conditions from coverage in a health benefits plan for a period of not more than twelve (12) months or, in the case of a late enrollee, eighteen (18) months. This permitted exclusion does not apply to persons who satisfy the portability requirements of § 20-2308. The health plan is also required to reduce the period of a pre-existing condition exclusion by the aggregate of the periods of creditable coverage applied to the individual.

Under the Affordable Care Act, people with pre-existing conditions may not be denied access to their parents' health plan and insurance companies will no longer be allowed to insure a child, but exclude treatments for that child's pre-existing condition. Insurance companies no longer have the ability to deny or limit coverage or charge higher premiums to anyone because of pre-existing conditions. Although still subject to ongoing litigation, the Affordable Care Act may supersede Arizona statutes dealing with pre-existing illnesses. 42 U.S.C.A. § 18001, *et seq.* In 2018, the Trump administration allowed insurance companies to offer Americans cheaper, less-comprehensive policies called Association Health Plans (AHPs) that last only up to a year. Since AHPs are short-term, companies can charge higher premiums or deny coverage based on medical history and pre-existing conditions, which Obamacare made illegal for long-term plans.

E. Statutes of Limitations and Repose

Arizona has a six-year statute of limitations for breach of a written contract after the action accrues. A.R.S. § 12-548. An action for common law fraud is three years from the date of accrual. A.R.S. § 12-543. A claim for consumer fraud has a one-year statute of limitations from

the date of accrual. A.R.S. § 12-541. Arizona also recognizes the discovery rule which will toll the statute of limitations until the injured party either knows or with reasonable investigation should have known of the cause of action. *Gust, Rosenfeld & Henderson v. Prudential Insurance Company of America,* 182 Ariz. 586, 898 P.2d 964 (1995).

The statute of limitations for a bad faith claim against an insurer is two years from the date of accrual. A.R.S. § 12-542. *Taylor v. State Farm Mut. Auto. Ins. Co.,* 185 Ariz. 174, 913 P.2d 1092 (1996); *Ness v. Western Sec. Life Ins. Co.,* 174 Ariz. 497, 851 P.2d 122 (App. 1992). For a first-party bad faith claim, the cause of action accrues, and the limitations period begins to run, when the insurer finally denies the claim. *Id.* For a third-party bad faith claim arising out of the failure to settle, the two-year statute of limitations accrues, and when the underlying judgment against the insured becomes final or non-appealable. *Taylor, supra*.

VIII. TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

A. Trigger of Coverage

With respect to occurrence type liability coverage, coverage is triggered when the negligent act ("accident") results in property damage or bodily injury during the policy period. *University Mech. Contractors v. Puritan Ins.,* 150 Ariz. 299, 723 P.2d 648 (1986); *Outdoor World v. Continental Cas. Co.,* 122 Ariz. 292, 594 P.2d 546 (App. 1979); *Associated Aviation Underwriters v. Wood,* 209 Ariz. 137, 98 P.3d 572 (App. 2004). For claims-made-and-reported policies, coverage is triggered when the claim is first made and reported to the insurer during the policy period. *Sletten v. St. Paul Fire & Marine Ins.,* 161 Ariz. 595, 780 P.2d 428 (App. 1989); *Thoracic Cardio. Assoc. v. St. Paul Fire & Marine Ins.,* 181 Ariz. 449, 891 P.2d 916 (App. 1994).

B. Allocation Among Insurers

Arizona allocates loss among insurers by giving effect to the "other insurance" clauses in the policies if the clauses are consistent and not in conflict. *State Farm Mut. Auto. Ins. Co. v. Bogart,* 149 Ariz. 145, 717 P.2d 449 (1986). Arizona will find that the "other insurance" clauses are mutually repugnant if the only method of construing which insurer is primary depends upon which policy is read first. *Id.* If the "other insurance" clauses are mutually repugnant, the insurers' share of the loss is determined by the proportion that each insurer's policy limits bears to the aggregate of available policy limits. *Id.*; *Fremont Indem. Co. v. New England Reinsurance Co.,* 168 Ariz. 476, 815 P.2d 403 (1991). The losses are prorated only after all required deductibles have been exhausted. *Fremont Indem. Co. v. New England Reinsurance Co.,* 168 Ariz. 476, 815 P.2d 403 (1991). Also, pure excess or umbrella policies are not allocated a share of the loss until all applicable primary insurance coverage is exhausted. *American Family Mut. Ins. Co. v. Continental Cas. Co.,* 200 Ariz. 119, 23 P.3d 664 (App. 2001); *United Services Auto. Assn. v. Empire Fire & Marine Ins. Co.,* 134 Ariz. 64, 653 P.2d 712 (App. 1982).

IX. CONTRIBUTION ACTIONS

A. Claim in Equity vs. Statutory

The doctrine of equitable contribution is based on "the equitable principle that where two companies insure the same risk and one is compelled to pay the loss, it is entitled to contribution from the other." *Indus. Indem. Co. v. Beeson*, 132 Ariz. 503, 506, 647 P.2d 634, 637 (App.1982) (internal quotation marks omitted); *see also Nat'l Indem. Co. v. St. Paul Ins. Cos.*, 150 Ariz. 458, 459, 724 P.2d 544, 545 (1986) (holding that an insurer must contribute to the defense costs borne by another insurer in defending their mutual insured); *see generally Home Indem. Co. v. Mead Reinsurance Corp.*, 166 Ariz. 59, 62, 800 P.2d 46, 49 (App.1990) ("Each insurer with a duty to defend, therefore, had to contribute to the indemnification of the insured."); *accord Ocean Accident & Guarantee Corp. v. U.S. Fld. & Guar. Co.*, 63 Ariz. 352, 357, 162 P.2d 609, 612 (1945).

There is no statutory right to contribution for property casualty claims, instead, contribution among insurers is dictated by the equitable contributions discussed *infra*.

B. Elements

In order for an insurer to be entitled to equitable contribution, Arizona courts apply a four-part test. An insurer will be required to contribute to another insurer's claim payment if the policies cover "(1) the same parties, (2) in the same interest, (3) in the same property, [and] (4) against the same casualty." *Granite State Ins. Co. v. Emp'rs Mut. Ins. Co.*, 125 Ariz. 275, 278, 609 P.2d 90, 93 (App.1980); *cf. W. Agric. Ins. Co. v. Indus. Indem. Ins. Co.*, 172 Ariz. 592, 594, 838 P.2d 1353, 1355 (App.1992) (holding that the lessee's insurer was not entitled to contribution from the lessor's insurer because the policies did not cover the same parties); *see generally* 15 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 218:3 (3d ed. 2011) (the policies must insure the same entities, the same interests in the same property, and the same risks).

X. DUTY TO SETTLE

Arizona recognizes the implied duty of insurer to treat settlement proposals with equal consideration to its interests and those of the insured. *Ariz. Prop. & Cas. Ins. Guar. Fund v. Helme,* 153 Ariz. 129, 735 P.2d 451 (1987); *Safeway Ins. Co., Inc. v. Guerrero,* 210 Ariz. 5, 106 P.3d 1020 (2005); *McReynolds v. American Commerce Ins. Co.*, 225 Ariz. 125, 235 P.3d 278 (App. 2010). In cases where there is a high potential of claimant recovery and a high potential of damages exceeding policy limits, the insurer's obligation to give equal consideration to the interests of an insured may require that the insurer offer policy limits to settle before receiving a demand within policy limits from the claimant. *Fulton v. Woodford,* 26 Ariz. App. 17, 545 P.2d 979 (1976). An insurer's reservation of rights does not excuse it from its contractual duty to consider settlement offers in good faith. *Parking Concepts, Inc. v. Tenney,* 207 Ariz. 19, 83 P.3d 19 (2004). If an insurer defends unconditionally but breaches the duty to settle in good faith, the cooperation clause is narrowed and the insured may unilaterally settle the claim the same as if

the insurer had issued a reservation of rights. *State Farm Mut. Auto. Ins. Co. v. Peaton,* 168 Ariz. 184, 821 P.2d 1002 (App. 1990).

XI. LH&D BENEFICIARY ISSUES

A. Change of Beneficiary

Typically, Arizona follows the general rule that the owner of a policy can change his beneficiary at will, but ordinarily he is required to make the change in the manner required by the insurance contract. *McLennan v. McLennan*, 29 Ariz. 191, 240 P. 339 (1925). In stating this rule, the Arizona court in *McClennan,* discussed three exceptions:

> (1) if the society has waived a strict compliance with its own rules, or in pursuance of a request of the insured to change his beneficiary has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued; (2) if it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been regularly made, and (3) if the insured has pursued the course pointed out by the laws of the association, has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued.

Id. at 196.

In recognizing one of the exceptions enumerated in *McClennan,* the Arizona Supreme Court held that policy provisions establishing the procedure for making a change of beneficiary are for the benefit of the insurer, and may not be questioned by a beneficiary if the insurer does not demand compliance. *Doss v. Kalas*, 94 Ariz. 247, 383 P.2d 169 (1963).

B. Effect of Divorce on Beneficiary Designation

A.R.S. § 14-2804 provides that a "divorce" automatically rescinds any pre-dissolution revocable disposition or appointment of property made by a divorced person to that person's former spouse. As recognized in *Matter of Estate of Dobert*, 192 Ariz. 248, 963 P.2d 327 (Ct. App. 1998), such statutes rest on the belief that, after a divorce, neither spouse will usually wish to leave any part of his or her estate to the other:

> The statutes anticipate that, upon undergoing a fundamental change in family composition such as ... divorce ... [the insured] would most likely intend to provide for their new family members,

> and/or revoke prior provisions made for their ex-spouses. The statutes also anticipate that [the insured] will often fail to so provide and revoke, not out of conscious intent, but simply from a lack of attentiveness. By automatically revoking prior beneficiary-designations upon a change in family composition, and by substituting statutory beneficiaries in their place [the statutes] are designed to protect [the insured] from such inattentiveness.

192 Ariz. at 254, ¶ 24, 963 P.2d at 333 *(quoting Coughlin v. Bd. of Admin.*, 152 Cal.App.3d 70, 199 Cal.Rptr. 286, 287–88 (1984)). Revocation is automatic upon divorce "[e]xcept as provided by the express terms of a governing instrument, a court order or a contract relating to the division of the marital estate made by the divorced couple before or after ... divorce...." A.R.S. § 14–2804(A). Thus, if a former spouse intends to keep the other as an intended beneficiary, the spouse must re-designate beneficiary status in writing. *In re Estate of Lamparella*, 210 Ariz. 246, 250, 109 P.3d 959, 963 (Ct. App. 2005).

XII. INTERPLEADER ACTIONS

A. Availability of Fee Recovery

Most federal courts hold that a disinterested stakeholder is entitled to its attorney's fees associated with initiating the interpleader action. *See Michelman v. Lincoln Nat. Life Ins. Co.*, 685 F.3d 887, 898, 82 Fed. R. Serv. 3d 1326 (9th Cir. 2012); *but see First Trust Corp. v. Bryant*, 410 F.3d 842, 856, 2005 FED App. 0254P (6th Cir. 2005) (questioning legitimacy of traditional rule authorizing fees from the stake). Two categories where an interpleading party is not usually allowed attorney fees are: (1) where the party acts in bad faith; and/or (2) where the party is not disinterested, but benefits, beyond resolution of the issue, from the litigation. 28 U.S.C.A. § 1335. *Sun Life Assur. Co. of Canada v. Sampson*, 556 F.3d 6 (1st Cir. 2009). The trial court has discretion as to whether to award fees and the amount to be awarded. *Trustees of Directors Guild of America-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 426, (9th Cir. 2000), opinion amended on denial of reh'g, 255 F.3d 661 (9th Cir. 2000). Courts expect that attorney's fees in this context should be low because the truly disinterested interpleader plaintiff's role should be limited to filing the complaint, depositing the stake, and then seeking discharge from the suit. *See Trustees of Directors Guild of America-Producer Pension Benefits Plans v. Tise, supra*. Any attorney's fee award generally should be limited to efforts associated with the interpleader itself, and should not include fees incurred because of collateral matters such as dealing with collateral claims or defending against counterclaims. *See Sun Life Assur. Co. of Canada v. Sampson*, 556 F.3d 6, 8 (1st Cir. 2009), cert. denied, 2009 WL 2955862 (U.S. 2009) (noting that fees generally not awarded where the interpleading party benefits from the litigation beyond resolving the claims to the stake); *Sun Life Assur. Co. of Canada v. Bew,* 530 F. Supp. 2d 773, 776 (E.D. Va. 2007); *Sun Life Assur. Co. of Canada v. Grose*, 466 F. Supp. 2d 714, 717 (W.D. Va. 2006).

The cases typically assume (though sometimes specify) that the stakeholder's fees will be paid out of the stake. *See, e.g., Trustees of Directors Guild of America-Producer Pension Benefits Plans v. Tise*, 234 F.3d at 427, ("[B]ecause the attorneys' fees are paid from the interpleaded fund itself, there is an important policy interest in seeing that the fee award does not deplete the fund at the expense of the party who is ultimately deemed entitled to it."). Because the stake is thereby depleted, ultimately the stakeholder's fees are borne by the claiming party that prevails on the merits. For this reason, some courts have stated that the court may choose to tax the stakeholder's fees directly against a losing claimant. *See Schirmer Stevedoring Co., Ltd. v. Seaboard Stevedoring Corp.*, 306 F.2d 188, 195 (9th Cir. 1962). In some circumstances, federal law may preclude taxing fees out of the stake. *See Premier Trust, Inc. v. Duvall*, 559 F. Supp. 2d 1109, 1117 (D. Nev. 2008) (until federal tax lien is satisfied or becomes unenforceable, court may not award stakeholder fees if they would diminish the fund available to satisfy the lien); *Island Title Corp. v. Bundy*, 488 F. Supp. 2d 1084, 1094 (D. Haw. 2007) (court could not award stakeholder fees out of funds allocated to satisfy federal tax lien).

In Arizona, a party may recover attorneys' fees in a contested action arising from contract pursuant to A.R.S. § 12-341.01. This statute may provide for the recovery of attorneys' fees from an interpleader action.

B. Differences in State vs. Federal

In Arizona, the procedure for interpleader practice is governed by Rule 22 of the Arizona Rules of Civil Procedure. Ariz. R. Civ. P. 22. The Federal Rule has no counterpart to Rule 22(b), Ariz. R. Civ. P., which allows the party instituting the interpleader to secure a discharge from liability, with Court approval, upon depositing with the Court the property or amounts as to which there are competing claims. *But cf.*, 28 U.S.C.A. §§ 1335, 2361. A complaint for interpleader is set out in Official Federal Form 18. *See* Appendix of Forms to Federal Rules of Civil Procedure.