

## DISTRICT OF COLUMBIA

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### I. REGULATORY LIMITS ON CLAIMS HANDLING

#### A. Timing for Responses and Determinations

State Statutes Governing Timeliness or  
Acknowledgement of Claim and for Determination of  
Acceptance or Denial of Coverage

The District of Columbia Code dictates that no person shall commit or perform with such frequency as to indicate a general business practice any of the following: (1) knowingly misrepresent pertinent facts or insurance policy provisions relating to the claim at issue; (2) refuse to pay a claim for a reason that is arbitrary or capricious based on all available information; (3) attempt to settle a claim on the basis of an application which is altered without notice to, or the knowledge or consent of, the insured; (4) fail to include with a claim paid to an insured or beneficiary a statement setting forth the coverage under which payment is being made;; (5) fail to settle a claim promptly whenever liability is reasonably clear under one portion of a policy in order to influence settlements under other portions of the policy; or ; (6) fail promptly upon request to provide a reasonable explanation of the basis for a denial of a claim. See D.C. Code § 31-2231.17(a).

Moreover, the District of Columbia Code mandates that no person shall commit or perform with such frequency as to indicate a general business practice any of the following: (1) knowingly misrepresent pertinent facts or insurance policy provisions relating to coverage at issue; (2) fail to acknowledge and act reasonably promptly upon communication with respect to claims arising under insurance policies; (3) fail to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies; (4) refuse to pay claims without conducting a reasonable investigation; (5) fail to affirm or deny coverage of claims *within a reasonable time* after proof of loss statements have been completed or after having completed its investigation related to the claims; (6) not attempt in good faith to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear; (7) compel insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in actions brought by the insureds or beneficiaries; (8) attempt to settle a claim for less than the amount to which a reasonable person would believe the insured or beneficiary was entitled by reference to written or printed advertising material accompanying or made part of an application or policy; (9) attempt to settle claims on the basis of an application which was materially altered without notice to or knowledge or consent of the insured; (10) make claims payments to an insured or beneficiary without indicating the coverage under which each payment is being made; (11) make

known to insureds or claimants of a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises of less than the amount awarded in arbitration; (12) unreasonably delay the investigation or payment of claims by requiring both a formal proof of loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof of loss form; (13) fail, in the case of claims denials or offers of compromise settlement, to promptly provide a reasonable and accurate explanation of the basis for such action; or (14) make false or fraudulent statements or representations on, or relative to an application for, a policy, for the purpose of obtaining a fee, commission, money, or other benefit from a provider or individual person. See D.C. Code § 31-2231.17(b) (emphasis added).

One can find more specific guidelines laid out in the District of Columbia Municipal Regulations. See, e.g., D.C. Mun. Regs. tit. 26, § 100.

Written notice of a claim must be given to the insurer within 20 days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible. D.C. Code § 31-4712(c)(1)(E). Additionally, the insurer, upon receiving a notice of claim, must furnish to the claimant relevant forms for filing proofs of loss. If such forms are not furnished within 15 days after giving such notice, the claimant will be deemed to have complied with the requirements of the policy as to proof of loss upon submitting, within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, the character and the extent of the loss for which claim is made. D.C. Code § 31-4712(c)(1)(F).

Written proof of loss must be furnished to the insurer at its said office in claims for loss within 90 days after the termination of the period for which the insurer is liable, and for any other loss within 90 days after the date of such loss. Failure to furnish such proof within the time required will not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than 1 year from the time proof is otherwise required. D.C. Code § 31-4712(c)(1)(G).

With respect to the timing for the payment of claims, the District of Columbia requires the following provision in sickness or accidental death insurance policies:

“TIME OF PAYMENT OF CLAIMS: Indemnities payable under this policy for any loss other than loss for which this policy provides any periodic payment will be paid immediately upon receipt of due written proof of such loss. Subject to due written proof of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid ..... (insert period for payment which must not be less frequently than monthly) and any balance remaining unpaid upon the termination of liability will be paid immediately upon receipt of due written proof.”

D.C. Code § 31-4712(c)(1)(H).

**B. Standards for Determination and Settlements**  
State Statutory Guidelines for Insurance Policies

The District of Columbia Code defines unfair claim settlement practices. See D.C. Code § 31-2231.17. However, the Code also notes that this chapter permits only administrative remedies for violations therein, not private causes of action. See D.C. Code § 31-2231.02.

Under District of Columbia law, an insurer may not:

- (1) Knowingly misrepresent pertinent facts or insurance policy provisions relating to the claim at issue;
- (2) Refuse to pay a claim for a reason that is arbitrary or capricious based on all available information;
- (3) Attempt to settle a claim on the basis of an application which is altered without notice to, or the knowledge or consent of, the insured;
- (4) Fail to include with a claim paid to an insured or beneficiary a statement setting forth the coverage under which payment is being made;
- (5) Fail to settle a claim promptly whenever liability is reasonably clear under one portion of a policy in order to influence settlements under other portions of the policy; or
- (6) Fail promptly upon request to provide a reasonable explanation of the basis for a denial of a claim.

D.C. Code § 31-2231.17.

Additionally, an insurer must adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies. Attempting to settle a claim for less than the amount to which a reasonable person would believe the insured or beneficiary was entitled by reference to written or printed advertising material accompanying or made part of an application or policy; or, attempting to settle claims on the basis of an application which was materially altered without notice to or knowledge or consent of the insured, is prohibited by District of Columbia law. D.C. Code § 31-2231.17.

**II. PRINCIPLES OF CONTRACT INTERPRETATION**

Fundamentally, when interpreting a contract, ‘the court should look to the intent of the parties entering into the agreement.’ *Intercounty Constr. Corp. v. District of Columbia*, 443 A.2d 29, 32 (D.C. 1982) (citation omitted). The question of intent is resolved by an objective inquiry,

and “[t]he first step” is therefore to determine “what a reasonable person in the position of the parties would have thought the disputed language meant.” *Id.* Contractual provisions are interpreted taking into account the contract as a whole, so as to give effect, if possible, to all of the provisions in the contract. *See Akassy v. William Penn Apts., Ltd. P’ship*, 891 A.2d 291, 303 (D.C. 2006) (noting that District of Columbia courts “construe the contract as a whole, giving effect to each of its provisions, where possible”).

Additionally, “[e]xtrinsic evidence of the parties’ subjective intent may be resorted to only if the [contract] is ambiguous.” *Sacks v. Rothberg*, 569 A.2d 150, 205–06 (D.C. 1990). However, “[t]he endeavor to ascertain what a reasonable person in the position of the parties would have thought the words of a contract meant applies whether the language is ambiguous or not.” *Sagalyn v. Foundation for Pres. of Historic Georgetown*, 691 A.2d 107, 112 n.8 (D.C. 1997). In this context, a reasonable person is: (1) presumed to know all the circumstances surrounding the contract’s making; and (2) bound by usages of the terms which either party knows or has reason to know. *See Intercounty Constr. Corp.*, 443 A.2d at 32. “[T]he reasonable person standard is applied both to the circumstances surrounding the contract and the course of conduct of the parties under the contract.” *Id.* If an ambiguity in the contract raises a factual issue, it must be resolved by a fact finder. *See Rastall v. CSX Transp., Inc.*, 697 A.2d 46, 51 (D.C. 1997).

### III. CHOICE OF LAW

Generally, in determining choice of law, the District of Columbia employs a governmental interest analysis. *District of Columbia v. Coleman*, 667 A.2d 811, 816 (D.C. 1995). Under this analysis, District of Columbia courts first look at each jurisdiction’s policy to see what interests the policy is meant to protect, and then consider which jurisdiction’s policy would be most advanced by applying the law of that jurisdiction. Part of the test of determining the jurisdiction whose policy would be most advanced is determining which jurisdiction has the most significant relationship to the dispute. *Id.*; *see also Hercules & Co. v. Shama Restaurant Corp.*, 566 A.2d 31, 41 n.18 (D.C. 1989); *Vaughan v. Nationwide Mut. Ins. Co.*, 702 A.2d 198 (D.C. 1997).

The courts review choice of law questions on a *de novo* basis. *Vaughan*, 702 A.2d at 200 (D.C. 1997) (citing *Hercules & Co. v. Shama Rest. Corp.*, 566 A.2d 31, 40 (D.C. 1989)); *Atkins v. Industrial Telecomms. Ass’n*, 660 A.2d 885, 888 (D.C. 1995). Under a choice of law analysis, the Court of Appeals for the District of Columbia Court has applied another state’s law when (1) its interest in the litigation is substantial, and (2) “application of District of Columbia law would frustrate the clearly articulated public policy of that state.” *Kaiser-Georgetown Cmty. v. Stutsman*, 491 A.2d 502, 509 (D.C. 1985). In tort cases, District of Columbia courts use a “governmental interests” analysis to determine whether to apply District of Columbia law. *Id.* (citing *Williams v. Williams*, 390 A.2d 4, 5 (D.C. 1978) (other citations omitted)). Under this analysis, “[w]hen the policy of one state would be advanced by application of its law, and that of another state would not be advanced by application of its law, a false conflict appears and the

law of the interested state prevails.” *Id.* (quoting *Biscoe v. Arlington County*, 738 F.2d 1352, 1360 (D.C. Cir. 1984)).

A true conflict arises when both states have an interest in applying their own laws to the facts of the case, in which case the law of the forum “will be applied unless the foreign state has a greater interest in the controversy.” *Id.* (citing *Biscoe*, 738 F.2d at 1360) (other citations omitted); *see also Barimany v. Urban Pace LLC*, 73 A.3d 964, 967 (D.C. 2013). In order to facilitate the governmental interests analysis, District of Columbia courts consider four factors, enumerated in the RESTATEMENT (SECOND) CONFLICT OF LAWS (1971) § 145, Comment d.:

- a) the place where the injury occurred;
- b) the place where the conduct causing the injury occurred;
- c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
- d) the place where the relationship is centered.

*District of Columbia v. Coleman*, 667 A.2d 811, 816 (D.C. 1995) (citing *Hercules & Co.*, 566 A.2d 31, 40-41 (D.C. 1989)).

#### IV. DUTIES IMPOSED BY STATE LAW

##### A. Duty to Defend

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

In determining whether a **duty to defend** exists, it is appropriate to examine the complaint for all plausible claims encompassed within the complaint and to ascertain whether allegations of the complaint state a cause of action within policy coverage and give fair notice to the insurer that the insured is being sued upon an occurrence which gives rise to a **duty to defend** under the terms of the policy. *American Continental Ins. Co. v. Pooya*, 666 A.2d 1193, 1197 (D.C. 1995). To be sure, however, the obligation to defend “is not affected by facts ascertained before suit or developed in the process of litigation or by the ultimate outcome of the suit.” *Id.* at 1198; *see also Fogg v. Fid. Nat'l Title Ins. Co.*, 89 A.3d 510, 514-515 (D.C. 2014). Rather, if the allegations of the complaint state a cause of action within the coverage of the policy, the insurance company must honor its duty to defend. *Id.* at 1198. If it is possible that the allegations of a complaint would bring it within coverage of the policy, the insurer is obligated to defend, even if it ultimately is not required to pay a judgment. *Sherman v. Ambassador Ins. Co.*, 670 F.2d 251, 259 (D.D.C. 1981).

##### 2. Issues with Reserving Rights

In *Green Leaves Restaurant, Inc. v. 617 H Street Associates*, the Court of Appeals of the District of Columbia specifically addressed issues concerning the reservation of rights. The court

stated that it follows the traditional common law rule that a creditor may preserve its rights against the guarantors “by the simple expedient of reserving those rights expressly in its release of the principal debtor.” 974 A.2d 222, 234 (D.C. 2009). Under this “so-called ‘reservation of rights’ doctrine, two consequences followed from the mere act of informing the principal obligor that the obligee was reserving rights against the secondary obligor in conjunction with conduct that would otherwise impair the secondary obligor’s recourse. First, by reserving rights against the secondary obligor, the obligee preserved all rights of the secondary obligor as though the conduct had never occurred. Second, by reserving rights against the secondary obligor, the obligee prevented discharge of the secondary obligor based on the conduct of the obligee because, according to the doctrine, the preservation of the secondary obligor’s rights as though the conduct had not occurred resulted in that conduct causing the secondary obligor no harm.” Id.

The court acknowledged criticism of the traditional “reservation of rights” doctrine, on the ground that an unsophisticated debtor would be unlikely to realize that a creditor’s mere “incantation of a ‘reservation of rights’” in a release preserves the debtor’s liability to its secondary obligors. Id.; see also *Corto v. National Scenery Studios, Inc.*, 705 A.2d 615, 624 (D.C. 1997) (settlement which “expressly reserved ... rights to file claims against [third party]” necessarily could not act to protect third party from suit); *Knight v. Cheek*, 369 A.2d 601, 603 (D.C. 1977) (“Where the creditor releases a principal, the surety is discharged, unless (a) the surety consents to remain liable notwithstanding the release, or (b) the creditor in the release reserves his rights against the surety.”)

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

### **1. Criminal Sanctions**

In addition to the Federal Gramm-Leach-Bliley Act, the District of Columbia has enacted the Required Annual Financial Statements and Participation in the NAIC Insurance Regulatory Information System Act of 1993, codified under D.C. Code Ann. §§ 31-1901 *et seq.* This Act is based on model legislation originally drafted by the National Association of Insurance Commissioners. See id., § 31-1901(a). If an insurance company, agent, solicitor, or brokers violates any section of the code, the Commissioner has the authority to enforce administrative penalties. In the case of a violation by a creditor or anyone not licensed in D.C. as an insurance agent, solicitor, broker may face a penalty up to \$1,000 or twelve (12) months of incarceration. D.C. Code Ann. § 31-2502.42.

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

The District of Columbia’s guidance for the standard for compensatory and punitive damage awards comes directly from Supreme Court precedent. The purpose of a compensatory damage award is to “redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct.” *Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 56 (D.C. 2010)

(citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 (2003)). When analyzing compensatory damages, the court must ensure that the award is not “extraordinarily disproportionate to the injuries and losses claimed,” *Modern Mgmt. Co. v. Wilson*, 997A. 2d at 59.

The analyzing court will consider the following when determining whether punitive damages are reasonable:

- a. Whether the court conducted a *meaningful and adequate review* of the jury’s award. The court both at the trial and appellate level to ensure that the award is the product of a process that is entitled to a strong presumption of validity;
- b. The award punishes truly reprehensible conduct;
- c. The punitive damage award has some relation to the harm suffered by the plaintiff and evidences “reasonableness and proportionality,” although there is no “bright-line” ratio, to ensure that the award is not grossly out of proportion to the severity of the offense; and
- d. The award advances a State policy concern such as protection of the public by deterring the defendant or others from doing such wrong in the future.

Id. at 45.

### **3. State Arbitration and Mediation Procedures**

Arbitration proceedings in the District of Columbia are governed by D.C. Code Ann. § 16-4401, *et al.* An arbitrator has the authority to conduct hearings in the manner that the arbitrator deems most appropriate for a fair and expeditious proceeding. The arbitrator has the power to hold conferences with the parties to the arbitration proceeding before the hearing and has discretion to evaluate and determine the admissibility, relevance, materiality, and weight of any evidence. Id. at § 16-4415(a). In order to initiate an arbitration proceeding, an individual must give notice to the other parties to the arbitration agreement by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. Id. at § 16-4415. The notice must describe the nature of the controversy and the requested remedy. Id. Once an award has been made, that arbitrator must make a record of the award and an arbitrator who agrees with the award must authenticate the record and a copy of the award must be sent to each party. Id. at § 16-4419. Once a party receive notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to § 16-4420 or § 16-4424 or is vacated pursuant to § 16-4423. Id. at § 16-4422.

Mediation in the District of Columbia are governed by D.C. Code Ann. § 16-4201 *et al.* Except as otherwise provided in § 16-4205, communication which occurs during a mediation is

privileged and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by § 16-4204.

- a. In a proceeding, the following privileges apply:
  - i. A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
  - ii. A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
  - iii. A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
  - iv. Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

D.C. Code Ann. § 16-4203.

#### **4. State Administrative Entity Rule-Making Authority**

The District of Columbia rule-making authority can be found in West's District of Columbia Regulations (Westlaw). There are three types of rules. (1) Mayor's rule- administrative rules that are issued by the mayor to carry out the duties of the mayor; (2) Agency rules- rules adopted by agencies exercising the authority delegated to the agency by the Council; (3) Emergency rules- these rules are promulgated in narrow instances. The rules are valid for 120 days and are adopted without public notice or pre-publication.

### **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

The District of Columbia does not recognize a cause of action in tort for bad faith breach of an insurance contract. *See Fireman's Fund Ins. Co. v. CTIA*, 480 F. Supp. 2d 7, 9-11 (D.D.C. 2007). While the District of Columbia Court of Appeals "has not squarely addressed the question whether bad faith denial of an insurance claim constitutes an independent tort under D.C. law," *Messina v. Nationwide Mut. Ins. Co.*, 998 F.2d 2, 4 (D.C. Cir. 1993), all federal district courts, with the exception of one, have found that District of Columbia law does not recognize the independent tort of bad faith refusal to pay an insurance claim. *See, e.g., American Nat'l Red*



*Cross v. Travelers Indem. Co.*, 896 F. Supp. 8, 12, n.4 (D.D.C. 1995) (finding that the decision in *Washington v. GEICO*, 769 F. Supp. 383 (D.D.C. 1991), holding that the independent tort of bad faith refusal to provide insurance coverage does not exist under District of Columbia law, is the better approach); *Washington v. GEICO*, 769 F. Supp. 383, 386 (D.D.C. 1991) (granting GEICO's motion for summary judgment and holding that District of Columbia law does not recognize a cause of action for "bad faith refusal to pay an insurance claim."); *Cf. Malacca v. Travelers Indem. Co.*, 421 F. Supp. 2d 137, 140 (D.D.C. 2006) (finding that, under District of Columbia law, an insured could not recover against a fire insurer for breach of good faith and fair dealing absent some evidence that its denial of extended business interruption benefits for fire loss might reasonably be conceived as a tortious act). But see *Washington v. Group Hospitalization, Inc.*, 585 F. Supp. 517 (D.D.C. 1984) (denying defendant's motion for summary judgment on a complaint alleging causes of action for both breach of contract and bad faith refusal to pay insurance claims, instead relying upon *Continental Ins. Co. v. Lynham*, 293 A.2d 481 (D.C. 1972), for the proposition that the District of Columbia recognized the tort of bad faith refusal to pay).

## 2. Third-Party

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

As in first-party bad faith claims, the District of Columbia does not recognize a tort of **bad faith** against **insurance** companies in the handling of third-party policy claims. See *Choharis v. State Farm Fire and Cas. Co.*, 961 A.2d 1080 (D.C. 2008).

## B. Fraud

Elements and Remedies in Cause of Action Against Insurers

In order to recover damages for fraud under District of Columbia law, a plaintiff must prove the following elements:

1. a false representation;
2. in reference to a material fact;
3. made with knowledge of its falsity;
4. with the intent to deceive; and
5. action is taken in reliance upon the representation.

*Pearson v. Soo Chung*, 961 A.2d 1067, 1074 (D.C. 2008); *Morris v. Bovermo Props., Inc.*, 510 F. Supp. 2d 112, 119 (D.D.C. 2007); *Williams v. District of Columbia*, 902 A.2d 91, 94 n.4 (D.C. 2006); *Caulfield v. Stark*, 893 A.2d 970, 974 (D.C. 2006); *Atraqchi v. GUMC Unified Billing Servs.*, 788 A.2d 559, 563 (D.C. 2002). A plaintiff's reliance on any representation must further be reasonable. See *Morris*, 510 F. Supp. at 119. One pleading fraud must allege such facts as will reveal the existence of all the requisite elements of fraud. See *Atraqchi*, 788 A.2d at 563. Moreover, the plaintiff must establish these elements by clear and convincing evidence. See id.

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

Under District of Columbia law, a claim for intentional infliction of emotional distress requires a showing of:

1. extreme and outrageous conduct on the part of the defendant that;
2. either intentionally or recklessly;
3. causes the plaintiff severe emotional distress.

*Armstrong v. Thompson*, 80 A.3d 177, 189 (D.C. 2013); *District of Columbia v. Tulin*, 994 A.2d 788, 800 (D.C. 2010); *Darrow v. Dillingham & Murphy, LLP*, 902 A.2d 135, 139 (D.C. 2006); *Carter v. Hahn*, 821 A.2d 890, 892 (D.C. 2003); *Larijani v. Georgetown Univ.*, 791 A.2d 41, 44 (D.C. 2002). “Liability will not be imposed for mere results, indignities, threats, annoyances, petty oppressions, or other triviality.” *Carter*, 821 A.2d at 892-93 (internal citations omitted); *Manago v. District of Columbia*, 934 A.2d 925, 928 (D.C. 2007) (noting that the “intentional” element is key and must be clearly proven in order to prevail on an emotional distress claim). Rather, the alleged 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.” *Carter*, 821 A. 2d at 893 (internal citations omitted).

Under District of Columbia law, a plaintiff can recover for negligent infliction of emotional distress only if the emotional distress results from a direct physical injury; if the defendant’s negligence placed the plaintiff in a zone of physical danger such that the plaintiff was caused by the defendant’s negligence to fear for his or her own safety; or if the plaintiff can show that (1) the defendant has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, of a nature that necessarily implicates the plaintiff’s emotional well-being, (2) there is an especially likely risk that the defendant’s negligence would cause serious emotional distress to the plaintiff, and (3) negligent actions or omissions of the defendant in breach of that obligation have, in fact, caused serious emotional distress to the plaintiff. *Etoh v. Fannie Mae*, 883 F. Supp. 2d 17, 43 (D.D.C. 2011).

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

State Statutes, Rules or Regulations as a Basis for Cause of Action Against Insurer Including Consumer Protection and Trade Practices

While the Unfair Insurance Trade Practices Act does not create or imply a private cause of action for violations thereunder, civil actions are available under the District of Columbia Consumer Protection Procedures Act (“CPPA”), codified in Chapter 39 of Title 28 of the District of Columbia Code. The CPPA affords a panoply of remedies, including treble damages, punitive damages and attorneys’ fees, to consumers who are victimized by unlawful trade practices. See D.C. Code Ann. § 28-3905(k)(1). “The Consumer Protection Procedures Act is a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which

injure consumers.” *District Cablevision Ltd. Partnership v. Bassin*, 828 A.2d 714, 722-23 (D.C. 2003) (citing *Atwater v. District of Columbia Dep’t of Consumer & Reg. Affairs*, 566 A.2d 462, 465 (D.C. 1989)). Actions under the CPPA may be brought by, or on behalf of, aggrieved consumers who are victimized by unlawful trade practices. *See Ford v. Chartone, Inc.*, 908 A.2d 72, 80-81 (D.C. 2006) (citing D.C. Code Ann. § 28-3905(k)(1)). While the CPPA enumerates a number of specific unlawful trade practices, *see* D.C. Code Ann. § 28-3904, the enumeration is not exclusive. *See Atwater*, 566 A.2d at 465. A main purpose of the CPPA is to “assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices.” D.C. Code Ann. § 28-3901(b)(1). Trade practices that violate other laws, including the common law, also fall within the purview of the CPPA. *See Atwater*, 566 A.2d at 465-66 (citing D.C. Code Ann. § 28-3905(b)). *Accord Osborne v. Capital City Mortgage Corp.*, 727 A.2d 322, 325-26 (D.C. 1999) (stating that “the CPPA’s extensive enforcement mechanisms apply not only to the unlawful trade practices proscribed by § 28-3904, but to all other statutory and common law prohibitions.”). While the CPPA is broad in the conduct it proscribes, even more important perhaps is the array of enforcement mechanisms it contains for the protection of consumers. The CPPA empowers agency investigation and regulation of businesses, *see* §§ 28-3902, 3903; establishes consumer complaint procedures, *see* § 28-3905; and allows for civil actions in Superior Court for multiple damages and fees, *see* § 28-3905(k)(1). While the CPPA does not specifically address a consumer’s burden of proof under the Act’s protections, the District of Columbia Court of Appeals has held that the clear and convincing evidence standard applies to claims of intentional misrepresentation under the CPPA. *See Dorn v. McTigue*, 157 F. Supp. 2d 37, 46 (D.D.C. 2001); *Osbourne v. Capital City Mortgage Corp.*, 727 A.2d 322, 326 (D.C. 1999).

Chapter 22A of Title 31 of the District of Columbia Code addresses unfair trade practices and other prohibited practices. *See* D.C. Code Ann. §§ 31-2231.01 *et seq.* Specifically, § 31-2231.17 contains provisions relating to unfair claim settlement practices.

## VI. DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

### A. Discoverability of Claims Files Generally

There appears to be only one case in the District of Columbia dealing with the discoverability of an insurer’s claim file in an action against an insurer, albeit the case involved an automobile insurer. In *Athridge v. Aetna Cas. and Sur. Co.*, 184 F.R.D. 181 (D.D.C. 1998), the Plaintiff was the assignee of an insured’s breach of fiduciary duty claim against the automobile insurer defendant. To make out its case against the insurer, the Plaintiff demanded access to the insurer’s claim file. The insurer objected on grounds of attorney-client and work product privilege. The Court held that the claims file was not protected by the attorney-client privilege as it was generated by the insurance company’s employees, and contained nothing that was communicated by any of them to any attorney, let alone confidentially and for the purpose of seeking legal advice. *Id.* at 188. In addition, none of the documents in the claim file were prepared for trial in the sense of the work product privilege either. *Id.* at 190. Therefore, the

Court granted the Plaintiff's motion to compel and ordered the production of the insurer's claim file. Id. at 199,

#### **B. Discoverability of Reserves**

Addressing the relevancy of reserve information in a coverage litigation discovery dispute, courts across the country have reached mixed conclusions. In one case, a District of Columbia court held that discovery of reserve information from an insurer in coverage litigation was not relevant, and thus, not discoverable, generally finding that whether a reserve has been set and the amount of such reserve is not relevant to the interpretation of the policies at issue or whether coverage is provided under such policies. See *Indep. Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 283, 288 (D.D.C. 1986) (denying motion to compel production of reserve information because of the "very tenuous relevance, if any relevance at all" of that information). In a later case, though, involving a breach of fiduciary duty claim, the same Court distinguished *Indep. Petrochem. Corp.*, and held that reserve information was relevant and discoverable. See *Athridge v. Aetna Cas. and Sur. Co.*, 184 F.R.D. 181, 192-193 (D.D.C. 1998).

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

Case law is unsettled as to whether discovery of reinsurance communications is relevant in a coverage dispute. Numerous courts throughout the country have recognized that reinsurance documents, including communications with reinsurers, are generally relevant and discoverable. District of Columbia courts, however, have explicitly held that reinsurance communications are not relevant, and not discoverable, in a coverage dispute involving a policyholder and insurer because: (1) a policyholder is not a party to the reinsurance contract; (2) the policyholder does not have any rights under that reinsurance contract; and (3) the insurance policy between the policyholder and insurer may have different terms and conditions. See, e.g., *Potomac Elec. Power Co. v. Cal. Union Ins. Co.*, 136 F.R.D. 1, 3 (D.D.C. 1990) ("[W]e conclude that the correspondence [relating to reinsurance agreements]—if it exists—lacks sufficient indicia of relevance. . . . In addition, the correspondence may well constitute proprietary information or be protected by the attorney-client privilege or the work product doctrine. Therefore, the discovery . . . does not appear 'reasonably calculated to lead to the discovery of admissible evidence.'" ). Yet, D.C. federal courts have found reinsurance *agreements* discoverable under Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure. See *id.* at 2 (reinsurance agreements discoverable under Rule 26).

#### **D. Attorney/Client Communications**

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.

Attorneys representing insurance companies in coverage disputes often face reoccurring issues in determining whether certain communications are privileged. See also *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (“[W]hile the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.”). Even though the work product privilege likely protects information that a policyholder prepares and shares with its insurer for the purposes of defending the underlying claim or claims, insurers and policyholders should consider entering into a confidentiality agreement if only to show that the disclosure of the information was done with a mind toward maintaining secrecy of the documents. See *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984) (finding that a party waives work product unless it insists on a promise of confidentiality before disclosure).

## VII. DEFENSES IN ACTIONS AGAINST INSURERS

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

One who has been induced by misrepresentations to enter into a contract ordinarily may choose between two remedies: he may either rescind the contract and recover what he has parted with or affirm the contract and sue for damages caused by the fraud. See *Dresser v. Sunderland Apartments Tenants Ass’n*, 465 A.2d 835, 840 (D.C. 1983) (holding that the District of Columbia recognizes the doctrine of misrepresentation and the remedy of rescission); see also *Rubewa Prods. Co. v. Watson’s Quality Turkey Prods., Inc.*, 242 A.2d 609, 615 (D.C. 1968). Chapter IIIA of Title 22 of the District of Columbia Code addresses insurance fraud, including penalties. See D.C. Code Ann. §§ 22-3225.01 *et seq.* See also *id.* § 31-2231.19 (prohibiting false or fraudulent statements or representations in insurance applications).

Under District of Columbia law, an insurer alleging such a defense must prove (1) that the insured made a false statement that (2) was material to the insurer’s decision to provide coverage. See *Hood v. Prudential Life Ins. Co.*, 758 F. Supp. 764, 766 (D.C. 1991). A statement is false if it contradicts facts shown to be in existence and known to the insured at the time he or she applied for insurance. See *Skinner v. Aetna Life & Cas.*, 804 F. 2d 148, 151 (D.C. Cir. 1986). The test for materiality of representation in an insurance application is whether the representation would reasonably influence the insurer’s decision as to whether it should insure the applicant; it does not mean that the influence must be dispositive as to the insurer’s decision. See *Burlington Ins. Co. v. Okie Dokie, Inc.*, 368 F. Supp. 2d 83, 88 (D.D.C. 2005). A misrepresentation that influences an insurer to assume a risk which it otherwise would not have underwritten inevitably is material. See *Jones v. Prudential Ins. Co. of Am.*, 388 A.2d 476, 481 (D.C. 1978).

Where a party innocently misrepresents a material fact by mistake or makes such a representation without knowing it to be true or false, even though he believes it to be true, or without reasonable grounds for believing it to be true, such representation will support an action for fraud. See *Stein v. Treger*, 182 F.2d 696, 699 (D.C. Cir. 1950). Furthermore, where the

misrepresentation would affect the company's acceptance of the risk (or where the misrepresentation was made with an intent to deceive), there need be no causal relationship between the condition misrepresented or omitted from the application and the condition giving rise to the claim on the policy. See *Jones v. Prudential Ins. Co. of Am.*, 388 A.2d 476, 480 (D.C. 1978).

**B. Failure to Comply with Conditions**  
Assistance and Cooperation/ Late Notice

Notice provisions in insurance contracts are of the essence of the contract. The D.C. Court of Appeals had stated that where a liability policy requires an insured to provide notice of occurrence or suit within a reasonable time as a contractual precondition to coverage, the issue of reasonableness of delay, though often question for jury, may become a question of law if evidence as to timing is uncontradicted. *Greycoat Hanover F Street Ltd. Partnership v. Liberty Mut. Ins. Co.*, 657 A.2d 764, 768 (D.C. 1995)(citing *Starks v. North East Insurance Co.*, 408 A.2d 980, 982-83 (D.C. 1979).

Thus, an insured's failure to comply with notice requirements of a liability policy constitutes a waiver of the insured's claim to coverage under the policy, and thus absolves insurer of duty to defend, even if the underlying claim would otherwise have been covered. Id.

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

Under certain circumstances, no-action clauses are enforceable in the District of Columbia. For example, where a "no action" clause has not been complied with, no judgment has been rendered against the insured, and there has been no settlement to which the insurer consented, District of Columbia courts have found no coverage for the insured. *I.J.G., Inc. v. Penn-America Ins. Co.*, 803 A.2d 430 (D.C. 2002) (holding that policy condition similar to a "no-action" clause barred coverage for consent judgment where there was no trial).

**D. Preexisting Illness or Disease Clauses**

The Health Insurance Portability and Accountability Act, see D.C. Code Ann. §§ 31-3301.01 *et seq.*, defines "pre-existing condition exclusion" as:

[A] limitation or exclusion of benefits relating to a condition based on the fact that the condition was present before the first day of coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before that day.  
Genetic information shall not be treated as a preexisting condition in the absence of a diagnosis of the condition related to such information.

Id. § 31-3301.01(39). Moreover, a “pre-existing conditions provision” is defined as “a provision in a health benefit plan that limits, denies, or excludes benefits for an enrollee for expenses or services related to a preexisting condition.” Id. § 31-3301(40).

A health insurer offering group health insurance coverage may, with respect to a participant or beneficiary, impose a preexisting limitation only if: (1) such exclusion relates to a condition (whether physical or mental), regardless of the cause of the condition, for which medical advice, diagnoses, care, or treatment was recommended or received within the 6-month period ending on the enrollment date; (2) such exclusion extends for a period of not more than 12 months (or 18 months in the case of a late enrollee) after the enrollment date; and (3) the period of any such preexisting condition exclusion is reduced by the aggregate of the periods of creditable coverage, if any, applicable to the participant or beneficiary as of the enrollment date. See id. § 31-3303.07(a) (2001). Section 31-3303.07 enumerates limitations on the pre-existing condition exclusion period.

In *American Cas. Co. of Reading, Pa. v. Shefferman*, the Court of Appeals for the District of Columbia was asked to determine whether an insurance provision that defined ‘sickness’ as used in the policy could be modified to mean “sickness or disease causing loss commencing while the Policy [wa]s in force.” 193 A.2d 428, 429 (D.C. 1963). The question was whether ‘commencing while the Policy is in force’ modified ‘sickness’ or ‘loss.’ Id. The insured conceded that his wife, a dependent under coverage of the policy, at the time of issuance of the policy, had a preexisting condition for which she had been and continued to be under the care of her doctors; that after issuance of the policy she continued under the care of her doctors for the same illness which ultimately resulted in her hospitalization for which claim under the policy was made. Id. The insurance company contended that the policy did not cover preexisting conditions, or loss resulting from sickness which existed prior to issuance of the policy. Id. Applying the long-established rule that ambiguity in an insurance policy must be resolved against the insurer, the Court of Appeals held that the trial court correctly ruled that the insured was entitled to recover. Id. Had the insurer intended to restrict coverage for losses from sickness to losses from sickness which commenced after the effective date of the policy, it could have so stated in plain and unambiguous language. Id.

The problem of causation and preexisting conditions in insurance contracts has received considerable judicial thought in this jurisdiction. The case of *Prudential Ins. Co. of Am. v. McKeever*, 89 A.2d 229 (D.C. Mun. App. 1952), aff’d, 204 F.2d 59 (D.C. Cir. 1953) expressed the rule that when the insured’s death is caused by an infirmity sufficient in itself to have brought about the result, no recovery is allowed even if an accidental injury that was not itself sufficient to cause the result, aggravates the infirmity. Id. at 230. The dissenting opinion in that case suggested that if the accidental injury was an exciting, efficient, and predominating cause, that would be sufficient causation even though the preexisting condition was the predisposing cause. See also *Bradford v. Mutual Ben. Health and Acc. Ass’n*, 159 A.2d 870 (D.C. Mun. App. 1960).

#### **E. Statutes of Limitations and Repose**

There is a three-year statute of limitations under District of Columbia law for causes of action based upon an express or implied contract. See D.C. Code Ann. § 12-301(7). The three-year limitations period governing actions based on contracts begins to run from the date the contract is breached. See *Bembery v. District of Columbia*, 758 A.2d 518, 520 (D.C. 2000). A breach is “an unjustified failure to perform all or any part of what is promised in a contract entitling the injured party to damages.” Id. (citing *Fowler v. A & A Co.*, 262 A.2d 344, 347 (D.C. 1970)).

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

### A. Trigger of Coverage

Rather than adopting trigger theories, D.C. courts apply the facts of a particular case to the language in the relevant insurance policies. This approach recognizes that the insured and the insurer have a contract, limited by its terms, and that only by applying the policy terms to the particular facts at issue can trigger questions be resolved. In some instances, neither the wording of a particular policy nor the facts of the particular case provide an answer. See, e.g., *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1041 (D.C. Cir. 1981) (stating that neither case law nor policy terms determined the “trigger”).

### B. Allocation Among Insurers

The District of Columbia adopts an “all sums” method of allocating liability among insurers, not the pro rata method common to other jurisdictions. The seminal all sums case, *Keene Corp.*, 667 F.2d 1034 (D.C. Cir. 1981), held that each insurance policy was responsible (up to its limits) for the total amount of damage to the insured, and the policyholder could choose from which policy to recover. “All sums” allocation is frequently referred to as “joint and several” liability. See id.

## IX. CONTRIBUTION ACTIONS

### A. Claim in Equity vs. Statutory

In the District of Columbia, contribution is an equitable remedy, see *Paul v. Bier*, 758 A.2d 40, 49 n.16 (D.C. 2000), that “has been established by case precedent rather than by statute.” *District of Columbia v. Washington Hosp. Ctr.*, 722 A.2d 332, 336 (D.C. 1998) (en banc). It is well settled under District of Columbia law that there is a right of equal contribution among joint tortfeasors. Id. (citing *Early Settlers Ins. Co. v. Schweid*, 221 A.2d 920, 923 (D.C. 1966)).

Liability as a joint tortfeasor may be either “judicially established,” *Drs. Groover, Christie & Merritt, P.C. v. Burke*, 917 A.2d 1110, 1112 n.1 (D.C. 2007), or conceded by a stipulation of “all parties.” *Berg v. Footer*, 673 A.2d 1244, 1251 (D.C. 1996).



A nonsettling defendant is entitled to a *pro tanto* credit for the amount paid by settling defendants who are not joint tortfeasors and a *pro rata* credit based on the nonsettling defendant's right of contribution against a settling joint tortfeasor. *Paul*, 758 A.2d at 42-43.

## B. Elements

According to District of Columbia case law, a right of contribution accrues when two or more parties are joint tortfeasors but is enforceable only after the one seeking it has been forced to pay. *Paul*, 758 A.2d at 47. Although the right to contribution does not accrue until the nonsettling defendant's status as a joint tortfeasor is established, a cross-claim for contribution against a settling defendant must be asserted before the verdict is rendered. *Id.* All defendants are, therefore, required to file cross-claims for contribution before the verdict in order to give notice to other defendants that they will be required to pay their fair share of damages to a joint tortfeasor in the event that they are found liable. *Id.* at 48.

The essential prerequisite for entitlement to contribution is that the parties be joint tortfeasors in the sense that their negligence concurred in causing the harm to the injured party. *District of Columbia v. Washington Hosp. Ctr.*, 722 A.2d at 336. Moreover, the right to contribution is contingent upon a finding of joint liability. *Washington v. Washington Hosp. Ctr.*, 579 A.2d 177, 187 (D.C. 1990). The liability of a settling tortfeasor must be judicially established as a predicate to asserting the right to contribution. *Lamphier v. Washington Hosp. Ctr.*, 524 A.2d 729, 733 n.5 (D.C. 1987) (citing *Otis Elevator Co. v. Henderson*, [514 A.2d 784, 786 \(D.C.1986\)](#)). .

## X. DUTY TO SETTLE

The District of Columbia has never expressly recognized or rejected a duty to settle a claim within policy limits. Nevertheless, insurers in the District of Columbia have a contractual duty to act in good faith in handling claims against their insureds. *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1087 (D.C. 2008); *see Murray v. Wells Fargo Home Mortgage*, 953 A.2d 308, 321 (D.C. 2008).

District of Columbia Courts generally consider Maryland to be a sister jurisdiction, and legal authority from Maryland is considered particularly persuasive authority. It is likely that the District of Columbia would adopt the Maryland rule that “[a]n 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*, 639 A.2d 652, 659 (1994).

## XI. LH&D BENEFICIARY ISSUES

### A. Change of Beneficiary

In the District of Columbia, when a policy of insurance is assigned or in any way made payable to another as the lawful beneficiary or assignee, that beneficiary will be entitled to its proceeds and avails against the creditors and representatives of the insured and of the person effecting such insurance whether the right to change the beneficiary is reserved or permitted and whether the policy is made payable to the person whose life is insured. D.C. Code Ann. § 31-4716.

However, where the insured reserves the right to change beneficiary of a life insurance policy, the interest of the beneficiary may be defeated by the insured's expedient changing of the beneficiary. D.C. Code Ann. § 31-4716; *Kindleberger v. Lincoln Nat. Bank of Wash.*, 155 F.2d 281, 286 (D.C. 1946). In the absence of such a change, when the policy has matured because of insured's death, the claim of a beneficiary to the insurance proceeds cannot be defeated; and, if the beneficiary has not survived, the beneficiary's executors or administrators are entitled under statute to the proceeds against creditors and representatives of insured. *Id.*

There is no statute in the District of Columbia controlling when a change of beneficiary becomes effective. Therefore, it is likely that the terms of the policy will control.

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

In the District of Columbia, once a spouse is designated as a life insurance beneficiary, he or she is deemed to have a vested interest. Therefore, upon divorce, a former spouse is not automatically divested of that interest, unless there is convincing evidence that the Divorce Decree was intended to deprive the named beneficiary of that interest. *See Mayberry v. Kathan*, 232 F.2d 54, 55 (D.C. Cir. 1956). More recently, in *Bolle v. Hume*, the District of Columbia Court of Appeals declined to extend application of doctrine of revocation by implication, which holds that divorce automatically revokes any existing will's bequest to former spouse regardless of testator's actual intent, to revoke a husband's beneficiary designation in his life insurance policy naming his former wife as the beneficiary. 619 A.2d 1192, 1198 (D.C. 1993). Part of the Court's rationale though, was that the husband had re-designated his former wife as the life insurance beneficiary on the same day the judgment of absolute divorce was entered. *Id.* On a different set of facts, the Court may have ruled differently.

### **XII. INTERPLEADER ACTIONS**

#### **A. Availability of Fee Recovery**

Superior Court Rule 22 governs interpleader in the District of Columbia. The rule provides, in pertinent part:

- (1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple

liability. Service of process under this Rule shall be accomplished in the manner and within the time limits prescribed by Rule 4. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this Rule supplement and do not in any way limit the joinder of parties permitted in SCR Civil 20.

Super. Ct. Civ. R. 22(a)(1) (2015). Accordingly, there is no provision in Superior Court Rule 22 that expressly provides for the availability of a fee recovery in interpleader. While no case addressing the availability of a fee recovery in an interpleader action under District of Columbia law could be found, such an award may lie within the discretion of the Superior Court given that the Rule is virtually identical to Fed. R. Civ. P. 22. *See Companion Prop. & Cas. Ins. Co. v. Apex Serv.*, 2014 U.S. Dist. LEXIS 177788, at 10 (D.D.C., May 6, 2014) (stating that the district court has authority to award attorney's fees and costs to the plaintiff stakeholder in an interpleader action whenever it is fair and equitable to do so).

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

Superior Court Rule 22 is substantially derived from its federal counterpart, Fed. R. Civ. P. 22. The only difference between the two rules is jurisdictional.